

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**OAKVIEW PROPERTIES, LLC,
Plaintiff,**

v.

**Case No. 13-135902-CK
Hon. James M. Alexander**

**CB 2010, LLC and
TRIMONT REAL ESTATE ADVISORS, INC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition. In January 2008, Plaintiff executed a promissory note in favor of Citizens Bank in the principal sum of \$470,000. As security for the note, Plaintiff executed a mortgage in Citizens' favor that encumbers an office building located at 1523-1527 North Main Street in Royal Oak.

Under the mortgage's terms, Plaintiff was required to pay the property taxes, and failure to do so constituted a default. In May 2010, Citizens provided Plaintiff with written notice of default based on Plaintiff's failure to pay the 2008 and 2009 property taxes. Plaintiff, however, failed to cure within the ten-day period provided in the mortgage. Instead, Plaintiff waited until January 2011 to pay the past-due taxes.

Based on Plaintiff's failure to cure, Citizens began charging the default interest rate of 10.64% in July 2010. In December 2010, Citizens assigned the note to Defendant CB 2010, who continued to charge the default interest rate. The assignment was recorded on July 18, 2013. The

note matured on January 14, 2013, and Plaintiff failed to pay the balance due – which also constitutes a default on the note and mortgage. CB 2010 provided notice of this default on April 25, 2013, and Plaintiff (again) failed to cure. In July 2013, CB 2010 then began foreclosure by advertisement proceedings under a “power of sale” clause contained in the mortgage.

In August 2013, Defendants filed this action to stop Plaintiff from foreclosing the mortgage. Plaintiff’s two-count Complaint alleges that (1) Defendant CB 2010 violated the terms of a promissory note by charging the default interest rate, and (2) Defendants violated Michigan’s foreclosure by advertisement statute.

Defendants now move for summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

First, Defendants claim that that they are entitled to summary disposition of Plaintiff’s claim that CB 2010 violated the terms of the promissory note by charging the default interest rate after Plaintiff satisfied the tax deficiency in January 2011.

In response, Plaintiff argues that “CB 2010 cannot have it both ways. It must either declare the Note to be in default and pursue its legal remedies . . . or it may allow [Plaintiff] to cure the default.” Plaintiff alleges that it cured the default when it paid the past due taxes.

In their Reply Brief, Defendants point to the “unambiguous language of the note” as resolving Plaintiff’s argument. The “Cure Provision” of promissory note provides:

If any default, other than a default in payment is curable and if Borrower has not been given a notice of breach of the same provision of the Note within the preceding twelve (12) months, **it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within ten (10) days;** or (3) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender’s sole discretion to be sufficient to cure the

default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

As stated, Citizens provided Plaintiff with written notice of default for failure to pay property taxes on May 4, 2010. Plaintiff, however, admits did not pay the delinquent taxes until January 2011. As a result, Plaintiff failed to “cure” the default as defined in the note, which requires reconciliation of said default within ten days. In other words, Plaintiff missed its chance to cure when it failed to pay the past-due taxes within ten days of the written notice.

Despite Plaintiff’s argument to the contrary, there is no ambiguity in the note. It plainly defines cure. And CB 2010 was within its right to charge the default rate for the remainder of the loan’s term based on Plaintiff’s failure to cure.

Next, Plaintiff argues that CB 2010 was not organized as a corporation until December 16, 2010 – one day after an Allonge to the Note was executed that evidenced Citizens’ assignment to CB 2010. Additionally, although the assignment was effective December 29, 2010, it was not recorded until July 2013. Without citation to any authority, Plaintiff claims that these facts “raise fact questions regarding Defendants’ interest in the Property and its ability to foreclose thereon.”

As Defendants point out in their reply brief, “it is a well-established rule that a contract entered into prior to the formation of a limited liability company can be adopted or ratified once the company is formed,” citing *Duray Dev, LLC v Perrin*, 288 Mich App 143, 151; 792 NW2d 749 (2010). As a result, it is of no consequence that CB 2010 was incorporated one day after the Allonge. Further, there is no dispute that the assignment was recorded before CB 2010 initiated foreclosure proceedings. As a result, the Court rejects Plaintiff’s unsupported arguments that CB 2010 was unable to foreclose.

For all of the foregoing reasons and viewing the evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute and Defendants are entitled to judgment as a matter of law. Therefore, the Court GRANTS Defendants' motion for summary disposition under (C)(10), and Plaintiff's Complaint is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED

April 16, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge