To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A. AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF GREENWICH CAPITAL COMMERCIAL FUNDING CORP., COMMERCIAL MORTGAGE TRUST 2005-GG3, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-GG3, acting by and through its special servicer, CWCapital Asset Management LLC and ANDERSON HILL ROAD CAPITAL, LLC,

Index No. 53946/19
Motion Seq. No. 3
Motion Date: 1/7/20

Plaintiffs,

- against -

DCCA, LLC, COUNTY OF WESTCHESTER INDUSTRIAL DEVELOPMENT AGENCY, HOWARD KASKEL, THE ESTATE OF MS. CAROLE SCHRAGIS, ANITA KASKEL ROE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, DORAL GREENS HOMEOWNERS ASSOCIATION, INC. VILLAGE OF RYE BROOK, PROFORM TENNIS, LLC, NEW YORK SMSA LIMITED PARTNERSHIP D/B/A VERIZON WIRELESS, and “JOHN DOE NO. 5” TO “JOHN DOE NO. 100” inclusive, the last ninety-six names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98**,** 99, 100, 101, 102 were read on this motion by Defendants DCCA, LLC (“DCCA”), Howard Kaskel, Steven

Schragis, as Co-Executor of the Estate of Ms. Carole Schragis, Gary Schragis as Co-Executor of the Estate of Ms. Carole Schragis, Anita Kaskel Roe ("Sponsor Defendants") (together "Defendants") to dismiss the Amended Commercial Mortgage Foreclosure Complaint of Plaintiff U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3 ("Plaintiff" or "Trust"), [1] acting through its Special Servicer, CWCapital Asset Management, Inc. ("CWCapital" or "Special Servicer"). Plaintiff opposes the motion.

FACTUAL AND PROCEDURAL BACKGROUND

In this foreclosure action, filed on March 13, 2019, the Trust through its Special Servicer, CWCapital seeks to foreclose on a mortgage secured by the Doral Arrowwood Hotel and Conference Center, a hotel located in the Village of Rye Brook, New York which sits on approximately 114 acres and consists of 373 rooms, 70,000 square feet of meeting space, a 9-hole golf course and driving range, a sports center, five tennis courts, squash and basketball courts, a restaurant, a pub, a café, and indoor and outdoor swimming pools (the "Mortgaged Property" or "Hotel"). A full recitation of the factual and procedural history is set forth in this Court's March 26, 2020 Decision and Order (the "March 2020 Decision") (NYSCEF Doc. No. 343), which is incorporated herein by reference.

A. The Loan Documents

On or about January 12, 2005, Archon Financial, L.P. (the "Original Lender"), the Trust's predecessor-in-interest and DCCA entered into a Loan Agreement dated January 12, 2006 (the "Loan Agreement") whereby the Original Lender agreed to make a loan to DCCA in the principal amount of $75,000,000 (the "Loan"). The Loan was evidenced by an Amended, Restated and Consolidated Note dated January 12, 2005 (the "Original Note"). The Original Note had a maturity date of February 1, 2015. The Original Note was secured by a Fee and Leasehold Mortgage, Fee and Leasehold Mortgage Modification and Consolidation Agreement, Security Agreement and Fixture Filing dated January 12, 2005 (the "Mortgage"). After DCCA defaulted on the Loan by failing to pay the amounts due on its maturity date in 2015, the parties entered in a Loan Modification and Reinstatement effective as of February 1, 2015 (the "Modification Agreement"). Under the Modification Agreement, the Trust waived DCCA's default, reinstated and extended the maturity date to February 1, 2018. On February 1, 2018, DCCA exercised its right under the Modification Agreement to pay $150,000 and extend the Maturity Date to February 1, 2019 by entering into a Loan Extension Agreement effective as of February 1, 2018 (the "First Loan Extension"). Then on February 1, 2019, DCCA again exercised its right under the Modification Agreement to extend the maturity date to February 1, 2020 pursuant to a Loan Extension Agreement effective February 1, 2019 (the "Second Loan

[1] At the initiation of this action, the Trust held the $75 million loan at issue as part of a commercial mortgage-backed security ("CMBS"). However, its purported successor-in-interest, Anderson Hill Capital LLC, has been joined as Plaintiff in this action pursuant to this Court's Decision and Order dated March 20, 2020 (NYSCEF Doc No. 325). For ease of reference, the Court will only be referencing the Trust as Plaintiff in this action.

Extension"). These documents are collectively referred to herein as the Note and/or Loan Documents.

B. The Complaint and the Appointment of the Receiver

The main event which led to the filing of this action and the Trust's application for the appointment of a receiver was the Trust's receipt of a termination notice dated March 7, 2019 issued by Benchmark Management Company ("Benchmark"), the Hotel's manager, purporting to terminate a Hotel Management Agreement entered into between Benchmark and DCCA on September 1, 2015 (the "HMA") (the "Benchmark Termination Notice"). Plaintiff contends that its receipt of Benchmark's Termination Notice as well as DCCA's alleged threat to cease operations of the Hotel effective March 17, 2019 (NYSCEF Doc. No. 13 at ¶ 4) caused the Trust to move simultaneously with the filing of its Summons and Complaint for an order: (1) appointing Kirby Payne of HVS Management as Receiver; and (2) temporarily restraining DCCA and Benchmark from terminating the operations of the Hotel pending the Court's institution of the Receiver.

In the Benchmark Termination Notice, Benchmark advised that it was terminating its management of the Hotel and terminating the employees effective March 16, 2019 based on DCCA's alleged failure to pay it some $1.24 million for outstanding management fees and reimbursables. According to the Trust, unbeknownst to it, on December 24, 2018, DCCA filed an action against Benchmark in Supreme Court, New York County entitled *DCCA, LLC v BMC-The Benchmark Management Company*, Index No. 656411/2018 (the "Benchmark Action").[2] Simultaneous with the filing of the Benchmark Action, DCCA sent a termination notice to Benchmark purporting to terminate it as manager (*see* Benchmark Action - NYSCEF Doc. No. 39**)**, which was followed by a second termination notice dated January 2, 2019 (*see* Benchmark Action - NYSCEF Doc. No. 43).

In its pleadings in the Benchmark Action, DCCA alleged that the value of the Mortgaged Property had decreased in excess of $20,000,000 based on Benchmark's actions, including its failure to engage in proper maintenance resulting in mold issues causing guest complaints, its failure to construct a fence around pools resulting in the pool's closure, and its failure to repair potholes, cracks in carpeting, broken machines, poor lighting in public areas, water damage around radiators, plumbing and lighting issues (*see* Benchmark Action - NYSCEF Doc. No. 1). In response, Benchmark refuted DCCA's contentions concerning its alleged deficient management and asserted that the cause of the Hotel's problems stemmed from DCCA's unwillingness to provide any funding for the capital improvements that were desperately needed (*see* Benchmark Action - NYSCEF Doc. No. 50 at ¶¶ 6, 8-10). According to Benchmark, it had

[2] According to DCCA, Benchmark was holding it hostage by refusing to transition the management back to DCCA, which is why it filed the Benchmark Action. According to Benchmark, in a letter dated December 11, 2018, it offered to separate amicably and transition the management back to DCCA provided that it received its alleged $1.2 million in management fees owed and that the Trust approved the transition as required by the Loan Documents. Benchmark contended that in response to the letter, DCCA filed the Benchmark Action (*see* Benchmark Action, NYSCEF Doc. No. 50 at ¶¶ 41-43).

made requests to DCCA in 2017 and 2018 for funding in the amounts of approximately $1.5 million for each year (*id.* at ¶¶ 11-12). It further contended that it was owed in excess of $1.2 million in past due management fees and reimbursables under the HMA, which required DCCA to provide funding for the operations of the Hotel, including payroll liability, employee benefits, and payments to vendors (*id.* at ¶ 41). The Benchmark Action was ultimately stayed in favor of compelled arbitration under the HMA's arbitration clause in an order issued by Justice Jennifer G. Schecter dated February 11, 2019. DCCA and Benchmark ultimately settled their arbitration in 2019.

