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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

DOCKETED

JAN 21 2025

WELLS FARGO BANK, NATIONAL
ASSOCIATION, as Trustee for the Benefit of
Holders of Comm 2014-CCRE21 Mortgage
Trust Commercial Mortgage Pass-Through
Certificates,

Plaintiff,

v.

MARINE CLUB ASSOCIATES, LLC,

Defendant.

April Term 2021

No. 745

Commerce Program

Control Nos. 24055931/24056001

R. POSTELL
COMMERCE PROGRAM

OPINION

This is an action in mortgage foreclosure. Plaintiff Wells Fargo Bank, National Association, as Trustee for the Benefit of Holders of Comm 2014-CCRE21 Mortgage Trust Commercial Mortgage Pass-Through Certificates ("Wells Fargo Bank") filed this action seeking to collect on a mortgage recorded at 1100 South Broad Street in Philadelphia, Pennsylvania ("the Property"), and filed this motion for summary judgment. Defendant Marine Club Associates, LLC ("Marine Club") opposes the entry of summary judgment and filed a cross motion for summary judgment asserting defenses to the mortgage foreclosure action. For the reasons discussed below, Wells Fargo Bank's motion for summary judgment filed is granted on liability only and against Marine Club and the motion filed by Marine Club is denied. A hearing to assess damages will be scheduled.

BACKGROUND

OPFLD-Wells Fargo Bank, National Association, As Trustee [RCP]



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Parties

Plaintiff Wells Fargo Bank is the trustee for the benefit of the Holders of Comm 2014 – CCRE21 Mortgage Trust Commercial Mortgage Pass through Certificates and together with its agents is the lender in this mortgage foreclosure action.¹ Marine Club is a limited liability company. (Dkt. 5-28-24 Marine Club’s Motion ¶5 and 6-28-24 Wells Fargo Bank’s Response ¶ 5.) The members and investors of the Marine Club are Eric Blumenfeld, holding a 91 percent interest; Marine Club Manager, Inc. (an entity wholly owned by Eric Blumenfeld), holding a one percent interest; and RB Commercial Mortgage LLC (“RB Commercial”), a preferred equity investor, holding an eight percent interest.² (*Id.*; Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 23 and Dkt. 6-27-24, Response by Marine Club ¶ 23). Eric Blumenfeld and Marine Club Manager, Inc., controlled and managed Marine Club. (Dkt. 5-28-24 Marine Club’s Motion ¶ 6 and 6-28-24 Wells Fargo Bank’s Response ¶ 6.) Marine Club’s Operating Agreement, however, made provisions for RB Commercial to control Marine Club if a “Changeover Event”, as defined by the Operating Agreement, occurred. (*Id.* ¶ 7.)

The Loan

On November 14, 2014, Marine Club and Cantor Commercial Real Estate Lending, L.P. (“Cantor”), entered into a loan agreement in the amount of \$24,650,000.00. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 1 and Dkt. 6-27-24, Response by Marine Club ¶ 1.) Marine Club used the proceeds of the loan to acquire the Property. (*Id.* at ¶ 2.) The Property is comprised of

¹ In this opinion, Wells Fargo Bank and its agents are referred collectively as “Wells Fargo Bank.”

² A preferred equity investment is a capital investment in a company that receives a prescribed return and receives priority treatment in distributions. (Motion of Wells Fargo Bank ¶ 24 and Dkt. 6-27-24, Response by Marine Club ¶ 24.) A preferred equity investment behaves like a debt and is structurally subordinate to senior debt but is paid out before common equity. (*Id.*)

342 condominium units, 202 residential units, 134 parking units, three commercial units and three rooftop units). (*Id.* at ¶ 5.)

