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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

In re:)	
)	
USA COMMERCIAL MORTGAGE CO.,)	2:07-cv-00892-RCJ-GWF
)	
Debtor,)	
)	
_____)	

ORDER

Before the Court is Plaintiffs' Motion to Terminate Compass and Asset Resolution as Servicer Pursuant to Paragraph 8 of the Preliminary Injunction (#1178). Defendants filed a Response (#1250), and Plaintiffs filed a Reply (#1263). On August 12, 2009, the Court heard oral argument on the Motion (#1178), as well as on a Motion for Leave to File Third Amended Complaint (#1331), which the Court granted, (*see* #1458), and a Motion to Appoint Equity Receiver (#1318), which the Court denied without prejudice, with a written order to follow. This is that order.

The Court held in abeyance its ruling on the Motion to Terminate Compass and Asset Resolution as Servicer Pursuant to Paragraph 8 of the Preliminary Injunction (#1178), pending submission of supplemental briefs on the issue of whether Nevada law authorizes 51% percent of the Direct Lenders to designate a new loan servicer in spite of any contractual provisions to the contrary. Plaintiffs filed a Supplemental Brief (#1412), and Defendants filed Supplemental Response (#1413). For the reasons given herein, the Motion to Terminate Compass and Asset

1 Resolution as Servicer (#1178) is granted, and the Motion to Appoint Equity Receiver (#1318) is
2 denied.

3 **I. FACTS AND PROCEDURAL HISTORY**

4 USA Commercial Mortgage Co. (“USA Commercial”) was a loan servicing company that
5 went bankrupt. At an auction pursuant to those bankruptcy proceedings, Compass USA SPE, LLC
6 (“Compass”) purchased USA Commercial’s interest in thousands of Loan Servicing Agreements
7 (“LSA”). Those LSAs were contracts between USA Commercial and various financial institutions
8 (“Direct Lenders”) that had lent money for the purchase of commercial real estate. The LSAs gave
9 USA Commercial the right to administer the loans on behalf of the Direct Lenders. Silar Advisors,
10 LP and Silar Special Opportunities Fund, LP (collectively, “Silar”) financed Compass’ purchase of
11 the LSAs, retaining a security interest in the LSAs. Silar later assigned the loan and corresponding
12 security interest in the LSAs to Asset Resolution LLC (“Asset Resolution”), an entity created and
13 owned by Silar for this purpose. Asset Resolution eventually foreclosed on the LSAs.

14 Certain Direct Lenders subsequently formed various companies (“the LLCs”), who sued
15 Compass in this Court to determine their rights and obligations under the LSAs and for various torts.
16 Asset Resolution and Silar intervened, and soon thereafter they filed an Amended Answer to the
17 Second Amended Complaint and Asset Resolution, LLC’s Counterclaims. (#912). Those
18 counterclaims, brought against approximately sixty-five Counterdefendants, (*see id.* at 22–23), were
19 for declaratory judgment, breach of contract, breach of the covenant of good faith and fair dealing,
20 permanent injunction, and quantum meruit, (*id.* at 41–45).

21 Further complicating matters, on October 14, 2009, Asset Resolution and Silar filed a Notice
22 of Commencement of Chapter 11 Bankruptcy Cases (#1547), indicating that Asset Resolution, but
23 not Silar itself, had filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the
24 Southern District of New York. On November 24, 2009, the Bankruptcy Court for the Southern
25 District of New York granted Asset Resolution’s motion for transfer of venue, transferring the

1 bankruptcy action to the Bankruptcy Court for the District of Nevada and giving this Court exclusive
2 jurisdiction over the bankruptcy estate of Asset Resolution. (#22-1 at 13).

3 Each Direct Lender in the present suit has executed one LSA that governs the relationship
4 between it and the servicing agent (originally USA Commercial, then Compass, and now Asset
5 Resolution). Thousands of LSAs exist in this matter. The LSAs provide that a servicer may only
6 be terminated for cause and with written notice of thirty (30) days. The “cause” required is failure
7 to perform under the LSA. “Lender may, by 30 days written notice to USA [Commercial], terminate
8 this agreement, and the power of attorney granted, if one is granted, under Section 9 of this
9 Agreement, if USA [Commercial] fails to perform its obligations hereunder.” (#1179, Ex. 2, at ¶ 8).
10 Counterdefendant Roger Stubbs, a former employee of USA Commercial who is familiar with the
11 LSAs, declares that all of the LSAs contain identical provisions. (*Id.* at 2:27–3:2). The LSA
12 contains a choice-of-law clause, which chooses the law of Nevada. (*See id.*, Ex. 2, at ¶ 13). Choice
13 of law is not contested.

