

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**BERNARD J. FRIED**

**J.S.C.**

PART 60

PRESENT.

Index Number : 601192/2003

WILMINGTON TRUST

vs

STRAUSS, MICHAEL L.

Sequence Number : 016

SUMMARY JUDGMENT

**FBEM**

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

C

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
OCT 31 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

**FILED**  
OCT 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/30/06

*Bernard J. Fried*

**BERNARD J. FRIED** J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FBI**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
WILMINGTON TRUST COMPANY, as Issuer Trustee  
of FMAC LOAN RECEIVABLE TRUST 1997-C, FMAC  
LOAN RECEIVABLE TRUST 1998-A, FMAC LOAN  
RECEIVABLE TRUST 1998-B, FMAC LOAN RECEIVABLE  
TRUST 1998-C, and GMAC COMMERCIAL MORTGAGE  
CORPORATION, as Servicer of FMAC Loan  
Receivable Trust 1997-C, FMAC Loan Receivable  
Trust 1998-A, FMAC Loan Receivable Trust  
1998-B, and FMAC Loan Receivable Trust 1998-C,

**Index Number**  
**601192-2003**

Plaintiffs,

-against-

MICHAEL L. STRAUSS,

Defendant.

-----X  
MICHAEL L. STRAUSS, individually and as  
assignee of WESTWIND GROUP HOLDINGS, INC.,  
THE WESTWIND GROUP OF OREGON, INC., WESTWIND  
GROUP NORTH CAROLINA, INC., AND THE WESTWIND  
GROUP, INC.,

Counterclaim Plaintiff,

-against-

BAY VIEW FRANCHISE MORTGAGE ACCEPTANCE  
COMPANY; FRANCHISE MORTGAGE ACCEPTANCE COMPANY;  
GMAC COMMERCIAL MORTGAGE CORPORATION; FMAC LOAN  
RECEIVABLE TRUST 1997-C; FMAC LOAN RECEIVABLE  
TRUST 1998-A; FMAC LOAN RECEIVABLE TRUST 1998-B;  
FMAC LOAN RECEIVABLE TRUST 1998-C; WILMINGTON  
TRUST COMPANY; JOSEPH WOLNICK; AND DOES 1-30,  
inclusive,

Counterclaim Defendants.

**FILED**  
OCT 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X

**APPEARANCES:**

**For Plaintiffs/Counterclaim  
Defendants**

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(H. Peter Haveles, Jr.)

**For Defendant/Counterclaim Plaintiff**

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**For Counterclaim Defendants**

Dewey Ballantine LLP  
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New York, New York 10019  
(John Collins, Jeffrey Rugg)

**FRIED, J.:**

In this case, plaintiffs are Wilmington Trust Company, as issuer-trustee (Trustee) of FMAC Loan Receivable Trust 1997-C, FMAC Loan Receivable Trust 1998-A, FMAC Loan Receivable Trust 1998-B and FMAC Loan Receivable Trust 1998-C (collectively, the Trusts), and GMAC Commercial Mortgage Corporation (GMACCM), as servicer of the Trusts. In their amended complaint (Complaint) filed against defendant Michael L. Strauss (Strauss), plaintiffs seek a judgment directing Strauss to pay to the Trusts and GMACCM the full amount of his obligations due and owing under two personal guarantees, the "First Guaranty" and the "Second Guaranty," as such capitalized terms are hereinafter defined.

In his answer to the Complaint, Strauss, individually and as assignee of Westwind

Group Holdings, Inc., The Westwind Group of Oregon, Inc., Westwind Group North Carolina, Inc., and The Westwind Group, Inc. (collectively, Westwind), asserts various affirmative defenses and counterclaims. The counterclaims are asserted not only against plaintiffs, but also against Bay View Franchise Mortgage Acceptance Company (Bay View), Franchise Mortgage Acceptance Company (FMAC), and Joseph Wolnick (Wolnick).

Counterclaim defendants Bay View and Wolnick filed a motion for summary judgment (Motion Sequence Number 16), seeking dismissal of the counterclaims asserted against them. Defendant and counterclaim plaintiff Strauss filed a motion for summary judgment (Motion Sequence Number 17), seeking dismissal of plaintiffs' claims under the First Guaranty, as well as dismissal of the defenses of plaintiffs and counterclaim defendants with respect to his counterclaims. Plaintiffs Trustee and GMACCM filed a motion for partial summary judgment (Motion Sequence Number 18) with respect to their claims under the Second Guaranty, as well as dismissal of defendant Strauss' counterclaims.

Because the summary judgment motions (Sequence Numbers 16, 17 and 18) involve substantially similar background facts and legal issues, they are consolidated herein for disposition.

The Trustee is the issuer trustee for the Trusts, which consist of a pool of securitized loans, including the four loans made in 1997 by Credit Suisse First Boston Mortgage Capital (CSFB) to Westwind. In November 2001, GMACCM acquired servicing rights with respect to the loans from Bay View, and in January 2002, GMACCM entered into an agreement with Bay View to act as servicer of the loans. As servicer for the Trusts, GMACCM is responsible for administering the loans on behalf of the Trustee.

Strauss was an officer, director and majority owner of Westwind Group Holdings Inc. (Westwind Holdings; a holding company incorporated in Delaware), which in turn, wholly-owned all of the shares of The Westwind Group of Oregon, Inc., Westwind Group North Carolina, Inc., and Westwind Group, Inc. These Westwind entities were franchisees of Burger King Corporation (Burger King), and they operated numerous Burger King restaurants in the states of Florida, North Carolina, Oregon and Washington.

Bay View acquired FMAC in November 1999, and became successor to FMAC with respect to certain loans and loan servicing agreements, including the CSFB loans that were made to Westwind and assigned to FMAC. Wolnick was a FMAC employee, and became an executive officer of Bay View after the 1999 acquisition. In connection with a loan restructuring agreement (as discussed below), Wolnick, with the alleged encouragement of Strauss, agreed to serve as a director of Westwind Holdings.

In 1997, Westwind borrowed money from CSFB to acquire certain assets, franchise rights, and leasehold interests relating to the Burger King franchises, as well as to refinance certain debts. The parties entered into a Loan and Security Agreement dated October 15, 1997 (Loan Agreement), pursuant to which CSFB loaned an aggregate principal amount of \$66,230,000 to Westwind.