The loan is evidenced by a Loan Agreement, a Promissory Note, an Assignment of Leases and Rents, a Security Agreement, and a Mortgage. These agreements along with a Recognition Agreement that will be discussed below collectively make up the Loan Documents. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶¶ 3-8 and Dkt. 6-27-24, Response by Marine Club ¶¶ 3-8.) The Promissory Note in the principal amount of \$24,650,000.00 dated November 14, 2014, and an Open-End Mortgage and Security Agreement created a first-priority mortgage lien on the Property. (*Id.*) The Mortgage was recorded with the Philadelphia Commissioner of Records on November 24, 2014. (*Id.*)

Once the Loan Documents were executed, the loan was securitized³ and transferred away from Cantor and pooled together with a number of other commercial mortgage loans in a trust called the COMM 2014-CCRE21 Mortgage Trust Commercial Mortgage Pass-Through Certificates. (*Id.* ¶¶ 9-12.) Midland Loan Services (“Midland”), a division of PNC Bank, National Association became the Master Servicer for the loan that communicated with Marine Club and was responsible to administer performing loans, including collecting mortgage payments and passing the funds to the Trustee, administered escrows and reserves, advanced payments when necessary and transferred non-performing loans to the Special Servicer for Administration. (*Id.* ¶¶ 13, 14.)

In October 2020, the loan was transferred to LNR Partners, LLC (“LNR Partners”), because the monthly debt service payments on the loan were more than 60 days delinquent.

³ Securitization is the process by which a few commercial mortgages or other cash flow producing assets are pooled together in a trust to create securities that are sold to investors and pay a predictable rate of return. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 10 and Dkt. 6-27-24, Response by Marine Club ¶ 10.)

(Dkt. 5-28-24 Marine Club's Motion ¶23 and 6-28-24 Wells Fargo Bank's Response ¶ 23.)

Wells Fargo is the trustee for the Trust. (*Id.* ¶17.)

Recognition Agreement

The Loan Documents also include a Recognition Agreement. (Dkt. 5-28-24, Motion Wells Fargo Bank, Exhibit 6.) On November 14, 2014, Cantor and RB Commercial entered into this agreement setting forth their respective rights, obligations and priorities with respect to the payment of the debt and of distributions to RB Commercial. (*Id.*) The intent of the Recognition Agreement was to preserve the lender's security interest in the Property. (*Id.*) Marine Club is not a signatory to the Recognition Agreement, nor is it a third-party beneficiary. (*Id.* at ¶ 12.)

In the Recognition Agreement, Wells Fargo Bank agreed to provide RB Commercial with written notice of any event of default by Marine Club. Wells Fargo Bank also agreed to give RB Commercial the right to cure any default before the expiration of any applicable cure period provided to Marine Club and to accept the cure by RB Commercial as though the cure was performed by Marine Club. (*Id.* at ¶ 1 (k).)

RB Commercial agreed to obtain the written consent of Wells Fargo Bank to modify the Operating Agreement of Marine Club. Specifically,

Without first obtaining the written consent of Lender, [RB Commercial] shall not enter into any Modification whatsoever of, regarding or relating to the Borrower Operating Agreement, provided that Lender will not unreasonably withhold its consent to Modifications of the Borrower Operating agreement that do not adversely affect the Loan, Lender or the Lender's rights and remedies under the Loan Documents or the Borrower's obligations under the Loan Documents....

(*Id.* ¶ 6 (b).)

The Recognition Agreement also provided, "Nothing herein contained shall operate to release Borrower from their respective obligations to keep and perform all the terms, conditions, obligations, covenants and agreements contained in the Loan Documents." (Dkt. 5-28-24,

Motion Wells Fargo Bank, Exhibit 6 ¶ 20.) The Recognition Agreement, unlike the other Loan Documents, is governed by New York law. (*Id.* ¶ 15, 25.)

The Default

From November 2014 until November 2019, Marine Club made every contractually required payment under the loan. (Dkt. 5-28-24 Marine Club's Motion ¶24 and 6-28-24 Wells Fargo Bank's Response ¶ 24.) In 2019, the property taxes for Marine Club increased by 20 percent from the previous year and the annual insurance premium for the Property also increased from the previous year. (*Id.* ¶¶ 26-29.) On September 5, 2019, Midland performed an annual escrow analysis for the Tax and Insurance Escrow funds to be deposited with lender over the 12 months beginning in November 2019. (*Id.* ¶ 30; Loan Agreement § 7.2.1.) In November 2019, Midland informed Marine Club that it was required to increase its monthly payment for taxes and insurance premiums with its November 2019 payment. (Dkt. 5-28-24 Marine Club's Motion ¶¶32-33 and 6-28-24 Wells Fargo Bank's Response ¶¶ 32-33.)