Plaintiff alleges that pursuant to Paragraph 2 of the Second Loan Extension, DCCA represented that "'[t]o the best of Borrower's knowledge, Borrower hereby represents, warrants and covenants that no Default or Event of Default, as such terms are defined in the Loan Documents, exists on the date hereof"; however, based on DCCA's allegations in the Benchmark Action, this representation was "patently false" (NYSCEF Doc. No. 70 "Amended Complaint" at ¶ 40). Plaintiff further alleges, *inter alia*, that DCCA defaulted under the loan documents based on the following Non-Monetary Defaults: (1) DCCA's alleged breach of Sections 4.12 and 6.4 of the Loan Agreement, which provides that DCCA does not have outstanding "any Debt other than Permitted Debt" by incurring debt beyond the Permitted Debt; (2) DCCA's alleged breach of Section 4.13 of the Loan Agreement, wherein DCCA represented that there were no actions pending, when, in fact DCCA had filed the Benchmark Action and failed to notify Plaintiff of same; (3) DCCA's alleged breach of Sections 4.23(a) and 5.2(a) of the Loan Agreement, which required DCCA to keep the Mortgaged Property in good condition, by allowing the property to fall into disrepair consisting of mold issues in and around the guest bathrooms, potholes, cracks in carpeting, broken machines and objects, ineffective security camera, poor lighting in parking lots, property grounds and pedestrian sidewalks, fire extinguishers, fire exists, blocked stairwells, water damage on and around radiators, hot water issues, plumbing issues and lighting issues; (4) DCCA's alleged breach of Section 5.4 of the Loan Agreement requiring DCCA to pay and discharge all lawful claims for labor, materials and supplies, by failing to pay for local vendors who provided labor, materials and supplies to the Hotel; (5) DCCA's alleged breach of Section 5.10(a) of the Loan Agreement, which provides that "[t]he Property shall be managed at all times by an Approved Property Manager pursuant to an Approved Management Agreement[]" by allowing Benchmark to terminate the HMA; (6) DCCA's alleged breach of Section 5.10(c) of the Loan Agreement, which provides that "Borrower shall notify Lender in writing of any default of Borrower or the Approved Property Manager under the Approved Management Agreement" by failing to notify the Trust in writing of Benchmark's purported breaches of the HMA as alleged in the Benchmark Action; (7) DCCA's alleged breach of Section 5.11 of the Loan Agreement, which provides that "Borrower shall give Lender prompt notice … of (x) any material change in the financial or physical condition of the Property … or (y) any litigation or governmental proceeding pending or threatened in writing against Borrower which is reasonably likely to have a Material Adverse Effect[]" by failing to notify the Trust that the value of the Mortgaged Property decreased by $20,000,000 as alleged in the Benchmark Action; and (8) DCCA's alleged breach of Section 6.11(iii) of the Loan Agreement, which provides that "Borrower shall not terminate, amend or modify the Approved Management Agreement," by allowing Benchmark to terminate the HMA (*id.* at ¶ 42[a]-[i]). All of these purported defaults are set forth in Plaintiff's Notice of Default dated March 12, 2019 (NYSCEF Doc. No. 76).

Plaintiff alleges the Sponsors are joined based on their position as "indemnitors of certain obligations of Borrower pursuant to an Environmental Indemnity Agreement as of January 12, 2005 (the 'Environmental Indemnity') wherein the Sponsors agreed pursuant to the Loan Agreement to jointly and severally indemnify Plaintiff and hold Plaintiff harmless from and against any all damages resulting from or arising out of the Indemnified Liabilities defined in the Loan Agreement" (*id.* at ¶¶ 10, 20). According to Plaintiff, the occurrence of some or all of the Non-Monetary Defaults constitute Indemnified Liabilities entitling Plaintiff to an award of damages in an amount to be determined after the foreclosure sale of the Mortgaged Property pursuant to Section 9.19 of the Loan Agreement (*id.* at ¶ 43-44]).

Plaintiff also asserts that DCCA committed monetary defaults pursuant to Section 7.1(a) of the Loan Agreement, which defines an Event of Default as DCCA's default in the payment when due of principal or interest which default continues for a period of five business days, when DCCA defaulted in the monthly payment due on April 1, 2019 and each and every month thereafter (*id.* at ¶¶ 47-48). According to Plaintiff, on May 10, 2019, it notified DCCA and the Sponsors of DCCA's monetary default and DCCA failed to cure the monetary default (*id.* at ¶ 50). It is Plaintiff's contention that DCCA has failed to cure either the Non-Monetary or the Monetary Defaults and, as a result, Events of Default have occurred pursuant to Section 7.1(a) and (i) of the Loan Agreement and are continuing under the Loan and Loan Documents to date (*id.* at ¶ 52).

Plaintiff asserts a First Cause of Action for Mortgage Foreclosure and a Second Cause of Action seeking an order, *inter alia*, foreclosing on Plaintiff's security interests in the Collateral. For its Third Cause of Action, Plaintiff alleges that to induce the original lender to make the loan, the Sponsors agreed to jointly and severally indemnify the Original Lender and hold the Original Lender harmless from and against any and all Damages to Original Lender resulting from or arising out of any of the Indemnified Liabilities (*i.e.*, Section 9.19(b) of the Loan Agreement) (*id.* at ¶ 67). Plaintiff alleges that pursuant to Section 9.19(b)(ii) of the Loan Agreement, the Sponsors agreed to jointly and severally indemnify Plaintiff and hold Plaintiff harmless from and against all damages arising out of "the misappropriation or misapplication by Borrower, the Sponsor or any of their respective affiliates of any funds (including misappropriation or misapplication of Revenues, security deposits and/or Loss Proceeds) in violation of the Loan Documents[.]" (*id.* at ¶ 68). It is Plaintiff's contention, upon information and belief, that DCCA and/or the Sponsors or their respective affiliates incurred debt in the amount of $3,282,278.40 and, therefore, they have "misapplied and/or misappropriated funds, as that term is used in Section 9.19(b)(ii) of the Loan Agreement, in violation of the Loan Documents" (*id.* at ¶ 70). Plaintiff alleges that DCCA and the Sponsors misappropriated funds based on their use of rooms and office spaces for less than market rates as well as their consumption of food and beverages at the Hotel for less than retail rates. Plaintiff contends that based on the Borrower's, Sponsors' and/or any of their respective affiliates' misapplication and/or misappropriation of funds, Plaintiff has suffered damages in an amount to be determined at trial (*id.* at ¶ 73).

THE PARTIES' CONTENTIONS

A. Defendants' Contentions in Support of Their Motion

The central theme underlying Defendants' arguments is that because pursuant to Section 7.1(i) of the Loan Agreement, DCCA was entitled to: (1) a 30-day cure period for non-monetary defaults that are susceptible of being cured; (2) a 180-day cure period for non-monetary defaults that are susceptible of being cured, but cannot reasonably be cured within 30 days if DCCA makes diligent efforts to commence and complete the cure; and (3) a 10-day cure period for monetary defaults, and because a default does not become an Event of Default unless and until the default remains uncured for the appropriate period of time, by commencing this action within two days of the Notice of Default, none of the defaults ripened into an Event of Default sufficient to sustain Plaintiff's Amended Complaint (Defs' Mem. at 9-10). It is Defendants' position that compliance with the notice and cure provisions are conditions precedent to Plaintiff's right to institute this action, and because each of the following purported defaults were susceptible of being cured, Plaintiff's failure to afford DCCA the opportunity to cure necessitates the dismissal of this action (*id.* at 13).

Defendants contend that Plaintiff's allegation that DCCA has "Debt other that Permitted Debt" in violation of §§ 4.12 and 6.4 (Amended Complaint at ¶ 42[a]) is insufficient because Plaintiff fails to allege how DCCA exceeded the limit of Permitted Debt under the Loan Agreement, which is 3% of the Loan Amount or $3,282,278.40 as the only debt alleged in the Amended Complaint is the $1.2 million allegedly owed to Benchmark. Defendants further contend that because the definition of the limit of Permitted Debt excludes debt that is contested in good faith, because Plaintiff contested that it owed Benchmark the $1.2 million, even that amount does not fall within the meaning of Permitted Debt (Defs' Mem. at 3).

With regard to Plaintiff's allegation that DCCA's commencement of the Benchmark Action violated the representation found in Loan Agreement § 4.13 (*i.e.*, that there are no actions now pending) (Amended Complaint at ¶ 42[b]), Defendants argue that this cannot support Plaintiff's Amended Complaint because DCCA was entitled to a cure opportunity (*i.e.*, by discontinuing the action) before Plaintiff could default it based on that technical violation of the Loan Agreement (Defs' Mem. at 4).

With regard to Plaintiff's claims that DCCA: (1) violated the representation found in the Loan Agreement § 4.23 (*i.e.*, that the Hotel is in good condition) (Amended Complaint at ¶ 42[c]); and (2) breached the covenant found in the Loan Agreement § 5.2(a) (*i.e.*, to "keep the Property in good working order and repair") (Amended Complaint at ¶ 42[d]), Defendants again argue that by failing to give DCCA an opportunity to cure, Plaintiff cannot rely on those alleged defaults (Defs' Mem. at 4).

