

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

**WELLS FARGO BANK, NA, as Trustee
for the registered holders of JP MORGAN
CHASE COMMERCIAL MORTGAGE
SECURITIES CORP, COMMERCIAL
MORTGAGE PASS-THROUGH CERTIFICATES
SERICES 2004-C3, acting by and through
C-III ASSET MANAGEMETN LLC, as
Special Servicer,
Plaintiff,**

v.

**Case No. 14-144382-PR
Hon. James M. Alexander**

**UNIVERSITY DEVELOPMENT CO, LLC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition. Plaintiff's predecessor made a generally nonrecourse loan to Defendant secured by a Mortgage on certain real property located at Cambridge Court Phases I and II at 2601 and 2701 Cambridge Court in Auburn Hills. This property consists of an office building. It is undisputed that Defendant is in default for nonpayment and owes \$20,227,845.84 on the Note and that Plaintiff is entitled to foreclose on said Mortgage.

The only dispute is what language, if any, should be included in the Judgment of Foreclosure relative to Plaintiff's right to pursue Defendant for any deficiency following the foreclosure sale. Plaintiff argues that it is entitled to pursue Defendant for such a deficiency under the Note's carve-

out terms. Defendant argues that no carve-out applies in this case, and therefore, Plaintiff is not entitled to pursue Defendant for any deficiency.

To its end, Plaintiff now moves for summary disposition under MCR 2.116(C)(9) or (C)(10) – seeking entry of its proposed Judgment of Foreclosure. MCR 2.116(C)(9) tests whether the defendant’s defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). MCR 2.116(C)(10) tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Defendant asks the Court to enter its version of the Judgment of Foreclosure, presumably under (I)(2).

The parties agree that the Court must determine and adjudge whether Defendant remains liable for any deficiency on the mortgage debt and, under MCL 600.3150, include the same in any judgment of foreclosure. The cited statute provides:

In the original judgment in foreclosure cases the court shall determine and adjudge which defendants, if any, are personally liable on the land contract or for the mortgage debt. The judgment shall provide that upon the confirmation of the report of sale that if either the principal, interest, or costs ordered to be paid, is left unpaid after applying the amount received upon the sale of the premises, the clerk of the court shall issue execution for the amount of the deficiency, upon the application of the attorney for the plaintiff, without notice to the defendant or his attorney. The court may order and compel the delivery of the possession of the premises to the purchaser at the sale.

Both sides cite to the November 23, 2004 Fixed Rate Note in support of their argument regarding any deficiency language.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*,

281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Following a default, the Note’s Exculpation provision, at paragraph 10.(a)(ii), provides (in relevant part) (emphasis added):

any judgment in any action or proceeding shall be enforceable against Borrower only to the extent of Borrower’s interest in the Property, in the Rents and in any other collateral given to Lender by the Security Instrument, and no other assets of Borrower, and no other person or entity shall have any liability whatsoever. Lender, by accepting this Note and the Security Instrument, agrees that it shall not, **except as otherwise specifically herein provided**, sue for, seek or demand any deficiency judgment against Borrower or any other person or entity in any action or proceeding, under or by reason of or under or in connection with this Note, the Assignment, the Other Loan Documents or the Security Instrument, or the Loan Documents.

Plaintiff claims that “except as otherwise specifically herein provided” refers to paragraph 10.(a)(iv) of the same section, which provides (also in relevant part):

Notwithstanding the provisions of this Article to the contrary, Borrower, by only to the extent of the interest in the Property, the Rents and any other collateral given to Lender created by the Security Instrument shall be personally liable to Lender for the Losses it incurs to the extent of and directly attributable to: . . . (D) to the extent of any act of actual waste or arson by Borrower, any principal, affiliate, general partner or member thereof.”

Plaintiff argues that it alleges “waste” that falls within paragraph 10.(a)(iv)’s limited carve-out, which serves as the basis for its right to pursue a deficiency against Defendant. In response to Plaintiff’s motion, Defendant argues that Plaintiff failed to allege actual waste.

Relevant to this point, Plaintiff’s Complaint alleges “waste” as follows:

Paragraph 7: (re: breaches) “(d) Defendant’s failure to make repairs to the subject

property resulting in waste.”

Paragraph 21: (re: defaults) “failure to cure any default . . . including, without limitation, failing to maintain the Property and allowing waste to occur.”

Paragraph 37: Details the waste to the property and claims \$258,100 in costs with these “deferred maintenance issues”:

- A. Deteriorating asphalt surfaces that require replacement;
- B. Deteriorating structural/frame areas that require replacement;
- C. Failure to replace outdated emergency generator; and
- D. Failure to recharge depleted fire extinguishers.

Paragraph 57: “As described herein, Defendant has committed waste against the Property, by allowing deterioration and disrepair to occur to the Property.”

Paragraph 58: “As described herein, Defendant’s failure to maintain the Property, and to allow waste to occur, places the Property at risk of loss and constitute a breach of the Loan Documents.”

The term “waste” is not defined in the loan document. When a term contained in a contract is undefined, it is appropriate to refer to dictionary definitions. *Fremont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012).

Black’s Law Dictionary defines “waste” as “Action or inaction by a possessor of land causing unreasonable injury to the holders of other estates in the same land.” Black’s Law Dictionary, 6th Ed; see also *Nusbaum v Shapero*, 249 Mich 252, 263; 228 NW 785 (1930) (reasoning “Anything that tends to destroy the security is waste.”).

Accepting Plaintiff’s “waste” allegations as true, the Court finds that the same do not rise to “actual waste.” Rather, Plaintiff’s allegations (regarding asphalt, structure/frame, generator, and fire extinguishers) represent only common, every-day deterioration and “deferred maintenance” items, not “actual waste” (not unreasonable injury or tending to destroy the security).

Because none of the Note’s contractual carve-outs contained in paragraph 10.(a)(iv) apply in

this case, Plaintiff has no right to pursue Defendant on any deficiency following the foreclosure sale, and the Judgment of Foreclosure must so provide.

The parties may present an appropriate Judgment of Foreclosure for entry based on this Opinion.

IT IS SO ORDERED.

October 21, 2015
Date

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