Marine Club made its last payment to Wells Fargo Bank for the monthly debt service amount on August 6, 2020. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 28 and Dkt. 6-27-24, Response by Marine Club ¶ 28.) Marine Club contends it was justified in not making payments because of bad faith conduct by Wells Fargo Bank. (Dkt. 6-27-24, Response by Marine Club ¶ 28.)

Notice of Default and Notice to RB Commercial

On September 1, 2020, Marine Club was sent a notice of payment default. (Dkt. 5-28-24, Wells Fargo Bank Motion ¶ 30 and Exhibit C and Dkt. 6-27-24, Marine Club Response ¶ 30.) The default notice informed Marine Club that its failure to pay the past due amount of

\$209,866.47 within ten days of the notice may result in the loan being transferred to the special servicer, acceleration of the indebtedness, assessment of default interest and assessment of other collection costs. (Dkt. 5-28-24, Exhibit C, Wells Fargo Bank Motion ¶ 31 and Dkt. 6-27-24, Marine Club Response ¶ 31.) RB Commercial was not provided with notice of the payment default of Marine Club by Wells Fargo Bank. ((Dkt. 5-28-24 Marine Club's Motion ¶ 39 and 6-28-24 Wells Fargo Bank's Response ¶ 39.)

On September 15, 2020, Wells Fargo Bank sent another letter to Marine Club notifying it that the payment default triggered a cash management triggering event. (Dkt. 5-28-24 Marine Club's Motion ¶ 41 and 6-28-24 Wells Fargo Bank's Response ¶ 41, *id.* Exhibit L.) Under the terms of the Loan Agreement, a "Cash Management Period" is triggered by "the commencement of any Cash Trap Period," which in turn is defined to "commence upon the occurrence of," among other things, "any Event of Default" and "Cash Trap Period." (Dkt. 5-28-24 Wells Fargo Motion, Exhibit C p. pg. 4.) Marine Club was required to provide certain documentation so that an account could be opened within seven days. (*Id.*) RB Commercial was not copied on the September 15, 2020, letter. (*Id.*)

On October 13, 2020, Wells Fargo Bank sent Marine Club a Notice of Default and Right to Cure letter because it failed to provide the Know Your Customer Documents to open the accounts referenced in the September 15, 2020, letter for cash management purposes. (Dkt. 5-28-24 Wells Fargo Bank Motion, Exhibit Q.) RB Commercial was not copied with this letter, but it knew that a cash management event was triggered by a default. ((Dkt. 5-28-24 Marine Club Motion Exhibits D, T, and U.)

On October 16, 2020, RB Commercial informed Wells Fargo Bank that a Changeover event occurred and that it was exercising its remedies under Marine Club's Operating Agreement. (Dkt. 5-28-24, Marine Club's Motion, Exhibit T.) Additionally, RB Commercial

informed Wells Fargo Bank that “paragraph 1 (k) of the Recognition Agreement required that lender provide it with all notices of default” and requested that Wells Fargo Bank provide it with notice of all Marine Club’s correspondence going forward. (*Id.*) RB Commercial acknowledged that a Cash Trap Event occurred and confirmed that it was not receiving distributions from Marine Club. (*Id.*)

Marine Club did not make the past due payments or cure the payment default within ten days of the notice of payment default. ((Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 32 and Dkt. 6-27-24, Response by Marine Club ¶ 32.) In fact, the last minimum distribution received by RB Commercial from Marine Club was in March 2020. (Dkt. Wells Fargo Motion, Exhibit 1, Sam deposition 20: 3-15, 79:10-25, 80:1-9.)

