



Colfin Grand Triangle Holding, LLC v U.S. Bank N.A.

2020 NY Slip Op 30501(U) (2020) | Cited 0 times | New York Supreme Court | February 20, 2020

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SUPREME COURT OF STA OF YORK

YORK COUNTY

HON. OSTRAGER

COLFIN TRIANGLE HOLDING, COLONY . CAPITAL OPCO, Plaintiffs,

U.S. NATIONAL ASSOCIATION, OF AMERICA, NATIONAL ASSOCIATION, LASALLE
NATIONAL ASSOCIATION, UBS COMMERCIAL TRUST 2006-C1, COMMERCIAL
PASS-TROUGH CERTIFICATS, SERIES 2006-C1 LB-UBS COMMERCIAL TRUST 2006-C7,
COMMERCIAL PASS-TROUGH CERTIFICATES, SERIES 2006-C7 PARTNERS, IAS MOTION

INDEX NO.

MOTION MOTION SEQ. NO. 004

DECISION ORDER ON MOTION

NYSCEF 002) 30,

DISMISSAL

following NYSCEF 004) 90,

CAPTION/PLEADINGS HON. OSTRAGER

\$200

2005 UBS

"Loan").

655971/2018 COLFIN TRIANGLE U.S. NATIONAL 002, 004 Page FILED: NEW YORK COUNTY
CLERK 02/21/2020 10:53 AM INDEX NO. 655971/2018 NYSCEF DOC. NO. 102 RECEIVED
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1 of 7 THE TE NEW NEW PRESENT: BARRY R. Justice

-----X GRAND LLC, and AMC LLC

- v - BANK as successor-in interest to BANK as successor by merger to BANK as Trustee for the registered holders of LB MORTGAGE MORTGAGE and the registered holders of MORTGAGE and LNR LLC, Defendants. -----X PART 61 EFM

655971/2018 03/13/2014, DA TE 11/22/2019 002

+

The following e-filed documents, listed by document number (Motion 31, 32, 33, 34, 35, 36, 37, 38, 39,40,41,42,44,45,46,47,48,49,50, 51, 52, 53, 82, 85, 95 were read on this motion to/for

The e-filed documents, listed by document number (Motion 86, 87, 88, 89, 91, 93, 94, 96, 99 were read on this motion to/for AMEND BARRY R.

This action concerns a loan in the principal amount of million originally made on

November 16, by Real Estate Investments, Inc. in connection with the development of

a regional shopping center serving the Raleigh, North Carolina metro area known as the

Triangle Town Center (the

As collateral for the Loan, the original borrowers pledged a portion of the property. The

Loan was initially evidenced by one promissory note, which was split after closing into a Note A

GRAND vs. BANK Motion Nos. 1of7 [* 1] U.S. ("US Bank")

("Colfin").

002), Second

004).

Servicing 2006 "Servicing Agreement").

("LNR") Special Servicer Servicing



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"in

money"

Under

2006

2006

"Controlling

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2 of 7 (in the principal amount of about \$127 million) and a subordinated Note B (in the principal amount of about \$73 million). Note B was divided a year later into Note B-1 (for about \$44 million) and Note B-2 (for about \$29 million). Notes A and B-2 are currently controlled by defendant Bank National Association as Trustee. Note B-1 is held by plaintiff

Colfin Grand Triangle Holding, LLC

Presently before the Court is defendants' motion to dismiss the First Amended Complaint (seq. no. and plaintiffs' motion for leave to file a Amended Complaint (seq. no.

As part of the securitization of Notes A and B-2, the lenders entered into a Pooling and Agreement dated January 11, (the Defendant LNR

Partners, LLC now acts as the Pooling and for the Loan. The

Agreement and the related intercreditor agreements also establish a framework by which the lenders would determine which among them would be deemed the Directing Lender with the authority to (1) advise and direct the master servicer and/or special servicer with respect to the



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Loan, and (2) replace the special servicer.

The Agreement contemplated that the lowest priority note holder who remained the would be deemed the Directing Lender to ensure that the value of the property would be maximized for the benefit of all lenders, and not just the holder of the more senior note. the terms of a January 6, Co-Lender Agreement, the non-bifurcated Note B holder would be the Directing Lender. However, the Co-Lender Agreement did not contemplate the bifurcation of Note B into two separate subordinate Notes B-1 and B-2. Therefore, after the bifurcation, the parties entered into a Noteholders' Priority Agreement dated November 22, that set forth terms by which one or the other Note B holders would act as the 655971/2018 GRAND vs. BANK Motion Nos. 2 of 7 [* 2] Lender."