14 On or about May 18, 2007, Plaintiff Donna M. Cangelosi sent letters (the “Termination
15 Letters”) to Compass on behalf of the LLCs she established advising it of its termination as servicer.
16 The Bankruptcy Court (in Compass’s bankruptcy) declared this purported termination ineffective.
17 On November 6, 2007, the Court issued its Preliminary Injunction and Order Pursuant to 11 U.S.C.
18 §§ 105 and 1141 and Fed. R. Civ. P. 65 Enforcing Confirmation Order (#199). In the Preliminary
19 Injunction, the Court ordered that Compass would remain as loan servicer notwithstanding the
20 Termination Letters, and the Court set forth guidelines for terminating the servicer in the future. The
21 Court also found Cangelosi in contempt for her solicitation of the Direct Lenders to join the LLCs
22 and sanctioned her by voiding any and all of her efforts to terminate Compass. (#198 ¶ 32).

23 Plaintiffs have now moved to terminate Compass and Asset Resolution pursuant to the
24 Preliminary Injunction (#199). At oral argument on the present Motion (#1178), the Court requested
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1 that the parties file briefs on the limited issue of whether Nevada law permits a majority of the
2 Direct Lenders to terminate Compass and Asset Resolution and appoint a new loan servicer.

3 **II. LEGAL STANDARDS**

4 **A. Paragraph 8 of the Preliminary Injunction**

5 The Preliminary Injunction delineated the standard this Court would use for termination of
6 Compass (or the current loan servicer) by the Direct Lenders:

7 Motion to Terminate Compass. Fifty-one (51%) or more of the Direct
8 Lenders in a Loan, whether acting directly or acting through a person or entity
9 holding a power of attorney of such Direct Lender granted after such Direct Lender's
10 receipt of this Preliminary Injunction Order and the Contempt Order re Donna M.
11 Cangelosi entered concurrently herewith and reiterating such Direct Lender's desire
12 to terminate Compass ("Majority Lenders"), may file a motion seeking an order
authorizing the termination of Compass as servicer with respect to such Loan (as
well as any Subservicer engaged by Compass). . . . The foregoing notwithstanding,
Compass shall be terminated as servicer of the Loans identified on Exhibit B hereto
effective as of the date of this Preliminary Injunction Order

13 (#199 at 9:23–10:5) (footnote omitted). This language reflects the requirements for termination in
14 the LSAs. The LLCs were also given the right to file a motion for termination upon obtaining a
15 power of attorney from each Direct Lender required to move to terminate servicing rights to a given
16 loan. (*See id.* at 10 n.1).

17 **B. Appointment of an Equity Receiver**

18 Federal courts may appoint equity receivers "solely by virtue of their equitable powers."
19 *Canada Life Assurance Co. v. LaPeter*, 563 F.3d 837, 843 (9th Cir. 2008). Rule 66 notes that the
20 Federal Rules of Civil Procedure govern actions in which an equity receiver is sought, but Rule 66
21 does not provide standards for appointing a receiver. *See* Fed. R. Civ. P. 66. This determination is
22 a matter of federal common law, even in a diversity action. *LaPeter*, 563 F.3d at 843.¹ "Under
23 federal law, appointing a receiver is an extraordinary equitable remedy, which should be applied
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25 ¹The present case is a removal from the Bankruptcy Court. (*See* #1).

1 with caution.” *Id.* at 844 (citations and internal quotations marks omitted). Courts usually consider
2 such factors as:

3 (1) whether [the party] seeking the appointment has a valid claim; (2) whether there
4 is fraudulent conduct or the probability of fraudulent conduct, by the defendant; (3)
5 whether the property is in imminent danger of being lost, concealed, injured,
6 diminished in value, or squandered; (4) whether legal remedies are inadequate; (5)
7 whether the harm to plaintiff by denial of the appointment would outweigh injury to
the party opposing appointment; (6) the plaintiff’s probable success in the action and
the possibility of irreparable injury to plaintiff’s interest in the property; and, (7)
whether [the] plaintiff’s interests sought to be protected will in fact be well-served
by receivership.