In connection with the Loan Agreement, Strauss executed a "control person - trigger event" guaranty (First Guaranty), whereby he guaranteed repayment of the outstanding liabilities owed by Westwind under the Loan Agreement, upon the occurrence of one or more of the so-called "trigger events" that were set forth in a schedule annexed to the First Guaranty.

In April 2000, Westwind informed Bay View that it was experiencing severe liquidity stress. After months of negotiation, the parties entered into a Loan Restructuring Agreement, dated March 28, 2001 (Restructuring Agreement), whereby (a) Bay View, on behalf of the Trusts, agreed to reduce the amount owed by Westwind under the Loan Agreement from over \$60 million to \$43 million, and, on account of the reduced debt, the Trusts received Westwind preferred stock; and (b) Bay View agreed to make a \$2.6 million loan (the Special Servicing Advance) to Westwind. The Restructuring Agreement also modified the terms concerning the manner and priority in which Westwind's financial obligations would be paid and the respective responsibilities of the various parties under the Loan Agreement, as discussed more fully below.

In connection with the Restructuring Agreement, Strauss also executed an Amended and Restated Guaranty (Second Guaranty), whereby he guaranteed repayment of up to \$1.8 million of the \$2.6 million Special Servicing Advance. Simultaneously, Strauss also reaffirmed the First Guaranty.

Despite entry into the Restructuring Agreement whereby debt payment obligations were reduced, Westwind continued to experience financial difficulties. In September 2001, Westwind began making late payments to Burger King. On April 5, 2002, GMACCM notified Westwind, alleging that it had violated certain covenants of the Restructuring Agreement, which constituted "events of default." The alleged violations included improper payment to a Westwind affiliate, failure to submit financial information in a timely manner, variances from the operating budget, and delinquency in paying Burger King royalties. On May 8, 2002, GMACCM notified Westwind that all debt obligations owed to the Trusts

would be accelerated and immediately payable.

In July 2002, Westwind stopped debt service payments to the Trusts and GMACCM, and ceased paying Burger King obligations. GMACCM and Burger King agreed with Westwind that they would not exercise rights to foreclose or terminate the franchise agreement, but Westwind's assets would have to be liquidated. In late 2002 and early 2003, Burger King began marketing Westwind's assets. Westwind's assets were subsequently either sold in bankruptcy or transferred to Burger King, plus the assumption of certain liabilities. The Trustee and GMACCM allegedly recovered only approximately \$3 million from the liquidation of such assets.

Because Westwind did not repay the debts evidenced by the Term Notes under the Special Servicing Advance, plaintiffs made demands upon Strauss, and commenced an action against him under the Second Guaranty. Moreover, because Westwind did not repay the debts evidenced by the Restructured Notes under the Restructuring Agreement, plaintiffs amended the complaint and sought recovery against Strauss under the First Guaranty.

In setting forth the standard for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted.]

Adhering to the guidance of the Court of Appeals, the lower courts uniformly

scrutinize motions for summary judgment as well as the facts and circumstances of each case to determine whether relief should be granted or denied. *See e.g., Martin v Briggs*, 235 AD2d 192, 196 (1<sup>st</sup> Dept 1997) (“[i]n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion”). However, summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2<sup>nd</sup> Dept 1988).

In his answer to the Complaint, the counterclaims asserted by Strauss, individually and as assignee of Westwind,<sup>1</sup> are (1) breach of contract; (2) breach of the implied covenant of good faith; (3) breach of fiduciary duty; and (4) intentional interference with contractual and business relations. Strauss also seeks declaratory relief with respect to the First Guaranty and the Second Guaranty. Plaintiffs GMACCM and the Trustee, as well as counterclaim defendants Bay View and Wolnick, all move for entry of summary judgment dismissing such counterclaims.

#### Breach of Contract Counterclaim

Strauss alleges that the Trustee, GMACCM and Bay View (collectively, Lenders) violated the payment priority provisions of the Restructuring Agreement, by improperly taking funds that should have been used to pay approved budgeted expenses (which included Burger

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Strauss acknowledges that the only claim he asserts individually is a lost salary claim. With respect to the claims allegedly assigned by Westwind to Strauss, although plaintiffs do not acknowledge the validity of such assignments, they accept the truth of Strauss' allegation regarding the assignment solely for the purpose of their summary judgment motion, and reserve their right to show, at any trial in this action, that the assigned claims are invalid (and thus Strauss lacks standing), to the extent the assigned claims survive summary judgment.

King royalties), and used such funds to pay the Restructured Notes and the Term Notes,<sup>2</sup> both of which are lower in payment priority than the approved budgeted expenses. Strauss alleges that because the Lenders took the first dollars from Westwind's operating income to pay themselves, they caused a shortage of funds with which to pay Burger King, which resulted in foreclosure of the restaurants and demise of Westwind's business.

Article V of the Restructuring Agreement sets forth the priority scheme and payment mechanism that addresses the various obligations of the Westwind borrowers.<sup>3</sup> More specifically, section 5.1 (b) provides, in relevant part:

(b) On or prior to the Closing Date, the Borrowers shall establish an account with a banking institution acceptable to the Servicer ... the "Payment Account" ... thereafter, during each Payment Period, income and revenues generated from the [Borrowers'] Businesses ... net of Approved Budgeted Expenses that have been paid by the Borrowers during such Payment Period, shall be transferred by the Borrowers from the operational accounts of the Borrowers to the Payment Account ...  
[emphasis added].

Thus, under section 5.1 (b) of the Restructuring Agreement, Westwind must use its income and revenue to first pay Approved Budgeted Expenses (these expenses are defined to include Burger King royalties and other operating expenses), and then transfer the remaining funds (defined as "Available Funds") in Westwind's "operational accounts" (an undefined

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<sup>2</sup>

The Restructured Notes evidence the debt under the Loan Agreement, as restructured by the Restructuring Agreement, and the Term Notes evidence the debt as to the \$2.6 million Special Servicing Advance under the Restructuring Agreement.

