STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

THE BANK OF NEW YORK MELLON TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY CAPITAL I, INC, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-IQ14, acting by and through C-III ASSET MANAGEMENT LLC, as Special Servicer,

Plaintiff,

v.

CAMPUS VILLAGE SAGINAW, LLC, a Michigan limited liability company,

Defendant.
_____/

Case No. 14-023086-CH

Judge: M. Randall Jurrens (P27637)

OPINION RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION ON COUNT I OF COMPLAINT AND FOR SUMMARY DISPOSITION ON DEFENDANT'S COUNTERCLAIM

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The plaintiff seeks to enforce various commercial loan documents related to the defendant's apartment complex located adjacent to Saginaw Valley State University. The defendant demurs, asserting several defenses and, moreover, counterclaims for relief from the plaintiff.

Asserting there is no genuine issue of any material fact or, alternatively, that the defendant has failed to state a claim on which relief can be granted, the plaintiff now requests

partial summary disposition on its breach of contract claim and also dismissal of the defendant's counterclaim.

For the reasons stated in this opinion, the court concludes that the plaintiff is entitled to judgment on substantial portions of Count 1 of its complaint, and also to dismissal of most of the defendant's counterclaim.

Background

On March 1, 2007, the defendant entered into a commercial loan transaction with LaSalle Bank evidenced by several loan documents:

- Promissory Note in the principal amount of $11,400,000, payable with interest at the non-default rate of 5.62%, in monthly installments on the 1st day of each month until March 1, 2017; and, in the event of default continuing for 5 days, interest rises to 10.62% plus a 5% late charge on the past due amount, but, subject to specified exceptions, with enforcement being limited to collateral and without recourse to the defendant (or guarantor) (plaintiff's complaint, Exhibit A)
- Mortgage granting a mortgage on a parcel of real property located in Kochville Township, Saginaw County, Michigan, commonly described as 2207 Pierce Road, together with an assignment of all related leases/rents, a security interest in all personal property assets of the defendant, and requiring monthly funding of estimated taxes/insurance and a capital improvement replacement reserve (plaintiff's complaint, Exhibit B)
- Assignment of Leases and Rents assigning all leases and rents related to the mortgaged property, recorded March 7, 2007, in Liber 2428, Page 2166, Saginaw County Records (plaintiff's complaint, Exhibit C)
- Guaranty by Ernest D. Schaefer (plaintiff's complaint, Exhibit D)
- Letter of Credit Agreement requiring the defendant provide a $325,000 letter of credit in form and issued by a financial institution acceptable to plaintiff, and continuously renewed for successive 12 month periods (defendant's counterclaim, Exhibit 2)
- Hazardous Substances Indemnification Agreement (plaintiff's complaint, Exhibit E)
- Allonge assigning the Note to the plaintiff (plaintiff's complaint, Exhibit H)
- Assignment assigning the Mortgage and the Assignment of Rents to the plaintiff, recorded July 23, 2007 in Liber 2451, Page 1995, Saginaw County Records (plaintiff's complaint, Exhibit I)
- Omnibus Assignment (the "Omnibus Assignment") assigning to the plaintiff "any claims, collateral, insurance policies, certificates of deposit, letters of credit, escrow accounts, performance bonds, demands, causes of action and any other collateral arising out of and/or executed and/or delivered in or to or with respect to the Loan, together with any other documents or instruments executed and/or delivered in connection with or otherwise related to the Loan" (plaintiff's complaint, Exhibit J)
- Assignment of Management Agreement (plaintiff's complaint, Exhibit K)

As required by the Letter of Credit Agreement, the defendant procured a $325,000 letter of credit from Bank of America, which was renewed annually for several years.

After nearly four years of prompt payments, the defendant's monthly installments were commonly paid after the due date and expiration of the 5-day cure period before a default could be declared or default interest or late charges assessed (Note ¶¶ 4.1, 4.2, and 4.3; July 11, 2014 affidavit of Bryan Petska, ¶¶ 2-4; October 3, 2014 affidavit of Bryan Petska, ¶¶ 2-4; defendant's brief, Exhibit 6)[1].

The potential late charge if payment was not made within the 5-day cure period was reflected on each month's billing statement to the defendant[2] (plaintiff's supplemental brief, Exhibit B).

As time and events of default progressed, the plaintiff began sending periodic demand letters, beginning June 6, 2011 (and in 13 of the succeeding 30 months) which detailed the amount due, including "Default Interest Accrued thru xx/xx/xxxx [$]xxx,xxx.xx" (plaintiff's supplemental brief, Exhibit C).[3]

On October 24, 2011, Bank of America advised the plaintiff and the defendant that it was electing to not extend the letter of credit which was to expire by its terms on January 14, 2012 (plaintiff's brief, Exhibit 7).

On December 13, 2011, the defendant's Vice President of Finance, Ryan Conzelmann, emailed the plaintiff's Reserve Administrator, Robert Krueger (defendant's brief, Exhibit 7):

> We have requested on several occasions that Bank of America extend the letter of credit and our request has been denied. I recognize that the SLC[4] is a requirement under the loan documents, but I would ask if the SLC is still necessary? If so, are you planning to draw on the letter of credit prior to its expiration? If so, what will be done with the cash? Will it be held in a separate cash collateral account?

In response, Krueger emailed Conzelmann on December 16, 2011 (defendant's brief, Exhibit 7):

> Yes, we will cash the Letter of credit and put the funds in a Reserve Escrow Account; as per terms of Sec 3.05 of the Letter of Credit Agreement.

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[1] Interestingly, while both affidavits of Bryan Petska aver late payments began in March 2011, the defendant's documentary evidence indicate late payments began in December 2010 (defendant's brief, Exhibit 6).

[2] For example, the 12/16/10 statement for payment due 01/01/11 indicates "Late Charge of $4,429.08 Due if not paid by 01/06/2011".

[3] For example, the first letter provided to the court, dated June 6, 2011, notifies the defendant that it owes [$]128,077.84 in "Default Interest Accrued thru 6/5/2011", and the last letter provided, dated December 2, 2013, advises the defendant it owes "Default Interest Accrued thru 10/31/2013 [$]828,948.27".

