



## RESOLUTION TRUST CORP. v. FORD MALL ASSOCS. L.P.

819 F. Supp. 845 (1993) | Cited 0 times | D. Minnesota | April 12, 1993

### AMENDED ORDER

The above matter came on for trial before the court on February 3, 1993, on the complaint of plaintiff Resolution Trust Corporation ("RTC") for the entry of judgment against defendants Ford Mall Associates Limited Partnership ("FMALP"), Milton Cohen ("Cohen"), Roseville Bank, n/k/a FirStar Roseville ("FirStar"), and Pope Associates, Inc. ("Pope Associates"). Elmer B. Trousdale, Ferdinand F. Peters, and Linda J. Soranno, all of Oppenheimer Wolff & Donnelly, 3400 Plaza VII Building, 45 South Seventh Street, Minneapolis, Minnesota 55402, appeared on behalf of plaintiff RTC as receiver for Midwest Savings Association, F.A. There was no appearance on behalf of defendants Ford Mall and Cohen. Joseph Paiment, Esq. appeared on behalf of FirStar, and James Lindell, of the Lowe, Schmidhuber & Lindell Law Firm, 2420 Centre Village, 431 South Seventh Street, Minneapolis, MN 55415, appeared on behalf of Pope.

Based on the testimony and other evidence admitted at trial, prior orders of the court, memoranda submitted regarding the case, and the file and proceedings herein, the court makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. This action involves various disputes arising out of the renovation and new construction of the Ford Mall project. Ford Mall Associates Limited Partnership was a partnership between general partners Cohen, a St. Paul businessman, and Joseph Weis ("Weis"), owner and operator of Weis Builders, Inc., a general contractor. FMALP was formed to develop the Ford Mall complex in Highland Park, a neighborhood in St. Paul, Minnesota.

### FORECLOSURE OF MWF'S MORTGAGE

2. Beginning in the fall of 1986, FMALP, acting through Weis and Cohen, sought financing from MWF Mortgage Corporation ("MWF") to remodel an existing Ford Mall building and to construct a new retail shopping mall, office building, and parking ramp at the Ford Mall complex. MWF was a wholly owned subsidiary of Midwest Federal Savings & Loan Association ("Midwest Federal"). On December 4, 1986, Weis and Cohen obtained a commitment from MWF for a construction loan in the amount of \$ 8,625,000.

3. By appointment order dated December 7, 1990, RTC was appointed as receiver for Midwest



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Savings Association, F.A. On August 1, 1989, pursuant to an assignment of mortgage and security agreement and fixture financing statement, MWF Mortgage Corporation ("MWF") assigned to Midwest Savings Association, F.A. its interest in the mortgage and security agreement and fixture financing statement ("MWF's mortgage").

4. On December 29, 1986, Weis and Cohen, on behalf of FMALP, executed in favor of MWF a construction loan agreement ("construction loan agreement"), a promissory note in the original principal amount of \$ 8,625,000 ("note"), a mortgage and security interest and fixture financing statement ("mortgage") and an assignment of rents and leases ("assignment"). The promissory note, mortgage and assignment shall collectively be referred to as the "loan documents." Weis and Cohen also executed personal guarantees which provided that they absolutely and unconditionally agreed to be jointly and severally liable for the obligations of FMALP under the terms of the note. The mortgage, which has been recorded, is described as follows:

Ford Mall Associates Limited Partnership, Mortgagor, MWF Mortgage Corporation, mortgagee, dated December 29, 1986, filed on July 6, 1987, as Document Number 2390670 in the office of the County Recorder in and for Ramsey County, Minnesota, and filed on July 22, 1987, as Document Number 843628 in the office of the Registrar of Titles in and for Ramsey County, Minnesota.

The mortgage encumbers the real estate legally described as follows:

Lots 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, Block 8, St. Catherine Park, according to the recorded plat thereof, Ramsey County, Minnesota.

5. On January 29, 1989, the loan to FMALP was declared in default. As of February 1, 1993, the amount outstanding on FMALP's indebtedness totals: 1) principal in the amount of \$ 7,067,818.39; 2) interest and late charges in the amount of \$ 3,022,638.99; and 3) attorneys' fees and costs in the amount of \$ 185,641.40. Specifically, the events of default are as follows:

- a. FMALP failed to pay interest due under the terms of the note and mortgage on the first day of October, 1988 and on the first day of each month thereafter.
- b. FMALP failed to pay late charges due pursuant to the terms and conditions of the note on October 15, 1988, and on the 15th day of each month thereafter for payments delinquent beyond that date.
- c. The completion date, as that term is defined in the construction loan agreement, did not occur on or prior to April 1, 1988, in that FMALP failed by that date to satisfactorily complete the construction of improvements on the premises contemplated in the construction loan agreement and, pursuant to the terms of the note, and as a result of such failure, MWF was, as of April 1, 1988, entitled to declare the entire unpaid principal balance under the note immediately due and payable.