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Article 4 of the Supplemental Intercreditor Agreement among the Lenders, Burger King, Westwind and Strauss contains, in all material respects, identical priority provisions.

term) to the Payment Account. After Available Funds are transferred into the Payment Account, they are to be applied, in accordance with section 5.3 (a) through section 5.3 (k), in a specified descending order of priority (commonly known as a “waterfall”) to various Westwind obligations, including, among other things, the obligations owed to Burger King under the BKC Receivables Notes<sup>4</sup> and the BKC Construction Notes, as well as those owed to the plaintiff-Lenders under the Restructured Notes and the Term Notes.

Plaintiffs do not dispute that the Burger King royalties should be paid before the Restructured Notes and the Term Notes. Instead, they point to several key requirements or features of the Restructuring Agreement. First, plaintiffs point out that Westwind should have established the Payment Account as required by the Restructuring Agreement (but the account was never set up), instead of using the Concentration Account under the Loan Agreement, and in doing so, Westwind, in effect, treated the Concentration Account as if it were the Payment Account for purpose of the Restructuring Agreement. Notably, pursuant to the Concentration Account Agreement executed in connection with the Loan Agreement, all of Westwind’s operating receipts were to be deposited into the Concentration Account,

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Section 5.3 provides, in relevant part, that “Available Funds on deposit in the Payment Account shall be applied ... in the following descending order of priority” for payment of (a) the BKC Receivables Notes; (b) pro rata, the Term Notes and BKC Construction Notes; and (c) the Restructured Notes. Section 5.3 further provides that, “[t]o the extent Available Funds ... are not sufficient to make the payments set forth in items (d) - (i) ... the amounts due shall be accrued and deferred until ... Available Funds are available to make such payments.” In other words, payments for items (a) - (c) are not deferrable even if Available Funds are insufficient to pay for such items. The BKC Receivables Notes, in item (a), represent unpaid royalties owed to Burger King that predated the Restructuring Agreement, as well as the BKC Construction Notes, in item (b), are not relevant to the subject of this litigation.

and the Trusts were entitled to be paid before Burger King. The Restructuring Agreement changed the payment priority, from paying the Trusts first, to paying the Approved Budgeted Expenses first, including the Burger King royalties, as required by Burger King.

Plaintiffs also point out that, under the Restructuring Agreement, Westwind was solely responsible for paying the Burger King royalties before transferring funds to the Payment Account, and that after the funds were deposited in the Payment Account,<sup>5</sup> pursuant to section 5.3, the Trusts had the absolute right to accept and apply such funds for repayment of the debts owed by Westwind to the Trusts, without regard to whether Westwind paid the Burger King royalties.

Strauss contends, however, that because section 5.1 (a) of the Restructuring Agreement requires that “the Servicer shall continue to collect, manage and maintain funds on deposit in the Concentration Account in accordance with [the Loan Agreement,]” he construes that to mean all of Westwind’s operating income should continue to be deposited or swept into the Concentration Account. This contention misconstrues the language of section 5.1 (a), which addresses only what the Servicer, not what Westwind, was required to do in respect of the Concentration Account. In fact, section 5.1 (b) of the Restructuring Agreement expressly requires that Westwind transfer its operating income to the Payment Account after Westwind paid its Approved Budgeted Expenses – i.e. “net of Approved Budgeted Expenses that have been paid by the Borrowers.”

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As noted, Westwind failed to set up the Payment Account required by the Restructuring Agreement. Instead, it continued to use the Concentration Account as if it were the Payment Account.

Also, contrary to Strauss' contention, the operating receipts of Westwind were not automatically swept from its various operating accounts into the Concentration Account. Instead, the record shows that Westwind had control over its receipts before depositing them in the Concentration Account that was maintained at U.S. Bank, the financial institution that agreed to serve as the depository bank under the Concentration Account Agreement. For example, in a letter sent to the Lenders dated July 18, 2002, Strauss advised that "[c]ash flow is insufficient to make both the current payment of budgeted operating expenses (including Burger King payments) and the debt service. This letter is to inform you that Westwind has taken a temporary measure to suspend payment into the concentration account for the FMAC debt account." Thus, Strauss acknowledged that Westwind was not only responsible for paying Burger King, but that Westwind also exercised control over its receipts before depositing them in the Concentration Account.

Also, the fact that Westwind's controller, Gary Allen, was not involved in negotiation of the Restructuring Agreement and was not aware of its terms, and that he continued his practice (under the Loan Agreement) in sending Westwind's receipts to the Concentration Account, was not a mistake that can be attributed to plaintiffs. Further, Strauss' arguments that, plaintiffs should have instructed U.S. Bank to transfer funds in the Concentration Account to Westwind for payment of Approved Budgeted Expenses and that Allen should have been told that plaintiffs should be paid from the Payment Account and not the Concentration Account, are equally without merit. Nowhere in the Restructuring Agreement are such obligations imposed on plaintiffs. Instead, Strauss and Westwind are bound by the acts or omissions of their employees.

Strauss contends that plaintiffs knew that all of Westwind's receipts went to the Concentration Account, and thus plaintiffs should not be permitted to keep the money that was intended for Burger King. In support of his contention, Strauss points to, among other things, a Larry Rosselot e-mail and a Cabell Finch cash flow diagram (both were plaintiffs' employees), as well as letters from Burger King. However, such evidence only shows Burger King's priority to payment (which is undisputed), it does not address Westwind's own responsibility of paying Burger King first, before transferring funds to the Payment Account, which Westwind never established. Indeed, given the contractual language governing the payment mechanism and priority scheme under the Restructuring Agreement, once Westwind transferred funds to the Concentration Account, these funds implicitly represented Available Funds (*i.e.* funds net of Approved Budgeted Expenses that were paid by Westwind) that could be applied pursuant to the "waterfall" under section 5.3 of the Restructuring Agreement. Hence, any contention that plaintiffs breached the Agreement, by misappropriating funds that should have been paid to Burger King, is without merit.

Strauss also alleges that plaintiffs breached the Restructuring Agreement by either failing to respond or denying Westwind's request to close money-losing restaurants, which caused Westwind to suffer financial hemorrhage, aggravated its cash flow problem, and led to its destruction. Plaintiffs counter that (1) Westwind never requested their consent; (2) there was no evidence of any such request, as section 14.6 of the Restructuring Agreement requires that all communications or requests to be in writing; and (3) even assuming that such request had been made, plaintiffs were entitled to grant or withhold consent in its "sole discretion, opinion and judgment," pursuant to section 10.2 (c) of the Restructuring Agreement.

Based on the record, which contains conflicting witness testimonies, it is not entirely clear as to whether (and when) Westwind had requested plaintiffs' consent to close underperforming restaurants. However, in the fall of 2002, in the reports prepared by Deloitte & Touche, which was retained by plaintiffs to analyze restaurant closure issues, the list of restaurants annexed to such reports (according to Strauss and undisputed by plaintiffs) closely matched the list of restaurants prepared by Westwind.<sup>6</sup> Construing the facts in favor of Strauss, it appears that Westwind might have communicated with plaintiffs about potential restaurant closures, albeit it also appears undisputed that such communications were not in writing.

Plaintiffs' argument that closure requests must be in writing, pursuant to section 14.6 of the Restructuring Agreement, is unpersuasive for several reasons. First, that section contains only general language that "notices and communications under this Agreement shall be in writing." However, the operative provisions (section 10.2) of the Agreement that govern "Disposition of Property," including restaurant or business closure, contain no requirement that request for approval of closure (or any consent thereto) must be in writing. In contrast, other sections of the Restructuring Agreement expressly contain "in writing" requirements. For example, "ALWA Releases" must be in writing under section 7.18; Servicer's waiver of compliance as to "Negative Covenants" must be in writing under Article X; and Westwind's consent in respect of "Amendment and Waiver" must be in writing under section 14.2. Thus,

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Attached to an e-mail, dated September 30, 2002, from Jack Paul Martinchuk (a Deloitte employee) to Scott Roehr (another Deloitte employee) and Cabell Finch (a GMACCM employee), was a file that provided "a summary of (i) Deloitte developed potential store closures, and (ii) potential store closures provided by Westwind."

the parties knew when written notices would be required in specific circumstances, and they expressly specified the “in writing” requirement in the Restructuring Agreement. The absence of any “in writing” requirement in section 10.2 (c) with respect to restaurant closure is telling. Moreover, Peter Humphrey, Esq., plaintiffs’ attorney who was involved in negotiating and drafting the Restructuring Agreement, testified that Westwind could send notices pursuant to section 14.6, but as a practical matter, could just call up and ask informally with respect to restaurant closures. Based on the foregoing, I conclude that the parties did not contemplate, nor does the Restructuring Agreement specifically require, that restaurant closure requests must be in writing.

However, as noted above, section 10.2 (c) provides that the Servicer’s consent with respect to property disposition or restaurant closures may be given in its sole discretion or judgment. Further, that section provides, among other things, that in respect of property dispositions or closings, Westwind must provide to the Servicer “substitute collateral” having a value sufficient to collateralize the obligations of Westwind secured by such property “in form and substance acceptable to the Servicer.” Strauss has not alleged nor come forward with evidence that Westwind had offered to provide substitute collateral in connection with any restaurant closure requests. Moreover, he testified that Westwind could not afford to pay for the costs related to restaurant closing (which included payroll, taxes, utilities, vendors and occupancy costs), and that, had plaintiffs agreed to help Westwind by modifying the Concentration Account and loan documents (such as a moratorium on debt service payments), Westwind could have generated the cash needed to close the money-losing restaurants.

Based on the foregoing, and assuming that Westwind did request consent to close

restaurants but that no consent was obtained, it does not appear that plaintiffs' exercise of discretion or judgment in refusing to give consent was arbitrary or irrational. *Dalton v Educational Testing Service*, 87 NY2d 384, 392 (1995) (holding that a party must fulfill its contractual obligation and act in good faith, but a court "will not interfere with [the party's] discretionary determination unless it is performed arbitrarily or irrationally"). Accordingly, the breach of contract counterclaim, alleging that plaintiffs breached the Restructuring Agreement, is dismissed.<sup>7</sup>

#### Breach of Implied Covenant of Good Faith Counterclaim

Strauss asserts that the central purpose of the Restructuring Agreement is to permit Westwind to continue its business operations until it, and Burger King, could improve the business situation. Strauss also alleges that plaintiffs breached the implied covenant of good faith and fair dealing by depriving Westwind of its benefits under the Restructuring Agreement, and driving it into bankruptcy and ultimate destruction.

While it may be true that one of the objectives of the Restructuring Agreement was to permit Westwind to continue its operations (instead of shuttered via foreclosure) such that it could achieve a turnaround of its business, another objective was to enhance the possibility that Westwind would repay the debts owed to the Trusts. A financial restructuring was

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7

Strauss further contends that possessing discretion does not permit plaintiffs to ignore or refuse to decide upon requests for closure. However, Strauss also alleges (and has testified) that, in connection with negotiating the Restructuring Agreement, Westwind requested if plaintiffs would allow a moratorium on debt service to enable Westwind's payment of closure costs, but the request was denied. Denying a request is an exercise of business judgment and discretion, which is not the same as ignoring or refusing to decide upon a request.

effected under the Restructuring Agreement whereby Westwind's debt owed to the Trusts was reduced by \$17 million, and Westwind received a loan of \$2.6 million under the Special Servicing Advance and used the loan proceeds to pay off critical vendors. Thus, the primary purpose of the Restructuring Agreement was to restructure the debt owed by Westwind to the Trusts (as reflected by its title), with the hope that Westwind would achieve a viable operational restructuring, by realigning or revamping its business operations, such that it would be able to pay the restructured loans owed to the Trusts, as well as the obligations owed to Burger King and third parties.

Under New York law, “[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.” *Dalton, supra*, at 389. The implied covenant of good faith and fair dealing requires that “even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party’s right to the benefit under the agreement.” *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 (1<sup>st</sup> Dept 2003). To sustain a breach of the implied covenant claim, the claimant must allege and show that the other party “exercised a [contractual] right malevolently, for its own gain as a part of a purposeful scheme designed to deprive [claimant] of the benefits” under the contract. *Id.* However, the implied covenant claim is not without limit, and no obligation can be implied or imposed upon a party that “would be inconsistent with other terms of the contractual relationship.” *Murphy v American Home Products Corp.*, 58 NY2d 293, 304 (1983).

