

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002470

U.S Bank National Association

AW MAGPIG LLC

Bank Of America N A

HW MAGBIG LLC

PLAINTIFF(S)

DEFENDANT(S)

RECEIVED

FEB 01 2017

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented

SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. No. suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. *The order requiring turnover of collateral and sequestering rents is granted. Formal order attached.*
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Rehoad Judge Code 2164 Date 11/22/16

For Clerk of Court Office Use Only

This judgment was entered on the 30 day of Nov, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Nov, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

David Hughes Simpkins

Robert Daniel Dodson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court Jeanette Williams

SCANNED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 U.S. BANK NATIONAL ASSOCIATION,)
 AS TRUSTEE, AS SUCCESSOR-IN-)
 INTEREST TO BANK OF AMERICA,)
 N.A., AS SUCCESSOR BY MERGER TO)
 LASALLE BANK NATIONAL)
 ASSOCIATION, AS TRUSTEE FOR THE)
 REGISTERED HOLDERS OF BEAR)
 STEARNS COMMERCIAL MORTGAGE)
 SECURITIES, INC., COMMERCIAL)
 MORTGAGE PASS-THROUGH)
 CERTIFICATES, SERIES 2007-TOP26,)
)
 Plaintiff,)
)
 vs.)
)
 AW-MAGPIG, LLC; HW-MAGPIG, LLC;)
 and MW-MAGPIG, LLC,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-40-02470

ORDER REQUIRING
 TURNOVER OF COLLATERAL
 AND SEQUESTERING RENTS

2016 NOV 28 PM 3:48
 RICHLAND COUNTY
 FILED
 JEFFREY M. BRIDGEMAN
 C.P. & C.S.

RECEIVED
 FEB 01 2017
 SC Court of Appeals

This matter came before the Court for a hearing on the Motion for Order Requiring Turnover of Collateral and Sequestering Rents (the "Motion") filed by the plaintiff, U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26 ("Plaintiff").

Having considered the Motion, the affidavits and memorandum submitted in support thereof by Plaintiff, the memorandum in opposition submitted by the defendants AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC (individually or collectively, as the context requires, "Borrowers"), and the arguments of counsel, the Court finds that the Motion should be granted. Accordingly, I make the following findings of fact:

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FINDINGS OF FACT

1. This is a foreclosure action. Borrowers own the Property (defined below) that is the subject of this action. Plaintiff is the current owner and holder, by assignment, of a \$4,500,000.00 commercial mortgage loan (the "**Loan**") made to Borrowers on March 1, 2007, by Bear Stearns Commercial Mortgage, Inc., a New York corporation ("**Original Lender**"). The Loan is evidenced and/or secured by, without limitation:

- (a) Promissory Note dated March 1, 2007, executed by Borrowers and payable to Original Lender in the original principal amount of the Loan (the "**Note**");
- (b) Mortgage, Fixture Filing and Security Agreement dated March 1, 2007, executed by Borrowers and recorded in the Richland County Register of Deeds (the "**Register**") in Book 1288 at Page 3842 (the "**Mortgage**");
- (c) Assignment of Leases and Rents dated March 1, 2007, executed by Borrowers and recorded in the Register in Book 1288 at Page 3902 (the "**ALR**");
- (d) Cash Management Agreement dated March 1, 2007, between Borrowers, Original Lender and The Bank of New York Trust Company, N.A. (the "**Cash Management Agreement**"); and
- (e) Replacement Reserve and Security Agreement dated as of March 1, 2007, between Borrowers and Original Lender (the "**Reserve Agreement**");
- (f) Conditional Assignment of Management Agreement dated March 1, 2007, between Borrowers, Whatfor, LLC, a New York limited liability company ("**Property Manager**") and Original Lender (the "**CAMA**").¹

2. The Mortgage encumbers the Property (as defined therein), which is comprised of certain land and improvements forming Magnolia Pointe retail shopping center, located at 2000-2020 Clemson Road, Columbia, South Carolina. The Property also includes certain other collateral more fully described in the Mortgage, notably including the Leases and the Rents, as such terms are defined in Section 1.1(f) thereof.

¹ Copies of the Note, Mortgage, ALR, Cash Management Agreement and Reserve Agreement are attached to the Complaint as Exhibits A, B, D, E and G, respectively. A copy of the Management Agreement Assignment is attached as Exhibit 5 to the Dickerson Affidavit.

3. Further, pursuant to both the Mortgage and the ALR, Borrowers assigned and conveyed to Plaintiff, without limitation, all of Borrowers' rights, title and interests in and to the Leases and the Rents, as such terms are defined in Section 1.1(f) of the Mortgage and Sections 1.1(a)-(c) of the ALR.² Upon such assignment, Borrowers were granted a revocable license to, inter alia, collect and receive the Rents (the "License"). Upon an Event of Default or a Default (as defined in the ALR), the License is automatically revoked and Plaintiff becomes immediately entitled to collect and receive the Rents even if Plaintiff does not enter or control the Property.

