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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 331768

No. 336301

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, National Association,

Respondent,

v.

AZURE CHELAN, LLC,
a Washington limited liability company,

Appellant,

v.

LSPL CORPORATE SERVICES, INC.,
a Washington corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Bank¹ relies exclusively upon RCW 7.28.300, which applies only to property owners, to assert standing to quiet title against Azure and raise a statute of limitation defense that is personal to the borrower, Lake Hills Development Division 1, LLC (“LDHH1”). The Bank’s summary judgment motions should have been denied² because LHDD1 disabled itself of the ability to further encumber the Property³ by way of a junior trust deed, thereby precluding the Bank from claiming ownership. Alternatively, the Trustee’s Deed⁴ purportedly conveying title from the Trustee to the Bank contained a property description materially different from that set forth in the Bank’s purported Deed of Trust,⁵ which was published in the Notice of Trustee’s Sale.

The Bank seemingly agrees that a disabling restraint divests a transferor of the ability to convey the dispossessed right.⁶ Instead, the Bank claims that Azure’s Deed of Trust⁷ contains an acceleration clause

¹ Washington Federal is successor to Horizon Bank (collectively, the “Bank”).

² CP 0-240 – 256; CP 0-0483 – 500.

³ The subject property (“Property”) is known as the Lake Hills Estates, a 168-acre tract next to the Chelan public golf course, located in Chelan County, Washington.

⁴ See Appendix B to Opening Brief, Trustee’s Deed (“Appendix B”), CP 0-0273 – 282.

⁵ Compare Appendix A to Opening Brief, Bank’s Deed of Trust (“Appendix A”), CP 0-0260 – 271, with Appendix B, CP 0-0273 – 282.

⁶ See Joint Brief of Respondent’s (“Respondent’s Brief”) at 12-13.

⁷ CP 0-0291 – 305.

rather than a disabling restraint.⁸ This is incorrect. Section 4.11 of Azure's Deed of Trust mandates that LHDD1 "shall not" further encumber the Property.⁹ It does not say, *if* there is a further encumbrance, the debt will be accelerated, which is the hallmark of an acceleration clause. Because it was contractually disabled from doing so, LHDD1 lacked power to grant the Bank its junior lien, without which the Bank has no basis to claim standing as an owner under RCW 7.28.300.

The Bank's unilateral alteration of the Property's legal description, from that which was described in its Deed of Trust¹⁰ to something quite different in the Trustee's Deed,¹¹ renders the Trustee's Deed void. The Bank suggests that Azure offered no evidence that the Trustee's Deed, as altered, is inaccurate.¹² However, it is the Bank's burden on summary judgment to prove the Trustee's Deed is accurate and that it owns the Property. Only *if* the Bank, as the moving party, meets its burden of producing evidence showing it is entitled to judgment as a matter of law does the burden shift to Azure to set forth facts showing that there is a genuine issue of material fact.¹³ *Hash by Hash v. Children's Orthopedic*

⁸ Respondent's Brief at 12-13.

⁹ CP 0-0295 (Section 4.11).

¹⁰ Appendix A, CP 0-0260 – 271.

¹¹ Appendix B, CP 0-0273 – 282.

¹² Respondent's Brief at 9.

¹³ While not required to do so, Azure did offer evidence that the "profound" differences exist between the Banks's Deed of Trust and the Trustee's Deed. CP 0-0423 and CP 0-0427-28.

Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). There are material differences between the legal description in the document supporting the Bank's claim of ownership (the Trustee's Deed) and the document used to justify the grant of that Deed (the Bank's Deed of Trust). It is not clear that the Bank owns any of the Property securing Azure's Deed of Trust, and there are questions of fact concerning whether the Bank could avail itself of RCW 7.28.300 as a mechanism to quiet title. Consequently, the trial court erred in granting summary judgment.

Alternatively, even if the Bank is the "owner" of the Property, material questions of fact exist as to when the six-year statute of limitations began to run on Azure's claim against LDHH1. Again, the Bank impermissibly attempts to shift the summary judgment burden, claiming Azure failed to offer evidence that it did not accelerate in 2007. Azure has no burden on summary judgment until the Bank, as the moving party, meets its initial burden, which as shown herein, it did not. Irrespective, Azure offered competent, admissible evidence that LHDD1 cured the 2007 defaults or Azure temporarily excused them.¹⁴ Either way, material questions of fact exist as to when Azure accelerated the Note and whether subsequent acts amounted to a waiver or abandonment of any acceleration, making summary judgment inappropriate.

¹⁴ Opening Brief at 10 (citing CP 0-0328 – 329, CP 0-0336 – 337).

II. REPLY STATEMENT OF FACTS

The Bank does not dispute that the Foreclosure Trustee modified the Trustee's Deed¹⁵ such that it currently sets forth a different legal description than that contained in the Bank's Deed of Trust.¹⁶ Azure retained a surveyor to examine the legal descriptions and advised that the differences were "profound."¹⁷ The surveyor gave a preliminary opinion that the legal description in the Trustee's Deed significantly expanded the land area described, but felt the degree of expansion was difficult to quantify.¹⁸ In its opening brief, Azure provided exhibits tracking the numerous differences between the documents. *Compare* Appendix A (Bank's Deed of Trust), Appendix B (Trustee's Deed), and Appendix C, (demonstrative exhibit showing the differences between Bank's Deed of Trust and the Trustee's Deed). The Bank does not dispute this evidence, but instead steadfastly claims, with no evidentiary support, that its changes merely clarified¹⁹ the legal description to correct a scrivener's error.²⁰ Because the Bank bears the burden on summary judgment to prove it owns the Property, and material questions of fact exist concerning the scope of

¹⁵ Appendix B, CP 0-0273 – 282.

¹⁶ Respondent's Brief at 8.

¹⁷ CP 0-0423; CP 0-0427-28.

¹⁸ *Id.*

¹⁹ Respondent's Brief at 3. The Bank also admits the legal description in the Trustee's Deed is "worded differently." *Id.* at 7.

²⁰ Citing no evidence but only its briefing below, the Bank claims the changes did not add or subtract any land. Respondent's Brief at 8.

its ownership document (Trustee's Deed), summary judgment was not proper.

The Bank's summary judgment motion also requires a factual finding that the underlying debt was accelerated. Washington law requires "unequivocal" proof of acceleration. *Glassmaker v. Ricard*, 23 Wn. App. 35, 38 (1979). The Bank argues that acceleration notices were "sent" in the spring of 2007, but as proof offers only unsigned, undated draft copies of some notices. This is insufficient evidence to satisfy the Bank's summary judgment burden to prove "unequivocally" that Azure accelerated the debt in May 2007, especially in light of the proof offered by Azure of cure and/or waiver.

The Bank states that Azure offered no evidence that Azure abandoned or rescinded its initial claims of default, nor that LHDD1 cured the monetary defaults by making payments. This is incorrect. As permitted under its Deed of Trust, Azure allowed LHDD1 to cure the monetary default and temporarily excused performance of the defaulted terms.²¹ Azure offered evidence that it elected to accept the actions, assurances, and other commitments of LHDD1 rather than initiate foreclosure.²² Azure continued to send LHDD1 Notices of Default.²³ But in each instance, Azure chose to accept the verbal assurances from LHDD1 as

²¹ CP 0-0328 – 329; CP 0-0336 – 337.

²² *Id.*

²³ *See* CP 0-0376 – 377; CP 0-0378 – 387.

supporting a cure or excuse of those default events.²⁴ At a minimum, questions of fact exist on whether and to what extent LHDD1 cured the defaults or whether its performance was temporarily excused.

III. REPLY ARGUMENT

A. **The Bank lacks standing to quiet title based on LHDD1's statute of limitation defense.**

The Bank concedes, as it must, that to possess standing to invalidate Azure's senior Deed of Trust, it must prove it is an "owner" of the Property under RCW 7.28.300. This section permits a property owner in a quiet-title action to assert that a lien clouding title is time-barred. RCW 7.28.300 provides a narrow exception to the general rule that one creditor may not invoke the debtor's personal statute of limitations defense so as to maneuver ahead of another creditor. *Guar. Sec. Co. v. Coad*, 114 Wash. 156 (1921).

While the Bank claims owner status, it fails to prove (1) the validity of its Deed of Trust, which is fatal given that Azure's recorded, prior Deed of Trust disabled LDHH1 from granting any further encumbrances and (2) the validity of the Trustee's Deed, which is fatal because the Trustee admittedly conveyed property described materially different from that described in the Bank's Deed of Trust and Notice of Trustee's Sale. Both failures independently defeat the Bank's claim of ownership because the Foreclosure Trustee was without power to convey a trustee's deed if the Trustee never had title, or, if it did, its effort to convey

²⁴ CP 0-0329; CP 0-0336 – 337.

property different than what was specified in the Bank's Deed of Trust was invalid. At a minimum, material issues of fact were presented to the trial court on the question, requiring denial of summary judgment.

1. The Bank lacks standing as an "owner" under RCW 7.28.300 because LHDD1 relinquished its right to grant a junior deed of trust.