In response to Plaintiff's allegations that DCCA violated the Loan Agreement § 5.4 through its failure to "pay and discharge ... all lawful claims for labor, materials and supplies ...." (Amended Complaint at ¶ 42[e]), Defendants argue that the plain meaning of this section is limited to mechanic's liens (or other artisan's liens) filed against the Mortgaged Property which could impact Plaintiff's liens. Accordingly, Plaintiff's failure to: (1) identify any such claims or

mechanic's liens in the Amended Complaint; and (2) give Defendants an opportunity to cure any such violation, means that Plaintiff cannot rely on this purported default to support its Amended Complaint (Defs' Mem. at 5).

According to Defendants, Plaintiff has not alleged a default sufficient to support its Amended Complaint based on its allegations that by allowing Benchmark to terminate the Management Agreement, DCCA breached: (1) Loan Agreement § 5.10(a) requiring that the Property be managed by an Approved Property Manager pursuant to an Approved Property Management Agreement Management Agreement (Amended Complaint at ¶ 42[f]); and (2) Loan Agreement § 6.11(i) prohibiting DCCA from terminating an Approved Management Agreement, because

> having deprived DCCA of any opportunity to cure this alleged violation – and DCCA would have been entitled to at least a 30-day cure period – this Court now knows what Plaintiff knew at that time: DCCA had the approved manager (Conference Center Management Corp. "CCMC") preparing to take over management of the Property. Plaintiff's rush to the courthouse deprived DCCA of the opportunity to have CCMC take over management and obviate many (if not all) of the alleged defaults identified in the Notice. This Court can also take judicial notice[3] that there was no time prior to the Receiver's appointment when Benchmark was not managing the Property pursuant to the approved agreement (Defs' Mem. at 6).

In terms of Plaintiff's reliance on DCCA's purported breach of the Loan Agreement § 5.10(c) based on DCCA's failure to advise Plaintiff of Benchmark's breaches under the HMA (Amended Complaint at ¶ 42[g]), Defendants argue that Plaintiff had to give DCCA an opportunity to cure before it could rely on any such breach (Defs' Mem. at 6). Regarding Plaintiff's allegation that DCCA breached the Loan Agreement § 5.11(i) by failing to advise it that the value of the Property had plummeted in excess of $20 million as attested to in the Affidavit of DCCA's Gary Schragis in the Benchmark Action (Amended Complaint at ¶ 42[h]), Defendants argue that a decline in value is not a violation of the Loan Agreement and it is not an "Event"" and, in any event, any "'material change' requiring notice is to be 'reasonably determined by [DCCA]' under § 5.11 …." (Defs' Mem. at 6).

It is Defendants' contention that based on Plaintiff's recognition that none of these alleged defaults is an Event of Default under the Loan Agreement, Plaintiff tries to circumvent this obstacle by alleging that "some or all of these Non-Monetary Defaults constitute Indemnified Liabilities (as that term is defined in Section 9.19 of the Loan Agreement) that have caused Plaintiff to be damaged in an amount to be determined after the foreclosure sale of the mortgaged Property" (Amended Complaint at ¶ 43) (Defs' Mem at 7). In response, Defendants argue:

[3] Simply because Benchmark did not cease being the manager does not negate the fact that DCCA sent termination notices to Benchmark in violation of the Loan Agreement.

> none of these alleged defaults is an Indemnified Liability. And the Loan Agreement is clear that these alleged Indemnified Liabilities do not make DCCA liable as a guarantor for the deficiency judgment (See Loan Agreement § 9.19). So, if Plaintiff admittedly won't know if it has been damaged by the presumed occurrence of any Indemnified Liability until after the Property has been sold at foreclosure …, then Plaintiff cannot allege that it actually has sustained any "Damages." Thus, any claim under the limited recourse provisions of § 9.19(b) is at best pre-mature, and at worse a disguised deficiency claim (Defs' Mem. at 7).

And Defendants make the same arguments with regard to Plaintiff's indemnity claim against the Sponsors (*i.e.*, that because Plaintiff will not know if it has sustained any Damages until after the Property is sold at foreclosure, in actuality, Plaintiff's indemnity claim is a disguised deficiency claim to which Plaintiff is not entitled under the Loan Agreement) (*id.* at 19).

With regard to the allegations against the Sponsors that they are liable under Section 9.19(b)(ii) of the Loan Agreement based on their incurring excessive Debt and misapplying or misappropriating funds, Defendants argue that these allegations are insufficient to establish the Sponsors' breach of the indemnity provision. Thus, Plaintiff's allegations that the Sponsors incurred debt in excess of $3,282,278.40 and "misapplied or misappropriated funds" in violation of Section 9.19(b)(ii) by failing to charge and collect rent at market rates for two-four guest rooms and/or office spaces they used and by failing to pay for food and beverages they and their guests allegedly consumed at the Property do not support a violation of Loan Agreement § 9.19(b)(ii) because that section only prohibits the misappropriation or misapplication of funds (*i.e.*, revenues, security deposits and loss proceeds) in violation of the Loan Documents (Defs' Mem. at 8). In any event, Defendants point out that they were expressly permitted such discounts pursuant to the Approved Management Agreement (Defs' Mem. at 9).

According to Defendants, contracts of indemnity are strictly construed and "[c]onduct that violates this provision is an exception to the non-recourse nature of the Loan Agreement, because it imposes liability where there otherwise would be none … [and] by definition [must] be more egregious than a simple breach of the Loan Agreement" (Defs' Mem. at 16). It is Defendants' contention that Plaintiff fails to allege how incurring debt that exceeds Permitted Debt can be construed as a misapplication of funds under Section 9.19(b)(ii) since the language ("Revenues, security deposits and/or Loss Proceeds") means money or cash received from the Hotel and given the dictionary definition of misappropriation which is "[t]he application of another's property or money *dishonestly* to one's own use" (*id.* at 17-18).

Finally, Defendants refute Plaintiff's attempt in its Amended Complaint to allege monetary defaults based on DCCA's failure to pay the monthly debt service in April and May 2019 by pointing out that once Plaintiff accelerated the debt by filing this action, as a matter of law, DCCA's monthly obligations ceased (Defs' Mem. at 7, 14).[4]

[4] At oral argument, Plaintiff conceded that upon its acceleration of the Loan, DCCA was no longer obligated to make the monthly mortgage payments.

B. Plaintiff's Contentions in Opposition

In opposition to Defendants' motion, Plaintiff contends that "[t]o establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce 'the mortgage, the unpaid note, and evidence of default'" (Plf's Opp. Mem. at 5, *quoting Bank of N.Y. Mellon v Buckowitz*, 164 AD3d 730, 733 [2d Dept 2018]). Plaintiff notes that Defendants do not dispute the existence and validity of the Note, the Mortgage and the other Loan Documents and they are only disputing that DCCA defaulted (*id*.).

In support of its position that the Amended Complaint sufficiently alleges a default, Plaintiff argues that in the March 12, 2019 Notice of Default (Affirmation in Opposition of Keith M. Brandofino, Esq. dated July 30, 2019 ["Brandofino Aff."], Ex. 1), Plaintiff "declared the existence and continuation of Events of Default under the Loan Documents as a result of Borrower's violation of, inter alia, Sections 6.4 and 6.11 of the Loan Agreement, pursuant to which Borrower covenanted that 'it shall not have any Debt, other than the Permitted Debt[]' and that 'it shall not terminate, amend or modify the Approved Management Agreement in any material respect[]' (collectively, the 'Negative Covenant Defaults'), respectively" (*id*. at 6). According to Plaintiff, DCCA breached Section 6.11 when it terminated the Management Agreement with Benchmark by its letter dated December 24, 2018. In response to Defendants' contention that CCMC was prepared to take over the management upon Benchmark's termination, Plaintiff points out this factual allegation is merely set forth in Defendant's memorandum of law and is not supported by an affidavit from a person with personal knowledge and, in any event, in the context of a pre-discovery motion to dismiss, a resolution of this issue may not be considered. Plaintiff further points out that Defendants have not submitted documentary evidence refuting Plaintiff's allegation concerning DCCA's termination of the Management Agreement and, indeed, DCCA's pleadings in the Benchmark Action show DCCA's termination of Benchmark without Plaintiff's consent (*id*. at 7).

Plaintiff contends that DCCA breached Section 6.4 by incurring trade payables in the amount of $3,282,278.40 (reflected in Brandofino Aff., Ex. 4), which constitutes 4.376% of the $75,000.000 loan amount thereby exceeding the 3% Debt threshold under the Loan Agreement (*id*. at 7). Plaintiff refutes Defendants' allegation that there was no default of this provision because the Debt was contested in good faith by pointing out that not only is this assertion unsupported by any admissible evidence, it is also an assertion the veracity of which should not be considered by the Court in the present procedural context since the Court must accept Plaintiff's allegations as true and Defendants have not proffered any documentary evidence disproving Plaintiff's claims.