The record does not support Strauss’ allegation that Westwind was deprived of its benefits under the Restructuring Agreement. Instead, the record shows that despite

Westwind's financial restructuring (debt reduction and loan advance) that was achieved with the help of plaintiffs, Westwind failed to achieve, on its own, an operational restructuring of its business. Also, as discussed above, because the acceptance of funds transferred into the Concentration Account and the application of such funds toward the repayment of debts owed to the Trusts (as well as refusal to grant purported closure requests) were consistent with plaintiffs' contractual rights, the breach of the implied covenant claim cannot be used to limit or restrict plaintiffs' exercise of such rights, particularly where the record does not show that plaintiffs exercised such rights malevolently for their own gain.

Moreover, because the breach of contract and breach of implied covenant claims are based on the same facts and purported acts or omissions of plaintiffs, the breach of implied covenant claim should be dismissed as duplicative. *Empire State Building Associates v Trump*, 247 AD2d 214 (1<sup>st</sup> Dept 1998) (breach of implied covenant claim dismissed because claimant failed to allege or establish any breach of contract, and the implied covenant claim duplicated the contract claim). Accordingly, Strauss' breach of implied covenant of good faith counterclaim is dismissed.

#### Breach of Fiduciary Duty Counterclaim

Strauss concedes that his breach of fiduciary duty claim should be dismissed as to plaintiffs because it is black letter law that there is no fiduciary relationship between plaintiffs (as creditor) and Westwind (as debtor). See e.g., *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 (1<sup>st</sup> Dept 2004). However, as to counterclaim defendant Wolnick, who was allegedly encouraged by Strauss to serve as a Westwind director in connection with the Restructuring

Agreement (which provided the Trusts with the right to appoint a director on Westwind's board of directors, and Wolnick agreed to so serve as a Bay View representative), the counterclaim alleges that Wolnick breached his fiduciary duty to Westwind because he wore two hats at the same time, as a director of Westwind and as an officer of counterclaim defendant Bay View.<sup>8</sup> Specifically, Strauss alleges that because Wolnick had the power (as a Bay View executive) to stop the Trusts from breaching the Restructuring Agreement but that he failed to do so, he breached his duty of loyalty to Westwind because he favored the interests of his employer Bay View over Westwind.

Wolnick counters that he did not breach the duty of loyalty because (1) he did not seek or obtain personal gain, nor did he engage in self-dealing, as he did not benefit from the transactions among the Trusts, Bay View and Westwind; and (2) he did not have a disqualifying conflict of interest and, in any event, any conflict was not material since, during his short tenure as a director, Westwind's board did not vote or pass any resolution. Wolnick also contends that Strauss should be equitably estopped because he persuaded Wolnick to join the board, personally elected Wolnick to the board, and never objected to Wolnick's service as a Westwind director while knowing that he was also employed by Bay View.

Strauss does not argue, nor has he come forward with evidence, that Wolnick benefitted personally or engaged in self-dealing. Relying on *Strassberger v Earley*, 752 A2d 557 (Del. Ch. 2000), Strauss contends that the case stands for the proposition that a personal

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8

In his brief, Strauss indicates that the breach of fiduciary duty counterclaim is only meant to allege a breach of the duty of loyalty, not a breach of the duty of care. This distinction is important because both decisional and statutory authorities apply different standards in respect of these duties.

benefit need not be an element of a breach of loyalty claim, but that liability may be imposed upon a director who favors the interest of his employer over the interest of the corporation on whose board he sits.<sup>9</sup> In *Strassberger*, a minority shareholder commenced a derivative action, claiming that the board of directors breached their fiduciary duty by using assets of the corporation to repurchase its shares for the directors' own benefit. The Delaware court found that two of the directors (Stiska and Early) breached their duty of loyalty, not because they obtained a personal benefit, nor was there any evidence that they conspired with the culprit director (Walden) who was engaged in self-dealing and used corporate assets for his own benefit, but because they voted in favor of the stock repurchase due to their primary loyalty to their own employer (an entity that had decided to cash out its equity position in the corporation), and they were willing to subordinate the interest of the minority shareholders of the corporation to the interest of Walden. *Id.* at 581.

In *Strassberger*, however, the two defendant directors affirmatively voted along with Walden (and might be deemed to have aided and abetted Walden) in furtherance of an improper corporate transaction that injured minority shareholders. Here, no vote or resolution was passed by Westwind's board while Wolnick was a director. Also, the two *Strassberger* directors' action (voting for the transaction even though their motive was to benefit their own employer) was tainted by the self-dealing motive and illegal actions of the culprit director Walden. In contrast, Bay View's action in applying funds against debts owed to the Trusts were a proper exercise of contractual rights, and its refusal to grant closure request was an

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<sup>9</sup>

The parties cited to Delaware law because, Westwind Holding, on whose board Wolnick sat, is a Delaware corporation.

exercise of contractual discretion that was neither irrational nor arbitrary. Because Bay View acted properly and legally, Wolnick could not be said to have improperly or illegally favored Bay View over Westwind.

Further, under Delaware law, when a corporation is operating in the zone or vicinity of insolvency, its directors' fiduciary duty extends not only to the corporation's shareholders, but also to its creditors. *Credit Lyonnais Bank Nederland, N.V. v Pathe Communications Corp.*, 1991 WL 277613 (Del Ch. 1991).<sup>10</sup> Here, it seems undisputed that Westwind was insolvent or was in the vicinity of insolvency (during the relevant period) in that it was unable to pay its debts when they became due and payable. Thus, it would not have been improper for Wolnick, as a Westwind director, to consider (assuming he did consider) the interest of creditors of Westwind, including the Trusts and Bay View, as to how the assets of Westwind should be used to satisfy its various obligations. Accordingly, the breach of fiduciary (loyalty) duty counterclaim against Wolnick is dismissed.

With respect to Bay View, Strauss appears to concede that his breach of fiduciary duty claim should be dismissed, just as such claim is dismissed as against plaintiffs. Yet, he seeks leave of this court to amend his claim to assert that Bay View aided and abetted Wolnick's breach of fiduciary duty. Because I have determined that the breach of fiduciary duty counterclaim must be dismissed as against Wolnick, I deny Strauss' request for leave to

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New York law is similar: see *New York Credit Men's Adjustment Bureau v Weiss*, 305 NY 1, 7 (1953) ("[i]f the corporation was insolvent ... directors and officers ... were to be considered as though trustees of the property for the corporate creditor-beneficiaries."); see also *Cooper v Parsky*, 1997 WL 242534 (SD NY 1997), *aff'd*, 12 Fed Appx 28 (2d Cir 2001) (under New York law, creditors are owed a fiduciary duty by officers and directors when the corporation is insolvent).

amend the counterclaim as against Bay View.