Eric Blumenfeld’s Letter dated October 7, 2020

In the meantime, on October 7, 2020, Mr. Blumenfeld, Marine Club’s majority owner, requested a deferral of all interest payments for six months.⁴ (Dkt. 5-28-24, Wells Fargo Motion, Exhibit M). Additionally, he requested a 24-month deferral of amortization to LNR Partners LLC because they could not meet their obligations without Wells Fargo Bank’s assistance. (*id.*) Mr. Blumenfeld stated that the effects of COVID 19 placed many of its tenants in an untenable position for the foreseeable future and a need for substantial capital improvements which were

⁴ This was not the first time Marine Club requested assistance from Wells Fargo Bank on meeting its obligations under the mortgage. In June 2020, Marine Club sought approval from Wells Fargo Bank to apply for an Economic Income Disaster Loan (“EIDL”) through the Small Business Association (“SBA”). (Dkt. 5-28-24 Marine Club Motion, Exhibit R, Email 6-26-20.) Wells Fargo Bank could not approve the request because the loan documents prohibit additional secured debt. (*Id.*) Additionally, in July 2020, Marine Club sought permission from Wells Fargo Bank to approve its use of monies from its repair reserve and to stop making distributions to RB Commercial. (*Id.*) Wells Fargo Bank had no opportunity to consider the request because Marine Club withdrew it. (*Id.* Exhibit R.) The request for holding the distributions to RB Commercial was also placed on hold until the loan became current. (Dkt. Marine Club Motion Exhibit D.)

ongoing put Marine Club in a position of not being able to continue payments. (*id.*). Mr. Blumenfeld's request was denied.

On October 21, 2020, the loan was transferred to LNR as Special Servicer because the loan was in default. (Dkt. 5-28-24 Wells Fargo Motion, Exhibits N and O).

The Clearing Account Default

According to the Loan Agreement, Marine Club was required to establish and maintain a segregated bank account with PNC Bank, National Association ("PNC") denominated Clearing Account. (Dkt. 5-28-24 Wells Fargo Motion, Exhibit C § 2.7.1 (a) at 33). The Loan Agreement required that Marine Club Associates cause the Manager to deposit into the Clearing Account within one business day after receipt of all amounts received by Marine Club Associates or Manager constituting rents. (*Id.* at (b) p. 19). Beginning no later than November 2020 and continuing until December 2023, Marine Club stopped complying with its obligation to deposit the rents into the Clearing Account. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 41 and Dkt. 6-27-24, Response by Marine Club ¶ 41).

RB Commercial's demand for Arbitration

On November 17, 2020, RB Commercial filed a Demand for Arbitration with the American Arbitration Association against Marine Club Manager, its affiliated property manager EBRM Resurrection LLC and Mr. Blumenfeld pursuant to the Marine Club Associates, LLC Operating Agreement. (Dkt. 5-28-24 Wells Fargo Bank Exhibit 2.) RB Commercial alleged that a Changeover Event was triggered when Marine Club failed to make minimum distributions to RB Commercial, misapplied and/or absconded with rent and security deposits, grossly mismanaged the Property, and breached the Management Agreement. (Dkt. 5-28-24 Wells Fargo Bank Exhibit 2.) RB Commercial alleged that the declaration of default by Wells Fargo Bank also triggered the Changeover event. (*Id.*)

The Arbitrator issued her Final Award, Findings of Fact and Conclusions of Law on September 26, 2022. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 46 and Dkt. 6-27-24, Response by Marine Club ¶ 46.) The Arbitrator found that RB Commercial was entitled to control Marine Club Associates, and that Mr. Blumenfeld and/or Marine Club Manager were liable to RB Commercial in the amount of \$5,302,369.93 plus interest at a rate of 19.5 percent and awarded to RB Commercial attorney's fees and costs incurred in connection with the arbitration in the amount of \$1,795,846.02. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 48 and Dkt. 6-27-24, Response by Marine Club ¶ 48.) The United States District Court of the Western District of North Carolina confirmed the Final Award on July 31, 2023. (*Id.* ¶ 49).

Notice of Acceleration

The Promissory Note provides that "the Debt shall without notice become immediately due and payable at the option of the Lender, if any payment required in this Note is not paid...on or prior to the date when due" or "upon the occurrence of any other Event of Default. (Dkt. 5-28-24 Wells Fargo Bank Exhibits A and B § 7.1 (a).) On February 1, 2021, LNR and Wells Fargo Bank provided Marine Club and RB Commercial a "Notice of Acceleration and Demand for Rents". (Dkt. 5-28-24 Wells Fargo Bank, Exhibit Q.) The Notice of Acceleration informed Marine Club that Wells Fargo Bank was exercising its right to accelerate and declare all sums under the Note and other Loan Documents immediately due and payable. (*Id.*) RB Commercial was copied on the Notice of Acceleration. (*Id.*) Marine Club made no further payments under the Note and the Loan Documents. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 53 and Dkt. 6-27-24, Response by Marine Club ¶ 53.)