Pursuant Priority

Principal

(Priority

Priority US

US

\$101

Section

Special Servicer OPCO, ("Colony

AMC") US

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3 of 7 The Controlling Lender has the right to exercise all of Note B's rights as the Directing Lender under the Co-Lender Agreement.

to the Agreement, the Note B-2 holder would be the Controlling Lender so long as both (1) the unpaid principal amount of the Note B-2 Mortgage Loan (net of any existing Appraisal Reduction Amount and any Realized Loss with respect to the Note B Mortgage Loans) is less than 25% of the initial principal amount of the Note B-2 mortgage loan, and (2) the Note B-1 Mortgage Loan has not been paid in full. Agreement § 3.01(a)).

In December 2015, the Borrower failed to repay the loan in full by the maturity date and was in default. The default triggered LNR to obtain an appraisal which valued the property at \$150 million, as of January 20, 2016. Based on this appraisal, LNR calculated that the B-2 Noteholder remained the Directing Lender under the Co-Lender Agreement and the Controlling Lender under the Agreement. In February 2016, Bank, the Borrower, and the Guarantor - but not Colfin, executed a Loan Modification Agreement extending the maturity date to December 5, 2018.

In November 2018, Colfin notified Bank and LNR that, based on Colfin's calculations and million appraisal of the property, Colfin had succeeded the Note B-2 holder as the Directing Lender in accordance with 3.02 of the Co-Lender Agreement. In November 2018, Colfin obtained an additional appraisal valuing the property at \$77 million. Colfin then advised the parties that as Directing Lender it was exercising its right to terminate LNR as and appointing plaintiff Colony Capital AMC LLC



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as the replacement. Bank and LNR refused to recognize Colfin as Directing Lender and Colony AMC as the new special servicer.

655971/2018 GRAND vs. BANK Motion Nos. 3 of 7 [* 3] Plaintiffs 2018

2019 (NYSCEF

Special

Special

Special

Special

Second

2018 "Required Loan"

Special

Special

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4 of 7 commenced this action on December 3, in anticipation of the maturity

default and filed an Amended Complaint on February 6, Doc. No. 22) seeking a

judgment declaring that (1) Colfin is the Controlling Lender and the Directing Lender under the

loan documents; (2) the replacement by Colfin of LNR as Servicer is valid and

enforceable; (3) defendants are required to acknowledge and abide by the Replacement

Appointment; and (4) LNR is required to (i) relinquish control as Servicer of the Loan to

Colony AMC, (ii) cease and desist from taking any further actions as Servicer of the



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Loan, (iii) immediately turn over all books and records concerning the Loan to Colony AMC, and (iv) cooperate in the transition of all records necessary to enable Colony AMC to assume the role of Servicer in the place of LNR. Colfin also seeks money damages not less than \$6.6 million for breach of contract against both defendants pursuant to its Cause of Action and additional money damages in the Third Cause of Action for the unpaid balance of the B-1 Note (about \$43 million) against LNR.

The Borrower failed to pay the debt in full by the extended maturity date of December 5, and the loan returned to Appraisal status. In January 2018, a month after this case was commenced, LNR obtained an appraisal valuing the property at \$43M. Based on this appraisal, the A Noteholder became the Directing Lender.

Defendants have moved to dismiss the Amended Complaint asserting that, contrary to the terms of the controlling loan documents, Colfin unilaterally ordered an appraisal and, based on this allegedly unauthorized action, Colfin does not have the right to replace LNR as Servicer. More specifically, defendants claim that loan documents establish that Colfin (1) had no authority to either order the appraisal or replace LNR; (2) did not satisfy the procedural requirements to replace the Servicer, which go beyond the mere sending of a notice; and

GRAND vs. BANK Motion Nos. Page 4 of 7 [* 4] Plaintiffs 30, 2018,

(US Section Servicing

US 2018.

2018

Special Servicer,



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Sears, Saks,

(US

Special Servicer

2015 2016

2015 2016

2018.

