2013 WL 6511651 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

WELLS FARGO BANK, N.A., as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2003-PM1, by and through its Special Servicer, Orix Capital Markets, LLC, Plaintiff,
v.
PALM BEACH MALL, LLC, a Delaware Limited Liability Company; Simon Property Group, L.P., a Delaware Limited Partnership, also known as Simon Property Group, L.P., a Delaware Limited Partnership doing business as DeBartolo Realty Partnership, Ltd.; and Simon Palm Beach, LLC, a Delaware Limited Liability Company, Defendants.

No. 502009CA013088.
December 6, 2013.

***1** Civil Division: "AI"

Order Granting Defendants Cross-Motion for Summary Judgment as to Count IV upon Reconsideration

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Meenu Sasser, Judge.

THIS CAUSE came before the Court on Defendants' Motion for Reconsideration of Count IV, filed December 3, 2013, and Plaintiffs Response in Opposition to Defendants' Motion for Reconsideration of Count IV, filed December 4, 2013.

Defendants' Motion for Reconsideration of Count IV was directed at the Court's Order Denying Plaintiff's Motion for Partial Summary Judgment on Counts III and IV and Granting Defendants' Cross-Motion for Summary Judgment on Counts I and II, dated November 26, 2013, which ruled on Plaintiff's Motion for Partial Summary Judgment on Counts III and IV of the Second Amended Complaint and Defendants' First, Second, Third, Fourth, Eighth, Ninth and Eleventh Affirmative Defenses, and Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment.

The Court has read the submissions of the parties, considered the record, and heard argument of counsel. Upon reconsideration, it is

ORDERED AND ADJUDGED that Defendants' Motion for Reconsideration of Count IV is **GRANTED**. The Order Denying Plaintiff's Motion for Partial Summary Judgment on Counts III and IV and Granting Defendants' Cross-Motion for Summary Judgment on Counts I and II is replaced in its entirety as follows:

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS III AND IV AND GRANTING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND IV

THIS CAUSE came before the Court upon Plaintiff's Motion for Partial Summary Judgment on Counts III and IV of the Second Amended Complaint and Defendants' First, Second, Third, Fourth, Eighth, Ninth and Eleventh Affirmative Defenses," filed July 16, 2013, and Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment, filed August 21, 2013. This Court, having carefully reviewed the parties' submissions, having reviewed the record and all applicable legal authority, having heard the argument of counsel, and being otherwise fully advised in the premises, does hereby determine as follows:

I. *STANDARD OF REVIEW*

To deny a non-movant the fundamental right to a trial is only appropriate where there are no genuine issues of material fact, the record is settled, and the movants are entitled to a judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c); *Volusia Cnty v. Aberdeen at Ormond Beach, LP*, 760 So. 2d 126, 130 (Fla. 2000); *E. Qualcom Corp. v. Global Comm.Ctr. Ass'n*, 59 So. 3d 347, 350-51 (Fla. 4th DCA 2011) (observing that summary judgment is not a substitute for trial; if evidence raises any doubt as to any material fact, it cannot be entered); *Sanzare v. Varesi*, 681 So. 2d 785, 786 (Fla. 4th DCA 1996) (observing that summary judgment is not appropriate unless "the facts are so crystalized that nothing remains but questions of law").

***2** In evaluating the existence of genuine issues of material fact, all reasonable inferences must be drawn in favor of the non-movant *Firestone v. Time, Inc.*, 231 So. 2d 862, 864 (Fla. 4th DCA 1970); *Sanzare*, 681 So. 2d at 786. If there is even the slightest doubt or possibility that an issue of material fact may exist, summary judgment should be denied. *Snyder v. Cheezem Dev. Corp.*, 373 So. 2d 719 (Fla. 2d DCA 1979). The non-movant's opposing papers, including its brief and affidavits, should be "indulgently treated." *Firestone*, 231 So. 3d at 864. If the evidence submitted raises any issue of material fact that may permit different reasonable inferences, the case should be submitted to the trier of fact. *McKenna v. Camino Real Vill. Ass'n Inc.*, 877 So. 2d 900, 900-01 (Fla. 4th DCA 2004).