Additionally, the Notice of Acceleration informed Marine Club that "Lender Parties hereby demand the immediate turnover of all rents, revenue and other income generated by the Property pursuant to the terms of the Note, Mortgage, and all other related Loan Documents to

Lender Parties.” (Dkt. 5-28-24 Wells Fargo Bank, Exhibit Q.) Marine Club did not resume deposits into the Clearing Account until December 2023. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 55 and Dkt. 6-27-24, Response by Marine Club ¶ 55.)

The Mortgage provides in relevant part that, upon the occurrence and during the continuance of an Event of Default, Lender may “institute proceedings...for the complete foreclosure, in accordance with Pennsylvania law, of this Security Instrument under any applicable provision of law.” (Dkt. 5-28-24 Wells Fargo Bank Exhibit B § 7.1 (b).) As of June 2024, Wells Fargo Bank contends that \$37,520, 243.74 is due with additional interest and penalties accruing. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 57-69.)

Procedural History

On April 9, 2021, Well Fargo initiated this foreclosure action alleging that Marine Club defaulted by failing to make the required payment on the loan, furnish know-your-customer documents, deposit rent and comply with cash management obligations, maintain the Property and by denying access to the Property to Well Fargo Bank. (Dkt. 4-9-21, complaint.)

On June 23, 2021, Wells Fargo Bank filed an amended complaint and a Petition to Appoint a Receiver. (Dkt. 6-23-21, amended complaint and petition.) On August 13, 2021, RB Commercial filed a petition to intervene in the action. (Dkt. 8-13-21, petition.)

The Court conducted a hearing on the Petition to Appoint a Receiver and the Petition to Intervene on October 19, 2021. After the hearing, the Court denied the Petition to Appoint a Receiver but granted RB Commercial the right to intervene in the action. (Dkt. 10-19-21, order.)

On February 14, 2023, the Court stayed this action pending the disposition of the arbitration proceeding initiated by RB Commercial. (Dkt. 2-14-23, order.) On August 22, 2023, this action was removed from deferred status. (Dkt. 8-22-23, order.)

On May 3, 2024, Marine Club filed a motion for leave to amend its New Matter. (Dkt. 5-3-23, motion.) On June 16, 2024, the Court granted Marine Club's motion. (Dkt. 6-16-24, order.) The amended new matter was filed on June 20, 2024. (Dkt. 6-20-24, amended new matter.)

The New Matter raised several defenses to the mortgage foreclosure action including failing to provide notice of any alleged payment defaults to RB Commercial in accordance with the Recognition Agreement. (*Id.*) Additionally, the New Matter alleged that Wells Fargo Bank violated an implied duty of good faith and fair dealing by refusing to consent to Marine Club's deferral of minimum distribution payments to RB Commercial and declaring a Cash Trap Period based on payments made to RB Commercial. (*Id.*)

On May 28, 2024, the parties filed cross motions for summary judgment. (Dkt. 5-28-24, Motions.) On June 27, 2024, responses were filed to the motions. (Dkt. 6-27-24, responses.) The motions are ripe for disposition.

DISCUSSION

A. Wells Fargo Bank did not breach the Loan Documents by failing to give RB Commercial notice of Marine Club's default and an opportunity to cure.

Marine Club contends that it is not in default of the Loan Documents because Wells Fargo Bank breached the notice provisions in the Recognition Agreement by failing to timely notify RB Commercial of Marine Club's defaults and give it an opportunity to cure. (Dkt. 5-28-24, Marine Club Motion for Summary Judgment MOL p. 10.) Marine Club's reliance on this defense is misplaced for several reasons discussed below.