[4] The court assumes this is an acronym for "standby letter of credit".

On December 19, 2011, the plaintiff presented the letter of credit to Bank of America for payment (plaintiff's brief, Exhibit 8). The plaintiff continues to hold the proceeds of the letter of credit. The defendant never provided a replacement letter of credit.

Beginning April 1, 2012, monthly statements to the defendant included an entry for "Outstanding Default Int [$]xxx,xxx.xx" (although the amount was not included in the "Total Payment Due") (plaintiff's supplemental brief, Exhibit B).

When the defendant failed to make the December 1, 2013 and January 1, 2014 installment payments (defendant's brief, Exhibit 6), plaintiff's then-legal counsel, on January 15, 2014, sent a letter notifying the defendant that it was in default under the Loan Documents as a result of "failure to make timely and complete payment of the amounts due under the Note" and, accordingly, demand was made for "[i]mmediate payment of the entire indebtedness including late charges, interest, prepayment charge, default interest and expenses of collection" (albeit without indicating the amount due) (plaintiff's complaint, Exhibit L).

On May 16, 2014, the plaintiff filed its Verified Complaint for Appointment of Receiver and Injunctive Relief, together with a Motion for Ex Parte Order Appointing Receiver. The court heard the receivership motion on June 4, 2014, resulting in a June 5, 2014 Order Regarding Motion for Appointment of Receiver that required the January through May 2014 installments be paid immediately and the parties negotiate in good faith to resolve how the June 2014 payment be made. In the absence of other resolution, the defendant made the June payment on August 13, 2014 (and the court understands the defendant has made payment each subsequent month).

On June 23, 2014, amending its June 6, 2014 Answer and Affirmative Defenses, the defendant filed its First Amended Answer and Affirmative Defenses, and Counterclaim.

Also on June 23, 2014, the court conducted a case management conference and issued a Case Management Order that, among other things, suspended discovery and referred the matter to facilitative mediation (which, as reported by August 13, 2014 letter from the mediator, Gene J. Esshaki, was unsuccessful).

On July 14, 2014, the plaintiff filed a Motion for Partial Summary Disposition on Count 1 of Its Complaint and for Summary Disposition as to Defendant/Counter-Plaintiff's Counterclaims Pursuant to MCR 2.116(C)(8) and (10). The court heard oral arguments on August 14, 2014, and the matter was taken under advisement, with the parties subsequently filing supplemental briefs.

The Pleadings

The plaintiff's complaint alleges the defendant defaulted under the Loan Documents by failing to make timely payments for the months of October 2013 through May 2014 (Complaint ¶¶ 24-26 and 41-42)[5] which, in turn, supports assessment of attorney fees and expenses (Complaint ¶ 27), and late fees and default interest (Complaint ¶ 28), and forms the basis for

[5] The court notes that the complaint does not reference, much less allege the defendant's breach of, the Letter of Credit Agreement.

claims for the balance due on the Note, foreclosure of the Mortgage, appointment of a Receiver, and injunctive relief to preserve collateral.

The defendant's First Amended Answer generally denies the complaint's allegations, and affirmatively asserts several defenses, including the plaintiff first breached the Loan Documents (Affirmative Defense 3), the plaintiff wrongfully accrued default interest and late fees (Affirmative Defense 4 and 14), the plaintiff lacks standing (Affirmative Defense 5, 6, 7, and 9), and the claims are barred by waiver/laches/estoppel (Affirmative Defense 10).

The defendant also filed a counterclaim asserting the plaintiff breached the terms of the Mortgage by over-estimating tax/insurance escrow requirements and failing to reimburse capital improvement expenses; breached the Letter of Credit Agreement by failing to apply proceeds to debt service requirements; wrongfully exercised dominion over, converted, the proceeds of the Letter of Credit Agreement rather than applying the proceeds to the Note; and requested an accounting of tax/insurance escrow funds, and calculation of debt balance/default interest/late fees.

Summary Disposition Standards

Motions brought pursuant to MCR 2.116(C)(8) test the *legal* sufficiency of a claim. Such motions are determined on the pleadings alone, assuming all well-pleaded factual allegations are true and construed in a light most favorable to the nonmovant. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

Motions brought under MCR 2.116(C)(10), test the *factual* sufficiency of a claim or defense. In determining such a motion, the court (a) must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties (although only to the extent that the content or substance would be admissible evidence), (b) must not assess credibility or determine facts, and (c) must view the admissible evidence (including reasonable inferences) in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(5)(6); *Maiden v Rozwood*, 461 Mich 109 (1999); *Ritchie-Gamester v City of Berkley*, 461 Mich 73 (1999); *Quinto v Cross & Peters Co*., 451 Mich 358 (1996); *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425 (2008).The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Pena v Ingham County Road Comm'n*, 255 Mich App 299, 310 (2003). Finally, there is no absolute rule that precludes relief under MCR 2.116(C)(10) until discovery has been completed. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292 (2009).

Plaintiff's Complaint

The plaintiff seeks partial summary disposition on Count 1 (Breach of Contract) of its complaint, pursuant to MCR 2.116(C)(10), arguing that there is no genuine issue of material fact that the defendant breached the terms and conditions of the Loan Documents, thus entitling it to enforce sundry rights and remedies, including assessment of default interest under the Note and "holding" proceeds under the Letter of Credit Agreement.[6]

Standing

As a threshold matter, the defendant challenges the plaintiff's standing to pursue a breach of contract claim (Affirmative Defenses 5, 6, 7, and 9), arguing that there is no evidence that LaSalle Bank formally assigned the Note or the Letter of Credit Agreement to the plaintiff but, rather only assigned the Mortgage and Assignment of Rents (plaintiff's complaint, Exhibit I).