4. Property Manager is the property manager for the Property and, according to the Dickerson Affidavit, is an affiliate of Borrowers and controlled by one or more of the same principals. Pursuant to the CAMA, upon notice from Plaintiff following a default, Property Manager must directly remit to Plaintiff an amount equal to all Rents received less the Property's operating expenses. Further, during any time that any amount due and owing under the Note or Mortgage is not paid when due, Property Manager is not entitled to any fee, commission or other amount payable to Property Manager under the related management agreement (collectively, "Management Fees").

5. Under the Cash Management Agreement, upon a Cash Management Event^{3,4} Borrowers must, inter alia, establish a Cash Management Account and cause all Rents to be transferred therein from the Clearing Account on a daily basis. Cash Management Account

² "Rents" is broadly defined to encompass, without limitation, all rents, income, revenue or profits from the Leases or the Property. It is expressly noted that Rents include (without limitation) any amounts received by any Borrower Parties (defined below) from any lease guarantors or current or former tenants of any portion of the Property by virtue of any collection efforts, to include, without limitation, any threatened, existing or future litigation and/or judgment obtained against any such lease guarantors or current or former tenants.

³ Capitalized terms used but not defined herein shall have the meanings ascribed or referenced in the Cash Management Agreement.

⁴ A "Cash Management Event" includes "(a) the occurrence of an Event of Default, ..., [or] (d) the date Piggly Wiggly ceases operations at the Property, vacates the Property or otherwise 'goes dark,' or terminates its lease." Cash Management Agreement § 1.1, p. 2.

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funds are to be disbursed each month for amounts owed under the Loan Documents and for operating expenses, and all remaining funds (Excess Cash Flow) are to be disbursed to Plaintiff.

6. As indicated by the above-referenced provisions of the Loan Documents, it is readily apparent that Rents were intended to be and are a critical component of Plaintiff's security. The significance of the Rents as security is further heightened by the fact that Borrowers' only asset is to be the Property (including the Rents), which would be divested through foreclosure.

7. In addition, Borrowers are required under the Mortgage to deliver to Plaintiff, inter alia, (a) monthly rent rolls, operating statements and annual balance sheets and profit and loss statements, and (b) upon Plaintiff's request, a property management report, an accounting of tenant security deposits and an annual budget (collectively, "**Required Documentation**").

8. During the spring or summer of 2014, Piggly Wiggly ceased operations at the Property and went "dark", which Borrowers have not disputed. A Cash Management Event (the "**PW Event**") thus occurred.

9. On August 1, 2014, Plaintiff notified Borrowers of the PW Event and demanded compliance with their resulting obligations under the Cash Management Agreement (the "**Aug. 2014 Demand**"). Borrowers failed to do so within 60 days and continuing thereafter, resulting in one or more Events of Default (individually or collectively, the "**CM Default**").

10. As a result, Plaintiff has been deprived of benefits and security afforded by the Cash Management Agreement and the Mortgage, notably including all Excess Cash Flow, since the PW Event occurred over two years ago.

11. As evidenced by the Dickerson Affidavit, shortly after the PW Event and the Aug. 2014 Demand, Borrowers ceased providing Required Documentation to Plaintiff, effectively

concealing the Property's financial performance - including the amount of Excess Cash Flow. Borrowers' failure to provide subsequent Required Documentation, despite Plaintiff's multiple written requests, constitutes one or more further Events of Default.

12. As evidenced by the Dickerson Affidavit, the Property has likely been generating significant Rents and Excess Cash Flow for the past two years. In the first three quarters of 2014 the Property generated \$719,363.19 in total income and \$391,222.42 in net operating income. Plaintiff believes the Property is currently leased similar to September 2014, and Borrowers have offered no evidence to the contrary.

13. Following notice from Plaintiff on December 19, 2014, Borrowers have failed to pay the monthly replacement reserve deposits as required under the Reserve Agreement beginning in January 2015 and each month thereafter, resulting in additional Events of Default.

14. Pursuant to the CAMA, Plaintiff notified Borrowers and Property Manager that Property Manager should begin remitting to Plaintiff all Rents less operating expenses (excluding Management Fees) but Property Manager has failed to do so.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes as follows:

A. The Findings of Fact are denominated Conclusions of Law to the extent that they constitute the same.

B. Upon any above-referenced default, Borrowers' License to collect and receive the Rents was automatically revoked, and Plaintiff immediately became and is contractually entitled to collect and receive the Rents.

C. Further, the assignments of Rents contained in the Mortgage and the ALR (collectively, the "Assignments") and Plaintiff's rights with respect to same are perfected and

enforceable under S.C. Code Ann. § 29-3-100.

(1) The Mortgage and the ALR each constitute an "assignment of leases, rents, issues, or profits" as defined in S.C. Code Ann. 29-3-100(A)(2) (such an assignment is a "document assigning, transferring, pledging, mortgaging, or conveying an interest in leases...and rents, issues, or profits arising from real property..."). As such, upon recording of the Mortgage and the ALR, the Assignments became "enforceable...to pass the interest granted, pledged assigned, or transferred as against [Borrowers],...perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from [Borrowers]." S.C. Code Ann. § 29-3-100(B).

