

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

ECP COMMERCIAL II LLC,
A Delaware limited liability company,

Plaintiff,

Case No. 2015-273-CB

vs.

TOWN CENTER FLATS, LLC, a
Michigan limited liability company,

Defendant/Counter-Plaintiff,

and

VINCENT DILORENZO and
ANGELA TINERVIA,

Defendants.

OPINION AND ORDER

Plaintiff/Counter-Defendant ECP Commercial II, LLC ("Plaintiff") has filed a motion for judgment of foreclosure. Defendant/Counter-Plaintiff Town Center Flats, LLC's ("Defendant TCF") has filed a response and supplemental response.

I. Factual and Procedural History

This lawsuit stems from a loan transaction originally between KeyBank National Association and Defendant TCF, who is the debtor. The Loan was subsequently amended several times (original loan together with the amendments collectively, as "Loan"). The Loan was secured by a mortgage, which encumbered the following real property and other assets ("Mortgage"). Plaintiff is KeyBank's successor-in-interest with respect to the Loan and Mortgage. In addition, Defendants Vincent Diloranzo and Angela

Tinervia (“the Guarantors”) executed guaranties securing Defendant’s obligations under the Loan (“Guaranties”)(Loan and Guaranties collectively, “Loan Documents”). Plaintiff filed its “verified complaint for damages, foreclosure, appointment of receiver and injunctive relief” (“Complaint”) on January 23, 2015, which sought damages against Defendant TCF for its breaches of the Loan Documents and its failure to pay Plaintiff the amounts due thereunder, and damages against the Guarantors for their breaches of their Guaranties.

On January 31, 2015, Defendant TCF sought protection under Chapter 11 of the United States Code, 11 USC 1101 et seq., in the United States Bankruptcy Court for the Eastern District of Michigan, Case No. 15-413307. The Bankruptcy Court granted Debtor’s “Motion for Interim Use of Rents and Granting Adequate Protections” (the “Consent Order”) on April 22, 2015. (*See Exhibit D of Plaintiff’s Motion.*) In the Consent Order, Defendant TCF, as the debtor, conceded to both its indebtedness and its breach, and thus its default under the Loan with Plaintiff.

On May 12, 2017, the Bankruptcy Court dismissed Defendant TCF’s bankruptcy case. On June 5, 2017, this Court entered an Order appointing James Evans as the receiver over the “Mortgaged Property”, which includes, *inter alia*, the Subject Property (“Receivership Order”). Further, in the Receivership Order the Court held, *inter alia*, that Plaintiff is the assignee of the Loan Documents, that Defendant TCF has defaulted under the payment terms of those documents, that Defendant TCF’s failure constitutes a default and a breach of the Mortgage, and found that the foreclosure of the Subject Property is appropriate.

On September 1, 2017, Plaintiff filed a motion for summary disposition of its foreclosure claim. On November 28, 2017, the Court entered its Opinion and Order granting Plaintiff's motion.

On December 11, 2017, Plaintiff filed its instant motion for a judgment of foreclosure. On January 5, 2017, Defendant TCF filed its response. In addition, on January 8, 2017, Defendant TCF filed a supplemental brief in support of its response. On January 8, 2017, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Arguments and Analysis

As a preliminary matter, to the extent that Defendant TCF revisits issues already decided in this Court's November 28, 2017 Opinion and Order or its Opinion and Order entered in connection with Defendant TCF's motion for reconsideration, those arguments will not be revisited. The Court will now address Defendant TCF's objections specific to Plaintiff's instant motion.

First, Defendant TCF argues that Plaintiff is not entitled to a judgment of foreclosure finding that the Mortgage constitutes a first priority security interest in the Subject Property. Indeed, this Court, nor the Bankruptcy Court, has ruled that Plaintiff's security interest under the Mortgage is higher in priority than any other potential interest some unidentified third party may have. Consequently, Plaintiff's request for an order declaring that its security interest is first priority must be denied.