Plaintiff rebuts Defendants' contention concerning DCCA's right to cure these defaults by pointing out that these defaults constituted Negative Covenant Defaults which are incurable and result in immediate Events of Default under the Loan Documents. According to Plaintiff, Defendants' argument is predicated on their misquoting Section 7.1 of the Loan Agreement, which contained a typographical error insofar as two subsections of Section 7.1 are identified as (i). Plaintiff contends that the second (i) subsection labeled "Other Covenants" should have been labeled (j) rather than (i). By correcting this typographical error, Plaintiff contends that it is clear

that "the Loan Agreement prescribes no cure period for Borrower's failure to perform those negative covenants identified in the 'ERISA: Negative Covenants' subsection, including but not limited to, the negative covenants referenced in Sections 6.4 and 6.11" and, accordingly, DCCA was not entitled to any period of time to cure either of the Negative Covenant Defaults and those defaults instantly triggered an Event of Default entitling Plaintiff to the contractual remedy of foreclosure (*id*. at 10).

In terms of the remaining non-monetary defaults set forth in the Notice of Default, Plaintiff seems to concede that they were all defaults to which DCCA should have been afforded an opportunity to cure before Plaintiff filed its original complaint. However, Plaintiff takes the position that because it thereafter filed an Amended Complaint, which was filed some 80 days after the Notice of Default, and because the Amended Complaint supersedes the Original Complaint such that the Original Complaint ceases to exist, Defendants had ample time to remedy the remaining defaults. Thus, according to Plaintiff, these remaining non-monetary defaults "ripened into Events of Default under the Loan Agreement, thereby warranting foreclosure" (*id*. at 13).

With regard to Defendants' contention that Plaintiff cannot rely on the purported monetary defaults since DCCA was not required to tender the installment payments once Plaintiff accelerated the loan, Plaintiff argues that by advancing this argument, Defendants are admitting the viability of the Negative Covenant Defaults and the validity of Plaintiff's acceleration and in so doing, Defendants are improperly wielding the allegedly defective acceleration as a sword and a shield (*id*.). According to Plaintiff, if the acceleration was not valid, DCCA should have tendered the installment payments and its failure to do so constituted a monetary default, entitling Plaintiff to commence this foreclosure action (*id*. at 14).

Finally, in response to the branch of Defendants' motion seeking the dismissal of the Third Cause of Action asserted against the Sponsors, Plaintiff argues that it sued the Sponsors because under the Loan Documents, they may become personally liable for certain amounts upon the occurrence of certain events, which included their purported violation of Section 9.19(b) of the Loan Agreement concerning misappropriation or misapplication of funds. According to Plaintiff, contrary to Defendants' argument that incurring Debt beyond the Permitted Debt cannot be construed as a misappropriation or misapplication of funds, because "[f]or some or all of the trade payables that Borrower has failed to pay … those vendors may begin or may have already begun charging interest on the amount Borrower owes … In turn, Borrower's incurrence of and failure to shed this Debt may have resulted and/or may result in the diversion of monies that could have and should have been used towards the improvement of the Mortgaged Property which, in turn, would have increased the value of Plaintiff's collateral for the Loan or, at a minimum, prevented its decline in value. Thus, misappropriation and/or misapplication of funds has occurred" (*id*. at 16). Based on the foregoing, Plaintiff argues that because this Court must accept the allegations of the Amended Complaint as true and afford Plaintiff the benefit of every favorable inference, it has alleged a triggering event sufficient to sustain its Third Cause of Action.

C. Defendants' Contentions in Further Support of their Motion

In further support of their motion, Defendants point out that Plaintiff's main argument in opposition is that this Court should reform the Loan Agreement by replacing the (i) found in the second subsection (i), but that Plaintiff's argument fails for a number of reasons. First, Plaintiff's request for a reformation of the 2005 Loan Agreement is time-barred by the six year statute of limitations that accrues from when the mistake was made in 2005. Second, even if it were not time-barred, "proof of a 'scrivener's error' requires proof of a prior agreement between the parties which, when subsequently reduced to writing fails to accurately reflect the prior agreement … No such evidence of any 'prior agreement' is offered. Moreover, a 'scrivener's error' claim is available only where the other party (here, DCCA) 'with knowledge of the mistake, [tries] to take advantage of the error'" (Defs' Reply at 14). Third, "a party cannot invoke the 'scrivener's error' argument when it has been careless in drafting a contract" and absent fraudulent conduct by DCCA, Plaintiff cannot be relieved of its unilateral mistake (*id.*).

As their fourth argument, Defendants contend that even if the Court were to consider Plaintiff's scrivener's error, it is not accurate that the error was "the mislabeling of the second of those subsections as (i)" (*id*. at 8). Defendants point out that Plaintiff not only seeks to relabel the second subsection (i) to (j), but it also seeks to relabel within the subsection the phrase "this subsection (i)" to "this subsection (j)" "[b]ut if the 'mistake' was the inclusion of the word 'this' in the phrase 'this subsection (i),' then Plaintiff's proposed fix is wishful, highly speculative and ineffectual. Plaintiff does not clearly establish that its proposed rewriting of the Loan Agreement is the correct one" (*id*. at 9). According to Defendants, "Plaintiff's argument improperly places great reliance on the section headings. (Pltf's Mem. at 8-10) But Plaintiff ignores § 9.6 of the Loan Agreement: 'The Article and Section Headings in this Agreement are included in this Agreement for convenience of reference only and shall not constitute a part of this Agreement for any other purpose'" (*id*. at 9, n6).

Fifth, Defendants contend that Plaintiff's argument for reformation would result in there being "no cure period for any of the default provisions identified in Article 6 of the Loan Agreement." which "would render the second subsection '(i)' of § 7.1 and its very elaborate and differentiated cure provisions unnecessary and meaningless" (*id*. at 9).

In the alternative, even if the Court were to adopt Plaintiff's interpretation, Defendants rebut that there was a default under Section 6.4 or Section 6.11 of the Loan Agreement. Regarding Section 6.4, Defendants argue that the definition of Permitted Debt under (ii) is $2,250,000 ($75,000,000 x 3%) worth of trade payables not more than 60 days outstanding (unless contested in good faith) (*id*. at 4). Defendants argue that based on Plaintiff's Ex. 6 (debt schedule), $475,789.84 of trade payables was outstanding only 30 days and $484,631.66 of trade payables was outstanding between 30 and 60 days and, therefore, the amount must be reduced by $960,421.50 leaving a total debt of only $2,321,856.50 just $71,856 over the $2,250,000 limit (*id*. at 5). Defendants further argue that $1,026,123.66 of that amount is debt due to Benchmark which Defendants contested in the Benchmark Action (*id*.). According to Defendants, Plaintiff's argument that it is DCCA's burden to prove whether a debt is contested in good faith as a defense to a claimed default "defies the plain language of the Loan Agreement, and it flies in the face of Plaintiff's argument that a default under § 6.4 is 'incurable [by its] nature.' Plaintiff

cannot have it both ways: either Plaintiff must be sure that its claim of a default is accurate and correct, or DCCA must have a cure period during which it can demonstrate – as [it has] done here – that Plaintiff's arithmetic is wrong, that the Permitted Debt limit was not exceeded, that the trade debt was 'contested in good faith' and that there was no default" (*id*.).

In support of their position that Plaintiff cannot rely on a purported default under Section 6.11 of Loan Agreement, Defendants first argue that the Notice of Default itself was deficient in that it did not identify what DCCA did or failed to do in regard to a default under the provision and "[a] valid notice must apprise the recipient of the conduct it is alleged to have undertaken to bring about the alleged violation" (*id*. at 6).[5] Defendants also point out that in its Amended Complaint, Plaintiff alleged that DCCA violated Section 6.11 by allowing Benchmark to terminate the HMA, but according to Defendants, Benchmark's conduct cannot be attributed to DCCA. Defendants further point out that Plaintiff has apparently changed the factual predicate for breach under Section 6.11 since Plaintiff's opposition memorandum now contends that DCCA breached Section 6.11 when it terminated the HMA with Benchmark by letter dated December 24, 2018. In support of their position that the December 24, 2018 termination letter was not a breach of Section 6.11, Defendants request the Court take judicial notice of the fact that simultaneously with DCCA's termination notice, DCCA filed the Benchmark Action in which it sought a declaration that DCCA was entitled to terminate the HMA, thus making clear judicial approval was required before the termination could be effective. Defendants also request that the Court take judicial notice of the fact that Benchmark refused to honor DCCA' termination notice and refused to leave the Hotel (*id*.).[6]

Regarding Plaintiff's argument that in connection with the defaults where a cure period was required, this was satisfied based on DCCA's failure to cure the defaults during the 80-day period between the Notice of Default and the Amended Complaint, Defendants contend that this argument is without merit because the opportunity to cure is a condition precedent to Plaintiff's right to commence the action rather than file an amended complaint (*id*. at 10). Defendants further point out that because the Receiver was appointed at the commencement of this action, DCCA was no longer in possession of the property and any attempt to cure would have violated the Court's Receivership Order (*id*. at 11).

