

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA, OFFICE OF FINANCIAL
REGULATION,

CASE NO.: 07-43672 CA 09

Plaintiff,

v.

BERMAN MORTGAGE CORPORATION, a Florida
corporation, M.A.M.C. INCORPORATED, a Florida
corporation, DANA J. BERMAN, as Owner and Managing
Member,

THE ORIGINAL
FILED ON:
NOV 22 2010

Defendant.

and

IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

DB ATLANTA, LLC, a Florida limited liability
company, et al.,

Relief Defendants.

RECEIVER'S MOTION FOR AUTHORIZATION TO MODIFY RECEIVERSHIP
ESTATE'S INTEREST IN THE MAMC WINDWARD MORTGAGE AND TO
ABANDON RELIEF DEFENDANT MAMC WINDWARD LLC AND
DEFINE THE INVESTOR CLASS WHO MAY PARTICIPATE IN
ANY RECOVERY IN THE MAMC WINDWARD MORTGAGE

Michael I. Goldberg, the receiver over Defendants Berman Mortgage Corporation ("BMC"), M.A.M.C. Incorporated ("MAMC"), *et al.*, and Relief Defendants DB Atlanta, LLC, *et al.* (the "Receiver"), hereby files this Motion for Authorization to Modify The Receivership Estate's Interest in The MAMC Windward Mortgage, as that term is defined herein, to Abandon Relief Defendant MAMC Windward, LLC and to Modify the Interests of the Investors in that certain loan serviced by MAMC, Incorporated in which MAMC Windward, LLC is the borrower. In support of this Motion, the Receiver states as follows:

1. On December 11, 2007, this Court appointed Michael Goldberg as the receiver ("Receiver") over BMC and MAMC (the "Defendants") and the Relief Defendants (collectively, the "Receivership Defendants") and all of their respective assets ("Receivership Estates"). See Temporary Injunction and Agreed Order Appointing Receiver ("Receivership Order") previously filed with this Court.

2. MAMC Windward, LLC, ("MAMC Windward") is a Relief Defendant pursuant to an Order of this Court, dated May 5, 2008.

3. MAMC Windward's members are certain of the MAMC lenders who were investors ("Windward Investors") in two notes and mortgages originated by BMC and made to Cape Haze Windward Partners, LLC ("Cape Haze") and secured by two parcels of vacant land and thirty-six condominium units in Charlotte County, Florida (the "Property").

4. Cape Haze subsequently filed a voluntary bankruptcy petition in the U.S. Bankruptcy Court for the Middle District of Florida, Case No. 05-28339-KRM.

5. The Property¹ was transferred to MAMC Windward under a chapter 11 plan of reorganization following a credit bid at a sale of Cape Haze's assets.² The trustee in the Cape Haze bankruptcy issued a Trustee's Deed to MAMC Windward. Although represented as a first mortgage investment to the Windward Investors by BMC, the Windward Investors held a second lien on the Property junior to Orion Bank (the "Orion Lien"). The Orion lien was guaranteed by Kenneth Goodman as Trustee for the Cape Charlotte Investments Trust ("CCIT"). CCIT acquired the Orion lien and thereafter sold its lien to BMC and took back seller financing secured by a collateral assignment of the pre-confirmation notes and mortgages on the Property.

¹ During the bankruptcy case twenty-eight of the thirty-six units were sold and the proceeds were used to pay down a first lien in favor of Orion Bank.

² On September 26, 2006, the Bankruptcy Court entered an Amended Final Order Authorizing Sale of Property Free and Clear of all Liens, Claims and Encumbrances.

Although the chapter 11 plan transferred the Property free and clear of liens and encumbrances to the Trustee, who in turn transferred the Property to MAMC Windward free and clear of liens, CCIT still claims a first priority lien on the Property. MAMC Windward also borrowed \$1,000,000 from certain MAMC, Incorporated Lenders, (the "Windward Mortgage") which loan is still serviced by MAMC, Incorporated.

6. CCIT asserts a first priority secured lien against the Property. CCIT claims that the transfer of the Property to MAMC Windward by virtue of the Trustee's Deed triggered the maturity of its loan to MAMC Windward, converted its pre-confirmation lien to a first mortgage on the Property, after the recording of the Trustee's Deed and asserts MAMC Windward has failed to satisfy the loan. The Windward Mortgage is also in default. CCIT initiated a foreclosure against MAMC Windward and the Windward Mortgage. CCIT claims a first priority interest in the Property as does the Windward Mortgage, the first recorded mortgage after the recording of the Trustee's Deed.