However, this is rebutted by the Allonge (plaintiff's complaint, Exhibit H) and the Omnibus Assignment (plaintiff's complaint, Exhibit J)[7]; the former expressly referencing the Note to which it is attached, and the latter broadly encompassing,

> any claims, collateral, insurance policies, certificates of deposit, letters of credit, escrow accounts, performance bonds, demands, causes of action and any other collateral arising out of and/or executed and/or delivered in or to or with respect to the Loan, together with any other documents or instruments executed and/or delivered in connections with or otherwise related to the Loan.

However characterized (e.g. "standing", "real party in interest", etc.), there appears to be no genuine dispute that the plaintiff is, in fact, vested with authority to enforce the Loan Documents. *MOSES Inc v SEMCOG*, 270 Mich App 401 (2006).

Payment Default

Although the defendant formally denies the allegation it defaulted in timely payment of monthly installments (Answer ¶¶ 25 and 41, and Affirmative Defense 2), it submitted no evidence rebutting the plaintiff's evidence of nonpayment (July 11, 2014 affidavit of Bryan Petska, ¶¶ 2-8; October 3, 2014 affidavit of Bryan Petska, ¶¶ 2-4, 9, 11) and even provided the court a payment history that tacitly concedes the point (defendant's brief, Exhibit 6).

Rather, more to the point, the defendant argues any shortcoming in its performance should be excused for a variety of reasons, including the plaintiff first breached the Letter of Credit Agreement (Affirmative Defense 3), the plaintiff wrongfully accrued default interest and

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[6] The motion is characterized as one for "partial" summary disposition not only because it is limited to Count 1, Breach of Contract, but because the "[p]laintiff is not seeking an award of damages regarding the principal and interest amount at this juncture" (plaintiff's brief, n 2).

[7] These documents are also attached to the defendant's own brief (Exhibit 5).

late fees (Affirmative Defenses 4 and 14), and the plaintiff's claims are barred by waiver, laches and/or estoppel (Affirmative Defense 10).[8]

Letter of Credit Agreement / Application of Proceeds

The defendant argues that, although it may not have affirmatively paid monthly installments, it cannot be considered in default under the Note because the plaintiff was pre-paid when it received the entire proceeds ($325,000) of a letter of credit issued by Bank of America in satisfaction of the parties' Letter of Credit Agreement.

The Letter of Credit Agreement includes the following relevant provisions:

> **ARTICLE III**
> **Security/Term/Return of Letter of Credit/**
> **Presentment of Letter of Credit/Application of Proceeds**
>
> * * *
>
> **3.04 Presentment for Payment**. Lender may, at Lender's option and in addition to any other remedies it may have under the Loan Documents, and without notice to Borrower, present the Letter of Credit for a payment (in the amount of the Debt Service as defined hereinafter) and exercise any and all rights of collection, conversion or exchange and any and all other rights, privileges, options or powers pertaining or relating to the Letter of Credit upon Borrower's failure to pay, one time, any amounts owed pursuant to the Note within five (5) calendar days after such payment is due. In such event, Borrower must deliver to Lender a replacement Letter of Credit in the full amount required under this Agreement (or an amendment to the Letter of Credit so it again equals $325,000.00) prior to the last day of the month in which the draw occurred or it shall be an Event of Default under this Agreement, in accordance with Article IV below. Application of such payment proceeds shall be made in accordance with Section 3.05 herein.
>
> **3.05 Application of Proceeds of Letter of Credit**. Lender shall apply the proceeds from the Letter of Credit against any unpaid portion or installment of Debt Service under the Note. **"Debt Service"** shall mean the principal, interest, late fees and any other amounts due and payable under the Note in accordance with the terms thereof. Upon Lender's application of the proceeds of a draw to as set forth in this paragraph, such Event of Default for non-payment of Debt Service shall be deemed cured. At any time there has been a draw on the Letter of Credit and the replace Letter of Credit (or amendment) has not been delivered to Lender and thus less than $325,000.00 is available to be drawn upon by Lender, Borrower may not make any distributions to its members until the Letter of Credit again equals $325,000.00. Borrower agrees that it will use good faith, commercially reasonable efforts to make all Debt Service payments due under the Loan out of

[8] To the extent the defendant has not pursued other defenses, the court considers them abandoned. *Prince v MacDonald*, 237 Mich App 186, 197 (1999); *People v Bartello*, 35 Mich App 599 (1972).

the Gross Revenues from the Property prior to Lender having to draw on the Letter of Credit to cover any deficiency. **"Gross Revenues"** shall be defined as all income received from the Property, including without limitation, rent and any other amounts received with respect to the Property.

ARTICLE IV
Defaults and Remedies

4.01 Default. "Event of Default" shall mean the occurrence of any one or more of the following:

(a) Any default, failure or breach in the observance or performance by Borrower of any of Borrower's obligations or duties hereunder, including, but not limited to, Borrower's failure to renew or replace the Letter of Credit at least thirty (30) days prior to the then-current expiration date of the Letter of Credit;

(b) After any draw on the Letter of Credit, Borrower's failure to deliver to Lender a replacement Letter of Credit in the full amount required under this Agreement (or an amendment to the Letter of Credit so it again equals $325,000.00) prior to the last day of the month in which the draw occurred; and

(c) Any "Event of Default" (as defined thereunder), default, failure or breach in the observance or performance by Borrower of any of Borrower's obligations or duties under the note, the Mortgage, or any of the other Loan Documents, that is not cured within any applicable cure period set forth in such documents.

4.02 Remedies. Upon the occurrence of an Event of Default hereunder, Lender may, at Lender's option and sole discretion, take any or all of the following actions:

(a) Without notice to Borrower, present the Letter of Credit for full payment and exercise any and all rights of collection, conversion or exchange and any and all other rights, privileges, options or powers pertaining or relating to the Letter of Credit; or

(b) Exercise any and all rights and remedies afforded to Lender under the Uniform Commercial Code and any and/or all other applicable provisions of law or equity.