The Bank cannot be an "owner" and possess standing under RCW 7.28.300 because LHDD1 lacked the ability to grant the Bank a junior deed of trust. Section 4.11 of the Azure Deed of Trust provides:

4.11 Sale, Transfer, or Encumbrance of Property. Grantor shall not, without out the prior written consent of Beneficiary . . . further encumber the Property or any interest therein . . . without first repaying in full the Note and all other sums secured hereby.²⁵

The effect of section 4.11 is that LHDD1 was dispossessed of its right to further encumber the Property, which it would have retained but for this section. *See* 17 William B. Stoebuck & John W. Weaver, Wash. Prac., Real Estate: Property Law § 1.26 (2d ed. 2004 & Supp. 2015). Accordingly, the junior Deed of Trust LDHH1 purportedly conveyed to the Bank's Trustee really conveyed nothing because LDHH1 had no right to convey anything. In light of Section 4.11, LHDD1 could not convey anything to the Trustee. It follows, therefore, that the Trustee had nothing to convey to the Bank following the foreclosure sale.

The Bank does not challenge the proposition that a disabling

²⁵ CP 0-0295.

restraint deprives a transferor of the ability to convey the dispossessed right.²⁶ Rather, the Bank contends that Section 4.11 is not a disabling restraint, but a mere acceleration clause. That is incorrect.

Section 4.11 is not an “acceleration clause,” or a “due-on-encumbrance clause,” as the Bank argues. The plain language of the section confirms it is a disabling restraint, which prohibited LHDD1’s ability to further encumber the Property.²⁷ Unlike a “due-on” clause, section 4.11 does not state that *if* LHDD1 further encumbers the Property, the underlying debt would be accelerated. To the contrary, further encumbrances are prohibited unless the underlying debt is first repaid. There is no mention of any debt acceleration, in stark contrast to true acceleration or “due-on” clauses, which specifically contemplate debt acceleration *after* there is a sale (or further encumbrance).²⁸

The Washington Supreme Court examined a “due-on-sale” clause:

If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, . . . Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request.

²⁶ See Respondent’s Brief at 12-13.

²⁷ CP 0-0295.

²⁸ *Id.*

Perry v. Island Sav. & Loan Ass'n, 101 Wn. 2d 795, 797, 684 P.2d 1281, 1282 (1984). The Washington Court of Appeals has also addressed a “due-on-sale” clause:

Until this Note is paid in full, on the occasion of a subsequent sale of the property that this Note is given for, the holders shall have the right to approve the financial status of the prospective Purchasers of the property. The holders’ approval shall not be unreasonably withheld. In the event that the makers of this Note and/or the prospective Purchasers do not obtain holders approval of the sale, the entire outstanding balance of principal and interest due under this Note shall be due in full at the time of the closing of the sale of the property.

George v. Fowler, 96 Wn. App. 187, 189, 978 P.2d 565, 566 (1999). The common feature of these and other similar due-on-sale clauses is that *if* the underlying property securing the debt is sold (or encumbered) without consent, the note holder has the right to accelerate the entire debt. Thus, the transferor could elect to sell the underlying secured property, but would need to accept the economic consequence of doing so – the debt could be accelerated.

In contrast, Section 4.11 of the Azure Deed of Trust reflects an absolute bar to further encumbrance.²⁹ There is no retained right to accelerate – just a strict prohibition against further encumbrances. Section 4.11 divested LHDD1 of the ability to further encumber the Property. That is to say, one of the sticks from LHDD1’s bundle of property rights (e.g., the ability to encumber) was removed when LHDD1 agreed to Azure’s

²⁹ See CP 0-0295.

Deed of Trust, leaving LHDD1 with no legal ability to grant a junior secured interest to the Bank.³⁰

In *BMM Four, LLC v. BMM Two, LLC*, 18 N.Y.S.3d 577, 2015 WL 3821526 (N.Y. Sup. Ct. 2015)³¹, JP Morgan challenged the ability of the plaintiff land owners to partition their land in light of the following clause in their mortgage deed, which is substantially the same as section 4.11 in the Azure Deed of Trust:

Mortgagor shall not without the prior consent of mortgagee further encumber the property or any interest therein, cause or permit directly or indirectly whether beneficial or legal any change in the entity ownership or control of mortgagor or agree to do any of the foregoing without first retain in full the note and all other sums secured thereby.³²

Relying on that language, JP Morgan claimed the plaintiff BMM Four failed to comply with the terms of the mortgage, which mandated that absent JP Morgan's consent there shall be no change of more than 25% of the membership interest in the mortgagor and no sale or conveyance of the property without repaying in full the underlying promissory note and all other sums secured thereby. *BMM Four*, 2015 WL 3821526 at *1. JP Morgan claimed that BMM Four never received its approval for the transfer of interests; therefore, such action was a violation

³⁰ See Appraisal Institute, *The Appraisal of Real Estate* 112 (13th ed. 2008); see also *Spanish River Resort Corp. v. Walker*, 497 So.2d 1299, 1302 (Fla. Dist. Ct. App. 1986) (the "sticks" which constitute the "bundle of rights" include the right to mortgage property).

³¹ A copy of this opinion is found in the Appendix to this reply brief.

³² *BMM Four*, 2015 WL 3821526 *5.

of the mortgage. *Id.* at *2. JP Morgan cited, and the court in its decision relied upon, *TreeLine Garden City Plaza v. UBS Warburg Real Estate, Inc.*, 3 Misc.3d 1109 (N.Y. Sup Ct 2004)³³, where the court held that the mortgagee's consent was required for any transfer of ownership. *Id.* at *4. The court agreed with JP Morgan, holding:

Here, like in *Treeline*, BMM Four agreed that the mortgagor's consent was required for any transfer of ownership. BMM Four did not get JP Morgan Chase's consent for the transfer from Myra to Michael. Further, JP Morgan Chase is not consenting to the partition which is also a transfer of ownership without first being paid in full. Pursuant to the mortgage terms, JP Morgan Chase can condition its consent upon payment of its note in full. Accordingly, the Court finds that JP Morgan Chase is acting entirely within the contractual rights agreed upon by the parties.

Id.

The court rejected BMM Four's argument that JP Morgan's remedy was to commence a foreclosure action due to BMM Four's default caused by the unauthorized transfer. Based on the language in the contract, the court held that JP Morgan Chase had the right to withhold its consent to BMM Four's attempt to "sell, transfer, or otherwise convey the Property" and that the commencement of a partition action was an attempt to "sell, transfer, or otherwise convey" an interest in the premises and plaintiff agreed that any such action cannot be taken without the consent of JP Morgan Chase. The court held that JP Morgan Chase was withholding its consent from the partition/conveyance, that

³³ A copy of this opinion is found in the Appendix to this reply brief.

BMM Four was bound by the terms of the mortgage contract, and that it had no ability to partition without JP Morgan Chase's consent. *Id.*

The court in *BMM Four* engaged in a straight forward contract construction analysis that equally applies here under Washington law. That is, the operative provision dispossessed plaintiff BMM Four from a right that it would have otherwise had—the right to partition. The remedy was not a default action. Instead, the court in *BMM Four* held that by the terms of the parties' contract, BMM Four had no right to partition. The same rationale applies here. Based on LHDD1's contractual undertaking, it had relinquished its ability to grant a junior secured interest to the Bank.

2. The Bank lacks standing as an “owner” under RCW 7.28.300 because the Trustee's Deed was void and/or purported to convey property the Trustee had no power to convey.

The Bank's unilateral alteration of the Property description from that which was described in its Deed of Trust³⁴ to something quite different in the Trustee's Deed³⁵ renders the Bank's Deed of Trust void. A trustee under a deed of trust has no power to alter legal descriptions. *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). And only a court may reform a deed and then only if the party seeking reformation

³⁴ Appendix A; CP 0-0260 – 271.

³⁵ Appendix B; CP 0-0273 – 282.

proves the facts supporting reformation by clear, cogent, and convincing evidence. *Denaxas v. Sandstone Ct. of Bellevue, L.L.C.*, 148 Wn.2d 654, 669 (2013); *Glepcu, LLC v. Reinstra*, 175 Wn. App. 545 (2013); *House v. Erwin*, 81 Wn.2d 345 (1972) (holding that real estate brokers could not supply or alter real property descriptions in earnest money agreements, unless the agreement specifically empowered and authorized them to do so, because such authority could not be reconciled with the policies underlying the Statute of Frauds).

The Bank ignores this authority, and instead clings to a procedural defense that Azure did not specifically raise the issue below, so it cannot raise it now in connection with this *de novo* appeal.³⁶ The Bank is mistaken. Indeed, it was the trial court that asked for supplemental briefing concerning the efficacy of the Bank's unilateral alteration of the legal description.³⁷

Instead of providing this Court with legal authority supporting its self-help attempt at reformation, the Bank claims (1) the Deed of Trust Act does not forbid its action and that (2) Azure offered no evidence that the Trustee's Deed, as altered, is inaccurate.³⁸

As to the latter, the Bank again confuses its burden on summary judgment. Only after the moving party has met its burden of producing evidence showing it is entitled to judgment as a matter of law does the

³⁶ Respondent's Brief at 18.

³⁷ CP 0-0416.

³⁸ Respondent's Brief at 3.

burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Id.*; *Hash by Hash*, 110 Wn. 2d at 915.

As the moving party, the Bank had the initial burden of showing the absence of factual disputes on the material issues, which it failed to do. Rather, it states, in a purely conclusory and unsupported fashion, that the numerous changes to the Trustee's Deed were minor or otherwise inconsequential.³⁹ These conclusions cannot support summary judgment. What is more, while it had no burden to do so, Azure did offer the trial court competent evidence on the issue.⁴⁰ In contrast to the Bank's unsupported contention that the differences in the legal descriptions were the result of scrivener's errors, Azure retained a surveyor to examine the legal descriptions, who advised that the differences were "profound."⁴¹ The surveyor gave a preliminary opinion that the legal description in the Trustee's Deed significantly expanded the land area described, but felt the degree of expansion was difficult to quantify.⁴²

³⁹ *Id.* at 7.