II. *FINDINGS OF FACT*

Plaintiff, ORIX Capital Markets, LLC brought this action on behalf of the trustee of the CMBS trust that holds the Palm Beach Mall mortgage loan in a pool of other loans. Defendant, Palm Beach Mall, LLC ("Borrower") was formed in 2002 as a single purpose entity to enter into a contract with JP Morgan Chase Bank ("Lender") for the principal amount of $55,350,000.00 ("Loan Agreement"). The sole business purpose of Borrower was to own and operate the Palm Beach Mall. The Loan Agreement provided for an extensive definition of the Borrower's obligation to maintain "Special Purpose Entity" (SPE) status. The definition included, in relevant part, subsection (*i*) which required Borrower "is and will remain solvent and pays its debts and liabilities ... from its assets as the same shall become due, and is maintaining and will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations" and

subsection (q) which stated Borrower "has paid and will pay its own liabilities and expenses ... out of its own funds and assets, and has maintained and will maintain a sufficient number of employees in light of its contemplated business operations[.]"

The broad exculpation provision of the Loan Agreement limited Lender's recourse in the event of a default to Borrower's interest in the property, in any rents and in any collateral given to Lender. (Loan Agreement § 9.4). Lender agreed it would not sue, seek, or demand any deficiency judgment against Borrower or its members, partners, officers, directors, employees or agents (collectively, the "Exculpated Parties"). *(Id.)* The relevant exception to the exculpation provision could be found in subsection (g)(ii) which permitted Lender to "enforce the liability and obligation of Borrower, but not against any Exculpated Party" for "the gross negligence or willful misconduct of Borrower." *(Id.)* The exculpation provision of the Loan Agreement stated it did not "(c) affect the validity or enforceability of or any Guaranty made in connection with the Loan or any of the rights and remedies of Lender thereunder; ...." *(Id.)*

Defendant Simon Property Group, L.P. ("Simon") executed a "bad-boy" guaranty with Lender on behalf of Borrower ("Guaranty"). Section 1.2(a)(ii) of the Guaranty renders Simon liable for "gross negligence or willful misconduct of Borrower." Simon is liable pursuant to the Guaranty for the entire amount of the Debt if "Borrower fails to maintain its status as a Single Purpose Entity ...." (Guaranty § 1.2(b)(iii).) Officials who worked at Lender explained that only "very egregious acts" would convert the loan to a non-recourse loan which would make Simon liable for the full amount of the loan.

***3** On March 10, 2009, the loan went into default due to nonpayment and Plaintiff initiated the instant action shortly thereafter. A final judgment of foreclosure was entered by the Court in January 2010. Plaintiff filed its Second Amended Complaint on March 19, 2012 and alleged the following counts: Count I: Action on Guaranty: Gross Negligence and Willful Misconduct by Palm Beach Mall, LLC; Count II: Action on Guaranty: Gross Negligence and Willful Misconduct of Simon Property Group, L.P.; Count III: Breach of Loan Agreement (Special Purpose Entity Covenant by Palm Beach Mall, LLC); Count IV: Action on Guaranty (Special Purpose Entity Covenant by Simon Property Group, L.P.). Presently pending before the Court are Plaintiff's Motion for Partial Summary Judgment on Counts III and IV of the Second Amended Complaint and Defendants' First, Second, Third, Fourth, Eighth, Ninth and Eleventh Affirmative Defenses," filed July 16, 2013, and Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment, filed August 21, 2013.

III. *ANALYSIS*

Plaintiff argues that it is entitled to judgment as a matter of law on the issue of whether a violation of the special purpose entity covenant in the Loan Agreement section 4.1.30 renders a nonrecourse loan fully recourse against Borrower (Count III) and Simon, as Guarantor (Count IV). Also before the Court upon Defendants' cross-motion for summary judgment on Counts I and II is whether as a matter of law the actions of Borrower and Simon rise to the level of gross negligence to make the loan fully recourse. Defendants also cross-moved for summary judgment on Counts III and IV. Accordingly, each of these issues is considered in turn.

