[Cite as *First Union-Lehman Bros.-Bank of Am. Commercial Mtge. Trust, Commercial Mtge.-Pass Through Certificates v. Imperial Plaza, Ltd.*, 2010-Ohio-2009.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

FIRST UNION-LEHMAN BROTHERS BANK OF AMERICA COMMERCIAL MORTGAGE TRUST, COMMERCIAL MORGAGE-PASS THROUGH CERTIFICATES	:	C.A. CASE NO. 23686
	:	T.C. NO. 2008 CV 1652
Plaintiff-Appellee	:	(Civil appeal from Common Pleas Court)
v.	:	
IMPERIAL PLAZA, LTD., et al.	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 7th day of May, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of K. Dean Wertz, filed October 7, 2009. Wertz appeals from the September 8, 2009, Final Judgment Entry

granting a money judgment in favor of First Union-Lehman Brothers-Bank of America Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 1998-C2's ("First Union"). The judgment entry was issued after the trial court sustained First Union's motion for summary judgment against Wertz, and the judgment is in the amount of $432,557.47, along with interest accruing on the principal balance of $286,374.40, at the contractual rate of 10.42%, from April 17, 2009.

{¶ 2} On February 15, 2008, First Union filed a "Complaint for Foreclosure, Damages, Declaratory Judgment regarding Easements and other Relief" against Imperial Plaza, Ltd. ("Imperial"), Wertz, Pillar Real Estate Advisors, Inc. ("Pillar"), Carmax Auto Superstores, Inc., Custom Facilities, Inc., Ford Motor Credit Co., LLC, and Carolyn Rice, Montgomery County Treasurer. On April 18, 2008, First Union voluntarily dismissed its claims against Custom Facilities, Inc and Ford Motor Credit Co., LLC. On May 7, 2008, Wertz answered the complaint.

{¶ 3} On July 15, 2008, the trial court entered a default judgment against Imperial and Pillar, and on September 2, 2008, the court issued a Praecipe for Order of Sale and an Order of Sale. On February 26, 2009, the trial court issued a "Confirmation of Sale, Ordering the Deed and Distribution." The property at issue is located at 1129 Miamisburg-Centerville Road, in West Carrollton. On April 20, 2009, First Union filed its motion for summary judgment against Wertz, which the trial court granted on August 18, 2008.

{¶ 4} The events giving rise to this matter began after Imperial defaulted on a loan assigned to First Union. The original promissory note was entered into between W. Lyman

Case & Co., and Imperial. Imperial granted an open-ended mortgage and security agreement to W. Lyman Case & Co., which were recorded. Wertz signed a Guaranty of Recourse Obligations of Borrower with W. Lyman Case & Co., personally guaranteeing the debt at issue under specific circumstances. After the foreclosure sale, First Union sought the remaining deficiency by means of its motion for summary judgment against Wertz. At issue for the trial court was whether the conditions for invoking Wertz's personal guaranty had been met. In granting judgment in favor of First Union, the trial court concluded that they had.

{¶ 5} Evidentiary materials attached to the motion for summary judgment include, among other things, the affidavit of Charles Crouch, "Associate Director of ORIX Capital Markets, LLC, which serves as Special Servicer for [First Union], assignee of the W.Lyman Case & Company"; the original promissory note signed by Wertz and identifying Imperial as Borrower; the "Open-Ended Mortgage and Security Agreement"; and the Guaranty of Recourse Obligations of Borrower, signed by Wertz.

{¶ 6} Wertz asserts two assignments of error. His first assignment of error is as follows:

{¶ 7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING THAT WERTZ WAS PERSONALLY RESPONSIBLE FOR ANY DEFICIENCY WHICH RESULTED UPON SALE OF THE PROPERTY WHICH IS THE SUBJECT OF THIS MATTER WHICH WAS OWNED BY CO-DEFENDANT, IMPERIAL PLAZA, LTD. DUE TO LOANS MADE TO A THIRD PARTY."

{¶ 8} "Civ. R. 56(C) provides that summary judgment may be granted when the

moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. (Internal citations omitted). Our review of the trial court's decision to grant summary judgment is de novo." *Cohen v. G/C Contracting Corp.*, Greene App. No. 2006 CA 102, 2007-Ohio-4888.