1. Marine Club lacks standing to rely upon the Recognition Agreement.

The Recognition Agreement is among the lender, Cantor and RB Commercial, the preferred equity holder. The Agreement sets forth the signatories' respective rights, obligations and

priorities with respect to payment and collection of the debt to the lender and RB Commercial's right to distributions from Marine Club and remedies in the event the distributions are not made. (Dkt. 5-28-24 Wells Fargo Bank, Exhibit 6, § E.) Marine Club may not rely upon this agreement to defeat Wells Fargo Bank's motion for summary judgment based on its payment default and the other defaults triggered by its nonpayment because it is not a party to the agreement, which by its terms offers Marine Club no benefits. Section 12 of the Recognition Agreement specifically states, "The parties hereto do not intend the benefits of this Agreement to insure to any member of the Borrower Group or any other Person (including, without limitation, Borrower or Guarantor)." (*Id.* §12.) Borrower is defined as Marine Club. (*Id.* Recitals A.)

Since Marine Club is not a party to the Recognition Agreement and since the Recognition Agreement does not designate Marine Club as a third-party beneficiary, it lacks standing to sue for breach of any provisions within the Recognition Agreement. *See Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983)(A party has no standing to sue for breach of contract if it is neither a signatory nor a third-party beneficiary of the contract.) Since the right to rely upon the notice provision of the Recognition Agreement belongs only to RB Commercial, Marine Club is prohibited from utilizing the notice provision within the Recognition Agreement as a defense to defeat Wells Fargo Bank's motion for summary judgment.

2. The Recognition Agreement does not operate to release Marine Club from its obligations.

Even if Marine Club could utilize the notice provision within the Recognition Agreement to defeat Wells Fargo Bank's motion for summary judgment, the Recognition Agreement specifically and unambiguously prohibits its use to release Marine Club from any of its obligations under the Loan Documents. Section 20 of the Recognition Agreement provides, "Nothing herein contained shall operate to release the Borrower from their respective obligations to keep and perform all of the terms and conditions, obligations, covenants and agreements

contained in the Loan Documents.” (Dkt. 5-28-24, Wells Fargo Motion, Exhibit 6 § 20.)

Consequently, even if Wells Fargo Bank breached its obligation to notify RB Commercial of Marine Club’s defaults, Marine Club is prohibited from using the notice provision in the Recognition Agreement to release it from its own contractual obligations to pay its mortgage and deposit the rent in the Clearing Account.

3. Marine Club waived its right to assert any defenses to its nonperformance.

Additionally, Marine Club waived its right to raise the notice defense. The loan agreement specifically contains a requirement that Marine Club notify the Lender in writing of any alleged default by the Lender. Section 10.12 states:

Further, it is agreed that Lender shall not be in default under this Agreement, or under any other loan Document, unless a written notice specifically setting forth the claim of Borrower shall have been given to Lender within thirty (30) days after Borrower first had knowledge of the occurrence of the event which Borrower alleges gave rise to such claim and Lender does not remedy or cure the default, if any there be, promptly thereafter. Failure to give such notice shall constitute a waiver of such claim.

(Dkt. 5-28-24 Wells Fargo Bank, Exhibit C § 10.12.)

Marine Club never gave Wells Fargo Bank notice that it intended to raise as a defense Wells Fargo’s failure to give RB Commercial notice of its the defaults. Consequently, in accordance with § 10.12, Marine Club waived its right to now rely upon the notice defense.

4. Marine Club’s reliance on *JRA Inc. v. Springfield Partners, L.P.* is misplaced because RB Commercial had notice of Marine Club’s defaults.

Marine Club’s reliance on *JRA Inc. v. Springfield Partners, L.P.* No. 3154 EDA 2022, 2024 WL 1796183 (Pa. Super. April 25, 2024)(non-precedential, unpublished disposition) is misplaced. In contrast to *JRA*, where the Superior Court affirmed the trial court’s decision to grant summary judgment because the landlord failed to give the subtenant under the lease notice

of the tenant's default before declaring a default, the Loan Agreement in this case does not require Wells Fargo Bank to give RB Commercial notice before declaring a default.