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[5] Because this is a new argument not presented in Defendants' original motion papers, it has not been considered. It is well settled that "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Matter of TIG Ins. Co. v Pellegrini*, 258 AD2d 658, 658 [2d Dept 1999]). Accordingly, because Plaintiff did not have an opportunity to be heard on this issue, this argument has not been considered by the Court (*Shapiro v Kurtzman*, 149 AD3d 1117 [2d Dept 2017]).

[6] Contrary to Defendants' position, these are factual determinations that may not be made in the context of a CPLR 3211 motion to dismiss. Defendants will have the opportunity to try to prove at a different procedural juncture that they did not terminate the HMA in violation of Section 6.11.

Defendants rebut Plaintiff's arguments concerning DCCA's obligation to cure the alleged post-acceleration monetary defaults as speculative and meritless.

In further support of the branch of their motion seeking dismissal of the Third Cause of Action, Defendants point out that: (1) Plaintiff does not even attempt to argue that any Defendant is liable as a guarantor; and (2) based on its opposition, Plaintiff has abandoned its claim that the Sponsors bought food, played golf and used rooms at less than market value. According to Defendants, Plaintiff's Third Cause of Action is limited to the claim that DCCA incurred trade debt that is accruing interest, but this is insufficient to support its claim because "there is no claim that the failure to pay these trade creditors has resulted in unavailability of any funds with which to pay the debt service under the Loan Agreement" and, in any event, "incurring trade debt in excess of the Permitted Debt limit is not a 'Trigger Event'" particularly since there is no allegation that any Sponsor diverted any funds to themselves. According to Defendants, "[a]n argument, unsupported by any facts, that the incurrence of trade debt can somehow be a misappropriation or misapplication of funds that 'could' or 'should' have been used to improve the Property ignores the definition of the word 'funds' and it is utterly inconsistent with the documentary evidence and admissions Plaintiff has presented to this Court: there simply wasn't enough money to pay all the debts" (*id*. at 12).

Finally, Defendants argue that because Plaintiff amended as of right and because the motion to dismiss is not based on a pleading deficiency and instead is predicated on: (1) Plaintiff's failure to provide DCCA with notice of default and an opportunity to cure as required by the loan documents; and (2) none of the Defendants is liable as a guarantor for a deficiency judgment, the dismissal should be with prejudice.

Plaintiff's Letter of October 11, 2019 and Defendants' Letter of October 15, 2019

Following oral argument, the Court granted Plaintiff and Defendants leave to file supplemental papers concerning two issues: (1) whether the Court has the authority, through contract interpretation, to correct what Plaintiff contends was a typographical error in the second subsection (i) ; and, if not (2) whether Plaintiff's assertion of a cause of action for reformation of the Loan Agreement would be time-barred (*see* NYSCEF Doc. Nos. 101 and 102).

In response to the first question, Plaintiff asserts that regardless of a claim for reformation, a court is always entitled, as a matter of contract interpretation "to carry out the intention of a contract by transposing, rejecting or supplying words to make the meaning of the contract more clear … where some absurdity has been identified or the contract would otherwise be unenforceable in whole or in part" (NYSCEF Doc. No. 101 at 2, *quoting Wallace v 600 Partners Co.*, 86 NY2d 543, 547-48 [1995]). In support of the absurdity of the two subsection (i)'s, Plaintiff argues

> As written, Section 7.1 of the Loan Agreement is absurd in that two sub-sections thereof, "ERISA; Negative Covenants" and "Other Covenants" are both labeled "(i)" and cannot be enforced concomitantly according to their plain meaning. First, theses sub-sections have different and, more importantly, contradictory titles;

> the word "Other", by its very definition, connotes 'the one or ones distinct from that or those first mentioned or implied." That is, the other covenants identified in the "Other Covenants" subsection differ from those "Negative Covenants" previously mentioned.
>
> Moreover, a comparison of the language of the "Other Covenants" subsection (which allows a ten-day cure period for those defaults curable by the payment of money) with Section 7.1(a) (which allows a five-Business day cure period for a payment default) makes this typographical error clearer still. If the "Other Covenants" section was supposed to be a subsection (i), rather than (j), its language would directly contradict the language of subsection (a). As written, these two subsections cannot coexist.

According to Plaintiff, it is merely seeking to correct the numerical identification of subsection "Other Covenants" from "(i)" to '(j)" and this correction construes the Loan Agreement in accordance with the parties' intent and serves the "fundamental, neutral precept of contract interpretation." With this interpretation, Plaintiff contends that DCCA's failure to perform the negative covenants identified in "ERISA; Negative Covenants" for which DCCA had no right to cure, entitled Plaintiff to its foreclosure remedy (NYSCEF Doc. No. 101 at 2).

Regarding the second question, Plaintiff argues that a claim for reformation based on mutual mistake would not be time barred because while the 6 year statute of limitations accrues when the alleged scrivener's error was committed, here, the parties modified the Loan Agreement on August 7, 2015 and "'[t]he modification of a contract results in the establishment of a new agreement between the parties that pro tanto supplants the affected provisions of the original agreement while leaving the balance of it intact'" (*id.* at 3). It is Plaintiff's position that the scrivener's error was recommitted on the date of the modification and, therefore, Plaintiff may assert a reformation claim in an amended pleading on or before August 17, 2021. Plaintiff concludes by stating that if the Court declines to judicially interpret the Loan Agreement in accordance with Plaintiff's position, then Plaintiff will be required to move pursuant to CPLR 3025 to amend its Amended Complaint to assert a cause of action for reformation of the Mortgage.

In response to Plaintiff's submission, Defendants argue that Plaintiff has now retracked its argument that the Court should reform the Loan Agreement arguing instead that the Court should just interpret the subsection in a manner to avoid an absurd result while carrying out the parties' intentions (NYSCEF Doc. No. 102 at 1). However, according to Defendants, it is not self-evident from the language of the Loan Agreement that the breaches in the negative covenants in §§ 6.4 and 6.11 were not intended to allow for a notice and opportunity to cure. In support, Defendants rely on the fact that: (1) the same conduct that violates Section 6.4 is also a violation of Section 4.12[7] for which there is no argument that DCCA would be entitled to notice

[7]The Court does not agree with Defendants' argument that Section 6.4 and Section 4.12 are internally inconsistent as Section 4.12 is a representation that as of the Closing Date in 2005, DCCA did not have outstanding Debt other than Permitted Debt whereas Section 6.4 prohibited

and an opportunity to cure; and (2) disentitling DCCA to a notice and opportunity to cure under Section 6.11 is in conflict with DCCA's right under Section 5.10(a) to appoint a successor property manager.[8]

Defendants counter Plaintiff's argument that it is still timely for it to amend to bring a reformation claim by arguing the cases cited by Plaintiff do not support Plaintiff's contention. Instead, the cases stand for the proposition that a modification supplants the original agreement *pro tanto* (*i.e.*, supplanting the affecting provisions of the original agreement and leaving the remainder of the agreement intact). According to Defendants, because none of the language of Article 7 (or Section 7.1) was modified in the 2015 Modification, the scrivener's error was only made in 2004 and it was not made again in 2015 and the statute of limitations on Plaintiff's scrivener's error claim has expired.

DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff s claim (*AG Cap. Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-31 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys - Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary

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DCCA from incurring Debt beyond Permitted Debt during the period of the Loan. It is DCCA's alleged failure to abide this latter provision which is the provision on which Plaintiff relies to establish an Event of Default. The Court further does not agree that DCCA would have been entitled to an opportunity to cure a violation of Section 4.12 because if the representation was fraudulent, DCCA had no right to cure based on Section 7.1(b).

[8] The Court does not agree with Defendants' position. DCCA could not terminate the HMA and select a successor Approved Property Manager without Plaintiff's consent and its alleged failure to abide by this provision triggered an Event of Default (Loan Agreement § 6.11). Defendants' suggestion that Section 5.10(a) gave it the right to unilaterally appoint a successor property manager (and thus to terminate the Approved Management Agreement) is not supported by the provisions of the Loan Agreement. Thus, although DCCA was afforded the right to appoint a successor manager, the successor manager had to be an "Approved Property Manager" pursuant to an "Approved Management Agreement" (NYSCEF Doc. 78 at §5.10[a]) and the then existing Approved Management Agreement could not be terminated without Plaintiff's written consent pursuant to Loan Agreement § 6.11.

evidence (*Fontanetta,* 73 AD3d at 84-86).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC,* 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.,* 46 AD3d 530 [2d Dept 2007]).