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d. The loan is out of balance, as that term is defined in Article VII, Section 3 of the construction loan agreement.

e. FMALP failed to pay real estate taxes and assessments due and owing against the premises in 1988 and all subsequent years.

### JUDGMENT AGAINST MILTON COHEN

6. On December 29, 1986, Cohen executed a personal guaranty in favor of MWF covering the amount of the indebtedness specified above. Cohen has failed to pay any amount of the indebtedness, therefore, he is in default on the guaranty.

### POPE ASSOCIATES' LIEN CLAIM

7. Pope Associates has asserted that its lien amounting to \$ 28,873.61 is prior to MWF's mortgage lien on the property, making three arguments in support of that claim: (1) the first visible improvement on the Ford Mall property, in the form of demolition and surveys, took place prior to execution of the mortgage on December 29, 1986; (2) Pope Associates had no actual knowledge of the mortgage; and (3) even if the first visible improvement did not occur prior to December 29, 1986, Pope's lien accrued before MWF's mortgage was recorded.

#### A. Demolition

8. On September 28, 1984, the City of St. Paul issued a permit to Harvey Investments permitting certain demolition at the Ford Mall site ("1984 permit"). Cohen and the city inspector, Lee Williamson, testified that on March 18, 1985 and September 26, 1985, Kraus Anderson removed a total of two percent (2%) of the ceiling tiles from the lower level of the existing building on the Ford Mall site. Each demolition occurred a few days before the 1984 permit was to become void.<sup>11</sup> Certain fixtures, including bowling alley lanes, had already been removed for salvage. Cohen testified that he had the tiles removed in order to retain the 1984 permit, which would otherwise have expired. To remain valid, the 1984 permit required that work be performed within six months of issuance. Cohen wanted to keep the permit valid because development on the site was a "political hot potato in the neighborhood."

9. A lender visiting the site would not know the purpose of the demolition described above. Williamson testified that the demolition work may have appeared to have been done for at least the following reasons: (1) destruction of property by vandals; (2) demolition resulting from water damage; or (3) installation or removal of electrical equipment.

10. The demolition work performed under the 1984 permit was unrelated to the Ford Mall project. When FMALP undertook to develop the Ford Mall site, the 1984 permit was voided. A new permit



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was issued and took effect on December 26, 1986 ("December 1986 permit"). The December 1986 permit authorized construction and named Weis Builders as contractor. Whereas the 1984 permit specified the value of the work at \$ 250,000.00, the December 1986 permit valued the work at \$ 2,800,000.00. Weis Builders, the general contractor on the FMALP project, did not begin work until April 1987.

### B. Surveys

11. In early 1984, Cohen contacted Sunde Land Surveying ("Sunde") to conduct a boundary survey at the Ford Mall site for purposes of establishing the property corners. Sunde performed the survey and left the following designations on the property: (1) one parker kalon nail with a three-eighths inch (3/8") head and one monument both pounded flush to the ground; (2) a cross etched into the concrete at one corner; and (3) paint marking the four corners of the property. The survey did not impact the property at all and a lender viewing the site would not have known that a survey had been performed. In fact, the cross mark on the concrete was removed in 1985 when the sidewalk was replaced, and there was no evidence presented at trial establishing that the paint spots were still visible in December 1986. Mark Hansen, a Sunde surveyor, testified that the purpose of the survey was for early design work. The survey was performed two years before FMALP and Pope Associates entered into a contract.

12. Sunde performed subsequent surveys which also failed to alter the site. In April 1986, Hansen again established the property boundaries because the sidewalks in front of the property had been changed. The markings were similar to the ones specified above, except that Hansen also left staking on the site, consisting of one three-foot stake with a flag. Hansen does not recall seeing any stake on the property when he revisited the site in December 1986. He also testified that stakes may disappear as soon as a few days after they are placed on a property.

13. Another survey was conducted at the request of Security Pacific, the lender from whom FMALP sought financing in the spring of 1986. The survey was certified to Security Pacific.

14. In December 1986, at the request of Metro Title and MWF, Mark Hansen conducted another boundary survey to confirm that there were no encroachments on the property and to remove the survey exception from the title policy to be issued by Lawyers Title Insurance Corporation ("LTIC"). Like the prior surveys, the December 1986 survey was not certified to and was not performed at the request of any contractor.

15. In September 1988, after the FMALP project was underway, John Pope, president of Pope, testified that FMALP and Weis Builders commissioned Schoell & Madson to perform a survey, which entailed posting stakes to assist in the construction of the project. The stakes were used by Weis Builders to determine the location of the new building on the property.