A. *Contract Interpretation Under New York Law*

As a preliminary matter, the parties agree New York law applies to resolve this dispute. Under New York law, the initial interpretation of a contract is a matter of law for the court to decide. *Int'l Multifoods, Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 82 (2d Cir. 2002) (citations omitted). The first issue for the court to consider in such a situation is "whether the contract is unambiguous with respect to the question disputed by the parties." *Id.* at 83. If the contract is unambiguous, that is, only susceptible to one reasonable interpretation, the court must "give effect to the contract as written." *Madeleine L.L.C. v. Street*, 757 F. Supp. 2d 403, 405 (S.D.N.Y. 2010) (quoting *Id.* at 637). "[A]mbiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of

the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 184 (2d Cir. 2003) (internal quotation marks omitted).

Where a contract has more than one reasonable interpretation, "the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." *See Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London, Eng.*, 136 F.3d. 82, 86 (2d. Cir. 1998). A court should take care to consider evidence of "customs, practices, usages and terminology as generally understood in the particular trade or business." *Int* 7 *Multifoods Corp.*, 309 F.3d at 83; *see, e.g., Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 181 (2d Cir. 2004) (stating it was unable to resolve whether an obligation exchange has occurred since the "the district court took no submissions on the customs and usages of the credit derivatives industry, and the parties point us to no definitive source that resolves the difficulty.").

1. Plaintiff's Motion for Partial Summary Judgment on Counts III and IV

a. *Count HI*

In support of its allegation that Borrower violated the SPE covenant, Plaintiff relies on subsection (*i*) of the definition of SPE requiring Borrower solvency, and subsection (q) governing separateness.

i. *Borrower Solvency as an SPE Requirement*

***4** Plaintiff alleges that Borrower's insolvency in 2008 and 2009, before it defaulted on the loan, is a violation of subsection *(i)* of the SPE covenant rendering the loan fully recourse. Plaintiff acknowledges there is no definition of "insolvent" in the Loan Agreement but points to New York's version of the Uniform Commercial Code which states "[a] person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law." N.Y. U.C.C. Law § 1-201(23). Based on Borrower's current status on the loan in 2008 and 2009, the only viable definition for insolvency is the third option in the definition. "Insolvency" as defined in federal bankruptcy law in this situation is defined as "financial condition such that the sum of such entity's debts is greater than all of such entity's property at fair valuation, exclusive of- (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title." 11 U.S.C.A. § 101(32).

As to Plaintiff's argument that Borrower's alleged insolvency was a breach of the SPE, the Court finds that Plaintiff has failed to meet its burden establishing there is no issue of material fact on this point. Simply put, fact issues remain as to the correct valuation of the property which affects the determination of solvency. If fact, Defendants have themselves presented contradicting evidence relating to the valuation issues. Further, regardless of any disputed factual issues, it is questionable whether Plaintiff would be entitled to summary judgment as a matter of law based on the absence of any case law standing for the proposition that pre-default insolvency triggers the full recourse provisions of the loan. [1]

ii. *Borrower Separateness as SPE Requirement*

Plaintiff argues Borrower also violated subsection (q) of the SPE covenant upon its receipt of cash infusions from Simon, which in turn were used to pay debt service to the lender. Plaintiff argues that Borrower's acceptance of cash infusions from Simon made it more dependent on Simon and delayed its eventual default on the loan. Plaintiff asserts that the payments made were

not using the SPE's own funds and assets and that Borrower's acceptance of these funds from Simon circumvents the protection the SPE covenant provides to Plaintiff in the event of the Borrower's bankruptcy. Simon asserts the capital infusions from Simon were accounted for as capital contributions from Simon to Borrower and concludes that such infusions became an asset of Borrower. Plaintiff also argued the capital infusions gave Borrower more time to engage in the negligent acts which were the subject of Counts I and II of its Second Amended Complaint. The Court finds these arguments unpersuasive in light of the mortgage which anticipates that Borrower will hold other assets, and the Loan Agreement which contemplates possible capital contributions. *(See* Def. App. 100; Def. App. 16.).