7. On August 2, 2007, CCIT filed a Complaint in the Circuit Court for the Twelfth Circuit in Charlotte County ("Foreclosure Court"), captioned *Kenneth D. Goodman, as Trustee v. MAMC Windward, LLC, et al.*, Case NO. 07-002492-CA to foreclose its lien on the Property ("Foreclosure Case"). CCIT named MAMC Windward as the owner of the Property, the individual MAMC Windward Investors³ and the investors or holders of the Windward Mortgage as defendants in the Foreclosure Case.

8. On May 27, 2009, this Court entered an Order approving a settlement agreement between CCIT and the Windward Investors, wherein CCIT agreed to dismiss the individual Windward Investors from the Foreclosure Case. However, the Foreclosure Case continues against MAMC Windward and the investors in the Windward Mortgage. On November 12,

³ The MAMC Windward investors have been dismissed from the foreclosure case.

2010, the Foreclosure Court entered an Order scheduling a trial in the Foreclosure Case to take place during the trial period commencing December 6, 2010. Based on valuation of the assets it appears clear that in the Foreclosure Case there will be no recovery made by MAMC Windward.

9. The defense of the Foreclosure Case is costly. The preparation for the trial, including payment of attorney's fees is estimated to cost about \$150,000. In the event CCIT prevails, the Windward Mortgage lien will be foreclosed, however, if the investors in the Windward Mortgage prevail CCIT will own the property subject to the Windward Mortgage and there will be a recovery to the Windward Mortgage Investors. There is not sufficient equity in the Property to fully satisfy both the CCIT lien and the Windward Mortgage.

10. Through the date of the filing of the Motion, the Receiver, through Estate Assets⁴ has been funding the Foreclosure Case with the understanding that the Estate would be repaid through any recovery⁵. The Receiver has consulted with the Executive Committee⁶ of the Receivership Estate about the potential costs of the trial and the likelihood of success. The Executive Committee has advised the Receiver that they do not support the further use of Estate Assets for funding the legal fees and costs of the trial.

11. In light of the decision of the Executive Committee, and the uncertainty of a recovery in this case, the Receiver proposes that this Court enter an order modifying the interests of the MAMC Lenders in MAMC Windward and the Windward Mortgage. The recommendation of the Receiver is that any MAMC Lender who wishes to participate in any recovery from the Windward Mortgage or MAMC Windward, deposit in the Trust Account of

⁴ The Receiver, through other insurance litigation recoveries has funds on deposit that may be used to fund Estate Expenses, including litigation expenses.

⁵ The Receiver plans to distribute the Estate Assets to all injured investors at the conclusion of the case in a waterfall already established by this court.

⁶ At the outset of the receivership, the Receiver set up committees comprised of lenders for each loan and one overall committee made up of at least one lender from each loan ("Executive Committee") to advise the Receiver.

Berger Singerman, PA on or before December 3, 2010, funds to support the litigation. Provided sufficient funds are posted (\$150,000 "The Litigation Fund") the litigation shall proceed and the Lenders who post funds shall participate in any recovery in proportion to their investment in the litigation. Any MAMC Lender who does not post funds in the Litigation Fund shall not make any recovery in this case. Without a Litigation Fund there will be no recovery so any Lender who does not participate in the Litigation Fund should not make any recovery. As the Receiver is otherwise abandoning the project, the MAMC Estate shall not make a recovery from the case. Any recovery shall be distributed by this court following motion and hearing, in pro-rate to the investors in the Litigation Fund. If insufficient funds, defined as \$150,000⁷ are not raised, the Receiver seeks authority on December 6, 2010 to abandon the Foreclosure Case and stipulate to transfer of title to the Property to CCIT. The Receiver seeks authority to abandon MAMC Windward as there is no chance of a recovery to this entity.