Ultimately, "default waterfall,"

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5 of 7 (3) could not satisfy the requirements to be the Directing Lender even if its own appraisal were used.

implicitly admit that at least through November the B-2 Noteholder

Bank) was the Directing Lender. Thus, 3.09(a) of the Agreement suggests

that only Bank, and not Colfin, had the right to obtain a second appraisal in November

Thus, Colfin's November appraisal would appear to be unauthorized.

In anticipation of a default, LNR, as obtained an appraisal of the

property that valued it at only \$43 million. This appraisal assumed that and Macy's

would vacate the property by mid-2019. This \$43 million appraisal would have the effect of

putting both the B-1 and B-2 Notes out of the money and making the Note A holder Bank)

the Directing Lender since it would necessarily be the only Note still in the money.

Defendants claim that plaintiffs seek a declaration that would rewrite the parties'



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agreements. They further claim that Colfin seeks to add new terms to the agreements because the current agreements are silent as to what should happen in the event the fails to obtain updates to the required appraisals. They assert that the agreements authorize specific parties to obtain appraisals and that Colfin is not one of those parties.

Another dispute concerns which waterfall payment provision should have applied following the default and the modification of the Loan. The Borrower allegedly defaulted for non-payment in and eventually entered into a modification agreement in extending the maturity date to December The modification also deferred certain interest payments. payments were then made pursuant to the as opposed to the standard waterfall, which allegedly resulted in the Note A holder receiving more payments than it would otherwise be entitled to receive.

655971/2018 GRAND vs. BANK Motion Nos. 5 of 7 [* 5] Second

\$150

Note

2015

2016.

Second

2016,

30, 2016,

30, 2016,

20, 2016,



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Since "as of" 20th

Second

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6 of 7 In its motion for leave to file a Amended Complaint, plaintiffs seek to amend their factual allegations to include: that LNR wrongly verified, after the fact, that the million appraisal made the holder of the B-2 the Directing Lender at the time of the loan modification when, in fact, the Directing Lender should have been Colfin. Specifically, upon the occurrence of the December 5, maturity default, LNR was required to obtain a Required Appraisal by a contractually mandated deadline of February 4, It allegedly failed to do so. The Amended Complaint alleges that even though LNR entered into an agreement with the appraiser, CBRE, that required completion of an appraisal by January 25, the appraisal was not actually completed until March two months late. By then, LNR had already concluded the Loan extension and modification with a new borrower based on the presumption that the holder of Note B-2 was the Directing Lender.

Rather than have the appraisal issued on the day it was completed, March LNR allegedly had the Required Appraisal backdated to January a date approximately two and a half weeks before the loan modification closed (the appraisal expressly says that it has an as-of date more than two months before it was issued). LNR used an January date for the appraisal, it is alleged that LNR should have applied the loan balances and reserves existing as of that date as well to perform its Directing Lender calculation. Had LNR done so,



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Colfin asserts that it would have been the Directing Lender. There is an issue of fact as to whether LNR mixed and matched numbers from both before and after the Loan modification in an attempt to hide from Colfin that Colfin was really the Directing Lender.

The Amended Complaint states a claim, among others, that LNR manipulated the required appraisal process to prevent Colfin from becoming the Directing Lender. There has been no discovery in this case and, under the liberal pleading standards applicable pursuant to 655971/2018 GRAND vs. BANK Motion Nos. Page 6 of 7 [* 6] Second

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CASE DISPOSED DENIED SETTLE ORDER INCLUDES TRANSFER/REASSIGN APPLICATION:
CHECK IF APPROPRIATE:

655971/2018 COLFIN TRIANGLE U.S. NATIONAL -ll""lUll"<"Y OSTRAGER JSC

NON-FINAL DISPOSITION IN SUBMIT ORDER FIDUCIARY APPOINTMENT

002, 004 OTHER FILED: NEW YORK COUNTY CLERK 02/21/2020 10:53 AM INDEX NO.
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7 of 7 CPLR 321 l(a)(7), the motion to file a Second Amended Complaint is granted and the motion to dismiss the First Amended Complaint is denied on the grounds that defendants have failed to establish by irrefutable documentary evidence that defendants are entitled to judgment. As the Amended Complaint adds only factual allegations and no new causes of action, defendants shall e-file their Answer within twenty days of entry of this Decision and Order.



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Counsel shall appear for a discovery conference on March 31, at a.m. as previously scheduled.

DATE

ONE: GRANTED D

GRAND vs. BANK R.

GRANTED PART

Motion Nos. D

D REFERENCE

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