⁴⁰ Opening Brief at 31 (citing CP 0-0423 and CP 0-0427-28).

⁴¹ CP 0-0423; CP 0-0427-28.

⁴² *Id.* The Bank now objects to this evidence for the first time. However, by failing to object to this evidence below, the Bank waived the right now to offer

Azure's position that the changes were material is supported by a comparison of the Bank's Deed of Trust⁴³ and the Trustee's Deed.⁴⁴ *Compare* the following, which were appended to Azure's opening brief: Appendix A (Bank's Deed of Trust),⁴⁵ Appendix B (Trustee's Deed),⁴⁶ and Appendix C, which is a demonstrative exhibit showing the differences between the two documents. The Bank provided no comment or rebuttal to these exhibits.

Trying to minimize the impact of its unauthorized self-help, the Bank claims the Deed of Trust Act does not bar the Foreclosure Trustee's revisions to the Foreclosure Deed.⁴⁷ It surely owns some portion of the Property, the Bank argues, even though there may be questions as to exactly what it owns. This admission goes to the heart of Azure's position. That is, to have standing and obtain summary judgment under RCW 7.28.300, the Bank must prove by competent and undisputed evidence that it is the current "owner" of exact Property that Azure's Deed of Trust covers. The Bank has not (and cannot on this record) satisfy its summary

evidentiary objections. *Bonneville v. Pierce Cty.*, 148 Wn. App. 500, 509, 202 P.3d 309, 313-14 (2008) (holding that if a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment, the party waives any defects).

⁴³ Appendix A; CP 0-0260 – 271.

⁴⁴ Appendix B; CP 0-0273 – 282.

⁴⁵ Appendix A; CP 0-0260 – 271.

⁴⁶ Appendix B; CP 0-0273 – 282.

⁴⁷ Respondent's Brief at 17.

judgment burden of proving exactly what property it currently owns. At a minimum, questions of fact exist as to the Bank's ownership status, which precludes entry of summary judgment.

Next, the Bank claims that Azure must show prejudice before it can question the validity of the Trustee's Deed.⁴⁸ The Bank claims that because its junior lien could not have impacted Azure's senior lien, no prejudice can be established.⁴⁹ The Bank's contention misses the mark because it focuses on the incorrect issue.

The question before the Court is whether the Bank is the "owner" of the Property, thereby giving it standing under RCW 7.28.300 to assert LHDD1's statute of limitations defense. If the Foreclosure Trustee's Deed did not convey ownership status to the Bank over the Property covered by Azure's Deed of Trust, the Bank lacks standing. The Trustee's attempted conveyance to the Bank was ineffective to convey any interest in the described property, because the Trustee could not in any event have obtained title to anything other than the property LHDD1 purportedly conveyed. Accordingly, the Bank was never the "owner" of the property purportedly conveyed to it because the Trustee never held title to it.

That the Bank's lien is junior to Azure's lien is immaterial in determining ownership status, and a showing of prejudice is unnecessary. The relevant inquiry is whether the Bank is the owner of the Property.

⁴⁸ Respondent's Brief. at 19 – 20.

⁴⁹ *Id.*

While Azure incurred prejudice by the Bank's unilateral attempt at reformation of the Foreclosure Deed, the Bank's only mechanism to assert that Azure's Deed of Trust was time barred arose under RCW 7.28.300. Because it has no standing to invoke the statute, summary judgment should be reversed, and the Bank's quiet title claim should be dismissed as a matter of law.

B. Azure did not waive defenses relating to the validity of the Bank's Deed of Trust or the Trustee's Deed.

The Bank questions Azure's ability to now raise issues concerning the validity of the Bank's Deed of Trust and the Trustee's Deed. The Bank argues that Azure waived these defenses because they were not raised prior to the Trustee's sale. Several flaws exist in the Bank's position.

First, the Bank's waiver claim is premised on an unproven factual assertion – that Azure learned of the Bank's Deed of Trust before the foreclosure, and failed to object. While Azure admits to receiving some form of notice of the Trustee's sale, the Bank offered *no evidence* concerning the content of this notice. Indeed, the citation in the Bank's brief supporting this "fact" points to a single allegation in its Complaint.⁵⁰ What was not alleged, and not established, is whether what Azure received was legally sufficient notice. As the party moving for summary judgment, the Bank had the burden of proving this by competent and admissible evidence.

⁵⁰ Respondent's Brief at 15; CP 6 at ¶ 2.18 of Compl. ("Azure Chelan received notice of the trustee's sale and did not restrain the sale").

The Bank claims the burden was on Azure to offer facts that it did not receive legally sufficient notice. It again misstates Azure's burden on summary judgment. If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Graves*, 94 Wn.2d at 302. Only after the moving party has met its burden of producing evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Id.*; *Hash by Hash*, 110 Wn. 2d at 915.

The Bank did not meet its burden of proof on summary judgment relating to the content of the Notice of Trustee's sale. It was, therefore, not entitled to a summary judgment on any issue that rests upon notice, including its waiver claim.

The Bank's waiver argument also fails because the issues raised by Azure challenge the very validity of the property interest claimed by the Bank via its faulty Deed of Trust and invalid Trustee's Deed. Even if Azure had standing to previously litigate those claims, it had no reason to do so. The nonjudicial foreclosure of the Bank's Deed of Trust, and the ensuing notice of foreclosure sale did not trigger the need for Azure to bring any suit to enjoin the sale because the Bank had nothing to foreclose on, and whatever it did possess was indisputably junior to, and had no effect upon, Azure's rights. Azure had neither knowledge of the Trustee's rewrite of the legal description nor motivation or standing to challenge the

Bank's claim of title under the Trustee's Deed until the Bank brought this lawsuit. Azure waived nothing, but at a minimum, the question of waiver is one of fact, and this court should remand the issue for resolution at trial.

C. Material questions of fact exist concerning whether and when Azure accelerated the underlying debt.

Assuming the Bank owns the Property and has standing to rely on RCW 7.28.300 (it does not), it contends RCW 4.16.040's six-year statute of limitations barred Azure from enforcing the note against LLHD1, rendering Azure's Deed of Trust unenforceable.⁵¹ To reach that conclusion, the Bank asserts that Azure accelerated all payments on the LDHH1 Note in May 2007.⁵² That is disputed, however; material questions of fact exist on the issue of debt acceleration, which preclude entry of summary judgment.

1. The Bank did not prove that Azure unequivocally accelerated the Note balance.

It is undisputed that the Note was not due until February 2009,⁵³ and Azure had until *at least* February 2015 to bring suit on the Note. The Bank also agrees that under the Note's acceleration clause, Azure was permitted, but not required, to accelerate the entire Note balance upon the occurrence of specified default events.⁵⁴

To prove debt acceleration, "some affirmative action is required, some action by which the [creditor] makes known to the [debtor] that he

⁵¹ Respondent's Brief at 2.

⁵² *Id.* at 23.

⁵³ CP 0-355 – 358.

⁵⁴ CP 0-0287; Respondent's Brief at 22.

intends to declare the whole debt due.” *Weinberg v. Naher*, 51 Wn. 591, 594 (1909). The Bank concedes that “acceleration must be made **in a clear and unequivocal manner** which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.”⁵⁵ *Glassmaker*, 23 Wn. App. at 38 (emphasis added). This heightened evidentiary standard is required so that the “exercise of the [acceleration] option . . . be made in a manner so clear and unequivocal as to leave no doubt as to the holder's intention and to apprise the maker effectively of the fact that the option has been exercised.” C. T. Drechsler, *What is Essential to Exercise of Option to Accelerate Maturity of Bill or Note*, 5 A.L.R.2d 968, § 4[a] (2015).

The only evidence offered by the Bank in support of its assertion that the Note was accelerated is an unsigned, undated Notice of Events of Default,⁵⁶ and an unsigned, undated Notice of Default.⁵⁷ The Bank argues that the Notice of Events of Default is dated March 16, 2007,⁵⁸ and the Notice of Default is dated May 1, 2007, using the later as the date the statute of limitations began to run.⁵⁹

The Bank admits these unsigned, undated documents constitute the

⁵⁵ Respondent’s Brief at 23.

⁵⁶ CP 0-0307 – 309.

⁵⁷ CP 0-0311 – 317.

⁵⁸ CP 0-0241.

⁵⁹ Respondent’s Brief at 8.

sole evidence upon which it relies for entry of summary judgment on the acceleration issue. Exhibiting either a disregard or misunderstanding of the evidentiary burdens on summary judgment, the Bank again attempts to inappropriately shift the burden to Azure as the nonmoving party, this time suggesting Azure must *disprove* the authenticity of the questioned notices.⁶⁰ *Graves*, 94 Wn.2d at 302 (if the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion). Because the Bank did not meet its burden of showing the subject notices were executed and sent, it failed on its initial summary judgment burden and its motion should have been rejected. At a minimum, whether and when these notices were signed and sent is a question of fact.

The Bank claims Azure verified that these documents were true and correct copies of the signed and sent versions of the notices.⁶¹ In actuality, Azure produced the unsigned notices with the following caveat: “where unsigned, Defendant Azure states that the files are true and correct copies of the Microsoft Word documents used for signing at those times, and that Azure continues to search for copies of the signed versions.”⁶² This is insufficient evidence at the summary judgments stage to prove that these drafts were actually signed and delivered, which was required for the

⁶⁰ Respondent’s Brief at 24-25.