4.03 Application of Proceeds. The net proceeds of any amounts collected by virtue of the exercise by Lender of any of the remedies set forth in this Article IV (without regard to whether the Note has been accelerated) may be applied to the payment of all reasonable fees, charges, costs and expenses relating to the exercise of said remedies, including without limitation reasonable attorneys' fees, to the payment of the Indebtedness (including, without limitation, accrued and unpaid interest as set forth in the Note), and to the payment of any other costs and

> expenses of the Property or under the Loan Documents (including, without limitation, real estate taxes), in such order, and in in such amounts, as Lender shall, in its discretion determine and the residue, if any, shall be returned to Borrower. Lender may, in its sole and absolute discretion, apply the proceeds of the Letter of Credit, or any portion thereof, to cure an Event of Default or hold such security, but Lender shall have no obligation to apply any proceeds of the Letter of Credit to cure any Event of Default unless it so elects.
> *** * ***

The defendant argues that ¶ 3.05, *Application of Proceeds of Letter of Credit*, obligates the plaintiff to apply the letter of credit proceeds to installments it was otherwise obligated to pay (i.e. "Lender shall apply the proceeds from the Letter of Credit against any unpaid portion or installment of Debt Service under the Note"). And if so applied, many months' installments would be effectively pre-paid, thus eliminating the default claimed in the plaintiff's complaint and barring the requested relief.

The plaintiff counters that the defendant misreads the Letter of Credit Agreement: i.e. ¶ 3.05, *Application of Proceeds of Letter of Credit*, is limited to instances where, under ¶ 3.04, *Presentment for Payment*, the plaintiff is authorized to "present the Letter of Credit for payment (in the amount of the Debt Service as defined [in ¶ 3.05]) . . . upon Borrower's failure to pay, one time, any amounts owed pursuant to the Note." Moreover, ¶ 3.04 concludes by directing, "Application of such payment proceeds shall be made in accordance with Section 3.05 herein."

Rather, the plaintiff argues that it was authorized to retain the proceeds in a "reserve account" under the general default and remedies provisions of Article IV, particularly ¶ 4.03, *Application of Proceeds*:

> * * * Lender may, in its sole and absolute discretion, apply the proceeds of the Letter of Credit, or any portion thereof, to cure an Event of Default or hold such security, but Lender shall have no obligation to apply any proceeds of the Letter of Credit to cure any Event of Default unless it so elects.

The defendant contends that this merely demonstrates an inconsistency in the parties' contract, between ¶¶ 3.05 and 4.03, and such ambiguity may be resolved only at trial.

The primary goal in the interpretation of contracts is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473 (2003). When the language in the contract is unambiguous, courts must interpret and enforce the contract as written. *Rory v Continental Ins Co*, 473 Mich 457, 468 (2005). Unambiguous contract provisions reflect the parties' intent as a matter of law. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003). A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of one interpretation. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 386 (2013). A contract is ambiguous if two provisions irreconcilably conflict with each other, and courts should construe contracts so as to give effect to ever word or phrase as far as practicable. *Klapp, supra*, at 467. Contractual terms must be interpreted in light of their surrounding context. *Freemont Ins Co v Izenbaard*, 493 Mich

859 (2012). If the language of a contract is unambiguous, construction of the contract is a question of law for the court, and factual development to determine the intent of the parties is unnecessary. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722 (1997). If contract language is ambiguous, "the ambiguous language presents a question of fact to be decided by a" trier of fact. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

At first blush, ¶¶ 3.05 and 4.03 of the parties' Letter of Credit Agreement may appear inconsistent: the former mandates the plaintiff apply the proceeds to Debt Service, while the latter grants the plaintiff discretion in how to apply the proceeds, including the authority to "hold such security".

However, as the plaintiff points out, ¶¶ 3.05 and 4.03 can be harmonized when read in context: ¶ 3.04 authorizes the plaintiff to present the letter of credit for a payment in the amount of the "Debt Service" (a term ***defined only in*** ¶ 3.05), and concludes, "Application of such payment proceeds shall be made in accordance with Section 3.05". Accordingly, when directing the plaintiff to "apply the proceeds from the Letter of Credit against any unpaid portion or installment of Debt Service under the Note", ¶ 3.05 is limited by its context to presentment for payment under ¶ 3.04.

Conversely, ¶ 4.03, Application of Proceeds, applies to all other events of default, including, specifically, the defendant's "failure to renew or replace the Letter of Credit at least thirty (30) days prior to the then-current expiration date of the Letter of Credit", ¶ 4.01.

Rather than assume the [sophisticated] parties attributed no rational meaning to the words of ¶¶ 3.05 and 4.03, this interpretation gives effect to each provision of the parties' agreement. *Leon v Detroit Harvester Co*, 363 Mich 366, 370 (1961).

Moreover, there is no genuine dispute that the letter of credit was presented for payment on December 19, 2011 not because the defendant failed to make installment payments[9] but, rather, because Bank of America had indicated an intention to not renew the letter of credit that was expiring on January 14, 2012 (plaintiff's complaint, Exhibit 7).

Therefore, the parties' expressed their intent regarding how the proceeds of the letter of credit would be applied under the circumstances present in this case, not in ¶ 3.05 but, rather in ¶ 4.03: i.e. the defendant unambiguously agreed that, if it failed to renew or replace the letter of credit, the plaintiff could, in its sole and absolute discretion, apply the proceeds of the letter of credit or hold such security, but expressly without any obligation to apply the proceeds to cure any default.[10, 11, 12]

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[9] According to the payment history (defendant's brief, Exhibit 6), the payment due 12/1/11 was made 12/2/11, well within the 5 day grace period afforded under ¶ 4.1 of the Note.

[10] Defendant's counsel does not agree with this interpretation, whether out of expediency, good advocacy, or good faith. However, no other interpretation that would harmonize the provisions of the parties' agreement has been advanced, just an assertion that the Letter of Credit Agreement is internally inconsistent. This is not enough to justify a judicial finding of ambiguity.

Default Interest / Late Charges

The defendant also asserts that the plaintiff "wrongfully accrued default interest and late fees", and that "[t]here is a good faith dispute over default interest and late fees, which precludes acceleration of the debt and foreclosure" (Affirmative Defense 4 and 14).