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### C. Certification of No Prior Work

16. On December 29, 1986, Cohen and Joseph Weis, chairman of the board of the general contractor Weis Builders, on behalf of FMALP, executed a construction loan agreement certifying, among other things, that no prior work had been performed on the Ford Mall project:

21. Article VI. . . NO PRIOR WORK - No work or construction has been commenced or will be commenced by or on behalf of Borrower on the Premises, nor has Borrower entered into any contracts or agreements for such work or construction which could result in the imposition of a mechanic's or materialmen's lien on the Premises or the improvements prior to or on parity with the lien of the security interest evidenced by the Mortgage. . . .

According to the sworn document, the surveys and demolition work that Cohen had previously ordered do not constitute prior work on the project. This admission is consistent with Pope's discovery responses conceding that the first visible improvement occurred on April 7, 1987.

17. In its answers to interrogatories, Pope Associates, through its attorney, Stated that the first visible improvement was on April 7, 1987. Pope's attorney now argues that the court should disregard that admission because at the time the answers were drafted, Pope was unaware of the prior surveys and demolition. That contention, however, is contrary to the evidence presented at trial. The Sunde surveys performed in 1984 were conducted at the request of Pope's Mr. Klecker. Pope Associates is precluded from now claiming that it had no prior knowledge of the surveys in an attempt to avoid the admission of its attorney.

### D. Actual Notice of Mortgage

18. On December 16, 1986, the president of Pope, John Pope, executed a certificate of project architect which specifically referenced the \$ 8,625,000.00 mortgage loan from MWF Mortgage Corporation to FMALP covering the Ford Mall site.<sup>21</sup> The certificate provided that Pope Associates would comply with all building, zoning and use codes applicable to the project. John Pope testified at trial that he had executed a number of architect certificates in the past, and that he understood the purpose behind the December 16, 1986 certification when he signed it. He stated that the purpose of such certificates is to provide comfort to a lender that security interest that the lender was obtaining in the property would not be clouded with a defect arising from noncompliance with zoning and safety regulations. John Pope's awareness of that underlying purpose suggests that he was also aware that MWF had requested certification because MWF was going to obtain a security interest in the property.

19. On December 16, 1986, John Pope again executed a document specifically referencing the MWF mortgage loan. In an assignment of plans and specification and architects' contracts, Pope, on behalf of Pope Associates, agreed to assign to MWF its plans and specifications as well as the contract for



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architectural services entered between FMALP and Pope Associates on March 3, 1986.

20. As of December 16, 1986, Pope Associates was aware of MWF's mortgage loan to FMALP. It also was aware that the project went forward as Pope Associates was an integral part of development and construction of the project.

### E. The Accrual of Pope's Lien

21. The parties have stipulated that the first visible work on the Ford Mall project occurred no later than April 7, 1987.

22. Pope's services contributed directly to the construction of the building.

### CLAIM OF FIRSTAR ROSEVILLE

23. Prior to January 31, 1980, Esther Cohen was the fee simple owner of the property upon which the Ford Mall project subsequently was built ("Ford Mall property").

24. Under a contract for deed dated January 31, 1980, Esther Cohen, as vendor, agreed to sell the Ford Mall property to Growth Limited Partnership I ("Growth") as vendee. That contract for deed was filed February 1, 1980, as Document No. 688190 in the office of the Registrar of Titles for Ramsey County, Minnesota, and is Document No. 2070233 in the office of the County Recorder of Ramsey County.

25. Pursuant to the contract for deed, Esther Cohen remained "solely and exclusively liable to pay off and keep current the payments under any existing mortgage or mortgages or other refinancing specifically authorized hereby which is or are newly created or extended or refinance" on the Ford Mall property by Esther Cohen.

26. Under the contract for deed, Growth was to pay Esther Cohen out of "net cash receipts from rent generated out of the operations" of the Ford Mall property.

27. The payment amount required under the contract for deed was sufficient for Esther Cohen to make principal, interest and real estate payments to Twin City Federal, a mortgagee on the Ford Mall property. For nearly seven years, Growth made the payments required under the contract for deed. During that period of time, Growth made only six or seven payments that were insufficient, under the payment formula set forth in the contract for deed, to cover Esther Cohen's mortgage payments to Twin City Federal.

28. Between January 31, 1980 and December 29, 1986, Growth made sufficient payments under the contract for deed such that its interest as the vendee under the contract for deed was worth \$ 610,000.



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29. In December 1986, pursuant to the terms of a contract for sale between Growth and FMALP, Growth agreed to assign its entire right, title and interest as vendee under the contract for deed to FMALP.

30. Growth assigned its interest as vendee to FMALP by Growth's execution of a quit claim deed in favor of FMALP in December 1986. 31. On December 29, 1986, FMALP, under its agreement with Growth and under the contract for deed as the assignee of Growth, made the following payments to acquire the Ford Mall property: (a) Growth Limited Partnership I \$ 610,000.00 (b) Twin City Federal \$ 712,006.58 (c) Suburban National Bank \$ 260,000.00 (d) Esther Cohen \$ 52,993.42 TOTAL \$ 1,635,000.00