⁶¹ *Id.* at 25.

⁶² CP 0-0320.

debt to be accelerated. Whether a debt obligation has been accelerated requires a fact intensive analysis. Given the facts before the trial court, there was not “clear and unequivocal” proof of acceleration. *See Glassmaker*, 23 Wn. App. at 38. This alone justifies denial of summary judgment.

Moreover, Azure offered evidence that it continued to issue notices of nonmonetary defaults in April 2007; May 2007; and October 2008; and finally accelerated the debt in August 2009.⁶³ These notices support an inference to which Azure is entitled on summary judgment that it had *not* already accelerated the LDHH1 Note.

Finally, the language in the Notice relied upon by the Bank (if executed and sent) does not establish the fact that the entire debt was accelerated:

5. REINSTATEMENT: IMPORTANT! PLEASE READ!

- (a) As of May 1, 2007 the total amount that must be paid to reinstate the Deed of Trust and the obligation secured thereby before the date of recording the Notice of Trustee’s Sale is the total of unaccelerated portion of Section 3 plus Section 4 above, equaling \$470,448.50.⁶⁴

This notice does not constitute an unequivocal demand to pay *the entire note balance*. Rather, it advises LHDD1 of its right to reinstate the Deed of Trust if \$470,448 is paid. Azure submitted evidence below that LDHH1

⁶³ CP 0-325 – 405.

⁶⁴ CP 0-0314.

paid the amount demanded, therefore curing the default.⁶⁵

2. If the Note was accelerated, questions of fact exist as to whether Azure subsequently waived or abandoned the acceleration.

Once a debt has been accelerated, it can later be abandoned or waived. *Equitable Life Leasing Corp. v. Cedarbrook, Inc.* 52 Wn. App. 497, 501-502 (1988) (holding that acts inconsistent with acceleration constituted, as a matter of law, a waiver of acceleration).

While LHDD1 breached various provisions of the Azure Note and Deed of Trust in 2007, Azure offered evidence that it elected to accept the actions, assurances and other commitments of LHDD1 rather than initiate foreclosure.⁶⁶ As permitted under its Deed of Trust, Azure elected to permit LHDD1 to cure the monetary default and temporarily excused performance of the defaulted terms.⁶⁷ Azure continued to send LHDD1 Notices of Default.⁶⁸ But in each instance, Azure chose to accept the verbal assurances from LHDD1 as supporting a cure or excuse of those default events.⁶⁹

Realizing Azure's evidence refutes its summary judgment claim, the Bank questions its weight. However, that determination must await trial. Azure's evidence was properly authenticated by Bryan Meyers, an

⁶⁵ CP 0-0336 – 337; CP 0-0329; CP 0-0386 – 387.

⁶⁶ CP 0-0328 – 329; CP 0-0336 – 337.

⁶⁷ CP 0-0291 – 305

⁶⁸ See CP 0-0376 – 377; CP 0-0378 – 387.

⁶⁹ CP 0-0329; CP 0-0336 – 337.

equity owner in Azure and its general counsel. Mr. Meyer submitted testimony, wherein he declares, under penalty of perjury, that all factual statements made in Azure's pleadings were from his personal knowledge based on information he obtained in working on the Azure project since 2005.⁷⁰

The Bank asserts that to defeat summary judgment, Azure should have produced additional evidence that LHDD1 cured, such as canceled checks.⁷¹ The Bank does not offer support for imposing upon Azure this heightened evidentiary burden, nor does it explain how or why Azure would have copies of LHDD1 canceled checks. Azure met its summary judgment burden by offering admissible, competent evidence, based on Mr. Meyers' personal knowledge, that LHDD1 cured the monetary default and temporarily excused performance of the defaulted terms.⁷²

Highlighting the disputed factual record, which does not support summary judgment, the Bank next engages in a factual analysis of the various default notices.⁷³ By doing so, the Bank attempts to piece together a factual record supporting its theory of the case. What this shows, however, is a complex factual dispute relating to notices that may or may not have been sent to LHDD1, and the actions LHDD1 took in response. Azure offered competent evidence that cure payments were made, or Azure otherwise temporarily

⁷⁰ CP 0-0336 - 337.

⁷¹ Respondent's Brief at 27.

⁷² CP 0-0336 - 337.

⁷³ Respondent's Brief at 21-31.

excused performance. The Bank, citing the notices, argues conflicting evidence exists. The Bank's position just further underscores why summary judgment was inappropriate on this factually murky record.

IV. CONCLUSION

This Court should hold, as a matter of law, that the Bank's Trustee's Deed is void and dismiss the lawsuit. Alternatively, the matter should be remanded to resolve at trial the numerous questions of material fact that exist concerning the Bank's quiet title claim and Azure's counterclaims.

DATED this 30th day of December, 2015.

LEE & HAYES, PLLC

By 

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APPENDIX

BMM Four, LLC v. BMM Two, LLC,
18 N.Y.S.3d 577, 2015 WL 3821526 (N.Y. Sup. Ct. 2015)

TreeLine Garden City Plaza v. UBS Warburg Real Estate, Inc.,
3 Misc.3d 1109 (N.Y. Sup Ct 2004)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2015, I caused to be served a true and correct copy of the foregoing document as follows:

<p>Charles Dana Zimmerman Julie K. Norton Ogden Murphy Wallace, P.L.L.C. 1 Fifth St., Ste. 200 PO Box 1606 Wenatchee, WA 98807-1606</p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Fax Transmission <input checked="" type="checkbox"/> Email czimmerman@omwlaw.com jnorton@omwlaw.com lcooper@omwlaw.com lrussell@omwlaw.com</p>
<p>Gregory R. Fox Daniel A. Kittle Lane Powell PC PO Box 91302 1420 5th Ave., Ste. 4200 Seattle, WA 98111-9402</p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Fax Transmission <input checked="" type="checkbox"/> Email foxg@lanepowell.com kittled@lanepowell.com norbya@lanepowell.com</p>



Geana M. Van Dessel, WSBA 35969
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Appendix

Unreported Disposition

48 Misc.3d 1201(A), 18 N.Y.S.3d 577 (Table), 2015
WL 3821526 (N.Y.Sup.), 2015 N.Y. Slip Op. 50917(U)

**This opinion is uncorrected and will not be published in
the printed Official Reports.**

***1 BMM Four, LLC, Plaintiff,**

v.

**BMM Two, LLC and BMM THREE, LLC, JP
MORGAN CHASE BANK, N.A., As successor in
interests to WASHINGTON MUTUAL BANK,
F.A., and WORKERS' COMPENSATION BOARD
OF THE STATE OF NEW YORK, Defendants.**

60249/2011

Supreme Court, Westchester County

Decided on June 17, 2015

CITE TITLE AS: BMM Four, LLC v BMM Two, LLC

ABSTRACT

Partition

Property Held by Tenants in Common
Effect of Limited Liability Company Operating Agreement

Partition

Property Held by Tenants in Common
Consent of Mortgagee

BMM Four, LLC v BMM Two, LLC, 2015 NY Slip
Op 50917(U). Partition—Property Held by Tenants in
Common—Effect of Limited Liability Company Operating
Agreement. Partition—Property Held by Tenants in Common
—Consent of Mortgagee. (Sup Ct, Westchester County, June
17, 2015, Giacomo, J.)

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OPINION OF THE COURT

William J. Giacomo, J.

Factual and Procedural Background

Plaintiff (“BMM Four”) commenced this partition action with respect to certain real property and improvements located at 204 Union Avenue, Mt. Vernon, New York. BMM Four alleges it and the BMM defendants, BMM Two, LLC and BMM Three, LLC (“BMM Two” and “BMM Three”) are owners of the property as tenants in common and have been in possession and control of the premises since the date they acquired it on April 5, 2004. The property is a multi-unit commercial and residential building. Defendant, JP Morgan Chase, Bank, N.A., as successor in interest to Washington Mutual Bank, F.A., is a party to this action because it holds a mortgage on the premises in the original principal sum of \$2,587,500.00.

All defendants oppose BMM Four's request for partition. BMM Two and BMM Three argue that BMM Four has no right of possession in the premises nor an estate of inheritance, an estate for life, or an estate for years, which would allow it to bring a partition action. BMM Two and Three also claim that they and BMM Four agreed not to sell their interest in the premises without a super majority consent of all members of the BMM companies and that has not occurred. Finally, BMM Two and BMM Three argue that the complaint in this action was signed by Michael Otis, who is the husband of Myrna Otis, signor of the mortgage documents and operating agreements of BMM Four and BMM Two. They argue Myrna's interest was never transferred to Michael and, therefore, Michael is without authority to institute this action.

Defendant, JP Morgan Chase, also opposes the action for a partition. It asserts that BMM Two, BMM Three and BMM Four failed to comply with the terms of the mortgage which mandates, among other things, that absent JP Morgan Chase's consent there shall be no change of more than

25% of the membership interest in the mortgagor and no sale or conveyance of the property without repaying in full the underlying promissory note and all other sums secured thereby. JP Morgan Chase claims that Myrna Otis never received its approval for the transfer of her interest to Michael; therefore, such action is a violation of the mortgage.