In addition, Strauss alleges that the actions of Wolnick and Bay View caused the destruction of Westwind, because they could have prevented a shortfall of funds that Westwind needed to pay Burger King, and their failure to so act led Burger King to foreclose, thereby destroying Westwind's business. However, the record reflects (and Strauss has not produced contrary evidence) that Westwind's operating revenues were insufficient to pay Burger King and the Trusts (as well as other vendors). Failure to pay the debts, when due, under the Restructured Notes and Term Notes, was an event of default, which would trigger foreclosure rights by the Trusts and Bay View under the Restructuring Agreement. Thus, Westwind could have been foreclosed either by Burger King or by the Trusts, and the alleged action or inaction of Bay View and Wolnick could not have caused Westwind's demise.

Interference of Contractual and Business Relation Counterclaim

Strauss alleges that plaintiffs and Bay View tortiously interfered with the contractual and business relations between Westwind and Burger King, by wrongfully taking money that was earmarked for Burger King, thus rendering it impossible for Westwind to fulfill its obligations under the franchise agreements with Burger King to pay royalties to Burger King, which led to Burger King's termination of the franchise.<sup>11</sup>

The elements of a claim based on tortious interference with contractual or business relations are: (1) existence of a contract between the claimant and third party; (2) defendant's

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In his brief, Strauss states that this counterclaim is not asserted against Wolnick. The brief also recasts the claim as "tortious" interference as opposed to "intentional" interference.

knowledge of the contract; (3) defendant's intentional inducement of third party to breach or otherwise render contract performance impossible; and (4) damages to the claimant. *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993); *Bernberg v Health Mgmt. Systems, Inc.*, 303 AD2d 348, 349 (2d Dept 2003). When the defendant's conduct is based on economic justification, it is a defense to the claim. *Collins v E-Magine, LLC*, 291 AD2d 350, 351 (1<sup>st</sup> Dept 2002) (“[a]s a general matter, economic interest precludes a claim for tortious interference with a contract unless there is a showing of malice or illegality.”).

In this case, it appears that the first, second and fourth elements of the claim have been satisfied: Westwind and Burger King were parties to franchise agreements, plaintiffs and Bay View were aware of such agreements, and the agreements were terminated by Burger King for, among other reasons, nonpayment of royalties. However, the record does not support the allegation that plaintiffs and Bay View intentionally induced Burger King to terminate the franchise. Instead, it shows that plaintiffs and Bay View exercised their contractual rights in applying the funds (that were not earmarked) toward payment of the debts owed to the Trusts, which constitutes an economic justification and a defense to a tortious interference claim. While their act of exercising a contract right might have rendered or caused Westwind unable to perform its obligations to Burger King, it cannot be said that plaintiffs and Bay View acted maliciously or illegally, nor is there evidence to the contrary.

Plaintiffs and Bay View stood to gain nothing from the Burger King franchise termination, because that would lead to the cessation of Westwind's business, which in turn, would extinguish any hope of getting repaid on the debts that Westwind owed to the Trusts. In other words, it makes no sense why plaintiffs and Bay View would wish for franchise

termination, as that would be tantamount to economic suicide. Hence, the tortious interference of contractual and business relation counterclaim is dismissed.

#### Summary Judgment on The Second Guaranty

In addition to moving for summary judgment to dismiss the above counterclaims, plaintiffs also seek summary judgment that Strauss is liable under the Second Guaranty, which, as discussed, is in an amount up to \$1.8 million of the \$2.6 million Special Servicing Advance.

Opposing summary judgment, Strauss argues that because plaintiffs breached the underlying Restructuring Agreement with Westwind (the principal obligor), he is not liable on the Second Guaranty (as a guarantor) with respect to Westwind's obligations, citing, *Spancrete Northeast, Inc. v Travelers Indemnify Co.*, 112 AD2d 571, 572 (3d Dept 1985) ("As surety, defendant was entitled to assert any defenses or counterclaims ... that were available to [the principal obligor]). Plaintiffs contend that because Strauss' obligation under the Guaranty is personal, unconditional and absolute, and because he has expressly waived any and all claims and defenses as to the performance and payment of his obligation pursuant paragraph 18 of the Second Guaranty,<sup>12</sup> he cannot assert defenses or counterclaims of Westwind based on plaintiffs' alleged misconduct.

Strauss responds that the boilerplate language of paragraph 18 cannot override the special language in paragraph 25 of the Second Guaranty, which states, in relevant part, that

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Paragraph 18 provides, in relevant part, that Strauss agrees to waive "any and all claims ... and defenses to performance and payment hereunder relating in any way ... to the exercise of any of the Servicer's rights with respect to the Special Servicing Advance ... the Restructuring Agreement or any of the documents related thereto ...."

“notwithstanding anything to the contrary set forth in this Guaranty, [Bay View] acknowledges that enforcement of its rights under this Guaranty is subject to ... the terms and conditions of the Restructuring Agreement ....” According to Strauss, paragraph 25 overrides paragraph 18, and authorizes him to assert counterclaims and defenses of Westwind against any liability he may have under the Second Guaranty.

Regardless of whether Strauss may assert defenses or counterclaims of Westwind (based on paragraph 25 or otherwise), because I have determined that all counterclaims (as discussed) are without merit and must be dismissed, they are not available as defenses to Strauss’ liability under the Second Guaranty.

As a separate defense, Strauss argues that because plaintiffs received \$3 million from the bankruptcy sale of Westwind’s assets, which is more than his \$1.8 million liability under the Second Guaranty, plaintiffs should have applied the sale proceeds against the Second Guaranty, reducing the liability thereunder to zero. In support of this, Strauss contends that section 5.3 of the Restructuring Agreement, which sets forth the waterfall provisions, requires that Available Funds be first applied toward payment of the Term Notes (\$2.6 million) prior to the Restructured Notes (\$43 million).