***5** The Court therefore finds as a matter of law that Plaintiff is not entitled to summary judgment on Count III. Accordingly, Plaintiff's Motion for Partial Summary Judgment on Count III is **DENIED**.

b. ***Count IV***

At issue in Count IV is the interplay between the disparate terms of the Loan Agreement and the Guaranty. It is undisputed that the terms "special," in the Loan Agreement, and "single," found in the Guaranty are different. Plaintiff asserts the term "single" in the Guaranty should read "special," and thus subject Simon to liability for Borrower's alleged violation of the SPE covenant. In response, Simon argues Section 1.2(b)(iii) of the Guaranty does not state it would be liable if Borrower failed to maintain status as SPE, only that *Borrower* would be liable. Simon further posits that it would only be liable under the terms of the Guaranty if Borrower failed to maintain *single* purpose entity status, not *special* purpose entity (SPE) status. Simon notes that Plaintiff continues to confuse the two terms *special* and *single*, and the obligations of Borrower and Simon thereunder. Simon asserts the term "single" is much narrower and at no point did Borrower stop being a *single* purpose entity. Thus, Simon asserts, based on New York law, a guarantor cannot be bound by terms to which it did not agree and therefore, that Plaintiff's argument on this issue fails as a matter of law.

During the hearing held on November 4, 2013, Plaintiff repeatedly stated it sought plain language enforcement of the Loan Agreement and accompanying Guaranty. Plaintiff characterized the discrepancy between "special" and "single" was unimportant. Plaintiff further asserted that the term "single" in the Guaranty is a typographical error and not defined in the Loan Agreement. Plaintiff essentially seeks, without outright requesting, that the Court reform the Guaranty to match the term in the Loan Agreement. Under New York law, "[r]eformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of evidence." *Amend v. Hurley*, 59 N.E.2d 416, 419 (N.Y. 1944). The Court finds that Plaintiff has been unable to meet this high burden. The Court finds that the term "special purpose entity" is much broader than "single purpose entity." *(See* Defs'. App. 69.) The Court finds Plaintiff's arguments unpersuasive in light of the language of the documents memorializing the loan, the evidence of parties intent, and the sophistication of the parties to the agreement.

Plaintiff asserts that Simon cannot guarantee an obligation never imposed by the terms of the Loan Agreement and to this end, Plaintiff directed the Court to consider *Lehman Brothers Holdings, Inc. v. Matt*, 34 A.D. 3d 290 (N.Y. App. Div. 1st Dep't 2006). In *Lehman Brothers*, the payment guaranty referred to a particular numbered section in the loan agreement which listed the events that would trigger full recourse obligations. *Id.* The payment guaranty referred to these events by referring to a subsection which did not exist since it "was never delineated because of the inadvertent omission ...." *Id.* The court in *Lehman Brothers* stated that to ignore this obvious error would "render the payment guaranty an illusory obligation that would never take effect because its alleged triggering event does not exist." *Id.*

***6** The Court finds the *Lehman Brothers* case distinguishable since in that case there was an acknowledged scrivener's error between both parties to the contract. Here, the triggering events are listed in the Loan Agreement and the Guaranty contains its own provisions which do not refer to a nonexistent provision. Moreover, Plaintiff requests the Court proceed as if this was

a scrivener's error, ignore the plain language of the contract, and yet simultaneously assert it is not seeking a reformation of the contract. These positions are inconsistent and unavailing in light of the clear language of the contract and the evidence submitted by Defendants.

Indeed, according to the parties involved in negotiating the Loan Agreement and Guaranty, an event in which Plaintiff was not involved, the parties understood these terms to have distinct meanings. *(See* Def. Cross-Motion App. 13.) In addition to the evidence of intent. of the parties to the Loan Agreement and Guaranty, the usage and custom in the commercial lending industry of the term "special purpose entity" and "single purpose entity" shows that Plaintiff's argument is untenable. In light of the sophistication of the parties who entered into the Loan Agreement and the Guaranty, the Court finds that the parties knew these terms to have distinct meanings and negotiated their risk accordingly.

The Court therefore finds as a matter of law, Plaintiff is not entitled to summary judgment on Count IV. Accordingly, Plaintiff's Motion for Partial Summary Judgment on Count IV is **DENIED**. Defendants' cross-motion for summary judgment on Count IV is **GRANTED**.

2. Defendants' Cross-Motion for Summary Judgment on Counts I and II: Gross Negligence or Willful Misconduct of Borrower and Simon

Defendants argue that Counts I and II fail as a matter of law based on New York cases which have interpreted the terms "gross negligence" and "willful misconduct" in the context of a liability-limitation provision to entail a deliberate act beyond a party acting out of its economic self-interest. Defendants explain that according to Plaintiff, the conduct at issue centers on Defendants pursuing a redevelopment plan for the mall and not renewing tenant leases. Defendants assert that such conduct does not rise to the level of truly culpable conduct pursuant to New York law.

Contractual provisions that "clearly, directly and absolutely" limit liability for "any act or omission" are enforceable, "especially when entered into at arm's length by sophisticated contracting parties." *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E. 2d 413, 416 (1983). Courts in New York generally enforce contractual waivers or limitations of liability. *Baidu, Inc.v. Register.com, Inc.*, 760 F. Supp. 2d 312, 317 (S.D.N.Y. 2010). Contractual limitations of liability are unenforceable an exculpatory clause is unenforceable when,

[T]he misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.

Kalisch-Jarcho, 448 N.E.2d at 416-17 (citations omitted).

Defendants rely on *Metropolitan Life Insurance Company v. Noble Lowndes International, Inc.*, 643 N.E.2d 504 (N.Y. 1994) for the proposition that a contract with an exculpation provision with an exception for "willful acts and gross negligence" requires "truly culpable, harmful conduct, not merely intentional nonperformance of [a contract] motivated by financial self-interest." *Id.* at 438; *see Devash LLC v. German Am. Capital Corp.*, 104 A.D.3d 71, 77-78 (N.Y. App. Div. 1st Dep't 2013) (applying *Metropolitan Life* and declining to hold the limitation of remedies provision unenforceable since the conduct at issue advanced lender's legitimate economic self-interest because alleged "failure to approved the proposed leases was intended to maximize the lender's available options and the value of the property and the loan."); *Base Vill. Owner LLC v. Hypo Real Estate Capital Corp.*, 92 A.D.3d 541, 541 (N.Y. App. Div. 1st Dep't 2012) (finding the exculpation provision was not rendered ineffective since "[t]he limitation of remedies provision in the parties' loan agreement was properly construed as clearly, explicitly and unambiguously

barring plaintiff's claim for damages based on allegations that defendants' agent unreasonably withheld or delayed approval of the documentation upon which defendants' obligation to extend the loan was conditioned.").

***7** The Court finds the standard put forth in *Metropolitan Life* is the proper one to apply to the facts of the instant case in determining whether the alleged actions of Defendants rise to the level of overcoming the exculpation provision in the Loan Agreement. The Court finds that the alleged actions carried out by Defendants of planning to redevelop the failing mall and failing to secure long-term tenants for the retail space does not rise to the level of truly culpable conduct and Defendants have proven, as a matter of law that their actions do not rise to this level. During the hearing, Plaintiff attempted to distinguish *Metropolitan Life* and its progeny by explaining that all of them dealt with parties seeking enhanced contract damages, not a loan recourse provision. Plaintiff argued that *Metropolitan Life* was inapplicable since here, Plaintiff's remedy of foreclosure is a separate from its entitlement to pursue an action for the gross negligence of Defendants in "destroying" the collateral. Plaintiff noted during the hearing that the type of conduct that would overcome the high hurdle for gross negligence would be fraud, self-dealing, or breach of fiduciary duty. Upon further probing by the Court on the type of conduct mentioned, Plaintiff was unable to point to any evidence of fraud, self-dealing, or breach of fiduciary duty perpetrated by Defendants.