A trial was held by this Court on December 16, 2014 at which time numerous witnesses testified including the principals of BMM Two, BMM Three, and BMM Four as well as a representative of JP Morgan Chase. Post trial submissions were requested and received and have been reviewed. After review, the Court renders the following decision:

Right to Partition

It is undisputed that plaintiff BMM Four, is a tenant in common of the property known as 204 Union Avenue, Mt. Vernon, New York, which is a mixed use commercial and residential building which contains approximately 41 tenants. It is also undisputed that the defendant JP Morgan Chase holds a mortgage on the premises, which mortgage was signed by the members of BMM Two, Three and Four, to wit, Mark Fonte and William Fonte with respect to BMM Two and Robert Fonte with respect to BMM Three and Myrna Otis with respect to BMM Four.

It is also undisputed that some time in 2008 Myrna Otis transferred her interest in BMM Four to her husband, Michael Otis, without the execution of any formal documents, but by merely notifying her accountant that her husband was now the owner of 100% of the membership interest of BMM Four. The evidence discloses, and it was undisputed, that each of the BMM companies executed similar operating agreements, each one containing a paragraph preventing the transfer of substantially all the assets of that limited liability company without a super majority vote of the members. It is also undisputed that none of the BMM companies executed an agreement specifically with regard to the premises at issue.

BMM Four asserts that it has the absolute right to partition the property since it is an owner of the premises as a tenant in common. It claims that Real Property Action and Proceeding Law ("RPAPL") §901 allows a person holding and in possession of real property as a tenant in common to maintain an action for a partition of the property and, if said property is for sale, the sale must be at public auction pursuant to RPAPL §231(1) (see *Lauriell v Gallotta*, 70AD3d, 1009 [2nd Dept. 2010]). BMM Two and Three disagree. They

assert that the action should be dismissed because: (1) BMM Four has no standing to bring this action since it has no right of possession to the premises; (2) that Michael Otis, signor of the complaint, has no authority to bring this action because Myrna Otis transferred her interest in BMM Four to her husband without a formal writing as required by the operating agreement; and (3) because prior to purchasing the property there was an agreement among the BMM company owners that it could not be sold without a super majority agreement of the parties and BMM Two and Three, who collectively own 51% of the premises, do not wish to sell.

Defendant, JP Morgan Chase, also opposes the partition action claiming it is undisputed that Myrna Otis, who executed the mortgage documents on behalf of BMM Four, transferred her membership interest to her husband, Michael, without receiving the approval of JP Morgan Chase. Thus, such transfer is illegal and without legal affect and without the consent of JP Morgan Chase the partition cannot proceed.

Discussion

BMM Four asserts that it is undisputed that the premises in question cannot be physically partitioned as it is a multi-story 41 unit apartment building thus, it must be sold. BMM Four also asserts that as a tenant in common of the real property pursuant to a deed dated April 5, 2004, and recorded on January 26, 2005, it has the right to maintain this partition action. BMM Two and Three disagree. They argue that BMM Four has no right to actually possess any part of the building by virtue of its ownership interest. They also argue that BMM Four, through its sole member, Myrna Otis, admitted at trial that the property was bought as an investment only and with no intent to occupy it. Thus, BMM Two and Three claim that BMM Four has no right of possession. They claim RPAPL §901 defines *2 who may maintain a partition action and that only a person with a right of possession, an estate of inheritance, an estate for life or an estate for years to the premises can bring such an action. Thus, they claim plaintiff cannot do so although they cite no cases to support their legal argument.

RPAPL § 901. By whom maintainable, provides in relevant part:

1. A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears

that a partition cannot be made without great prejudice to the owners.

Here, BMM Four is a limited liability company and as such it may own real estate in its name (see *Limited Liability Company Law §202[b]*) and it may sell, convey, or assign such ownership interest in part or in all (see *Limited Liability Company Law §202[c]*).

Thus, BMM Four has the right to bring this partition action to sell its interest (see *Limited Liability Company Law §202[c]*).

Improper Transfer of BMM Four to Michael Otis

BMM Two and Three as well as JP Morgan Chase also argue that BMM Four may not maintain this action because Myrna Otis transferred her membership interest in it to her husband, Michael Otis, without executing a formal document as required by the operating agreement of BMM Four.

BMM Four argues that no formal written agreement is required to transfer a membership interest in an LLC. The undisputed evidence at trial disclosed that Myrna Otis was 100% owner of BMM Four at the time the property was purchased and the mortgage was executed and that she transferred her interest to her husband some time in 2008 which transfer was evidenced solely by a notation on the tax returns for plaintiff beginning that year. BMM Four notes that *Limited Liability Company Law § 604* allows Myrna Otis, as a sole member of the limited liability company, to transfer her interest to anyone of her choosing. BMM Four argues that *Limited Liability Company Law §603* provides that an operating agreement may provide for the assignment or transfer to be represented by a certificate but does not mandate it.

BMM Four cites *Bartfield v. RMT Associates, LLC*, (11 AD3d 386 [1st Dept 2004]) in support of its position. However, in *Bartfield* there was no operating agreement and the court held that “[t]he trial court also properly concluded that the assignment of James Murphy's interest in RMTS to his wife, Jane, was valid. There was no operating agreement in place for RMTS prohibiting such an assignment, which is otherwise authorized by law” (*id.*). Therefore, *Bartfield*, is not applicable here since there are valid operating agreements which usurp *Limited Liability Company Law §603*.

BMM Four relies on *Barkin Construction Corp. v. Goodman* (221 NY 156 [2nd Dept 1931], for the proposition that

irregularities, such as the lack of a written transfer agreement, may be overlooked if illegality would not result. BMM Four also relies on *Leslie, Semple & Garrison, Inc. v. Gavit & Co., Inc.*, 81 AD2d 950, 439 N.Y.S.2d 707 [3rd Dept 1981]) wherein the Court stated “Moreover, in the management and affairs of a family corporation, irregularities not directly harmful in their nature will be overlooked, and *3 invalidity will not be sought if the declaration of illegality could work injustice. Courts are not to shut their eyes to the realities of business life (citations omitted).”

In this case Article 3, Paragraph 3 of BMM Four's operating agreement states, “company shall keep books and records either in written form or in other than written form if easily convertible into such written form within a reasonable time.” Thus, this Court finds that pursuant to the operating agreement, Myrna Otis, as 100% owner of all the membership interest, did assign her interest in BMM Four “in other than written form” which transfer was converted into writing beginning in 2002 when the tax return was completed and filed.

At trial the evidence disclosed that such assignment of interest was conveyed orally to the other members of BMM Two and BMM Three. However, notice of the transfer was never conveyed to JP Morgan Chase, the holder of the mortgage on the premises. Nevertheless, in light of the above case authority and pursuant to the terms of the operating agreement the Court finds that contrary to defendant BMM Two and BMM Three arguments, the failure to produce a written assignment or transfer of membership interest does not prevent BMM Four's current sole member, Michael Otis, from pursuing a partition action on behalf of BMM Four.

Requirement of a Two-Thirds Majority

BMM Four also argues that there is no agreement in existence, as claimed by BMM Two and Three, among the three tenants in common of the premises (BMM Two, Three and Four) that prevents BMM Four from seeking a partition action without a two-third majority of the members. BMM Two and Three disagree. They claim that the operating agreement of BMM Two, of which BMM Four owns a 49.6% membership interest, contains a provision that requires a vote of two-thirds of its members to sell the premises. The agreement in question contains the following provision in Article 3, paragraph 6:

The vote of at least two-thirds in interest of the members are entitled to vote thereon, shall be required to approve the sale, exchange, lease, mortgage pledge or other transfer or disposition of all or substantially all of the assets of the company.

That paragraph limits the sale of substantially all the assets of BMM Two but has no effect on the authority of BMM Four to seek a sale of its one-third interest. The parties acknowledged at trial that there was no agreement executed by BMM Two, BMM Three and BMM Four together to govern the disposition of the premises. Hence, since BMM Four did not sign any agreement with regard to the premises sought to be partitioned it is not bound by the limitation contained in the operating agreement of BMM Two.

Thus, based upon the foregoing, BMM Two and Three, have not submitted viable objections to BMM Four's right to a partition of the premises (*see Manganiello v. Lipman,*

74 AD3d 667, 905 N.Y.S.2d 153 [1st Dept 2010])[Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property]; *Grossman v. Baker*, 182 AD2d 1119, 583 N.Y.S.2d 92 [4th Dept 1992][Right to partition is absolute in absence of countervailing conditions.]). Nevertheless, the right to seek partition is not absolute and may be precluded where the *4 equities so demand, or where partition would result in prejudice (*see Manganiello v. Lipman*, 74 AD3d 667, 905 N.Y.S.2d 153 [1st Dept 2010]).

JP Morgan Chase's Opposition to the Partition Action

JP Morgan Chase holds the mortgage lien on the real property as successor in interest to Washington Mutual Bank in the original principal sum of \$2,587,500.00 pursuant to an amended and restated mortgage security agreement, assignment of leases and rents and fixture filing dated April 4, 2004 ("the mortgage"). JP Morgan Chase argues that when the mortgage was executed BMM Three and BMM Four were wholly owned by Robert Fonte and Myrna Otis, respectively, both of whom signed the mortgage on behalf of those respective entities. BMM Two is owned by Mark Fonte 17%, William Fonte 17%, BMM Three 17% and BMM Four 49%. Accordingly, BMM Four owns 49.6% of the premises.