In pertinent part, the Note provides:

> 4. **Default**.
>
> 4.1 **Events of Default**.
>
> The following shall constitute an **"Event of Default"** under this Note: (a) failure to pay any amounts owed pursuant to this Note within five (5) days after such payment is due; (b) failure to pay the outstanding Principal Amount and all accrued and unpaid interest in full on the Maturity Date; or (c) the occurrence of any Event of Default under any of the other Loan Documents.
>
> 4.2 **Remedies**.
>
> So long as an Event of Default remains outstanding: (a) interest shall accrue at a rate (the **"Default Rate"**) equal to the lesser of (i) the Contract Rate plus 5% per annum, or (ii) the maximum amount permitted by applicable law, and, to the extent not paid when due, shall be added to the Principal Amount; (b) Lender may, at its option and without notice (which notice is expressly waived), declare the unpaid Principal Amount and all accrued and unpaid interest immediately due and payable. Lender's rights, remedies and powers, as provided in this Note and the other Loan Documents, are cumulative and concurrent, and may be pursued singly, successively or together against Borrower, the security described in the other Loan Documents, any guarantor(s) hereof and any other security given at any time to secure the payment hereof, all at the sole discretion of Lender. Additionally, Lender may in its sole discretion resort to every other right or remedy available at law or in equity without first exhausting the rights and remedies contained herein. Lender's failure for any period of time or on more than one occasion, to exercise its option to accelerate the Maturity Date shall not

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[11] The court notes that, notwithstanding the passage of nearly three years since the plaintiff presented the then-existing letter of credit for payment immediately prior to its impending expiration (with notice from Bank of America that it would not be renewed), the plaintiff has not taken steps to enforce, nor has the defendant satisfied, the requirement under the Letter of Credit Agreement for a replacement letter of credit (plaintiff's brief, Exhibit 6, Affidavit of Bryan Petska, ¶ 9).

[12] The court is not unaware of the December 13, 2011 email from the plaintiff's Reserve Administrator, Robert Krueger, to the defendant's Vice President of Finance, Ryan Conzelmann, indicating "[W]e will cash the Letter of credit and put the funds in a Reserve Escrow Account; as per terms of Sec 3.05 of the Letter of Credit Agreement". However, without more, this unilateral and erroneous reference to ¶ 3.05 cannot supersede proper application of ¶ 4.03 the parties' written agreement that allows the plaintiff to "hold" the proceeds under the circumstances of this case.

> constitute a waiver of the right to exercise the same at any time during the continued existence of any Event of Default or any subsequent Event of Default.
>
> 5. **Late Charge**.
>
> If payments of principal and/or interest, or any other amounts due under this Note or the other Loan Documents are not timely made and remain overdue for a period of five (5) days, Borrower, without notice or demand by Lender, promptly shall pay a late charge (the "Late Charge") equal to the lesser of (a) five percent (5%) of such past due amounts or (b) the maximum amount permitted by applicable law. Until paid, the Late Charge shall be added to the Principal Amount. Nothing in this Note shall be construed as an obligation on the part of Lender to accept, at any time, less than the full amount then due hereunder, or as a waiver or limitation of Lender's right to compel prompt performance.

Accordingly, there can be no genuine dispute that the plaintiff has the contractual authority to impose default interest and late charges.[13, 14] The better question is whether there is some legal basis to defeat the claim.

Waiver

The defendant asserts that the "[p]laintiff's claims are barred by . . . waiver, laches and laches" (Affirmative Defense 10).[15]

"Waiver is a voluntary and intentional abandonment of a known right. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003). Waiver is merely an extension of the freedom to contract, permitting parties to enter into new contracts or modify their existing agreements. *Id*. at 370-371.

> However, the freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement. Rather, a party alleging wavier or modification must establish a mutual intention of the parties to waive or modify the original contract. This principle follows from the contract formation requirement that is elementary to the exercise of one's freedom to contract: mutual assent.
> * * *

[13] The court is expressly not ratifying the plaintiff's calculation of late charges and default interest (i.e. determining the amount of damages) at this time.

[14] The other leg of the defense – "[t]here is a good faith dispute over default interest and late fees, which precludes acceleration of the debt and foreclosure" – is misplaced because the plaintiff's complaint is not premised on non-payment of default interest and late charges but, rather non-payment of monthly installments (plaintiff's complaint, ¶ ¶ 24-26 and 41-42), and because the argument focuses on the ultimate computation of damages, not the threshold issue of liability presently under consideration.

[15] Affirmative Defense 10 also cites "license, consent, [and] acquiescence", but the defendant has not pursued these doctrines in its oral or written arguments and, therefore, are considered abandoned. *Prince v MacDonald*, 237 Mich App 186, 197 (1999).

> The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses. [*Id*. at 372-375 (internal citation omitted)]

But, in any event, proof of a party's mere knowledge and silence does not constitute an intentional relinquishment of the defendant's contractual obligations or contractual restrictions against waiver. *Id*. at 377-378.

Here, hoping to avoid even the possibility that its conduct could infer an intention to forego the Note's authorization of default interest, the plaintiff cites an anti-waiver clause in the Mortgage[16]:

> 25. **Forbearance by Lender Not a Waiver**. Any forbearance by Lender in exercising any right or remedy under any of the Loan Documents, or otherwise afforded by applicable laws, shall not be a waiver of or preclude the exercise of any right or remedy. Lender's acceptance of payment of any sum secured by any of the Loan Documents after the due date of such payment shall not be a waiver of Lender's right to either require prompt payment when due of all other sums so secured or to declare a default for failure to make prompt payment. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the Indebtedness, nor shall Lender's receipt of any awards, proceeds or damages under Paragraph 5 hereof operate to cure or waive Borrower's default in payment or sums secured by any of the Loan Documents. With respect to all Loan Documents, only waivers made in writing by Lender shall be effective against Lender. [17]

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[16] Perhaps intentionally ignored in counsels' arguments, the court notes that a somewhat dissimilar anti-waiver provision appears in the Promissory Note:

> 6. Waiver.
>
> Borrower . . . agrees that its liability . . . shall not be in any manner affected by any indulgence, extension of time, renewal, waiver or modification granted or consented to by the Lender.

