

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

COMERICA BANK,

Plaintiff,

vs.

OCEAN 4660, LLC, et. al.,

Defendants.

GENERAL JURISDICTION DIVISION

CASE NO.: CACE11028447 (03)

ANSWER & AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT

Defendants, OCEAN 4660, LLC, HANNA KARCHO-POLSELLI and REMO POLSELLI, by and through their undersigned attorneys, hereby file their Answer, & Affirmative Defenses to Plaintiff's Second Amended Complaint, stating as follows:

I. ANSWER

1. Defendants admit Paragraphs 1, 3, 9, 14, 15, 40, 61 and 65 of Plaintiff's Second Amended Complaint.

2. Defendants deny Paragraphs 16, 31 (all sub-parts), 33, 34, 36, 51, 53, 55, 57, 63 and 67 of Plaintiff's Second Amended Complaint, and demand strict proof thereof.

3. Defendants are without knowledge to sufficiently answer Paragraphs 2, 4 through 8, 10 through 13, 17, 29, 35, 37, 38, 39, 41 through 50, 62 and 66 of Plaintiff's Second Amended Complaint, and therefore deny same and demand strict proof thereof.

4. As to Paragraphs 52, 54, 56, 58, 59, 60 and 64 of Plaintiff's Second Amended Complaint, Defendants re-assert and re-allege their responses to the allegations contained in Paragraphs 1 through 51, as though fully set forth herein.

5. As to Paragraphs 18 through 22 through 28, 30 and 32 of Plaintiff's Second Amended Complaint, Defendants state that the exhibits referenced therein speak for themselves.

II. AFFIRMATIVE DEFENSES

1. Contribution. Pursuant to the Swap Agreement attached to Plaintiff's Second Amended Complaint, if Defendants are found liable, Defendants are entitled to contribution from those who share a common liability as to any the loss allegedly suffered by Plaintiff. *See Am. Jur. 2d, Contribution § 1.*

2. Failure to Mitigate. Plaintiff has failed to mitigate its losses by thwarting Defendants' loss mitigation efforts with regard to the subject loan, and refusing to negotiate reinstatement with Defendants in good faith.

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 In the instant case, Plaintiff originally made representations to Defendants that it would negotiate reinstatement of the subject loan and forbear legal action, which are contrary to the position asserted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. Accord and Satisfaction Pending: Defendants are currently in the process of selling the subject property, which will result in accord and satisfaction of Plaintiff's claims herein, and have received numerous viable offers. Therefore, it would be manifestly unjust and inequitable for this matter to proceed to judgment.

5. Unenforceable SWAP Agreement / Duress: The SWAP Agreement being sued upon herein is unenforceable because it was signed under duress. Specifically: (i) Defendants involuntarily accepted the terms of the SWAP Agreement; (ii) Circumstances permitted no other alternative; and (iii) Said circumstances were the result of coercive acts of Plaintiff, by and through its representatives, Michael Malaga and Steve Davis. *See Woodruff v. TRG-Harbour House, Ltd.*, 967 So. 2d 248 (Fla. 3rd DCA 2007).

6. 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 Counts VI and VII of the Second Amended Complaint.

7. 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).

8. Right to Surplus Proceeds. In the event that the Court grants Plaintiff the relief requested in its Amended 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.

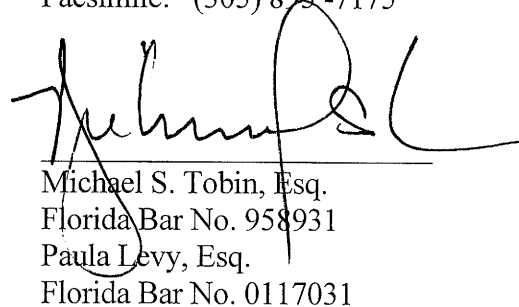
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 19 day of June, 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@hklaw.com.

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