(2) Each of the Assignments constitutes a "collateral assignment" under S.C. Code Ann. §29-3-100(A)(3) because each was "delivered in connection with the grant of [the Mortgage]...where the [Borrowers] retain the right to collect or to apply the [Rents] after assignment and prior to default."

(3) Therefore, upon any above-referenced default, Plaintiff became statutorily entitled "to collect and receive any accrued and unpaid or subsequently accruing [Rents] subject to the [A]ssignment[s], without need for the appointment of a receiver, any act to take possession of the [P]roperty, or any further demand on [Borrowers]." S.C. Code Ann. § 29-3-100(C).

D. Plaintiff is entitled to an Order (i) directing that all Rents presently in the possession, custody or control of Borrowers and/or their respective managers, members, officers, employees, agents (including, without limitation, Property Manager), affiliates or attorneys (with Borrower, collectively "Borrowers Parties" and each a "Borrower Party") be immediately

turned over to Plaintiff, (ii) sequestering all Rents hereafter collected or received by any Borrower Parties, and (iii) prohibiting any distribution or disbursement of Rents except as ordered hereunder.

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED and DECREED**:

A. Borrowers and all other Borrower Parties are hereby ordered and directed to remit and provide to Plaintiff, within five (5) days of the entry of this Order, (i) all Rents (to include funds in the amount of any Rents collected or received) currently on deposit, collected, retained or held by such Borrower Party and not previously remitted to Plaintiff, together with a complete and accurate accounting thereof, (ii) a complete listing of all account numbers for all bank or other accounts held by or for the benefit of such Borrower Parties and into which Rents were or are being deposited, held, received, collected or transferred, along with the names and addresses of any financial institutions at which such accounts are held.

B. Within five (5) days of the entry of this Order, Borrowers shall also deliver to Plaintiff (1) complete copies of all Leases (including any amendments, extensions, renewals, modifications, supplements or terminations thereof) that were and/or are currently in effect for any portion of the period beginning August 2014 and running through the date this Order is entered, (2) an accounting of all tenant security deposits currently held by any Borrower Parties, (3) monthly rent rolls and monthly operating statements for October 2014 and each month thereafter through and including the month in which this Order is entered, and (4) an annual balance sheet and profit and loss statement for 2014 and 2015. Said rents rolls, operating statements and balance sheet and profit and loss statements shall satisfy the requirements of Sections 3.11(a)(i), (ii) and (iii) of the Mortgage, respectively.

C. On or before December 10, 2016, on the tenth day of each calendar month thereafter and on the Friday preceding any foreclosure sale (if any), Borrowers are hereby ordered to remit and provide to Plaintiff:

- i. by wire transfer in immediately available funds all Net Operating Income for the prior calendar month. "Net Operating Income" shall mean all Rents received or held by any Borrower Parties less current (and not past due), actual, ordinary, necessary and reasonable expenses required for the operation and management of the Property (collectively the "Operating Expenses"; Operating Expenses shall not include, by way of example and not limitation, Management Fees, attorneys' fees or other legal costs of any Borrowers Parties, and/or payments or distributions to any Borrower Parties); and
- ii. a monthly rent roll and monthly operating statement for the prior calendar month which satisfy the requirements of Sections 3.11(a)(i) and (ii) of the Mortgage, respectively, along with copies of invoices, checks and receipts, and any other information or documentation reasonably requested by Plaintiff to support or explain a complete accounting of the receipt, collection, use and disbursement of Rents for such month.

D. During the pendency of this action, Borrowers shall deliver or cause to be delivered to Plaintiff (i) copies of all Leases and/or any amendments, extensions, renewals, modifications, supplements or terminations of any Leases entered into on or after the date hereof, within two (2) days of same being executed, and (ii) an annual balance sheet and profit and loss statement as and when required by Section 3.11(a)(iii) of the Mortgage.

E. Rents shall not be commingled with any other funds. Plaintiff may serve this

Order on any financial institutions that maintain or may maintain any bank accounts that are into which Rents were or are being deposited or otherwise related to the management and operation of Property. Any financial institution maintaining such accounts shall provide to Plaintiff a complete listing of account numbers under the name of Borrowers, Property Manager or any other Borrower Parties, including accounts previously closed. For each such account the financial institution shall provide the then-current balance and upon request by Plaintiff shall provide monthly bank statements (and details or copies for any transactions, including check copies, as requested) for the period beginning August 2014 through the date this Order is served on such financial institution.

F. Except as provided hereinabove, no disbursement or distribution of Rents shall be made. Borrowers and any other Borrower Parties shall take no action to divert the payment or receipt of Rents or otherwise to frustrate the intent and purposes of this Order.

IT IS SO ORDERED.



Hon. Robert E. Hood
Circuit Court Judge, Fifth Judicial Circuit

November 18, 2016
Columbia, South Carolina

Robert Daniel Dodson
1722 Main St
Suite 200
Columbia, SC 29201-2851