

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

COMERICA BANK,
a Texas banking corporation,

CASE NO. 12-013597 (18)

Plaintiff,

FLORIDA BAR NOS. 19968 & 28585

vs.

TROPIC RANCH, INC., a Florida
corporation, H.K. HOTEL
MANAGEMENT, LLC, a Michigan limited
liability company, HANNA KARCHO-
POLSELLI, individually, BROWARD
COUNTY, FLORIDA, a political
subdivision of the State of Florida, and
KENNETH A. FRANK, individually,

Defendants.

**PLAINTIFF COMERICA BANK'S REPLY TO DEFENDANTS H.K. HOTEL
MANAGEMENT, LLC, TROPIC RANCH, INC., AND HANNA KARCHO-POLSELLI'S
ANSWER AND AFFIRMATIVE DEFENSES**

Plaintiff, Comerica Bank ("Plaintiff"), pursuant to Florida Rule of Civil Procedure 1.140, hereby replies to Defendants H.K. Hotel Management, LLC, Tropic Ranch, Inc., and Hanna Karcho-Polselli's (collectively, the "Defendants") affirmative defenses contained in Defendants' Answer and Affirmative Defenses dated July 26, 2012 (the "Answer"). In support of this Reply, Plaintiff states as follows:

1. Defendants' First Affirmative Defense (Failure to Post Non-Resident Cost Bond) fails because Plaintiff posted a non-resident cost bond on Monday, August 13, 2012. *See generally* § 57.011, Fla. Stat. (2011) (permitting plaintiff to post non-resident cost bond within 20 days after defendant raises it as a defense).

2. Defendants' Second (failure to mitigate), Third (equitable estoppel), Fourth (failure of conditions precedent to guaranty), and Fifth (misapplications of payments) affirmative defenses all fail because Defendants executed a forbearance agreement, including two amendments, that waived these affirmative defenses. Specifically, Defendants executed a forbearance agreement on June 9, 2010, an amendment to the forbearance agreement on September 3, 2010, and a second amendment to the forbearance agreement on May 5, 2011 (collectively, the "Forbearance Agreements"). True and correct copies of the Forbearance Agreements are attached to the Complaint as Composite Exhibit H.

3. Under the Forbearance Agreements, Defendants waived all rights to notification that might otherwise be required under the applicable loan documents and also waived:

ALL CLAIMS, CAUSES OF ACTION, DEFENSES, COUNTERCLAIMS OR OFFSETS AND /OR ALLEGATIONS BORROWERS AND/OR GUARANTORS MAY HAVE OR MAY HAVE MADE OR WHICH ARE BASED ON FACTS OR CIRCUMSTANCES ARISING AT ANY TIME UP THROUGH AND INCLUDING THE DATE OF THIS AGREEMENT, WHETHER KNOWN OR UNKNOWN, AGAINST ANY OR ALL OF BANK, BANK'S EMPLOYEES, OFFICERS, DIRECTORS, ATTORNEYS, STOCKHOLDERS, AFFILIATES AND SUCCESSORS AND ASSIGNS.

(Compl. Comp. Ex. H.) Thus, Defendants' Second, Third, Fourth, and Fifth Affirmative Defenses fail.

4. Defendants' Sixth Affirmative Defense (Right to Surplus Proceeds) fails as a matter of law because it is not a true affirmative defense. All affirmative defenses are pleas by way of confession and avoidance. *Moore Meats, Inc. v. Strawn*, 313 So. 2d 660, 662 (Fla. 1975). Affirmative defenses admit the allegations of the plea to which they are directed and allege additional facts that avoid the legal effect of the confession. *Id.* Here, Defendants' Sixth Affirmative Defense does not contest liability but merely begs this Court to give Defendants a priority distribution in the event there is a surplus of proceeds. Nothing contained in the Sixth


Affirmative Defense establishes a legal basis for an “avoidance” to Plaintiff’s cause of action and therefore is an improper affirmative defense that does not prevent Plaintiff from proceeding with this action.

WHEREFORE, having replied to Defendants’ affirmative defense, Plaintiff prays the Court find in its favor on its Complaint, award Plaintiff the relief sought in the Complaint, and grant such other and further relief as the Court deems just and proper.

Dated: August 15, 2012

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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on **August 15, 2012**, a true and correct copy of the foregoing was served via U.S. mail upon:

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