JP Morgan Chase claims that pursuant to section 4.13 of the mortgage:

Mortgagor shall not without the prior consent of mortgagee further encumber the property or any interest therein, cause or permit directly or indirectly whether beneficial or legal any change in the entity ownership or control of mortgagor or agree to do any of the foregoing without first retain in full the note and all other sums secured thereby.

Mortgagor shall not without the prior written consent of mortgagee (which consent shall be subject to the condition set forth below), sell, transfer, or otherwise convey the Property or any interest therein, directly or indirectly, whether beneficial or legal, voluntarily or involuntarily, or agree to do any of the foregoing without first repaying in full the note and all other sums secured thereby.

* * *

Notwithstanding the foregoing and notwithstanding Section 4.15 Mortgagee's consent will not be required, and neither the Consented Transfer Fee nor the Unconsented Transfer Fee will be imposed, for the transfer of not more than twenty-five percent (25%) in the aggregate during the term of the Note of partnership interest in Mortgagor, if Mortgagor is a partnership, or of member interest in Mortgagor, if Mortgagor is a limited liability company, or shares of stock of Mortgagor, if Mortgagor is a corporation, provided that none of the persons or entities liable for the repayment of the note is released from such liability.

At trial Myrna Otis testified that she agreed to each and every one of the foregoing terms of the mortgage when she signed the mortgage and corresponding note. Notwithstanding the foregoing, Myrna Otis testified that she transferred all of her interest in BMM Four to her spouse, Michael Otis, in about 2008 without obtaining or seeking the consent of JP Morgan Chase in breach of the mortgage. Moreover, the Otis' accountant, Louis Orgera, also testified that in connection with effecting the transfer of BMM Four from an accounting standpoint he never sought JP Morgan Chase's consent for the transfer.

JP Morgan Chase argues that the aforementioned provisions are clear and that it *5 is undisputed that they have been violated by the transfer of BMM Four membership from Myrna to Michael. Thus, JP Morgan Chase opposes the partition. JP Morgan Chase notes that although the mortgage

documents have been breached it is not seeking to foreclose on the loan due to the uncertainty of a sale of the premises at public auction and the fact that the mortgage is not in default.

JP Morgan Chase asks the Court to deny BMM Four's request for a partition. JP Morgan Chase claims no sale should be allowed until its note is paid in full and absent its permission, which it denies, JP Morgan Chase has a right to the protection of its lien by this Court (*see Harlem Savings Bank v. Larkin*, 156 A.D. 666 [1st Dept 1913]).

In support of their position JP Morgan Chase cites *TreeLine Garden City Plaza v. UBS Warburg Real Estate, Inc.*, (3 Misc 3d 1109 NY Sup Ct 2004)]. In *Treeline*, the mortgagor, Treeline GCP, and guarantor, Treeline Whitman Associates, sought a declaration that they may proceed with a proposed financial transaction which changed ownership interest in the mortgage in order to get an infusion of cash for the mortgagor's business. Pursuant to the mortgage between the mortgagor and mortgagee, the mortgagor was required to get mortgagee's permission for any transfer of ownership. The mortgagor and guarantor sought permission from the mortgagee's servicer, Wachovia, for this proposed transaction. Permission was ultimately denied pursuant to Section 13(b)(v) of the mortgage which provides that a transfer includes "any pledge, hypothecation, assignment, transfer or other encumbrance of any direct or indirect ownership interest in the Mortgage." The mortgagor commenced the *Treeline* action seeking a declaration that the mortgagee's consent was not needed pursuant to the language of the mortgage documents. However, if it was, they sought reformation or rescission of the documents on the ground of mutual or unilateral mistake with respect to the need for the mortgagee's consent for a transfer of ownership. They also sought damages from the original lender on the grounds of fraudulent inducement.

The *Treeline* court found that the mortgagee's consent was required for any transfer of ownership, that there was no mutual or unilateral mistake, and that the mortgage documents were enforceable, and dismissed their claim for fraudulent inducement.

Here, like in *Treeline*, BMM Four agreed that the mortgagor's consent was required for any transfer of ownership. BMM Four did not get JP Morgan Chase's consent for the transfer from Myra to Michael. Further, JP Morgan Chase is not consenting to the partition which is also a transfer of ownership without first being paid in full. Pursuant to the

mortgage terms, JP Morgan Chase can condition its consent upon payment of its note in full. Accordingly, the Court finds that JP Morgan Chase is acting entirely within the contractual rights agreed upon by the parties. Moreover, as the mortgage also provides, JP Morgan Chase's failure to take action upon BMM Four's default upon the transfer from Myra to Michael does not prevent it from acting to prevent another type of transfer of ownership in this partition sale.

Paragraph 5.6 Remedies Cumulative; Subrogation of the mortgage provides in relevant part:

The failure of on the part of the Mortgagee to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver of any default shall not constitute a waiver of any subsequent default.

Thus, contrary to BMM Four's argument that JP Morgan Chase's remedy is to commence a foreclosure action due to BMM Four's default when Myrna transferred ownership to Michael, JP Morgan Chase was free to waive its right to recognize that as an event of default. Furthermore, by the language of the contract in this partition action, JP Morgan Chase has the right to withhold its consent to BMM Four's attempt to "sell, transfer, or otherwise convey the Property or any interest therein, directly or indirectly, whether beneficial, legal, voluntary, involuntary or agree to any of the foregoing without first repaying the Note and all other sums secured hereby." (See Mortgage Paragraph 4.13).

It cannot be disputed that the commencement of a partition action is an attempt to "sell, transfer, or otherwise convey" an interest in the premises and BMM Four agreed that any such action cannot be taken without the consent of JP Morgan Chase. Here, JP Morgan Chase is withholding its consent from the partition/conveyance and BMM Four is bound by the terms of the mortgage contract.

Nevertheless, based upon the arguments made by BMM Four on page 12 of its Post Trial Memorandum of Law and those made on page 9 of JP Morgan Chase's Post-Trial Memorandum of Law, the parties agree that a sale of the property, a partition sale at public auction or any other form of sale, may be permitted so long as the sales prices protects JP Morgan Chase's lien. In essence BMM Four and JP Morgan Chase agree that the sale of the premises can be conditioned upon the payment in full of the outstanding loan including any costs and fees related to it.

Appendix

3 Misc.3d 1109(A)

Unreported Disposition

(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

TREELINE GARDEN CITY PLAZA LLC and
Treeline Whitman Associates, Plaintiffs,

v.

UBS WARBURG REAL ESTATE INVESTMENTS
INC. and Lasalle Bank, National Association,
as trustee for LB-UBS Commercial Mortgage
Trust 2001-C2, Commercial Mortgage Pass-
Through Certificates, Series 2001-C2, Defendants.

No. 16757-03. | May 24, 2004.

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lasalle.

Opinion

LEONARD B. AUSTIN, J.

*1 Defendant LaSalle Bank, National Association, as
Trustee for LB-UBS Commercial Mortgage Trust 2001-
C2, Commercial Mortgage Pass-Through Certificates Series
2001-02 ("the Trust") moves for an order, pursuant to CPLR
3211(a)(1), (7) and 3016(b) dismissing the complaint against
it.

Plaintiffs Treeline Garden City Plaza, LLC ("Treeline GCP")
and Treeline Whitman Associates cross-move for an order
pursuant to 3211(c) and 3212(e), granting partial summary
judgment on their first cause of action in the form of
declaratory relief. Notice to treat Plaintiffs' cross-motion as
one for summary judgment was made on notice and granted
by this Court.

Defendant UBS Warburg Real Estate Investments Inc.
("UBS") also moves for an order, pursuant to CPLR 3212,
granting it summary judgment dismissing the complaint as
against it.

BACKGROUND

Plaintiff Treeline Garden City Plaza LLC is a limited liability
company. Its sole member is Plaintiff Treeline Whitman
Associates, a general partnership. Treeline Whitman
Associates has 14 general partners, one of which, PI Garden,
LLC, holds only a 0.0001% interest. The other 13 Treeline
Whitman Associates general partners are all members of
PI Garden, LLC. Treeline GCP and Treeline Whitman
Associates are in the business of owning, managing and
investing in commercial property.

Treeline GCP procured a \$40 million loan to fund its purchase
of an office complex located at 100, 200 and 300 Garden City
Plaza in Garden City, New York. The loan was secured by a
mortgage on that property given by UBS. Treeline Whitman
Associates is the guarantor of that loan. UBS funded this loan
intending to sell it. The loan closed on January 19, 2001.
Thereafter, UBS sold it to a securitized mortgage pool known
as the Trust, for which Defendant LaSalle Bank is the Trustee.

In this action, the mortgagor, Treeline GCP, and guarantor,
Treeline Whitman Associates, seek a declaration that they
may proceed with a proposed financial transaction whereby
the general partnership, Treeline Whitman Associates, will
sell PI Garden, LLC (which holds only a .0001% interest
in Treeline Whitmans Associates) to a third-party, Principal
Commercial Acceptance, LLC ("PCA"). PCA will, in turn,
provide Treeline Whitman Associates with a \$10.5 million
capital infusion in exchange for a preferred return on its
investment. PCA's investment is to be secured by a pledge
of the Treeline Whitman Associates' partners' interest in that
partnership to PI Garden, LLC.