The Court finds that the cases cited by Plaintiff where a plaintiff successfully overcame an exculpation provision were ones where the actions of a defendant rose to the level of gross negligence. *See Banc of America Sec. LLC v. Solow Bldg. Co. II LLC*, 47 A.D.3d 239, 250 (N.Y. App. Div. 1st Dep't 2012) (noting a landlord's attempt to obtain a $6 million dollar fee from tenant to review its proposed alteration plans to leased property was "without any lawful basis and might reasonably be perceived by a trier of fact as an intention to inflict monetary harm, which is tortious as a matter of law and renders the limitation on recovery contained in the lease unenforceable as a matter of public policy"); *Baidu, Inc. v. Register.com, Inc.*, 760 F. Supp. 2d 312, 318-19 (S.D.N.Y. 2010) (finding allegations of cyber-attack on plaintiff were effectively facilitated by defendant's failure to follow its own security protocols which caused injury to plaintiff's reputation and business, including millions in lost revenue, survived motion to dismiss). Defendants have proven that their actions are not the type of conduct that would overcome the broad protection afforded by the exculpation provision in the Loan Agreement. Therefore, Defendants have established there is no issue of material of fact and are entitled to summary judgment as a matter of law. Therefore, summary judgment is **GRANTED** on Count I and Count II.

3. Plaintiff's Motion for Summary Judgment on Defendants' Affirmative Defenses

Plaintiff also sought summary judgment on Defendants' First, Second, Third, Fourth, Eighth, Ninth, and Eleventh Affirmative Defenses. As to Plaintiffs motion for summary judgment on Defendants' Third Affirmative Defense, the Court finds as a matter of law that this defense is not a legitimate affirmative defense. Therefore, summary judgment as to Defendants' Third Affirmative Defense is **GRANTED**. Summary judgment as to the remaining affirmative defenses is **DENIED**. Accordingly, it is hereby,

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Partial Summary Judgment on Counts III and IV of the Second Amended Complaint is **DENIED**;

2. Defendants' Cross-Motion for Summary Judgment on Counts I, II, and IV of the Second Amended Complaint is **GRANTED**; and

3. Summary judgment as to Defendants' Third Affirmative Defense is **GRANTED**.

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida this 6th day of December, 2013.

<<signature>>

MEENU SASSER

CIRCUIT JUDGE

Copies furnished to all parties on the Service List:

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Footnotes

1 During oral argument, Plaintiff identified only two courts which have accepted this proposition, namely *Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. Partnership*, 812 N.W. 2d 799 (Mich. Ct. App. 2011) and *51382 Gratiot Ave. Holdings, LLC v. Chesterfield Development Co., LLC*, 835 F. Supp. 2d 384 (E.D. Mich. 2011). Plaintiff further acknowledged that no New York or Florida court has adopted the holdings of those cases. Importantly, both of these cases were decided applying Michigan law and were effectively repudiated by the action of the Michigan Legislature when it enacted the Nonrecourse Mortgage Loan Act, Mich. Comp. Laws § 445.1591 *et seq.* (2012). *See* Mich. Comp. Laws § 445.1593 ("A post closing solvency covenant shall not be used, directly or

indirectly, as a nonrecourse carveout or as the basis for any claim or action against a borrower or any guarantor or other surety on a nonrecourse loan."); *Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. P'ship*, 820 N.W. 2d 901 (Mich. 2012) (remanding the *Cherryland* decision due to passage of Nonrecourse Mortgage Loan Act).

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