[17] The defendant's argument that this anti-waiver provision is limited to future defaults (defendant's supplemental brief, pp. 1, 2-4), focusing on one phrase -- "Lender's acceptance of payment . . .shall not be a waiver of Lender's rights to . . . require prompt payment when due of all ***other*** sums" -- appears to be an overly narrow reading of the provision when read in its entirety (emphasis added):

> 25. **Forbearance by Lender Not a Waiver**. ***Any forbearance by Lender*** in exercising any right or remedy under any of the Loan Documents, or otherwise afforded by applicable laws, ***shall not be a waiver*** of or preclude the exercise of any right or remedy. ***Lender's acceptance of payment***

With contractual provisions like this, an additional hurdle must be overcome for waiver to apply:

> [W]hereas an original contract's written modification or anti-waiver clauses do not serve as barriers to subsequent modification by express mutual agreement, the significance of such clauses regarding the parties' intent to amend is heightened where a party relies on a course of conduct to establish modification. This is because such restrictive amendment clauses are an *express mutual statement* regarding the parties' expectations regarding amendments.
>
> [In the absence of an express oral or written agreement, the] clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statement regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses. [*Id*. at 372-375 (internal citation omitted)]

So, while contracting parties may waive rights and restrictions, including even anti-waiver clauses, the defendant here must establish by clear and convincing evidence not only the plaintiff's voluntary and intentional relinquishment of its right to timely payment/default interest but also the Mortgage's anti-waiver clause.

Here, rather than affirmative conduct manifesting an intent to abandon a right, the undisputed documentary evidence reinforces the plaintiff's right to default interest: (1) the plaintiff sent the defendant a succession of demand letters detailing amounts in default, including "Default Interest Accrued" (plaintiff's supplemental brief, Exhibit C), and (2) the plaintiff sent the defendant monthly statements detailing amounts due with the upcoming installment, including "Outstanding Default Int [$]xxx,xxx.xx" (plaintiff's supplemental brief, Exhibit B).

However, although these expressions preclude the conclusion that the plaintiff was then-waiving a right to default interest, the inconsistency in the plaintiff's conduct through a broader payment history allows some doubt of intention on other occasions of non-payment. In an attempt to more readily analyze events, the court has attached a default interest activity table (a visual aid if you will).

> of any sum secured by any of the Loan Documents ***after the due date*** of such payment ***shall not be a waiver of Lender's right to*** either require prompt payment when due of all other sums so secured or ***to declare a default*** for failure to make prompt payment. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the Indebtedness, nor shall Lender's receipt of any awards, proceeds or damages under Paragraph 5 hereof operate to cure or waive Borrower's default in payment or sums secured by any of the Loan Documents. With respect to all Loan Documents, ***only waivers made in writing by Lender shall be effective against Lender.***

So, distinguishing non-waiver of obligations to promptly pay other [future] sums, acceptance of late payment also does not waive the Lender's right to declare a default for the Borrower's failure to make the present, current payment promptly; and, accordingly assess default interest that the Note provides "shall accrue" "[s]o long as an Event of Default remains outstanding" (Note, ¶ 4.2).

Following the table chronologically, although default interest was assessable for the installments due 12-01-10 through 02-01-11 (i.e. installments paid after expiration of the contractual 5-day cure period), apparently none was assessed (plaintiff's supplemental brief, Exhibit A) and the plaintiff does not now assert a right to assess default interest. Without more, the court concludes the plaintiff waived the right to assess default interest on these installments.

Next, when the plaintiff apparently did internally calculate and post default interest for installments due 03-01-11, 04-01-11, and 05-01-11, it refrained from disclosing the amounts on the monthly statements to the defendant. Without necessarily concluding the plaintiff's failure to share its calculation and assessment of then-outstanding default interest constitutes waiver, the court concludes there is sufficient evidence to avoid summary disposition at this time.

Next, the plaintiff issued demand letters on June 6, 2011, July 18, 2011, and September 30, 2011 notifying the defendant its payment is past due and, among other items, owes "Default Interest Accrued thru x/x/2011 [$]xxx,xxx.xx". However, contemporaneous monthly statements omit any reference to default interest, and the plaintiff accepted the defendant's [late] payment of the amounts due on the statements. Again, without concluding the plaintiff's conduct necessarily constitutes waiver of its right to default interest on these installments, it at least justifies an opportunity for further inquiry and explanation.

Next, the 10-01-11 installment was paid well past the 5-day cure period, but the plaintiff did not calculate or post assessment of default interest and the plaintiff does not now assert a right to default interest for those months. Without more, the court concludes the plaintiff waived the right to assess default interest on this installment.

Next, the plaintiff finally, consistently began asserting its claim of outstanding default interest on monthly statements beginning April 1, 2012 (although the defendant paid the installments due 04-01-13 and 05-01-13 within the 5-day cure period). In the same vein, the attached table reflects the plaintiff's reinforcement of its right to claim default interest through a series of demand letters following untimely payment of installments due 7-1-12 through 10-1-12 and 6-1-13 through 12-1-13. Accordingly, the court concludes that the defendant cannot establish waiver of the plaintiff's right to default interest on installments beginning 4-1-13 (although this does not necessarily revive default interest on late payments dating back to the 06-01-11 installment that may ultimately be determined waived, or mean that the plaintiff's calculations are otherwise undisputable).

As to late charges, the defendant received notice on each monthly statement (i.e. "Late Charge of [$]x,xxx.xx Due if not paid by xx/xx/xxxx"). Rather than abandonment, the plaintiff's conduct demonstrates affirmation of its right to assess late charges on installments not paid within 5 days of due date. Accordingly, the defendant's affirmative defense that the plaintiff waived its right to late charges is without merit (although the court is not presently affirming the plaintiff's calculation of late charges).

Laches

The defendant also argues the plaintiff's claim is barred by laches.

