

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WELLS FARGO BANK N.A.,

Plaintiff,

Case No. 13-135141-CH

v

Hon. Wendy Potts

BECK BUSINESS CENTER, INC.,

Defendant.

OPINION AND ORDER RE:

DEFENDANTS BECK BUSINESS CENTER, INC, VASILIOS DAMAVOLETES, AND
BECK PROPERTY MANAGEMENT, LLC'S MOTION FOR SUMMARY DISPOSITION AS
TO COUNTS I, II, V, AND VI OF FIRST AMENDED COMPLAINT PURSUANT TO MCR
2.116(C)(8)

AND

DEFENDANT BECK BUSINESS CENTER, INC'S MOTION FOR PAYMENT OF
ATTORNEY FEES FROM PROPERTY INCOME

At a session of Court
Held in Pontiac, Michigan

DEC 02 2013

Defendants move the Court to dismiss some of Plaintiff's claims under MCR 2.116(C)(8) on the ground that Plaintiff fails to state its claims as a matter of law. A motion under (C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion may be granted only where the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). The Court is deciding the matter without oral argument. MCR 2.119(E)(3).

The Court notes at the outset that after Defendants filed this motion, Plaintiff filed a second amended complaint. The amended pleading eliminates Plaintiff's Count VI that claimed a

breach of the management subordination agreement. Thus, Defendants' request to dismiss that claim is moot.

Defendants argue that Plaintiff's Counts I and V fail to include sufficient factual allegations to support its claim for springing recourse liability under the note and Defendant Damavoletes's guaranty. Under MCR 2.111(B)(1), Plaintiff is required to plead a statement of facts and "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." Here, Plaintiff alleges that Defendants breached the note and guaranty in several specific ways that would give rise to Defendants' liability for a deficiency. The allegations are sufficient to give Defendants notice of the nature of Plaintiff's claim for breach of the loan documents and to allow Defendants to take a responsive position. *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Defendants are not entitled to summary disposition of these claims.

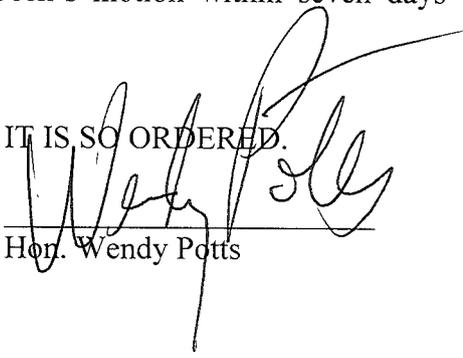
Defendants also argue that Plaintiff's Count II alleging claim and delivery is an improper attempt to obtain a deficiency judgment on a replevin theory. Plaintiff contends that it remedied this concern in its second amended complaint by removing all reference to a deficiency. However, the issue raised by Defendants is whether Plaintiff has a right to obtain possession of goods or chattel, which would be the proper basis for a claim and delivery action. MCL 600.2920(1). The Court agrees with Defendants that Plaintiff's Count II fails to plead that it is entitled to possession of goods or chattel. The Court dismisses Count II without prejudice. To the extent that Plaintiff believes that it is entitled to possess property that could be the subject of a claim and delivery action, Plaintiff may file an amended complaint within 14 days.

In sum, the Court grants Defendants' motion as to Count II seeking claim and delivery and dismisses that claim without prejudice. In all other respects, Defendants' motion is denied.

Regarding Beck Business Center's motion asking the Court to use rental income to pay its attorneys' fees, the Court orders Beck within seven days to produce detailed billing records or invoices from their attorneys regarding the fees incurred and serve copies of the documents on Plaintiff and the Receiver. Beck must also within seven days provide the Court, Plaintiff, and the Receiver with an accounting of any rents they have not turned over to the Receiver which must include, at a minimum, the date the rents were collected, the amounts collected, and from whom. The parties may submit supplemental briefs regarding Beck's motion within seven days of service of Beck's attorney fee documents and accounting.

Dated: **DEC 02 2013**

IT IS SO ORDERED.



Hon. Wendy Potts