The lease and amendments at issue in *JRA*, like the Recognition Agreement, require the landlord to give notice to the subtenant and the guarantor of any default and the opportunity to cure. Unlike the Recognition Agreement in this case, however, the agreements at issue in *JRA* specified that no "notice of default shall be deemed given to [Tenant] unless and until a copy of such notice shall have been delivered to Subtenant and [Guarantor]." (*Id.* at 1.) In this case, contrary to *JRA*, the Recognition Agreement does not make the notice to RB Commercial a condition precedent to declaring an event of default. The Recognition Agreement requires Lender only to "provide a copy to Preferred Equity Holder of any written notice of an Event of Default given by Lender...concurrently with the delivery of such Default Notice to Borrower." (Dkt. 5-28-24 Wells Fargo Bank Exhibit 6.) Notification is not a condition precedent to declaring an event of default in the Loan Documents in this case. (*Id.* Exhibit C § 8.1 (a).)

Additionally, unlike in *JRA*, there is evidence that Wells Fargo Bank gave RB Commercial actual notice of Marine Club's defaults, and that RB Commercial acknowledged receipt of the actual notice. New York law, which governs the Recognition Agreement, provides that a "party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract." *Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (applying New York Law). In other words, "a non-breaching party's obligation to perform is excused only when there is a material breach by the other party." *AKTIV Assets LLC v. Centerbridge Partners, L.P.*, No. 653259/2019, 2019 WL 7165927, at *7 (N.Y. Sup. Ct. Dec. 24, 2019) (citing *Smoley v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 541 (1st Dep't 2010)). "[I]n determining whether [a] material breach relieves non-breaching party's obligation

to perform, 'the extent to which the agreement provides for performance without delay' should be considered." *Frank Felix Assocs.*, 111 F.3d at 289 (quoting Restatement (Second) of Contracts § 242(c)).

In this case, the failure of Wells Fargo Bank to provide concurrent notice to RB Commercial of Marine Club's payment default and cash management default is not a material breach of the Recognition Agreement because actual notice was provided to RB Commercial with an opportunity to cure. (Dkt. 5-28-24 Marine Club Motion Exhibits D, T, and U.) RB Commercial knew that the loan was not current as it asked Wells Fargo Bank to hold its request for deferment of payment distributions. (Dkt. 5-28-24 Marine Club Motion Exhibit D.) Additionally, RB Commercial knew that a cash management event was triggered and received notice of acceleration of the debt due to the default. (Dkt. 5-28-24 Marine Club Motion Exhibits D, T, and U.) RB Commercial was given an opportunity to cure the Marine Club's default from October 2020, the date it received notice of the default, to April 2021, when this action was instituted. (*Id.*) RB Commercial did not cure the default. (Dkt. 5-28-24 Wells Fargo Bank Motion Exhibit J.) Since RB Commercial had notice of the defaults, Marine Club's performance is not excused.

**B. Wells Fargo Bank did not act unreasonably
nor breach its duty of good faith and fair dealing.**

In the alternative, Marine Club argues that Wells Fargo Bank acted unreasonably and breached its duty to act in good faith and fair dealing by denying its request for relief related to COVID-19 and its request to defer making monthly payments to RB Commercial as required under the Operating Agreement. (Dkt. 5-28-24 Marine Club Motion MOL p. 14.)

Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. *Creeger Brick and Bldg. Supply Inc. v. Mid-State Bank and Trust Co.*, 560 A.2d 151, 154 (Pa. Super.1989). "Good faith" has been defined as "[h]onesty in

fact in the conduct or transaction concerned.” (*Id.*) The Supreme Court of Pennsylvania has refused to impose a duty of good faith that would modify or defeat the legal rights of a creditor. (*Id.*) A lending institution does not violate its duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor. (*Id.*) The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights that have been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan that are favorable to itself. (*Id.*)

In this case, the Loan Agreement includes a “Lender’s Discretion” provision stating:

Whenever pursuant to this Agreement, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or to decide whether arrangements or terms are satisfactory shall (except as is otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive.

(Dkt. 5-28-24 Wells Fargo Motion Exhibit C § 10.2.)