The doctrine of laches is an affirmative defense "concerned with unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff.'" *Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612 (2004) (quotation omitted). "The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant." *Id*. at 612, citing *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998). "Mere delay in asserting a claim for a period less than that in the statute of limitations does not constitute such laches as will defeat recovery in law or equity." *McRaild v Shepard Lincoln Mercury*, 141 Mich App 406, 411; 367 NW2d 404 (1985) (quotation omitted).

Here, Count 1 of the plaintiff's complaint represents an action to recover sums due for breach of contract. Such an action enjoys a 6 year statute of limitation, *MCL 600.5807(8)*. Since the action was commenced nearly immediately following accrual, *MCL 600.5836*, *Sparta State Bank v Covel*, 197 Mich App 584 (1992), and, in any event, well within the statute of limitations, there is no cause to invoke or apply the doctrine of laches.

Estoppel

"Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399 (2006).

The defendant argues that "it is patently unfair for the [plaintiff] to continually accept the mortgage payments and apply them to principal, interest and escrow for taxes and insurance, while silently accruing $1 million in default interest, only to drop the hammer some three years later" (defendant's brief, p 12).

The plaintiff boldly counters that it "advised the defendant of the late payments from the very beginning and gave a timely notice of default and demand for payment of default interest" (plaintiff's supplemental brief, pp 4-5). With due respect, this seemingly absolute statement must give way to the documentary evidence.

Similar to waiver discussed above, and as outlined on the attached default interest activity table, at least beginning with the April 1, 2012 statement, the court agrees that the plaintiff's conduct precludes rather than allows application of estoppel. However, prior to that date, there appears at least room for reasonable persons to consider the import and effect of the plaintiff's mixed signals.

Illinois Law

The Note (¶ 10.7), the Mortgage (¶ 35), the Lease/Rent Assignment (¶ 5.7), the Guaranty (¶ 5.3), the Hazardous Substance Indemnification (¶ 6.6), and the Letter of Credit Agreement (¶ 5.02) each provides that it is to be governed by Illinois law.

Although having conducted no independent review of Illinois law, and relying on the representations of counsel, the court believes that application of Illinois law would produce an analysis and result consistent to that under Michigan law.

Lack of Discovery

The defendant argues that, regardless of analysis, it is simply too early to entertain summary disposition without first affording an opportunity for meaningful discovery.

> Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292 (2009) (footnotes omitted)]

Here, except as indicated above, the case is essentially controlled by the several Loan Documents that define the parties' rights and responsibilities and render further factual development unnecessary.

Defendant's Counterclaim

In addition to asserting defenses to the plaintiff's breach of contract claim, the defendant filed a counterclaim asserting the plaintiff breached the mortgage contract, breached the letter of credit agreement, committed conversion, and should be compelled to provide an accounting. The plaintiff requests summary dismissal of the counterclaim in its entirety, pursuant to MCR 2.116(C)(8) and (10).

Mortgage

In Count 1 of its counterclaim, the defendant alleges the plaintiff breached the Mortgage "by over-estimating escrow payments for taxes and insurance" and "refusing/failing to return the excess funds to [the defendant]" (¶¶ 7 and 16), and by failing "to reimburse [the defendant] for capital improvements from 2011-2013" (¶¶ 9 and 17), resulting in "damages in excess of $50,962.47" (¶ 18).

Among other things, ¶ 3 of the Mortgage (defendant's counterclaim, Exhibit 1) authorizes creation, operation, and disposition of an escrow for taxes and insurance, and a replacement reserve for capital improvements.

The escrow for taxes and insurance (¶¶ 3(a) and (b)) requires the defendant pay the plaintiff each month 1/12 of estimated amounts sufficient to enable the plaintiff to pay at least 30 days before due all relevant taxes and insurance premiums; and so long as no event of default exists, the plaintiff is required to pay the taxes and insurance premiums; and the defendant grants the plaintiff a security interest in such funds. The amount of the monthly escrow contribution for taxes and insurance is to be reviewed and adjusted annually, with the defendant required to cure any arrearage or receive credit for any surplus. Importantly, there is no requirement that "excess funds" be returned to the defendant. Rather, the parties agreed to have any overpayment or underpayment reconciled annually by cure or credit, as the case may be. Given the unambiguous language of the Mortgage that the defendant purposes to now enforce, and the lack of any allegation that the plaintiff has otherwise breached its obligations in the administration of the tax/insurance escrow, the defendant has failed to state a claim on which relief can be granted, *MCR 2.116(C)(8)*.[18]

The replacement reserve (¶ 3(c)) requires the defendant pay the plaintiff $3,100 each month, up to $74,400, which may be used for "improvements that are customarily accounted for as capital expenses, and other capital improvements approved in advance by [the plaintiff]" "upon [the defendant] providing [the plaintiff] with . . . documentation deemed necessary by [the plaintiff] to insure that the work and/or materials related to the requested disbursement have been completed" (with the defendant granting the plaintiff a security interest in such funds and, upon maturity, any remaining balance to be applied to the indebtedness). As required by a plain reading of the mortgage contract, the plaintiff's reimbursement obligation is subject to the defendant first (1) obtaining advance approval of "other capital improvements" not "customarily accounted for as capital expenses", and (2) providing documentation the plaintiff deems necessary to insure the work/materials related to the disbursement request have been completed/provided. The defendant alleges it "has fully complied with its obligations under the Mortgage" (counterclaim ¶ 15). Without more, the court concludes that the defendant has stated a claim on which relief can be granted. Additionally, there appears to be a genuine factual dispute over whether any necessary advance notice was requested/obtained, and whether necessary documentation was provided (e.g. defendant's counterclaim, Exhibit 9; and plaintiff's brief, p 7).

Letter of Credit Agreement

Count 2 of the counterclaim alleges the plaintiff breached the Letter of Credit Agreement "by failing to apply the $325,000 to certain prior late payments by [the defendant]" (¶ 22).