Next, Defendant TCF asserts that the amount of its liability under the Note needs to be determined prior to ordering the Subject Property be sold via foreclosure sale. In its motion for partial summary disposition of its foreclosure claim, Plaintiff submitted an

affidavit of Nathan Cann, its agent, in which he testified that as of August 18, 2017 there was an outstanding principal balance under the Note of \$740,503.74, plus interest of \$740,503.74, plus tax charges of \$149,176.53. (See Exhibit 4 to Plaintiff's Motion for Partial Summary Disposition.) Defendant has not presented any evidence contesting Mr. Cann's testimony. Consequently, the Court is satisfied that there is no genuine issue of material fact as to the amount due and owing as of August 18, 2017.

Finally, Defendant requests that this Court affix an "upset price" under MCL 600.3155. MCL 600.3155 provides:

In any forfeiture, foreclosure, or specific performance case based upon a mortgage on real estate or land contract the court may fix and determine the minimum price at which the real property covered by the mortgage or land contract may be sold at the sale under the forfeiture, foreclosure, or specific performance proceedings.

While Defendant requests that this Court set a minimum sales price, it has failed to provide any reason which such action is necessary. As a result, Defendant request is denied.

III. Conclusion

Based on the foregoing, Plaintiff's motion for summary disposition is GRANTED, IN PART and DENIED, IN PART. Specifically, the Court enters the following judgment:

- 1) As of August 18, 2017, there is an outstanding principal balance under the Note of \$740,503.74, plus interest of \$740,503.74, plus tax charges of \$149,176.53.
- 2) Defendant Town Center Flats, LLC is liable for the payment of the sums due under paragraph (1) above.

3) On or before March 1, 2018, Defendant Town Center Flats, LLC shall pay or cause to be paid to Plaintiff the sum due to Plaintiff under paragraph (1) above with additional interest from August 18, 2017 at the rate provided in the Loan Documents.

4) If Defendant Town Center Flats, LLC fails to pay the amounts specified in paragraph (3), then the Subject Property shall be sold at public sale by or under the directions of the Sheriff of Macomb County at any time after February 1, 2018.

5) The County Clerk must give public notice of the time and place of the sale according to the course and practice of this Court and applicable statutes. Plaintiff shall publish a notice of sale and file with this Court an affidavit of publication.

6) The Macomb County Sheriff shall execute a deed to the purchaser of the premises on the sale. Out of the proceeds of the sale, the Macomb County Sheriff shall pay to Plaintiff or its attorney the sums due as described in paragraphs (1) and (3) or so much of those amounts that the proceeds will pay. The Macomb County Sheriff shall take receipt for the amounts paid and file them with a report of sale. If there are surplus proceeds from the sale, the Sheriff shall deposit the balance with this Court until further order of the Court.

7) Pursuant to MCL 600.3145 any sums paid after entry of this judgment for insurance premiums covering the premises and any additional taxes assessed against the premises until expiration of the period of redemption shall be added to the amount due under this judgment.

8) Six months from the date of the sale, Defendants are forever barred and foreclosed from all redemption and claim to the Subject Property if not redeemed within that period.

9) Pursuant to MCL 600.3130, any of the parties who may be in possession of the premises or any person who since the commencement of this action has come into possession under any party shall deliver possession to the purchaser on production of the Deed of the Macomb County Sheriff for the premises and a certified copy of the order confirming the report of the sale after the deed has become operative.

10) If the proceeds from the sale are insufficient to pay the sums due to Plaintiff, the Macomb County Sheriff shall specify the amount of the deficiency in the report of the sale. Upon confirmation of the report of sale, Defendants Town Center Flats, LLC shall pay to Plaintiff the amount of the deficiency with interest from the date of the report. The clerk shall issue execution for the deficiency upon plaintiff's application without notice to Defendant Town Center Flats, LLC pursuant to MCL 600.3150.

11) The property authorized to be sold under this judgment is situated in the Township of Shelby, County of Macomb, State of Michigan and is more particularly described in the November 28, 2017 Opinion and Order.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Date: MAR 16 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge