

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

COMERICA BANK, a Texas banking
corporation,

GENERAL JURISDICTION DIVISION

Plaintiff,

CASE NO.: CACE12013597 (18)

vs.

TROPIC RANCH INC., et. al.,

Defendants.

ANSWER & AFFIRMATIVE DEFENSES

Defendants, H.K. HOTEL MANAGEMENT, LLC, TROPIC RANCH, INC., and
HANNA KARCHO-POLSELLI, by and through their undersigned attorneys, hereby file their
Answer, & Affirmative Defenses to Plaintiff's Complaint, stating as follows:

I. ANSWER

1. Defendants admit Paragraphs 3, 4, 6, 33, of Plaintiff's Complaint.
2. Defendants deny Paragraphs 1, 8, 23 (all sub-parts), 25, 26, 28, 29, 38, 40, 46, 50
and 54 of Plaintiff's Complaint, and demand strict proof thereof.
3. Defendants are without knowledge to sufficiently answer Paragraphs 2, 5, 7, 9,
21, 27, 30, 31, 32, 34, 35, 36, 45, 49 and 53 of Plaintiff's Complaint, and therefore deny same
and demand strict proof thereof.
4. As to Paragraphs 37, 39, 41, 42, 43, 47 and 51 of Plaintiff's Complaint,
Defendants re-assert and re-allege their responses to the allegations contained in Paragraphs 1
through 36, as though fully set forth herein.
5. As to Paragraphs 10 through 20, 22, 24, 44, 48 and 52 of Plaintiff's Complaint,
Defendants state that the exhibits referenced therein speak for themselves.

II. AFFIRMATIVE DEFENSES

1. Failure to Post Non-Resident Cost Bond. Florida Statutes §57.011 provides:

Costs; security by nonresidents.--When a nonresident plaintiff begins an action or when a plaintiff after beginning an action removes himself or herself or his or her effects from the state, he or she shall file a bond with surety to be approved by the clerk of \$100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days' notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney.

Plaintiff has not posted a nonresident cost bond in the instant case, notwithstanding the fact that its main office/headquarters is located at, 1717 Main Street, Dallas, Texas 75201. A banking association is deemed to be a citizen of the state in which its main office is located (as designated in its articles of association). See Wachovia Bank, N.A. v. Schmidt, 126 S.Ct. 941 (U.S.2006); RDC Funding Corp. v. Wachovia Bank, N.A., 2004 WL 717111 (D. Conn. March 31, 2004). Since Plaintiff has not posted the statutorily-mandated nonresident cost bond, alleged that it posted said bond, or alleged that it is a resident of the state of Florida, it cannot maintain the instant cause of action.

2. Failure to Mitigate. Plaintiff has failed to mitigate its losses by thwarting Defendants' loss mitigation efforts with regard to the subject loan, refusing to negotiate reinstatement with Defendants in good faith, and denying Defendants additional time to repair the subject commercial property, so that it is suitable for sale. As Plaintiff is aware, the subject commercial property is not currently operational, and is therefore not generating income. Accordingly, it is in the best interest of all parties to allow Defendants to obtain the necessary

permits and continue with the repairs, so that the subject commercial property can be sold, and Plaintiff's loan can be paid-off.

3. Equitable Estoppel: The elements of equitable estoppel are: (i) representation as to material fact that is contrary to later-asserted position; (ii) reliance on that representation; and (iii) change in position detrimental to party claiming estoppel that is caused by representation and reliance thereon. State v. Harris, 881 So.2d 1079 (Fla., 2004). In the instant case, Plaintiff originally made representations to Defendants that it would negotiate reinstatement of the subject loan and forbear legal action, which are contrary to the position asserted in Plaintiff's Second Amended Complaint. Defendants relied on those representations, and are now in a detrimental position as a result. Accordingly, Plaintiff's claims are barred by the doctrine of equitable estoppel.

4. Failure of Conditions Precedent to Guaranty. The burden is on Plaintiff to show that all of the conditions to the guarantor's liability had occurred or had been performed. Alderman Interior Systems, Inc. v. First National-Heller Factors, Inc., 376 So. 2d 22 (Fla. 2nd DCA 1979); Northwestern Bank v. Cortner, 275 So. 2d 317 (Fla. 2nd DCA 1973). Thus, Plaintiff has the burden of proving that the value of the assets it received through foreclosure is less than the total indebtedness which the defendants guaranteed. Thunderbird, Ltd. v. Great American Ins. Co., 566 So. 2d 1296 (Fla. 1st DCA 1990). That burden has not been met by Plaintiff, thereby precluding the relief requested in the Complaint.

5. Misapplication of Payments. Upon information and belief, Plaintiff received funds for allocation to the note, but wrongfully refused to apply them to the note, precluding the relief sought pursuant to the subject Guaranties. See Murrell v. NCNB Nat. Bank of Florida, 611 So. 2d 603 (Fla. Dist. Ct. App. 5th Dist. 1993). A guarantor is not required to allege payment as

an affirmative defense to an action on the guaranty, in order to raise the issue of the amount actually due where the guarantor disputes the amount of damages claimed. See Marlar v. Quincy State Bank, 463 So. 2d 1233 (Fla. 1st DCA 1985).

6. Right to Surplus Proceeds. In the event that the Court grants Plaintiff the relief requested in the Complaint, Defendants' respective interests in the subject property entitle them to a priority distribution of surplus proceeds from the foreclosure sale of the subject property.

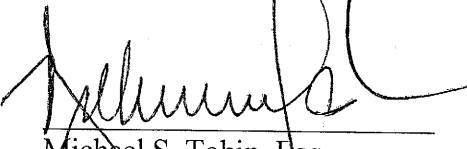
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 26 day of July, 2012 to: Brian K. Hole, Esq., Holland & Knight LLP, 515 E. Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301-4249; E-Mail: brian.hole@hkllaw.com.

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