Wells Fargo Bank’s decisions to deny COVID-19 relief and deny permission to stop paying RB Commercial were discretionary decisions. Wells Fargo Bank considered the request to defer the payment of distributions to RB Commercial but since the loan was not current the request could not be approved. (Dkt. 5-28-24 Marine Club Motion Exhibits D.) Additionally, there is no evidence that granting such a request would have made a difference since Marine Club had stopped making payments to RB Commercial well before the deferral request was made to Wells Fargo Bank. (Dkt. 5-28-24 Wells Fargo Bank Exhibit 2 Arbitration Demand.)

The decision to deny Marine Club’s request to apply for an EIDL loan through the SBA and to use the Repair Reserves was based on the terms of the Loan Agreement, which prohibited additional secured debt and the payment arrears. (Dkt. 5-28-24 Marine Club Motion, Exhibit H.)

Wells Fargo Bank was within its rights to deny Marine Club's requests. The implied covenant of good faith does not "compel a lender to surrender rights ...conferred to the lender by the terms of the loan contract." *Creeger*, 560 A.2d at 154. Wells Fargo Bank had no obligation to consider any of Marine Club's requests. ⁵

C. Wells Fargo is entitled to summary judgment.

The holder of a mortgage is entitled to summary judgment if the mortgagor admits that the mortgage is in default, the mortgagor has failed to pay on the obligation, and the recorded mortgage is in the specified amount. *Cunningham v. McWilliams*, 714 A.2d 1054, 1056–57 (Pa.Super.1998).

In this case, Marine Club admits that it executed a mortgage to secure the note in the amount of \$24,650,000.00. (Dkt. 5-28-24, Motion of Wells Fargo Bank ¶ 1 and Dkt. 6-27-24, Response by Marine Club ¶ 1.) It also has admitted that it has failed to make the required monthly payments on the loan since August 6, 2000, and failed to deposit the rents into a Clearing Account since October 2020. (Dkt. 5-28-24, Marine Club Motion ¶ 23 and 6-28-24, Response of Wells Fargo Bank ¶ 23; Dkt. 5-28-24, Motion of Wells Fargo Bank ¶¶ 28, 41 and Dkt. 6-27-24, Response by Marine Club ¶ ¶ 28, 41.) The failure to make the required monthly payments and the failure to deposit the rents in the Clearing Account are events of default under the Loan Documents. (Dkt. 5-28-24, Motion of Wells Fargo Bank Exhibit C § 8.1 (a)(i).) While Marine Club did assert defenses to its failure to pay and failure to deposit rents, those defenses lack merit as discussed above. Based on the foregoing, summary judgment is appropriate in favor

⁵ See, e.g., *Stobba Residential Associates, L.P. v. RS Rialto 2019-FL 1 Holder, LLC et al.*, No. 487 EDA 2023, 2023 WL 8542590 (Pa. Super. December 11, 2023)(unpublished disposition, non-precedential, memorandum) (Lender had no obligation to even consider the forbearance request of the borrower and the trial court properly granted summary judgment.)

of Wells Fargo. *See Cunningham v. McWilliams*, 714 A.2d 1054, 1056-57 (Pa. Super.1998) (summary judgment appropriate where borrower admitted it executed the mortgage and failed to make the required payments but disputed the occurrence of an actionable default because of lenders conduct.)

While summary judgment is appropriate on liability, there are questions of facts regarding the amount due under the mortgage, such as the outstanding balance on the Note, and the attorney fees and the out-of-pocket expenses requested by Wells Fargo Bank. Wells Fargo Bank relies upon the affidavit of its own witness John Yee as evidence of the amounts due under the Note, the attorney fees and the out-of-pocket expenses. As Marine Club challenges the credibility of the witness and the documents relied upon by the witness for damages calculation, the motion for summary judgment as to damages is denied. *See* Pa. R. Civ. P. 1035.3 (a)(1). As such, an assessment of damages is necessary to determine the amount due.

CONCLUSION

For the foregoing reasons, the Court grants the summary judgment motion of plaintiff Wells Fargo Bank as to liability only and denies the summary judgment motion of defendant Marine Club. A hearing on the assessment of damages is scheduled for March 20, 2025, at 10 a.m. in Courtroom 630 City Hall, Philadelphia, PA 19107. A separate order has been issued.

BY THE COURT:

Abbe F. Fletman
ABBE F. FLETMAN, J.

1/17/25