To the extent that Plaintiffs claims turn on a contract, the actual provisions of the contract rather than Plaintiff s characterization of the terms in their pleading are controlling (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74, 82 [1st Dept 2005]). Therefore, [w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1) (*159 Broadway N.Y. Assoc. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; *see also Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, [t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint]).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Props. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper*, 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp.*, 98 NY2d at 152).

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not

to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello*, 40 NY2d at 635-36; *Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; see *Kempf*, 37 AD3d at 765; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

In construing an unambiguous contract, "the intention may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning ...." (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). "On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

The Court of Appeals has emphasized that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms'" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], *quoting W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157 [1990]). "Where an the instrument is negotiated between sophisticated parties at an arm's length, "'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*id.*, *quoting Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]; *see also Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]).

"[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], *quoting* 1 Corbin, Contracts § 1). In examining a contract to find the parties' intent as to a particular section, a court should read "the entirety of the agreement in the context of the parties' relationship," rather than isolating distinct provisions out of an entire agreement (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). Thus, "[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Excess Ins. Co. Ltd. v Factory Mut. Ins.*, 3 NY3d 577, 582 [2004] [a contract is to be interpreted so that no portion of the contract is rendered meaningless]; *Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of NY*, 80 NY2d 19, 31 [1992]; *Two Guys from Harrison-NY, Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1992]). Where

there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls (*Aguirre v City of NY*, 214 AD2d 692, 693 [2d Dept 1995]). Likewise "a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits" (*Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 590 [1996]).

In its opposition, Plaintiff appears to concede that the only defaults set forth in its Notice of Default for which it was not required to afford DCCA a period to cure were the defaults based on Sections 6.4 and 6.11 of the Loan Agreement. The Court does not agree with Plaintiff's position that the other defaults listed in Plaintiff's Notice of Default can support Plaintiff's claims based on the 80 days that elapsed between the Notice of Default and Plaintiff's filing of the Amended Complaint because the notice and opportunity to cure was a condition precedent to Plaintiff's right to initiate this foreclosure action and the condition precedent was not satisfied by the time that elapsed until Plaintiff's filing of the Amended Complaint (*L.J. Litwak and Co. v General Signal Corp. O-Z Gedney Div.*, 293 AD2d 713 [2d Dept 2002]). Because Plaintiff fails to allege compliance with the notice and opportunity to cure for the defaults listed in the Notice of Default (other than the defaults arising from Sections 6.4 and 6.11 and the alleged fraudulent representation contained in the Second Extension Agreement), these defaults cannot provide the factual predicate for Plaintiff's foreclosure action. Furthermore, DCCA was divested of possession of the Hotel (including the Hotel's its bank accounts and accounts receivable) as of March 15, 2019 and had no right to its future revenue based on the stipulated Receivership Order. Therefore, DCCA could not have cured most of the purported defaults after March 15, 2019 without violating the Receivership Order. Accordingly, the sufficiency of Plaintiff's foreclosure claim is limited to whether Plaintiff was required to provide DCCA with notice and an opportunity to cure based on its alleged defaults of Sections 6.4 and 6.11 of the Loan Agreement and any fraudulent misrepresentations resulting from the Second Extension Agreement.

The relevant provisions of the Second Extension Agreement and the Loan Agreement are as follows.

The Second Extension Agreement

In the Second Extension Agreement effective February 1, 2019, DCCA represented that "[t]o the best of Borrower's knowledge, Borrower hereby represents, warrants and covenants that no Default or Event of Default, as such terms are defined in the Loan Documents, exists on the date hereof" (NYSCEF Doc. No. 80 at ¶ 2). DCCA further reaffirmed and ratified "all of the terms and provisions and its obligations under the Loan Documents…." (*id.* at ¶ 5).

The Loan Agreement

The Loan Agreement defines "Default" as "the occurrence of any event which, but for the giving of notice or the passage of time, or both, would be an Event of Default" (NYSCEF Doc. No. 78 at 5).

"Approved Management Agreement" is defined as "the Amended and Restated Management Agreement, dated as of September 11, 1986, by and between Westchester Conference Center Development Corporation, as owner and Conference Environments Corporation (predecessor in interest to Conference Center Management Corporation), as manager, as such agreement was assigned by Westchester Conference Center Development Corporation to Doral Conference Center Associates (predecessor in interest to Borrower) pursuant to that certain Assignment and Assumption Agreement, dated as of December 15, 1986, as that agreement may be modified or replaced in accordance herewith,[9] and any other management agreement with respect to which Lender receives Rating Confirmation and which provides that it may be terminated by Lender following an Event of Default and as otherwise provided in Section 5.10(d) without fee or penalty" (*id.* at 2).

"Approved Property Manager" is defined as "Conference Center Management Corporation or any other management company with respect to which Lender receives Rating Confirmation, in each case unless and until Lender requests the termination of that management company pursuant to Section 5.10(d)" (*id.*).

"Event of Default" is defined as having the meaning set forth in Section 7.1 (*id.* at 8).

"Indemnified Liabilities" is defined as having the meaning set forth in Section 9.19(b) (*id.* at 9).

"Permitted Debt" is defined as

(i) the Indebtedness; and
(ii) Trade Payables not represented by a note, customarily paid by Borrower within 60 days of incurrence and in fact not more than 60 days outstanding (unless contested in good faith) and rental payments in respect of equipment leases, which are incurred in the ordinary course of Borrower's ownership and operation of the Property, in amounts reasonable and customary for similar properties and not exceeding 3.0% of the Loan Amount in the aggregate (*id.* at 14).

"Indebtedness" is defined as "the Principal Indebtedness,[10] together with interest and all other obligations and liabilities of Borrower under the Loan Documents, including all Transaction Costs, Yield Maintenance Premiums and other amounts due or to become due to Lender pursuant to this Agreement, under the Notes or in accordance with any of the other Loan Documents, and all other amounts, sums and expenses reimbursable by Borrower to Lender hereunder or pursuant to the Notes or any of the other Loan Documents" (*id.* at 9).

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[9]Based on the allegations of the Amended Complaint, which the Court must accept as true, the HMA was the Approved Management Agreement in accordance with this definition.

[10] "Principal Indebtedness" means the principal balance of the Loan outstanding from time to time (NYSCEF Doc. No. 78 at 17).

"Loan Amount" is defined as $75,000,000 (*id.* at 11).

In Section 4.13 entitled "Litigation," DCCA represented "[t]here are no actions, suits, proceedings, arbitrations … by or before any Governmental Authority[11] or other agency now pending …." (*id.* at § 4.13**)**.

Article VI is entitled "Negative Covenants" and it is followed by the two Negative Covenants at issue in this case.

Section 6.4 entitled "Debt" provides "Borrower shall not have any Debt, other Permitted Debt" (*id.* at § 6.4).

Section 6.11 entitled "Modifications and Waivers" provides "[u]nless otherwise consented to in writing by Lender: … (iii) Borrower shall not terminate, amend or modify the Approved Management Agreement in any material respect" (*id.* at § 6.11[iii]).

Article VII is entitled "DEFAULTS." Section 7.1 is entitled "Event of Default" and provides that "[t]he occurrence of any one or more of the following events shall be, and shall constitute the commencement of, an 'Event of Default' hereunder (any Event of Default which has occurred shall continue unless and until waived by Lender in its sole discretion)" (*id.* at § 7.1). The Events of Default are contained in the subsections (a)-(i)[12] that follow.

Section 7.1, subsection (a) entitled "Payment" provides that there will be an Event of Default if "Borrower shall default, and such default shall continue for at least 5 Business Days after notice to Borrower that such amounts are owing, in the payment when due of principal or interest or other amounts owing hereunder, under the Notes or under any of the other Loan Documents" (*id.* at § 7.1[a]).

Section 7.1, subsection (b) entitled "Representations" provides "[a]ny representation made by Borrower in any of the Loan Documents … shall have been false or misleading in any material respect … as of the date such representation was made; provided in the case of any such misrepresentation which is not fraudulent, Borrower shall have the cure periods provided in **Section 7.1(i)**[13] below" (*id.* at § 7.1[b] [emphasis added]).

The First Subsection (i) of Section 7.1 entitled "ERISA; Negative Covenants" provides "[a] default shall occur in the due performance or observance by Borrower of any term,

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[11] "Government Authority" is defined to include courts (NYSCEF Doc. No. 78 at 9).

[12] As discussed more fully herein, there are two subsection (i)'s, and the issue in this motion is whether the second subsection (i) was mislabeled and should be read as subsection (j).

[13] Because the first subsection (i) contains no cure periods, this provision is further evidence of the mislabeling of the second subsection (i) and an additional reason why, to give meaning to all the provisions in the Loan Agreement (including Section 7.1[b]), the second subsection (i) must be read as subsection (j).

covenant, or agreement contained in Section 5.8[14] or in Section 6.3,[15] 6.4, 6.11, 6.13,[16] 6.15[17] and 6.16[18] of Article VI" (*id.* at § 7.1[i]). It is DCCA's purported defaults of Section 6.4, having debt beyond Permitted Debt, and Section 6.11, the termination of the HMA, are the defaults on which Plaintiff relies as constituting non-curable defaults for which no notice period was required.

The Second Subsection (i) of Section 7.1, which is the subsection Plaintiff contends is a typographical error and should be labeled (j), is entitled "Other Covenants" and it provides

> A default shall occur in the due performance or observance by Borrower of any term, covenant or agreement (other than those referred to in subsections (a), (b) (other than as provided therein), and (c) through (i) inclusive, of this Section 7.1) contained in this Agreement or in any of the other Loan Documents, except that if such default referred to in this subsection (i) is susceptible of being cured, such default shall not constitute an Event of Default unless and until it shall remain uncured for 10 days after Borrower receives written notice thereof, for a default which can be cured by the

[14] Section 5.8 requires that DCCA will do, or cause to be done, all things necessary to ensure that it will not be deemed to hold Plan Assets (*e.g.*, an employee benefit plan under ERISA) (*id.* NYSCEF Doc. No. 78 at § 5.8).

[15] Section 6.3 provides "Borrower shall not Transfer any Collateral other than in compliance with Article II and other than the replacement or other disposition of obsolete or non-useful personal property and fixtures in the ordinary course of business, and Borrower shall not hereafter file a declaration of condominium with respect to the Property" (*id.* at § 6.3).

[16] Section 6.13 provides that during the continuance of a Low DSCR Period or Event of Default, Borrower shall not perform or contract to perform any Capital Expenditures that are not consistent with the Approved Annual Budget and shall not perform or contract to perform any Material Alteration without the prior written consent of Plaintiff, which consent shall not be unreasonably withheld (*id.* at § 6.13).

[17] Section 6.15 prohibits Borrower from ceasing to be a Single-Purpose Entity (*id.* at § 6.15).

[18] Section 6.16 prohibits Borrower from: (i) initiating or supporting any change in the permitted uses of the property or seeking any zoning variances; (ii) consenting to any modification, amendment or supplement to any of the terms of any Permitted Encumbrance in a manner adverse to Plaintiff's interests; (iii) imposing or consenting to the imposition of any restrictive covenants, easements or encumbrances upon the Property in any manner that adversely affects in any material respect its value, utility or transferability; (iv) executing or filing any subdivision plat affecting the Property or instituting or permitting the institution of proceedings to alter any tax lot comprising the Property; and (v) permitting or consenting to the Property's being used by the public by any Person in such manner as might make possible a claim of adverse usage or possession or of any implied dedication or easement (*id.* at § 6.16).

> payment of money, or for 30 days after Borrower receives written notice thereof, for a default which cannot be cured by the payment of money; and if a default cannot be cured by the payment of money but is susceptible of being cured and cannot reasonably be cured within such 30-day period, and Borrower commences to cure such default within such 30-day period and thereafter diligently and expeditiously proceeds to cure the same, Borrower shall have such additional time as is reasonably necessary to effect such cure, but in no event in excess of 180 days from the original notice (*id.* at § 7.1[i]).

Based on the foregoing provisions, even without considering Plaintiff's argument concerning the appropriate interpretation of the second subsection (i) of Section 7.1, Plaintiff has stated a valid claim for foreclosure based on Plaintiff's allegations that DCCA committed fraud in the Second Extension Agreement when it represented that "[t]o the best of Borrower's knowledge, Borrower hereby represents, warrants and covenants that no Default or Event of Default, as such terms are defined in the Loan Documents, exists on the date hereof," since at the time of the Second Extension Agreement, DCCA was allegedly in default of, *inter alia*, the provision prohibiting it from terminating the HMA without Plaintiff's consent, the provision prohibiting it from incurring Debt beyond the Permitted Debt, and the representation that there were no actions then pending. Pursuant to Section 7.1(b), DCCA had no right to cure a misrepresentation that was fraudulent at the time it was made. Indeed, in the Second Extension Agreement, DCCA specifically reaffirmed and ratified "all of the terms and provisions and its obligations under the Loan Documents," which had the effect of reaffirming its representation found in Section 4.13 that there are no actions, suits, proceedings, arbitrations by or before any Governmental Authority, when, in fact, DCCA had filed the Benchmark Action. Because the representation that there were no actions then pending was arguably fraudulent at the time of the Second Extension Agreement, at least in the current procedural context of a motion to dismiss (*260 Mamaroneck Ave. LLC v Guaraglia*, 172 AD3d 6661 [2d Dept 2019]; *Wyle, Inc. v ITT Corp.*, 130 AD3d 438 [1st Dept 2015]), Plaintiff has sufficiently alleged a default under Section 7.1(b) that would not be subject to the cure provisions found in the second subdivision (i) of Section 7.1. Accordingly, regardless of the need to afford DCCA the opportunity to cure the defaults under Sections 6.4 and 6.11, Plaintiff has sufficiently alleged a claim for foreclosure based on DCCA's Event of Default under Section 7.1(b).[19]

Nevertheless, the Court further agrees with Plaintiff's interpretation of the two subsections (i) of Section 7.1 – *i.e.*, that the second subsection (i) is a typographical error that

[19] As alleged, DCCA was not entitled to a cure period since the misrepresentation was arguably fraudulent. However, DCCA may prove, at a different procedural juncture, that this representation was not fraudulent because the other elements of fraud cannot be met (*e.g.*, scienter and justifiable reliance).

must be corrected by re-labelling it (j)[20] in order to avoid an absurd interpretation of the Loan Agreement.

It is well settled that "where a particular interpretation would lead to an absurd result, the courts can reject such a construction in favor of one which would better accord with the reasonable expectations of the parties … Since the intent of the parties in entering an agreement is a paramount consideration when construing a contract, even the actual words provided therein may be transplanted, supplied or entirely rejected to clarify the meaning of the contract" (*Reape v New York News, Inc.*, 122 AD2d 29, 30 [2d Dept 1986], *lv denied* 68 NY2d 610 [1986]; *Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012]). "'Where … a literal construction defeats and contravenes the purpose of the agreement, it should not be so construed'" (*Currier, McCabe & Assoc., Inc. v Maher*, 75 AD3d 889, 892 [3d Dept 2010], *quoting Tougher Heating & Plumbing Co. v State of N.Y.*, 73 AD2d 732, 733 [3d Dept 1979]). If a contract interpretation "depends on 'formalistic literalism' …. ignores common sense, and could lead to absurd results that would leave [another portion of the contract] without meaning," the Court may reject such a reading and instead adopt a construction that produces a commercially reasonable and practical result (*Greenwich Cap. Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010]).

The reasonable expectation of the parties was that DCCA was entitled to cure periods with regard to certain Events of Default and not others. For example, as discussed *supra*, the pursuant to Section 7.1(b) of the Loan Agreement, the parties agreed that if DCCA had made any representation in the Loan Documents that was false or misleading in any material respect as of the date the representation was made, DCCA would have an opportunity to cure as set forth in the second subsection (i) provided that the misrepresentation was not fraudulent. If the misrepresentation was fraudulent, it was an automatic Event of Default to which DCCA was not entitled to cure and which supports, for pleading purposes, Plaintiff's filing of this action. It was the reasonable expectation of the parties that the subsections would be numbered consecutively without duplication (*i.e.*, the second subsection [i] was mislabeled by a typographical error and should be read as being labeled in its consecutive order as subsection [j]). By construing the Loan Agreement in this manner, the Court is giving effect to all of its provisions and abiding by the reasonable expectations of the parties.

Supplanting second subsection (i) as (j) gives meaning to the parties' intent to give DCCA the right to cure certain defaults susceptible of being cured versus Plaintiff's immediate right to foreclosure without having to await the relevant cure periods for certain defaults that were not readily susceptible of being cured (*i.e.*, Sections 6.4 and 6.11).[21] The Court must accept Plaintiff's allegations as true, including that DCCA had terminated the HMA or, alternatively

[20] And for the same reason: (1) the phrase in the section subsection (i) which reads "except that if such default referred to in this subsection (i) is susceptible of being cured" should read "except that if such default referred to in this subsection (j) is susceptible of being cured;" and (2) the reference to Section 7.1(i) found in Section 7.1(b) should read Section 7.1(j).

