

IN THE **CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT,**
IN AND FOR **CHARLOTTE COUNTY, FLORIDA**

CIVIL DIVISION

KENNETH D. GOODMAN, TRUSTEE,

CASE NO. 07-2492 CA

Plaintiff,

v.

M.A.M.C. WINDWARD, LLC, a Florida
limited liability company, et al.,

Defendants.

**RECEIVER'S MOTION FOR PROTECTIVE ORDER REGARDING PLAINTIFF'S
NOTICE OF TAKING DEPOSITION OF JAMES D. GASSENHEIMER, ESQUIRE**

Michael I. Goldberg, as Receiver over MAMC Windward, LLC and M.A.M.C., Inc. pursuant to Florida Rule of Civil Procedure 1.280(c) hereby files this Motion for Protective Order with regard to Plaintiff's Notice of Taking Deposition of James D. Gassenheimer, Esquire, and states good cause why the discovery should not be had as follows:

1. Plaintiff, Kenneth Goodman, as Trustee for CCIT ("Plaintiff") commenced this action to enforce a promissory note and to foreclose a mortgage on two parcels of vacant land and eight condominium units in Charlotte County, Florida (collectively, the "Property") once owed by Cape Haze Windward Partners, LLC. ("Cape Haze")

2. Plaintiff held a first position mortgage and M.A.M.C. lenders held a second position mortgage on the Property when Cape Haze filed for bankruptcy.

3. Negotiations in the bankruptcy proceedings yielded a settlement: In exchange for the release of his first position mortgage, the Plaintiff took a Note and Collateral Assignment of Rights under certain notes and mortgages.

4. The bankruptcy court authorized the sale of the Property to Berman Mortgage Corporation or its designee (Defendant, M.A.M.C. Windward, LLC) "free and clear of any and all liens, claims, interests, and encumbrances." On December 12, 2006, the bankruptcy trustee executed the Trustee's Deed transferring the Property to M.A.M.C. Windward, LLC. Therefore,

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the lenders took title to the Property in the name of M.A.M.C. Windward, LLC, which entity is owned by the lenders in proportion to their individual interests in the loan to Cape Haze. The Receivership Court made M.A.M.C. Windward, LLC a relief defendant in the receivership.

5. Subsequent to the Court's 363 order but prior to the recordation of the Trustee's Deed, the Plaintiff recorded his Collateral Assignment.

6. After M.A.M.C. Windward, LLC took title to the Property, a second group of Berman Lenders made a \$1 Million loan to M.A.M.C. Windward, LLC and recorded their mortgage on the Property, which became the first recorded instrument after the Trustee's Deed.

7. The validity and priority of these instruments are at issue in the instant case. Plaintiff contends he has a valid first mortgage on the Property by virtue of the recordation of the Collateral Assignment has sue sued M.A.M.C. Windward, LLC and the Berman Mortgage Lenders individually on the Note and Collateral Assignment.

8. Plaintiff seeks discovery on the negotiations that occurred prior to the bankruptcy court's order authorizing the sale of Property, confirmation and finalization of Cape Haze's plan of reorganization, and the Trustee's Deed transferring title to the Property to M.A.M.C. Windward, LLC free and clear of all liens, claims, interests, and encumbrances.

9. James D. Gassenheimer, Esq. represented M.A.M.C. during bankruptcy and the settlement negotiations between M.A.M.C. and the Plaintiff. Mr. Gassenheimer represents the Receivership and the Defendants in their defense of in the instant case.

10. The Plaintiff has unilaterally noticed the deposition of Mr. Gassenheimer for Wednesday, April 22, 2009.

11. The deposition of Mr. Gassenheimer is improper for several reasons.

12. First, clearly the Plaintiff anticipates questioning Mr. Gassenheimer on the negotiations underlying the settlement reached between the Plaintiff and the lenders in the bankruptcy proceeding. The underlying the settlement discussions are privileged by their very nature and not subject to probing in discovery.

13. Additionally, questioning Mr. Gassenheimer on the underlying settlement discussions and the intentions of his clients in the process necessarily implicates the attorney-client privilege.

14. Finally, taking the deposition of Mr. Gassenheimer creates a high potential for disclosure of the Defendants' legal theories, mental impressions, and other information protected by the attorney-work product doctrine.

15. Notwithstanding the impropriety of taking Mr. Gassenheimer's deposition in this case, Mr. Gassenheimer's will not be available on the date noticed for his deposition because of his spouse is scheduled for surgery on the very same day.

16. Additionally, Plaintiff never served Mr. Gassenheimer with a subpoena but merely noticed the deposition unilaterally.¹

WHEREFORE, the Michael Goldberg, as Receiver over MAMC Windward, LLC and M.A.M.C., Inc. requests this Court to enter a Protective Order pursuant to Florida Rule of Civil Procedure 1:280(c)(1) that the requested discovery may not be had by Plaintiff and awarding such other and further relief this Court deems just and proper.

Respectfully submitted,

BERGER SINGERMAN

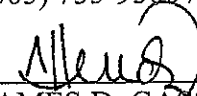
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By: _____


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¹ In raising this issue, the Receiver does not suggest that Mr. Gassenheimer would not cooperate with Plaintiff nor be made available for deposition without a subpoena should the Court overrule the other substantive objections to the requested discovery.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail, Federal Express (Overnight Mail to the Clerk's Office) and U.S. Mail on this 16th day of April 2009, to: **J. Michael Coleman, Esquire, Attorneys for Plaintiff**, COLEMAN HAZZARD & TAYLOR P.A., 2640 Golden Gate Parkway, Suite 304, Naples, Florida 34105.

Respectfully submitted,

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By: 

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