However, as addressed above, the Letter of Credit Agreement, ¶ 4.03, *Application of Proceeds*, expressly authorizes the plaintiff to,

> in its sole and absolute discretion, apply the proceeds of the Letter of Credit, or any portion thereof, to cure an Event of Default or hold such security, but Lender shall have no obligation to apply any proceeds of the Letter of Credit to cure any Event of Default unless it so elects.

[18] The court notes that, beyond the untenable allegation that the Mortgage obligates the plaintiff to "return the excess funds", the plaintiff provided unrebutted evidence that it is performing as required (plaintiff's motion, Exhibit 5).

There being no judicially recognizable ambiguity precluding enforcement of this contract provision, the defendant has failed to state a claim on which relief can be granted.

Conversion

Count 3 of the defendant's counterclaim alleges the defendant was entitled to have the $325,000 proceeds from the letter of credit applied toward monthly mortgage payments and, by ignoring its requests to utilize the proceeds to cure any defaults, the plaintiff committed common-law conversion and statutory conversion, *MCL 600.2919a* (defendant's counterclaim, ¶¶ 25, 26, and 27)

Conversion, in both the common law and under the statute is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591 (2004) (quotation marks and citation omitted).

The plaintiff points out that the defendant's counterclaim fails to allege any duty separate and distinct from contractual duties arising under the Letter of Credit Agreement and, accordingly, precludes any claim sounding in tort. *Rinaldo Constr Corp v Michigan Bell Tel Co*, 454 Mich 65 (1997). As pled, the defendant is attempting to enforce the Letter of Credit Agreement (or at least its now-desired version). Absent allegations of independent duties, the defendant's rights are defined by the Letter of Credit Agreement which, as discussed above, unambiguously authorizes the plaintiff to hold the letter of credit proceeds in reserve (counterclaim, Exhibit 2, ¶ 4.03, *Application of Proceeds*).[19]

Accounting

Count 4 of the defendant's counterclaim seeks an accounting of the debt balance, the tax/insurance escrow, default interest, late fees, and other [unidentified] charges that the plaintiff has charged.[20]

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[19] Going beyond the face of its own pleadings, the defendant asserts that it "is challenging the purported assignment of the Letter of Credit Agreement from LaSalle Bank to the [plaintiff]" (defendant's brief, pp 17-18). However, as discussed above, this ignores the Omnibus Assignment (defendant's brief, Exhibit 5) which broadly encompasses,

> any claims, collateral, insurance policies, certificates of deposit, letters of credit, escrow accounts, performance bonds, demands, causes of action and any other collateral arising out of and/or executed and/or delivered in or to or with respect to the Loan, together with any other documents or instruments executed and/or delivered in connections with or otherwise related to the Loan.

Accordingly, even if pled, there is no support for the defendant's proposition that the plaintiff was never assigned the Letter or Credit Agreement.

[20] Specifically, the defendant complains that the plaintiff "is controlling excess escrow funds for taxes and insurance" that "belong[], in whole or in part" to it, together with "detailed records supporting its calculation of the debt balance, default interest, late fees and other charges, which it has failed to provide to [the defendant]"; and that because determining "what is justly owed on the debt necessarily involves long and difficult inquiries into information in the possession of [the plaintiff]", without which the defendant "cannot reasonably be expected to ascertain the amount due" the court should order "an accounting that establishes in sufficient detail the balance of the debt, the over-funded escrow accounts for taxes and insurance, and the calculation of default interest, late fees and other fees that were wrongfully accrued and charged to [the defendant]" (defendant's counterclaim, ¶¶ 32-37).

An accounting is an equitable cause of action available where (1) the defendant has a pre-existing duty to account (e.g. there is a [fiduciary] relationship between the parties), (2) there are mutual accounts, or the account is complicated, and (3) there is a need for discovery. 1 Am Jur 2d, Accounts and Accounting, § 52 et seq.

As a general rule, courts do not invoke equity where there is an adequate remedy at law. *Basinger v Provident Life & Accident Ins Co*, 67 Mich App 1, 5-6 (1976).

Here, a separate equitable accounting does not appear necessary since the plaintiff must prove the amount due in its pending legal action on the Loan Documents (including the proper calculation of default interest, late charges, debt balance, etc.), and this affords the defendant an opportunity for meaningful discovery to determine the amounts at issue. *Boyd v Nelson Credit Centers Inc*, 132 Mich App 774, 779 (1984).

In this regard, the court notes the plaintiff has already produced various documents, including default interest calculation for the period 03-01-11 through 04-15-14 (plaintiff's supplemental brief, Exhibit A), monthly statements from 01-01-11 through 09-01-14 (Exhibit B), demand letters sent defendant from 06-06-11 to 12-02-13 (Exhibit C), default interest calculation from 11-5-13 to 7-1-14 (Exhibit D), and payoff calculation as of 09-30-14 (Exhibit E) that may at least begin to fill the defendant's discovery needs.

So, in order to afford the defendant an opportunity to make appropriate inquiry of facts relative to the plaintiff's claims and/or its defenses (as limited by this Opinion), rather than require an accounting, the court will revisit the issue of discovery that was suspended in the June 23, 2014 Case Management Order.[21]

Conclusion

The plaintiff seeks partial summary disposition on its breach of contract claim (Count 1) and dismissal of the defendant's counterclaim.

The court concludes that, except as to the amount of damages, there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law on Count 1 of its complaint; ***excepting*** default interest arguably waived between March 1, 2011 and April 1, 2012.

The court also concludes that the defendant's counterclaim should be dismissed for failing to state a claim on which relief may be granted, ***excepting*** portions of Count 1, Breach of Contract (Mortgage), alleging the plaintiff failed to reimburse the defendant for capital improvements.

[21] If not otherwise resolved by the parties' themselves, the issue of discovery will be addressed at the next status conference being scheduled in the immediate future.

Upon presentment in accordance with MCR 2.602(B), the court will sign an Order that comports with this opinion.[22]

Date: November 4, 2014 /s/ (P27637)
M. Randall Jurrens, Circuit Judge

[22] If either party, in good faith, believes that this opinion demonstrate palpable error, the court would entertain a timely motion for reconsideration, *MCR 2.119(F)*.