The mortgagor and guarantor sought permission from
the mortgagee's servicer, Wachovia, for this proposed
transaction. Permission was ultimately denied pursuant to
Section 13(b)(v) of the mortgage which provides that a
transfer includes "any pledge, hypothecation, assignment,
transfer or other encumbrance of any direct or indirect
ownership interest in the Mortgageor." Treeline GCP and
Treeline Whitman Associates allege that the mortgagee's
service agent represented that it would consent to the
transaction if the mortgagor and guarantor agreed to structure
the transaction as a transfer of the property and assumption of
the mortgage by PCA, which would require payment of 1%
of the loan twice as a transfer fee pursuant to Section 13(f)
of the mortgage once for the sales agreement and once for the
conveyance of the property for a total of \$800,000.

*2 In this action, Treeline GCP and Treeline Whitman Associates seek a declaration that the proposed transaction is permitted under the mortgage without the mortgagee Trust's permission. In the alternative, Treeline GCP and/or Treeline Whitman Associates seek reformation or rescission of the mortgage and damages from UBS for fraudulent inducement.

Defendants maintain that pursuant to the terms of the mortgage, the proposed transaction requires the mortgagee Trust's consent. They seek dismissal of the complaint on that ground of documentary evidence pursuant to CPLR 3211(a) (1), (7) and 3212.

DISCUSSION

A. General Legal Standards

Summary judgment is warranted where there are no genuine issues of material fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1974); and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980). When deciding a motion to dismiss, the court must "afford the complaint a liberal construction, accept as true the allegations contained therein, accord the Plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." *1455 Washington Ave. Assocs. v. Rose & Kiernan Inc.*, 260 A.D.2d 770, 771, 687 N.Y.S.2d 791 (3rd Dept.1999). See also, *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 (2001); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); and *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977).

"To succeed on a motion to dismiss pursuant to CPLR 3211(a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the Plaintiff's claim." *Prudential Wykagyl/Rittenberg Realty v. Calabria-Maher*, 1 A.D.3d 422, 766 N.Y.S.2d 885 (2nd Dept.2003), citing, *Trade Source v. Westchester Wood Works, Inc.*, 290 A.D.2d 437, 736 N.Y.S.2d 605 (2nd Dept.2002). See also, *Leon v. Martinez, supra*; and *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 69, 767 N.Y.S.2d 99 (1st Dept.2003).

Section 13 of the mortgage begins with an acknowledgment by the mortgagor that the mortgagee was relying on its

creditworthiness and business experience and that it would rely on its continued ownership of the property. Section 13(a) of the mortgage provides that the mortgagor Treeline GCP cannot make any "transfer" without the written consent of the mortgagee. Section 13(b)(iv) defines "transfer" to include:

"if Mortgagor, any Guarantor or any member of Mortgagor or any Guarantor is a limited or general partnership, joint venture or limited liability company, the change, removal, resignation or addition of a general partner, managing partner, limited partner, joint venturer or member or the transfer of the partnership interest of any general partner, managing partner or limited partner or the transfer of the interest of any joint venturer or member by which an aggregate of more than 25% of such limited partnership interests or membership interests are held by, or pledged to, parties who are not currently partners or member of Mortgagor's member (emphasis added)."

*3 Section 13(b)(v) of the mortgage further includes "any pledge, hypothecation, assignment transfer or other encumbrance of any direct or indirect ownership interest in mortgagor" in the definition of a transfer. The mortgage contains a merger clause and bars any modification which is not executed in written form.

B. First Cause of Action

In their first cause of action, Treeline GCP and Treeline Whitman Associates seek a declaration that the proposed transaction is permissible under the mortgage, specifically pursuant to Section 13(b)(iv), without the mortgagee Trust's consent.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990), citing,

Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 76 N.Y.2d 256, 269–270, 557 N.Y.S.2d 851, 557 N.E.2d 87 (1990); *Judnick Realty Corp. v. 32 West 32nd Street Corp.*, 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131 (1984); *Long Island R. Co., v. Northville Industries Corp.*, 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558 (1977); and *Oxford Commercial Corp. v. Landau*, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230 (1963). “That rule imparts ‘stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence.’” *W.W.W. Assocs., Inc., v. Giancontieri*, *supra* at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639, quoting *Fisch*, *New York Evidence* § 42, at 22 (2d ed). “The rule has even greater force in the context of real property transactions, ‘where commercial certainty is a paramount concern’ and where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm’s length.” See also, *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 (1995). *W.W.W. Assocs., Inc. v. Giancontieri*, *supra* at 160, 565 N.Y.S.2d 440, 566 N.E.2d 639.

“[T]he purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing.” *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 669, 722 N.Y.S.2d 784, 745 N.E.2d 1006 (2001), citing *Matter of Primex Intern. Corp. v. Wal-Mart Stores*, 89 N.Y.2d 594, 599, 657 N.Y.S.2d 385, 679 N.E.2d 624 (1997). Extrinsic and parol evidence cannot be permitted to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face. *WWW Assocs., Inc., v. Giancontieri*, *supra* at 163, 565 N.Y.S.2d 440, 566 N.E.2d 639. See also, *Intercontinental Planning, Ltd., v. Daystrom, Inc.*, 24 N.Y.2d 372, 379, 300 N.Y.S.2d 817, 248 N.E.2d 576, *rearg. den.*, 25 N.Y.2d 959, 305 N.Y.S.2d 1027, 252 N.E.2d 864 (1969). [W]hen a contract term is ambiguous, parol evidence may be considered “to elucidate the disputed portions of the parties’ agreement.” *Blue Jeans U.S.A. Inc. v. Basciano*, 286 A.D.2d 274, 276, 729 N.Y.S.2d 703 (1st Dept.2001), quoting *Pollak v. Lincoln Center for Performing Arts*, 276 A.D.2d 403, 404, 715 N.Y.S.2d 9 (1st Dept.2000). When extrinsic evidence is required to enable the interpretation of a contract, the issue becomes one for a jury. However, in the first instance, the determination of whether a writing is ambiguous is a question of law to be resolved by the court. *W.W.W. Assocs. v. Giancontieri*, *supra* at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639. See also, *Van Wagner*

Advertising Corp. v. S & M Enterprises, 67 N.Y.2d 186, 191, 501 N.Y.S.2d 628, 492 N.E.2d 756 (1986).

*4 Courts must interpret a contract so as to give meaning to all of its terms. *Excel Graphics, Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, *supra* at 67. See also, *Mionis v. Bank Julius Baer & Co., Ltd.*, 301 A.D.2d 104, 109, 749 N.Y.S.2d 497 (1st Dept.2001). “It is a cardinal rule of construction that a court should not ‘adopt an interpretation’ which will operate to leave a ‘provision of a contract without force and effect.’” *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599, 217 N.Y.S.2d 1, 176 N.E.2d 37 (1961), quoting *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 133 N.E.2d 688 (1956). If there is an inconsistency between a general provision and a specific provision of a contract, the specific provision must control. *Bank of Tokyo–Mitsubishi, Ltd., New York Branch v. Kvaerner, a.s.*, 243 A.D.2d 1, 8, 671 N.Y.S.2d 905 (1st Dept.1998). See also, *Muzak Corp. v. Hotel Taft Corp.*, *supra* at 46, 150 N.Y.S.2d 171, 133 N.E.2d 688; and 1 Restatement, Contracts § 236(a).

Here, even if the mortgagee’s permission was required for the proposed transaction pursuant to Section 13(b)(v), and Section 13(b)(iv) permits it without the mortgagee’s consent, the latter section would control. By interpreting the parties’ agreement in this fashion, Section 13(b)(v) does not nullify Section 13(b)(iv). Thus, whether Section 13(b)(iv) dispenses with the need for the mortgagee’s permission must be determined first.

The first step of the proposed transaction here is the sale of PI Garden, which is a partner in the general partnership Treeline Whitman Associates, to PCA. While this constitutes a sale of only .0001% of Treeline Whitman Associates, Section 13(b)(iv) of the mortgage specifically characterizes the transfer of the partnership interest of any general partner of the guarantor as a “transfer” which requires the mortgagee’s consent. The allowance of a transfer of 25% or less without the mortgagee’s permission applies to “limited partnership interests or membership interests”; not general partnership interests.

The second step of the alleged transaction involves a pledge of 99.9999% of the general partnership interests in Treeline Whitman Associates to PCA. Contrary to the position of Treeline GCP and Treeline Whitman Associates, Section 13(b)(iv) does not address nor permit this. That section bars the transfer of the interest of any **joint venturers or members**

by which an aggregate of more than 25% of such **limited partnership interests** or membership interests are held by, or pledged to, parties who are not currently partners or members of mortgagor' without the mortgagee's permission. Since Treeline Whitman Associates partners' interests not limited partnership or membership interests, that provision is of no avail.

Thus, it is hereby declared that the mortgagee's consent is required for the proposed transaction.

C. Second Cause of Action

In the event that the mortgagee's permission is, in fact, required for the proposed transaction, in their second cause of action, Treeline GCP and Treeline Whitman Associates seek reformation or rescission of the mortgage. They allege mutual mistake, in that UBS, Treeline GCP and Treeline Whitman Associates believed that the proposed transaction was permitted without the mortgagee's approval or, in the alternative, fraud in that UBS misrepresented its interpretation of Section 13(b)(iv), on which Plaintiffs relied to their detriment when they entered the mortgage arrangement. Treeline GCP and Treeline Whitman Associates further allege that had they known UBS' true position, they would never have entered the transaction.