WHEREFORE, Michael I. Goldberg, in his capacity as Receiver of Berman Mortgage, M.A.M.C. and related entities, respectfully requests this Court to enter an Order authorizing the Receiver to: (i) Modify the interests of the MAMC Windward Investors and the Windward Mortgage Investors to provide that only those investors who pay into the Litigation Fund shall participate in any recovery from the Property and all other MAMC Lenders' rights in MAMC Windward and the Windward Mortgage shall otherwise be extinguished; (ii) abandon MAMC Windward; (iii) In the event insufficient funds are deposited to the Berger Singerman PA trust account on or before December 3, 2010, the Receiver is authorized to abandon the Foreclosure Case and stipulate to transfer of title to the Property to CCIT and to return the Litigation Funds; (iv) In the event a minimum of \$150,000 is deposited in the Berger Singerman PA trust account

⁷ Berger Singerman approved invoices shall be paid from the funds in trust. Any unused portion of the funds raised shall be returned to the MAMC Lenders on a pro-rate basis.

the Receiver's Counsel, or counsel of the choosing of the new Windward committee will continue the litigation through trial and will only look to the Litigation Fund for payment, from the date of an order entered on this Motion and going forward;⁸ (v) A new committee will be formed of the investors in the Litigation Fund who will act with the same authority as committees in this Receivership case; (vi) Other than overseeing a fair and orderly distribution of any recovery in the Foreclosure Case, the Receiver shall have no further obligations or duties in regard to the Windward Mortgage.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of November, 2010, a true and correct copy of the foregoing was furnished via U.S. Mail to the parties on the attached Service List.

Respectfully submitted,

BERGER SINGERMAN

Attorneys for Receiver, Michael Goldberg

1000 Wachovia Financial Center

200 South Biscayne Boulevard

Miami, Florida 33131

Phone: (305) 755-9500 / Fax: (305) 714-4340

By: 

~~JAMES D. GASSENHEIMER~~

~~Florida Bar No. 959987~~

~~jgassenheimer@bergersingerman.com~~

MONICA F. ROSSBACH

Florida Bar No. 13641

mrossbach@bergersingerman.com

⁸ This fund is for trial work only. If there is an appeal the lenders will be required to provide further funds and the participation shall be modified by further motion before this court. Funds from the trust account will be dispersed on approval of invoices in accordance with the Receivership appointment orders and retention of counsel orders.

SERVICE LIST

Cristina Saenz Assistant General Counsel STATE OF FLORIDA OFFICE OF FINANCIAL REGULATION 401 N.W. 2 nd Avenue, Suite N-708 Miami, FL 33128	Alan M. Sandler, Esquire SANDLER & SANDLER 117 Aragon Avenue Coral Gables, FL 33134
Charles W. Throckmorton, Esquire <i>Attorneys for Dana Berman</i> KOZYAK TROPIN THROCKMORTON, P.A. 2525 Ponce de Leon Boulevard, 9 th Floor Coral Gables, FL 33134	Paul Huck, Esquire Dean C. Colson, Esquire COLSON HICKS EIDSON 255 Aragon Avenue, Second Floor Coral Gables, FL 33134
Jason S. Miller, Esquire <i>Counsel for Flagstar Bank</i> ADORNO & YOSS, LLP 2525 Ponce de Leon Boulevard, Suite 400 Coral Gables, FL 33134	Maurice Baumgarten, Esquire ANANIA, BANDKLAYDER, BLACKWELL, BAUMGARTEN, TORRICELLA & STEIN Bank of America Tower – Suite 4300 100 SE 2 nd Street Miami, FL 33131
Mark A. Basurto, Esquire and Charles Evans Glausier, Esquire, Attorneys for Gulf Island Beach and Tennis Club Condominium Association, Inc. BUSH ROSS, P.A. Post Office Box 3913 Tampa, Florida 33601-3913	Charles L. Neustein, Esquire CHARLES L. NEUSTEIN, P.A. 777 Arthur Godfrey Road, Second Floor Miami Beach, FL 33140
William Dufoe, Esquire Robert W. Lang, Esquire HOLLAND & KNIGHT, LLP 100 North Tampa Street, Suite 4100 Tampa, FL 33602	Deborah Poore Fitzgerald, Esquire WALTON LANTAFF SCHROEDER & CARSON, LLP Corporate Center, Suite 2000 100 East Broward Boulevard Fort Lauderdale, FL 33301
Peter Valori, Esquire DAMIAN & VALORI, LLP 1000 Brickell Avenue, Suite 1020 Miami, FL 33131	Christopher S. Linde, Esquire Burr Forman 450 S. Orange Avenue Suite 200 Orlando, Florida 32801

cc: The Honorable Jerald Bagley *(via U.S. Mail)*
Michael Goldberg, Esq., as Receiver *(via e-mail)*
The Investor(s)/Lender(s) Group *(via e-mail)*
Posted to the Berman Mortgage Website