{¶ 9} Subsection 14(a) of the promissory note provides that First Union (as assignee) may pursue legal action as follows:

{¶ 10} "14. Exculpation

{¶ 11} "(a) Except as otherwise provided herein, * * * Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in this Note or the Security Instrument by any action or proceeding wherein a money judgment shall be sought against Borrower, except that Lender may bring a foreclosure action, action for specific performance or other appropriate action or proceeding to enable Lender to enforce and realize upon this Note, the Security Instrument, the other Loan Documents, and the interest in the Property, the Rents * * * and any other collateral given to Lender created by this Note, the Security Instrument and the other Loan Documents; provided, however, that any judgment in any such 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 collateral given to Lender."

{¶ 12} Subsection 14(c) of the promissory note voids the agreement not to pursue

recourse liability under certain conditions as follows:

{¶ 13} "(c) Notwithstanding the foregoing, the agreement of Lender not to pursue recourse liability as set forth in Subsection (a) above SHALL BECOME NULL AND VOID and shall be of no further force and effect in the event of Borrower's default under Sections 4.2 or 8.2 of the Security Instrument, * * * ."

{¶ 14} The Security Instrument provides, "Borrower covenants and agrees that:

{¶ 15} "* * *

{¶ 16} "4.2 SINGLE PURPOSE ENTITY. It has not and shall not * * * (m) make any loans to any third party; * * * ."

{¶ 17} Regarding the prohibition against third party loans, Wertz indicated in response to an interrogatory as follows: "Imperial Plaza made advances to Pillar that was set up to be repaid over time at a stated interest rate." Wertz made similar admissions in a letter dated March 24, 2009, to counsel for First Union, that is attached to the motion for summary judgment. Paragraph 27 of First Union's Complaint alleges: "Pursuant to section 14(C) of the Note, any exculpatory provisions of the Note are rendered null and void in the event of a breach of Sections 4.2 and 8.2 of the Mortgage and Security Agreement, such that Imperial and Wertz are each liable for full recourse for breach of the Note and related loan documents, as well as an award of attorney fees and expenses." In his Answer, Wertz admitted this allegation. In his appellate brief, we note that Wertz asserts, "When the original financing was secured from W. Lyman Cass & Company on or about March 6, 1998, approximately $330,000.00 was distributed to the partners of Imperial and $90,000.00 was loaned to Pillar." Wertz also asserts in his brief that "Pillar still owes Imperial

$34,364.71 in connection with this loan."

{¶ 18} We agree with First Union that it established a breach of Section 4.2 of the Security Instrument such that it was entitled to summary judgment and to invoke Wertz's personal guarantee. Wertz's first assignment of error is overruled.

{¶ 19} Wertz's second assignment of error is as follows:

{¶ 20} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING THAT WERTZ WAS PERSONALLY RESPONSIBLE FOR ANY DEFICIENCY WHICH RESULTED UPON SALE OF THE PROPERTY WHICH IS THE SUBJECT OF THIS MATTER WHICH WAS OWNED BY CO-DEFENDANT, IMPERIAL PLAZA, LTD. DUE TO A CONVEYANCE OF CERTAIN REAL PROPERTY OWNED BY IMPERIAL."

{¶ 21} The Security Instrument provides:

{¶ 22} "8.2 NO SALE/ENCUMBRANCE. Borrower agrees that Borrower shall not, without the prior written consent of Lender, sell, convey, mortgage, grant, bargain, encumber, pledge, assign, or otherwise transfer the property or any part thereof or permit the Property or any part thereof to be sold, conveyed, mortgaged, granted, bargained, encumbered, pledged, assigned, or otherwise transferred."

{¶ 23} Paragraph 35 of First Union's Complaint alleges: "Without the consent of [First Union], Imperial and Carmax entered into a First Amendment to Easement Agreements * * * which was filed for record on January 9, 2008 with the Montgomery County Recorder as Deed No. 08-002068, during the period while Imperial was in default of its obligations to [First Union]. A copy of the First Amendment to Easements is attached

hereto as Exhibit E and incorporated by reference." Wertz admitted this allegation in his Answer. As the trial court noted, the "amendment of the preexisting parking easement changed the interest in the property. As such, the lender should have been contacted prior to entering into a new easement." Imperial violated Section 8.2 of the Security Agreement, and First Union demonstrated that Wertz personally guaranteed the debt at issue. In the absence of any genuine issue of material fact, Wertz's second assignment of error is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and FAIN, J.,concur.

Copies mailed to:

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