However, section 5.3, a portion of which is summarized in footnote 4, *supra*, provides that the waterfall is in effect “unless the Restructured Notes have been declared due and payable pursuant to Section 12.2 hereof.” Section 12.2 sets forth the rights and remedies of the Servicer if any “event of default” occurs under section 12.1 of the Restructuring Agreement. As noted above, in April 2002, GMACCM notified Westwind that events of default have occurred under the Restructuring Agreement, and in May 2002, GMACCM

declared that all debts owed to the Trusts would be accelerated, including the Restructured Notes and Term Notes. Hence, upon GMACCM's declaration of default pursuant to section 12.2, the waterfall under section 5.3 ceased to take effect, and GMACCM was entitled to apply the sale proceeds, according to its discretion, pursuant to the provisions of the Loan Agreement.

Strauss argues that the only reason for the default was due to Westwind's inability to pay Burger King caused by plaintiffs' misappropriation of funds that were intended for Burger King, and that the notice of default was improper or invalid. The notice of default, however, alleged multiple violations of the Restructuring Agreement, including, among other things, improper payments to a Westwind affiliate, failure to submit required financial information, variances from operating budgets, and delinquency in Burger King payments. The record does not reflect that Strauss or Westwind had challenged or contested the propriety or validity of the notice, and now belatedly claims that the default notice is invalid. I reject such claim because it is without merit.

Strauss' assertion that both his testimony, and that of Westwind's counsel, indicated that the reference in the Second Guaranty to section 5.3 (the waterfall) of the Restructuring Agreement was intended to ensure that funds be applied towards payment of the Term Notes prior to the Restructured Notes under all circumstances, is unavailing in this summary judgment motion. Such testimonies are inadmissible parol evidence because they contradict the clear and unambiguous language of section 5.3, which specifically states that the waterfall does not apply in the event of a default. *See South Road Assocs., LLC v International Business Machines Corp.*, 4 NY3d 272, 278 (2005) (“[E]xtrinsic and parol evidence is not

admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face”). Further, Strauss is a sophisticated businessman who was assisted by counsel in the negotiation and drafting of the Restructuring Agreement and Second Guaranty, and had he intended that the waterfall remain in effect after a default, he could have negotiated for such a clause. A careful reading of the documents leads to the conclusion that they have “a definite and precise meaning, unattended by danger of misconception in the purport of the [documents themselves], and concerning which there is no reasonable basis for a difference of opinion.” *Breed v Insurance Co. of North America*, 46 NY2d 351, 355 (1978). Thus, Strauss’ alleged personal intent does not create an issue of fact or ambiguity in the Guaranty.

Based on the foregoing, plaintiffs’ motion seeking summary judgment on the Second Guaranty is granted.

#### Summary Judgment for Dismissal of The First Guaranty

As noted above, simultaneous with the execution of the Loan Agreement, Strauss signed the First Guaranty, pursuant to which he guaranteed repayment of the debts owed by Westwind, upon the occurrence of certain “trigger events” that are set forth in a schedule annexed to the First Guaranty. The trigger events that are the subject of this litigation include: (1) improper payments to a Westwind’s affiliate; (2) granting purchase money security interests to vendors; and (3) improper distributions to Strauss.

Strauss argues that the intent of the First Guaranty is to prevent him from engaging in bad acts (such as theft or fraud for his personal benefit), but the alleged acts (which plaintiffs

characterize as trigger events) were, in some instances, business decisions made by him and Westwind that were necessary to save Westwind from liquidation. Hence, he contends that he is not liable under the First Guaranty, and moves for summary judgment dismissing plaintiffs' claim under the First Guaranty.

(1) Improper Payment to Affiliate

The Loan Agreement prohibits Westwind from making unauthorized transfers to its affiliate, and it is a trigger event under the First Guaranty if distributions made to Strauss, as guarantor, were in contravention of the Loan Agreement. In addition to owning Westwind, Strauss also owned a Westwind affiliate called Westwind ALWA LLC (ALWA), which operated many Burger King franchise restaurants in Alabama and Washington.<sup>13</sup>

Plaintiffs allege that, at Strauss' direction, Westwind made certain payments for the benefit of its affiliate, ALWA, in violation of the Loan Agreement and the Restructuring Agreement, including payment of approximately \$1 million of ALWA's management fees and \$300,00 of its legal fees, and ALWA's financial records indicated that during the relevant period, ALWA had negative cash flow and was unable to make such payments from its own resources.<sup>14</sup>

Strauss does not dispute that Westwind made transfers to and for the benefit of

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Specifically, Strauss owned 95% of the equity stock of ALWA, and Westwind Management Company, which is wholly-owned by Strauss, owned the remaining 5%. Westwind Management provided general corporate services to each of the Westwind operating companies, including ALWA, and each of them was required to pay a separate management fee to Westwind Management for such services.

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Notably, ALWA is not indebted to the Trusts, but to a different lender named Peachtree Franchise Finance.

ALWA, but argues that the management fees paid by Westwind were for its national overhead expenses, which would have to be paid regardless of whether ALWA existed. He also argues that the legal fees were for restructuring work, and the services provided by counsel had tremendous overlap due to a similarity of issues that involved both Westwind and ALWA. Strauss further argues that the First Guaranty only prohibits distributions to him (as guarantor), and just because he owned ALWA, the distributions to and for the benefit of ALWA, as well as the fees paid to counsel on behalf of ALWA, could not and should not be equated as distributions to him.

These arguments are unpersuasive for several reasons. First, ALWA was an entity having its own assets, obligations and lender. Strauss directed or authorized Westwind to divert revenues from its operations (which were collateral to the Trusts) to pay for the obligations of ALWA, which was not a borrower under the Loan Agreement or Restructuring Agreement, and did not pledge its assets to the Trusts. The loan documents acknowledged ALWA's existence and prohibited Westwind from making transfers to ALWA (for obvious reasons). In any event, ALWA was obligated to pay for its own share of the management fees, which cannot be deemed to constitute Westwind's national overhead expenses.

Second, the record shows that legal fees incurred by ALWA were for a restructuring that was unrelated to Westwind's own restructuring. Indeed, the law firm that represented both Westwind and ALWA in their respective restructuring acknowledged that separate legal services were rendered to ALWA, and its bills properly reflected fee allocations for such services.

Third, the Guaranty states that distributions made to Strauss in contravention of the

Loan Agreement would be a trigger event, and it is undisputed that Strauss owned ALWA, the immediate beneficiary of the subject transfers, and that he directed or caused Westwind in making such transfers. This raises an issue of fact as to whether Strauss was an indirect beneficiary, such that the transfers or distributions to ALWA could be deemed distributions to Strauss for purposes of the Guaranty, which may be construed to cover both direct and indirect distributions.

(2) Granting Purchase Money Security Interests to Vendors

It is a trigger event under the First Guaranty if Strauss voluntarily encumbered any collateral of the Trusts by granting to third parties liens that are not permitted by the Loan Agreement. In June and July 2002 (after GMACCM had notified Westwind of the occurrence of events of default and accelerated all debts owed to the Trusts), Strauss caused or authorized Westwind to grant purchase money security interests to three vendors: Prince Castle Inc. (a kitchen equipment supplier), as well as McCabes Quality Food Inc. and Meadowbrook Meat Company Inc. Under the Loan Agreement, the definition of "collateral" includes future acquisition or purchase of property by Westwind, such as kitchen equipment, food and meat.

Strauss contends that the granting of liens was necessary and cannot create liability under the Guaranty. As to the kitchen equipment liens, Strauss argues that the Burger King franchise agreement required kitchen upgrades, and failure to do so would be a default that could lead to franchise termination. As to the food/meat liens, Strauss argues that these vendors would stop deliveries unless they were granted security interests. Strauss also contends that all liens granted were the result of business decisions, as they were vital to the

continuation of Westwind's operations, and that the rule of reason, as well as the implied covenant of good faith and fair dealing, dictate that plaintiffs should have approved these liens.

While the granting of liens might have been a business necessity because Westwind did not have cash to pay the vendors, the purchase money security interests granted to these vendors trumped or primed the Trusts' liens, thus impairing the rights and interests of the Trusts in collateral. Strauss had to make a difficult choice as to whether to grant the liens (thus exposing himself to potential liability to the Trusts under the First Guaranty) or to test the wills of Burger King and the vendors (thus risking the potential of franchise termination and cessation of food deliveries). He chose the former.

The "rule of reason" argument raised by Strauss, contending that the Loan Agreement and the Guaranty should be interpreted to require plaintiffs to act reasonably in approving the grant of liens, is unpersuasive. These documents were negotiated by sophisticated parties, and the prohibition against the granting of liens without the lender's approval, without requiring the lender to act reasonably, was meant to protect the lender. Thus, there is no basis "to interpret an agreement as impliedly stating something which the parties have neglected [or did not intend] to include." *425 Fifth Avenue Realty Associates v Yeshiva University*, 228 AD2d 178 (1<sup>st</sup> Dept 1996). Further, it does not appear that plaintiffs acted in bad faith in refusing to approve the granting of liens, as they were exercising a contractual right to protect their economic interest and collateral. *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 15 (1988) (duty of good faith cannot be read to require a secured party to take actions that would impair its collateral); *Reda v Eastman Kodak Company*, 233 AD2d 914, 915-916 (4<sup>th</sup> Dept

1996) (“a court should not construe a contract as implying an obligation that would be inconsistent with other terms of the contract”).

(3) Improper Distributions to Strauss

As noted, it is a trigger event under the First Guaranty if distributions made to Strauss contravened the Loan Agreement. Plaintiffs allege that in addition to his salary (which was limited to \$450,000), Strauss received other distributions from Westwind, in the form of (i) maintenance payments for a Florida condominium that was owned and used by Strauss and his wife; and (ii) undocumented travel expenses reimbursed to Strauss.

Strauss argues that (a) the condominium was used for corporate purposes and it was appropriate that Westwind paid the maintenance charges; and (b) he was entitled to be reimbursed for travel expenses in addition to salary, and his expense receipts could not be located due to Westwind’s bankruptcy and warehousing of numerous corporate files. Further, Strauss argues that even if plaintiffs’ condominium and travel expense claim survives summary judgment, any damages suffered by plaintiffs relating to this claim would not exceed \$44,250, and he should not be held liable for the \$43 million debt owed by Westwind. More specifically, Strauss contends that, because the First Guaranty states that his agreement to pay the amount of any loss or damage suffered by plaintiffs is tied to acts or omissions “resulting from” one or more of the trigger events, his liability cannot exceed the actual amount of distributions (i.e. damages) he received from Westwind.<sup>15</sup>

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Strauss made a similar argument with respect to the alleged improper distribution to affiliate claim (\$1.3 million) and the improper granting of liens to vendors claim (\$100,000).

However, the First Guaranty also states that Strauss' liabilities "shall include the full payment and performance, of all of the Obligations of the Borrowers, not paid or performed by the Borrowers ... arising under or in connection with ... any of the other Loan Documents." This raises an issue as to whether his liabilities, as Strauss contends, are limited to the actual damages suffered by plaintiffs resulting from the trigger events, or his liabilities include all unpaid obligations owed by Westwind to the Trusts. This issue, alone, precludes summary judgment.

As discussed, there are other issues of fact as to whether (1) the condominium was used for corporate purposes, as Strauss contends, or it was used as his private residence; (2) the distributions made to and on behalf of ALWA should be deemed distributions to Strauss for purpose of the First Guaranty; and (3) the granting of security interests was a business justification that could overcome the restrictions under the First Guaranty.

Accordingly, based on the foregoing, summary judgment cannot be granted in favor of Strauss with respect to his liability under the First Guaranty.

Accordingly, it is

ORDERED that the motion for summary judgment by counterclaim defendants Bay View and Wolnick (Motion Sequence Number 16) is hereby granted, the counterclaims against them are hereby severed and dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk of the Court is hereby directed to enter judgment accordingly; and it is further

ORDERED that the motion for summary judgment by Strauss and counterclaim plaintiff (Motion Sequence Number 17) with respect to the First Guaranty is hereby denied;

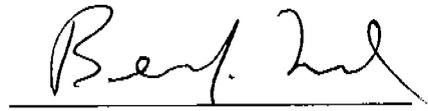
and it is further

ORDERED that the motion for partial summary judgment by plaintiffs and counterclaim defendants Trustee and GMACCM (Motion Sequence Number 18) with respect to the Second Guaranty is hereby granted and the counterclaims against them are hereby dismissed; and it is further

ORDERED that the remainder of this action shall continue.

Dated: 10/30/06

ENTER:



**BERNARD J. FRIED**  
I.S.G.  
J.S.C.

**FILED**

OCT 30 2006

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