

WELLS FARGO BANK NATIONAL  
ASSOCIATION, AS TRUSTEE FOR THE  
BENEFIT OF THE HOLDERS OF COMM  
2014-CCRE21 MORTGAGE TRUST  
COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES,

V.

And

Control Number 22011359

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default and filed its own action against plaintiff for lender liability which is currently pending in this court.<sup>1</sup>

On June 23, 2021, Plaintiff filed a petition for the appointment of a receiver. Plaintiff filed the petition to preserve and protect its collateral based on its express rights under the loan documents and for alleged mismanagement and misappropriation by Defendant LLC's operating member, Eric Blumenfeld.<sup>2</sup> Plaintiff alleged that Mr. Blumenfeld was "plundering the Property of its income for unrelated uses, absconding with security deposits, diverting, and converting rents, failing to pay condominium assessments and subjecting Lender's collateral to third party liens and claims."<sup>3</sup> On August 13, 2021, RB Commercial Mortgage LLC ("Intervenor") filed a petition to intervene in this action. Intervenor is a preferred equity investor and minority member in Defendant LLC.

A hearing on the Petition to Intervene and Petition to Appoint a Receiver was held on October 1, 2022. The court granted the petition to intervene and denied the Petition to Appoint a Receiver. The court denied Plaintiff's request for the appointment without prejudice. The court found that the evidence presented during the hearing which included the testimony and cross examination of Eric Blumenfeld by Plaintiff and Intervenor did not support the appointment of a receiver. The court found that the loan remained secured, there was no evidence of imminent irreparable harm to the collateral or the public and that an issue of fact existed as to whether a default existed under the loan.<sup>4</sup>

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<sup>1</sup> The lender liability action is captioned *Marine Club Associates LLC v. Wells Fargo Bank, N.A. et. al.* 2107-1565. Intervenor is not a party in the lender liability action.

<sup>2</sup> Plaintiff's Petition to Appoint Receiver ¶ 2.

<sup>3</sup> Id. at ¶3.

<sup>4</sup> Order denying Petition to Appointment Receiver dated October 18, 2021.

In addition to this mortgage foreclose action and the lender liability action filed by Defendant LLC against Plaintiff, Defendant LLC and Intervenor are parties to an ongoing AAA Arbitration proceeding.

On November 11, 2021, Intervenor, who has not filed any claims in this action, issued third party subpoenas to PNC Bank, TD Bank and to accountant Robert Downey at Downey Spevak & Associates. The subpoena directed to Downey seeks tax returns of Defendant LLC and non-parties, including EBRM, Waverly, Marine Club Condos and Eric Blumenfeld. The subpoenas to PNC Bank and TD Bank seek documents related to Defendant LLC's accounts. Additionally, the subpoena to TD Bank seeks documents related to accounts owned by nonparties, Marine Club Condos, Waverly and EBRM. The subpoenaed documents are the same documents sought by Intervenor in the AAA Arbitration and denied by the Arbitrator.

In response to the subpoenas, Defendant LLC filed a motion for protective order and to quash the subpoenas. Intervenor filed a motion to compel production. On January 4, 2022, the court held oral argument on the parties' respective motions and denied Defendant LLC's motion for protective order and motion to quash and granted Intervenor's motion to compel compliance with the subpoenas. Plaintiff was present at the hearing as an interested observer but was not a party to the pending motion and did not present any argument on the motions.<sup>5</sup>

On January 7, 2022, Defendant LLC filed a motion for reconsideration of this court's order dated January 4, 2022.<sup>6</sup> On January 19, 2022, Intervenor filed a response to the motion for reconsideration. After consideration of the parties' submissions, on February 3, 2022 the court

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<sup>5</sup> N.T. Discovery Hearing dated January 4, 2022 p. 4 L 11-14.

<sup>6</sup> Defendant LLC also filed a notice of appeal of this court's order dated January 4, 2022 which was subsequently withdrawn.

granted Defendant LLC's motion for reconsideration<sup>7</sup>, vacated its order dated January 4, 2022, and granted Defendant LLC's motion for protective order and motion to quash subpoenas to PNC Bank, TD Bank and Robert W. Downey/Spevak & Associates.<sup>8</sup> Intervenor filed this timely appeal on March 3, 2022.

## DISCUSSION

### I. Intervenor's Appeal should be Quashed.

Pennsylvania law makes clear that an appeal may be taken from a final order or an order certified as final (Pa. R. A. P. 341); an interlocutory order as of right (Pa. R. A. P. 341), an interlocutory order by permission (Pa. R. A. P. 312, 1311, 42 Pa. C. S. A. §702 (b)); or (4) a collateral order (Pa. R. A. P. 313).<sup>9</sup> Here, the order being appealed is a discovery order. Generally, discovery orders are deemed interlocutory and not immediately appealable because they do not dispose of the litigation.<sup>10</sup> Intervenor argues that the order dated February 3, 2022 and docketed February 4, 2022 is a collateral order and thus the appeal is proper.