*5 "[I]n order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon." *Slutzky v. Gallati*, 97 A.D.2d 561, 468 N.Y.S.2d 87 (3rd Dept), *lv. app. den.*, 61 N.Y.2d 602, 472 N.Y.S.2d 1025, 460 N.E.2d 231 (1983); and *Curtis v. Albee*, 167 N.Y. 360, 60 N.E. 660 (1901). See also, *Leavitt-Berner Tanning Corp. v. American Home Assur. Co.*, 129 A.D.2d 199, 201-2, 516 N.Y.S.2d 992 (3rd Dept.), *lv. app. den.*, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222 (1987). Only upon a "certainty of error" (*Slutzky v. Gallati*, *supra*) or "clear and convincing evidence" (*Leavitt-Berner Tanning Corp. v. American Home Assur. Co.*, *supra* at 201-2), is reformation to be granted. "The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties..." *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 29, 588 N.Y.S.2d 8 (1st Dept.), *lv. app. den.*, 80 N.Y.2d 1005, 592 N.Y.S.2d 665, 607 N.E.2d 812 (1992), *rearg den.*, 81 N.Y.2d 782, 594 N.Y.S.2d 714, 610 N.E.2d 387 (1993). See also, *Leavitt-*

Berner Tanning Corp. v. American Home Assur. Co., *supra* at 202. A party seeking reformation must not only prove 'in no uncertain terms' "mistake or fraud," "but exactly what was really agreed upon between the parties." *William P. Pahl Equipment Corp. v. Kassis*, *supra* at 29, 588 N.Y.S.2d 8, quoting, *South Fork Broadcasting Corp. v. Fenton*, 141 A.D.2d 312, 314, 528 N.Y.S.2d 837 (1st Dept.), *app. disp.*, 73 N.Y.2d 809, 537 N.Y.S.2d 494, 534 N.E.2d 332 (1988). See also, *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574, 498 N.Y.S.2d 344, 489 N.E.2d 231 (1986).

"To state a cause of action for fraud, a Plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the Plaintiff and resulting injury." *Kaufman v. Cohen*, 307 A.D.2d 113, 119, 760 N.Y.S.2d 157 (1st Dept.2003). See also, *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996); *Monaco v. New York University Medical Center*, 213 A.D.2d 167, 169, 623 N.Y.S.2d 566 (1st Dept.), *lv. app. den.*, 86 N.Y.2d 882, 635 N.Y.S.2d 944, 659 N.E.2d 767 (1995); and *Callas v. Eisenberg*, 192 A.D.2d 349, 350, 595 N.Y.S.2d 775 (1st Dept.1993). Detail is required when pleading a cause of action for fraud. *Kaufman v. Cohen*, *supra* at 120, 760 N.Y.S.2d 157; and *Monaco v. New York Univ. Medical Center*, *supra* at 169, 623 N.Y.S.2d 566. "[T]o meet such requirement a Plaintiff need only provide 'sufficient detail to inform Defendants of the substance of the claims.'" *Kaufman v. Cohen*, *supra* at 120, 760 N.Y.S.2d 157; and *Bernstein v. Kelso & Co., Inc.*, 231 A.D.2d 314, 320, 659 N.Y.S.2d 276 (1st Dept.1997).

Contrary to the Trust's position, Treeline GCP and Treeline Whitman Associates may simultaneously advance claims for declaratory relief enforcing their agreement or, in the alternative, rescission. *Evans v. Winston & Strawn*, 303 A.D.2d 331, 334, 757 N.Y.S.2d 532 (1st Dept.2003). However, they may not ultimately have their agreement both enforced and rescinded. *Id.* at 334, 757 N.Y.S.2d 532; and *Big Apple Car, Inc. v. City of New York*, 234 A.D.2d 136, 138, 650 N.Y.S.2d 730 (1st Dept.1996).

*6 Treeline GCP and Treeline Whitman Associates maintain that in the course of negotiating the mortgage, they repeatedly and emphatically advised UBS—and UBS agreed—that additional equity investments in the property would be needed. To facilitate that, partnership interests in Treeline Whitman Associates must remain freely transferable. More specifically, they allege that they specifically contemplated

and anticipated the sale of PI Garden which, in fact, was established solely for this purpose in exchange for a preferred return on the purchaser's investment, which was to be secured by a pledge of Treeline Whitman Associates' partnership interests. Again, the mortgagee UBS was allegedly advised of such and agreed. It is claimed that section 13(b)(iv) of the mortgage was allegedly inserted at the mortgagor and guarantor's request precisely to enable this transaction.

C. Glenn Schor, President of Treeline GCP, executed the mortgage on its behalf. He attests that counsel for UBS, Ross Honig, Esq., of Schulte, Roth and Zabel, LLP, agreed that section 13(b)(iv) of the mortgage would allow Treeline GCP and, its sole member and guarantor, Treeline Whitman Associates to obtain a capital infusion through the transfer of partnership interests in Treeline Whitman Associates without the mortgagee's consent. He further alleges that the parties never intended that section 13(b)(v) would preclude what 13(b)(iv) specifically permitted. Indeed, he attests to a voice mail left at his office on October 20, 2003, in which Mr. Honig stated "that it was the intent of the parties that there be certain types of permitted transfers and that that one particular clause [section 13(b)(v)] wasn't intended to trump all else...." In opposition, UBS, via Ross Honig, Esq., attests that it was never specifically apprised of the transaction at issue here nor did it agree to it.

Here, there has been no mutual mistake. As for unilateral mistake, Treeline GCP and Treeline Whitman Associates' claim of fraud relates to the meaning of the terms of the mortgage. The mortgage itself specifically precludes reliance on any extrinsic documents or representations. In view of the clear language of mortgage, the mortgagor and guarantor could not have justifiably relied on alleged oral representations by UBS or its counsel concerning its interpretation of the mortgage, which would be necessary for reformation. The partners who constitute Treeline Whitman Associates, a member of Treeline GCP, are indisputably sophisticated real estate business people who are well schooled in the finance and management of commercial realty. Indeed, in this transaction, all of the parties were represented by experienced, highly competent lawyers. See, *Chimart Assoc. v. Paul*, *supra*. Under these circumstances, fraud involving the interpretation of an agreement simply cannot be established. Furthermore, Mr. Honig's purported representation that section 13(b)(iv) remained viable despite section 13(b)(v) does not change this result or suffice to raise an issue of fact as to the intended meaning of the mortgage document.

*7 In order to find fraud, Plaintiffs must establish that they reasonably and "actually relied on the purported fraudulent statements." *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 927 F.Supp. 650, 660 (S.D.N.Y.1996), *affd.*, 119 F.3d 91 (2d Cir.1997). Reliance is not reasonable or justifiable where Plaintiffs, who were involved in a major transaction, such as this, with access to critical information (to wit: the mortgage), but failed to take advantage of that access. See, *Gruman Allied Indus., Inc. v. Rhor Indus., Inc.*, 748 F.Supp.2d 729, 737 (2d Cir.1984). See also, *Philip Credit Corp. v. Regents Health Group, Inc.*, 953 F.Supp. 482 (S.D.N.Y.1997); and *Pappas v. Harrow Stores, Inc.*, 140 A.D.2d 501, 528 N.Y.S.2d 404 (2nd Dept.1988). Here, this Court finds that reliance upon the mortgagee's attorney over the clear and unambiguous provisions of the mortgage to be unreasonable and unjustifiable. See, *Chasanoff v. Perlberg*, 231 NYLJ 63, p. 25, Col. 1 (Sup.Ct., Nassau Co. 4/2/04).

D. Third Cause of Action

In their third cause of action, Treeline GCP and Treeline Whitman Associates seek to recover from the original mortgagee UBS for fraudulent inducement. They allege that UBS knowingly misrepresented that the proposed transaction would be allowed to induce them to take out the mortgage; that they relied on that misrepresentation; and that they never would have taken the mortgage had they known UBS' true position. As and for damages, Plaintiffs cite the loss of the \$10.5 million infusion from PCA. This cause of action seeking damages for fraudulent inducement must also fail. To sustain such a cause of action, "there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury." *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70, 747 N.Y.S.2d 441 (1st Dept.2002); *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 119, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969); *Sorbaro Co. v. Capital Video Corp.*, 168 Misc.2d 143, 148, 646 N.Y.S.2d 445 (Sup.Ct., Dutchess Co.1996), *affd.*, 245 A.D.2d 364, 667 N.Y.S.2d 388 (2nd Dept.1997). A party's reliance on the misrepresentation must be reasonable. *Tannehill v. Paul Stuart, Inc.*, 226 A.D.2d 117, 118, 640 N.Y.S.2d 505 (1st Dept.1996). See also, *Philip Credit Corp. v. Regents Health Group, Inc.*, *supra*; and *Pappas v. Harrow Stores, Inc.*, *supra*. Again, the language of the mortgage speaks for itself. Under the circumstances, Treeline GCP and Treeline Whitman Associates' reliance on oral representations of UBS' attorney to afford them such significant and allegedly crucial rights was hardly reasonable.

In view of the foregoing, Plaintiffs' claims for punitive damages and attorney's fees cannot be sustained.

Accordingly, it is,

ORDERED, that the motion of Defendant LaSalle Bank, National Association to dismiss this action as to it is **granted**; and it is further,

ORDERED, that the motion of Defendant UBS Warburg Real Estate Investments, Inc. for summary judgment dismissing the complaint is **granted**; and it is further,

***8 ORDERED**, that Plaintiffs' cross-motion for partial summary judgment is **denied**.

This constitutes the decision and Order of the Court.

All Citations.

3 Misc.3d 1109(A), 787 N.Y.S.2d 681 (Table), 2004 WL 1305510, 2004 N.Y. Slip Op. 50519(U)

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