[21] Sections 6.4 and 6.11 are typical Negative Covenants since the compliance with these provisions was entirely within DCCA's control.

that it allowed the HMA to be terminated based on DCCA's defaults thereunder.[22] The Court must further accept as true Plaintiff's allegations that DCCA had permitted the Debt to exceed the Permitted Debt threshold under the Loan Agreement. The fact that some of this Debt was contested in good faith are factual determinations that cannot be made in the present procedural context of a motion to dismiss.[23] Accordingly, the Court further agrees with Plaintiff that it has sufficiently alleged DCCA's defaults of Sections 6.4 and 6.11, which were not subject to the cure provisions of the second subdivision (i) of Section 7.1, and, therefore, there was no need for Plaintiff to satisfy the condition precedents of notice and an opportunity to cure before it instituted this action.

DCCA may attempt to prove at the summary judgment stage that Plaintiff's allegations of DCCA's default have no factual merit insofar as: (1) DCCA did not commit fraud when it represented at the time of the Second Extension Agreement that there were no known defaults and no actions pending; (2) it did not terminate the HMA or cause Benchmark to terminate the HMA; and (3) it did not incur Debt beyond the Permitted Debt (*i.e.*, contrary to Plaintiff's claim that it incurred trade payables in the amount of $3,282,278.40 thereby exceeding the 3% Debt threshold). However, the Court cannot resolve these factual questions in the context of a motion to dismiss.

The interpretation of the second subsection (i) "Other Covenants" as subjection (j), and the replacement of this subsection in certain other provisions (*e.g.*, Section 7.1[b]) gives meaning to all provisions in the Loan Agreement, renders the second subsection (i) consistent with other sections, and harmonizes the intent of the parties (*LaSalle Bank Natl. Assn. v Nomura Asset Cap. Corp*., 424 F3d 195, 206 [2d Cir 2005]). By rectifying something that is so obviously a typographical error, the Court is avoiding an absurd result (*Wallace*, 86 NY2d at 547; *Behrens v City of N.Y.*, 279 AD2d 408 [2d Dept 2001], lv denied 96 NY2d 712 [2001]; *Serdarevic v Centex Homes, LLC*, 2012 WL 4054161 at n6 [SD NY 2012]; *Sik Gaek, Inc. v Yogi's Two, Inc.*, 2018

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[22] Because Benchmark terminated the HMA based on DCCA's alleged defaults, the Court does not agree with DCCA's premise that it cannot be held responsible for Benchmark's actions (*i.e.*, it cannot be found in default of this clause if Benchmark terminated the HMA). DCCA was also potentially in default of Section 5.10(c), which required DCCA to notify Plaintiff in writing of any default of DCCA or the Approved Property Manager under the Approved Management Agreement, after the expiration of any applicable cure periods. As alleged in DCCA's pleadings in the Benchmark Action, Benchmark's defaults in the HMA caused the Hotel to plummet in value by over $20 million. Thus, DCCA's failure to advise Plaintiff of this default violated Section 5.10(c). Further, Benchmark had notified DCCA of DCCA's purported defaults under the HMA and DCCA's failure to notify Plaintiff of Benchmark's claims potentially violated Section 5.10(c) since if Plaintiff had been properly notified, it would have had the right cure DCCA's defaults (NYSCEF Doc. No. 78 at §5.10[d]).

[23] Thus, DCCA may prove at the summary judgment stage that the $1,026,123 debt to Benchmark was contested in good faith and thereby reduce the Debt as of the action's commencement to within the Permitted Debt threshold such that DCCA would be entitled to summary judgment dismissing this aspect of Plaintiff's foreclosure claim.

WL 4845832 [ED NY 2018], *adopting report and recommendation* 2018 WL 4845735 [ED NY 2018]).

The Court next turns to whether Plaintiff has sufficiently alleged a claim for indemnification from DCCA and the Sponsors based on their alleged violation of Loan Agreement § 9.19(b)(ii), the only provision referenced in Plaintiff's Amended Complaint.

Section 9.19 is entitled "Recourse" and Section 9.19(a) provides (as relevant to Plaintiff's claim), that "[e]xcept as set forth in Section 9.19(b), no recourse shall be had for the Indebtedness against any affiliate of Borrower or any officer, director, partner or equityholder of Borrower or any such affiliate and recourse to Borrower and/or any of the foregoing shall be limited to the Liens of Lender on the Property and the other Collateral" (NYSCEF Doc. 78 at §9.19[a]).

Section 9.19(b)(ii) provides

> Borrower and the Sponsor … agree to jointly and severally indemnify Lender and hold Lender harmless from and against any and all Damages to Lender (including legal and other expenses of enforcing the obligations of the Borrower and the Sponsor under this Section 9.19) resulting from or arising out of any of the following (the "Indemnified Liabilities"): …. (ii) the misappropriation or misapplication by Borrower, the Sponsor or any of their respective affiliates of any funds (including misappropriation or misapplication of Revenues, security deposits and/or Loss Proceeds) in violation of the Loan Documents" (*id.* at § 9.19[b][ii]).

Revenues are defined as

> All rents, rent equivalents, moneys payable as damages pursuant to an Occupancy Agreement or in lieu of rent or rent equivalents, royalties (including all oil and gas or other mineral royalties and bonuses), income, receivables, receipts, revenues, deposits (including security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other consideration of whatever form or nature received by or paid to or for the account of or benefit of Borrower from any and all sources including any obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or grant of the right of the use and occupancy of the property or rendering of services by Borrower and proceeds, if any, from business interruption or other loss of income insurance (NYSCEF Doc. No. 78 at 19).

Loss Proceeds are defined as

> amounts, awards or payments payable to Borrower or Lender in respect of all or any portion of the Property in connection with a Casualty or Condemnation thereof …. (*id.* at 11).

Though not defined in the Loan Agreement, "funds" are commonly understood based on their dictionary definition (as defined in the Meriam-Webster's online dictionary) as "available pecuniary resources." Based on its dictionary definition, "misapplication" is commonly understood as "the act or an instance of applying something incorrectly or improperly." Finally, "misappropriation" is commonly understood as a wrongful appropriation (as by theft or embezzlement).

Because Plaintiff failed to oppose the branch of Defendants' motion seeking dismissal of the Third Cause of Action based on the allegations concerning the Sponsors alleged receipt of discounts on rooms and food and beverages, this branch of Defendants' motion is granted as unopposed (*Allan v DHL Express (USA), Inc.*, 99 AD3d 828 [2d Dept 2012]; *Agoglia v Benepe*, 84 AD3d 1072 [2d Dept 2011]]). Turning to the sufficiency of Plaintiff's allegations that Defendants misapplied and/or misappropriated funds based on their permitting the Debt to exceed the Permitted Debt, which resulted in excessive interest on trade payables and a consequent diversion of monies that could have been used to improve the Mortgaged Property, the Court does not agree that this conduct rises to the level of a misapplication or misappropriation of funds in accordance with the meanings of those terms such that there was a violation of Section 9.19(b) and potential liability for Indemnified Liabilities. Accordingly, the Court shall dismiss the Third Cause of Action.[24]

CONCLUSION

Based on the foregoing and for the reasons set forth above, it is hereby

ORDERED that the motion of Defendants DCCA, LLC ("DCCA"), Howard Kaskel, Steven Schragis, as Co-Executor of the Estate of Ms. Carole Schragis, Gary Schragis as Co-Executor of the Estate of Ms. Carole Schragis, Anita Kaskel Roe to dismiss the Amended

[24] The dismissal of the Third Cause of Action is based on the current allegations set forth in the Amended Complaint -- *i.e.*, Plaintiff cannot reallege this cause of action based on its contentions that a misapplication or misappropriation of funds occurred based on: (1) the excessive trade debt causing interest to be incurred; or (2) the Sponsors' use of rooms or consumption of food/beverages at discounted rates which allegation Plaintiff abandoned by failing to oppose this branch of Defendants' motion. However, a plaintiff may always seek leave to amend, which is liberally granted (CPLR 3025[b]; *Favia v Harley-Davidson Motor Co.*, 119 AD3d 836 [2d Dept 2014]). Accordingly, the dismissal is without prejudice to Plaintiff's right to request a Rule 24 Conference to seek leave to file a motion to amend its Amended Complaint, if Plaintiff be so advised.

Commercial Mortgage Foreclosure Complaint of Plaintiff U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3 acting through its Special Servicer, CWCapital Asset Management, Inc. is granted in part, and denied in part; and it is further

ORDERED that the branches of the motion seeking the dismissal of the First and Second Causes of Action is denied; and it is further

ORDERED that the branch of the motion seeking the dismissal of the Third Cause of Action is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 11, 2020

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HON. GRETCHEN WALSH, J.S.C.

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