A collateral order is defined as one that: "1) is separable from and collateral to the main cause of action; 2) involves a right too important to be denied review; and 3) presents a question that, if review is postponed until final judgment in the case, the claim will be irreparably lost."<sup>11</sup>

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<sup>7</sup> "A trial court always has the authority to reconsider its own judgment." *Moore v. Moore*, 634 A.2d 163, 167 (Pa. 1993).

<sup>8</sup> The court also denied a motion for sanctions and denied Defendant LLC's motion for a stay of enforcement of the order as moot.

<sup>9</sup> *Berkeyheiser v. A-Plus Investigation, Inc.* 936 A.2d 1117, 1123 (Pa. Super. 2007).

<sup>10</sup> *See, Meyer-Chatfield Corp. v. Bank Fin. Servs. Grp.*, 143 A.3d 930,936 (Pa. Super. 2016).

<sup>11</sup> *Andrews v. Devereux Foundation*, 262 A.3d 468 (Pa. Super. 2021) quoting *In re Bridgeport Fire Litigation*, 51 A.3d 224, 230 n.8 (Pa. Super. 2012); Pa.R.A.P. 313(b).

The court's order dated February 3, 2022 and docketed February 4, 2022 is not a collateral order as defined by Pa. R. A. P. 313.

The documents subpoenaed by Intervenor would not lead to discoverable information relevant to the mortgage foreclosure action. Instead, the subpoenas propounded by Intervenor which are the subject of this court's order dated February 3, 2022 are more appropriate in the AAA Arbitration proceeding where the dispute between Intervenor and Defendant LLC is now being litigated. The Arbitrator denied Intervenor request to subpoena the tax records and bank documents. Given the ongoing AAA Arbitration proceeding wherein the subpoenaed documents are likely relevant, the Arbitrator's decision to deny Intervenor's request for the same information requested in the subpoenas before the court, and the absence of any claims filed by the Intervenor in this action, this court's dated February 3, 2022 order lacks the importance necessary for review to granted at this time. Similarly, the February 3, 2022 order does not present a question that if postponed until final judgment will cause a claim to be lost. Intervenor has not brought any claims in this action against Defendant LLC and is precluded from doing so based on Defendant LLC's Operating Agreement.

Rule 313 must be interpreted narrowly, and the requirements for an appealable collateral order are stringent to prevent undue corrosion of the final order rule.<sup>12</sup> As the February 3, 2022 order docketed on February 4, 2020 fails to satisfy the requirements for a collateral order, the appeal should be quashed.

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<sup>12</sup> *Melvin v. Doe*, 836 A.2d 42, 46-47 (Pa. 2003).

**II. This court's order dated February 3, 2022 and docketed February 4, 2022 is proper.**

In the event the order dated February 3, 2022 and docketed February 4, 2022 is a collateral order, the order should be affirmed. A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.<sup>13</sup>

After careful review of the papers filed, this court concluded that the subpoenaed documents are not relevant to this mortgage foreclosure action. Defendant LLC disputes that it is in default of the mortgage. Intervenor has not asserted any claims against Defendant LLC in this action and there was no pending Petition to Appoint Receiver. At best, the subpoenas to the Banks, and Accountant are nothing more than a fishing expedition. Pennsylvania courts have outlined a two-part test to determine the discoverability of tax returns.<sup>14</sup> The party seeking discovery must demonstrate: (1) relevance; and (2) a compelling need for such documentation because the information is not available elsewhere.<sup>15</sup> Here, the test for discoverability of the tax return fails as they are not relevant to the existing claims and defenses in this action. Similarly, Intervenor's subpoena for banking information for Defendant LLC and nonparties is not relevant to the mortgage foreclosure claim and any defenses thereto and therefore, no reason existed to balance the privacy rights of these entities and individual with the interests of Intervenor.

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<sup>13</sup> Pa.R.C.P. 4003.1.

<sup>14</sup> *Railroad Recovery Inc. v. Mast*, 2017 WL 2560030, at \*9 (Pa.Super. 2017).

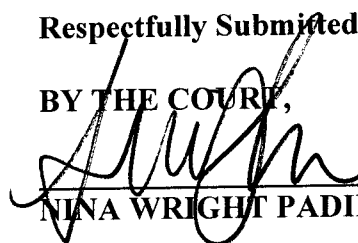
<sup>15</sup> *Id.*

## **CONCLUSION**

For the foregoing reasons, this court's order dated February 3, 2022 and docketed February 4, 2022 should be affirmed.

**Respectfully Submitted,**

**BY THE COURT,**



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**NINA WRIGHT PADILLA, S.J.**