8 *Id.* (quoting 13 James Wm. Moore, et al., Moore’s Federal Practice, § 66.04[2][b] (3d ed. 2008))
9 (internal quotation marks omitted). The most important factor is whether the property sought to be
10 put into receivership “[is] of sufficient value to insure payment” and “whether the defendant [is] of
11 doubtful financial standing.” *Id.* A court may appoint a receiver regardless of the factors listed
12 above if other considerations warrant it. *Id.* at 845. In summary, “the district court has broad
13 discretion in appointing a receiver, . . . it may consider a host of relevant factors, and . . . no one
14 factor is dispositive.” *Id.* A district court’s decision to appoint a receiver is reviewed for abuse of
15 discretion. *Id.* at 844.

16 **III. ANALYSIS**

17 **A. Motion to Terminate Compass and Asset Resolution**

18 Plaintiffs argue that they have shown that more than 51% of the Direct Lenders in each of
19 twenty-nine loans have agreed to terminate Compass and Asset Resolution as servicer. Plaintiffs
20 make this showing through the Stubbs Declaration, in which Roger Stubbs attests that “[a]s of the
21 date of this declaration, the law firm of Bickel & Brewer represents more than 51% of the Direct
22 Lenders in each of the Terminated Loans, in the percentages identified below . . .” (#1179, Ex. 2,
23 at 4:21–22). All of the percentages identified therein are at least 51% (the lowest is 54%). The table
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1 identifies the following loans: (1) 3685 San Fernando; (2) Collwood; (3) 60th St.; (4) 6425 Gess;²
2 (5) Bar-USA; (6) Bundy 2.5; (7) Bundy 5.0; (8) Bundy 5.725; (9) Bundy 7.5; (10) Cabernet; (11)
3 Castaic II; (12) Castaic III; (13) Charlevoix; (14) ComVest; (15) Comman; (16) Del Valle
4 Livingston; (17) Eagle Meadows; (18) Fiesta Murrieta; (19) Fox Hills; (20) Harbor Gtown [sic]; (21)
5 Clear Lake I; (22) Huntsville; (23) Lake Helen; (24) Mountain House; (25) Oak Shores II; (26)
6 Ocean Atlantic 9.425; (27) Tapia; (28) Ten-Ninety; and (29) Gardens LLC TSHR. (*Id.* at 4–5 tbl.).
7 These percentages were calculated according to percentage of ownership interest represented by
8 Bickel & Brewer. (*See id.* at 5). The Court is satisfied that this is sufficient under the language of
9 the LSAs.

10 In their Supplemental Brief (#1412), Plaintiffs also argue that any contractual clause
11 restricting the ability of a group of persons holding a majority of the beneficial interest in a
12 commercial mortgage investment loan is void and unenforceable as against the public policy of
13 Nevada. (#1412 at 2–3). As Defendants noted at oral argument, the relevant statute does not apply
14 in the face of a contrary contractual provision by its own terms:

15 Except as otherwise provided by law or by agreement between the parties and
16 regardless of the date the interests were created, if the beneficial interest in a loan
17 belongs to more than one natural person, the holders of 51 percent or more of the
18 outstanding principal balance may act on behalf of all the holders of the beneficial
interests of record on matters which require the action of the holders of the beneficial
interests in the loan, including, without limitation

19 A.B. 513 § 8(1). This section of the statute went into force on May 29, 2009. *See* 75th (2009)
20 Session Bill Information, Assembly Bill 513, *available at*
21 <http://www.leg.state.nv.us/75th2009/Reports/history.cfm?ID=989>. The clause in the LSA, however,
22 does not create any greater restriction on the ability of the Direct Lenders to terminate the servicer
23 than does the statute. Plaintiffs have made the required showing and do not require good cause to

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25 ²The disposition of this property was resolved when the Court approved the sale of the
property, subsequent to oral argument on the present motion. (#1440).

1 terminate the servicer under the Preliminary Injunction. As Plaintiffs note, Nev. Admin. Code
2 § 645B.073 requires—and did so long before A.B. 513 passed—that any document related to a
3 mortgage loan must contain a provision to allow the holder of 51% or more of the beneficial interest
4 to act on behalf of all of the beneficial interest holders. The Court therefore grants the Motion to
5 Terminate Compass and Asset Resolution as Servicer Pursuant to Paragraph 8 of the Preliminary
6 Injunction (#1178).

7 **B. Motion to Appoint Equity Receiver**

8 Asset Resolution requests to have Tom Grimmett, who has already served as receiver in this
9 case, appointed as an equity receiver. It also requests that the Court authorize and/or establish
10 procedures that are necessary to the management and liquidation of the remaining assets, including:
11 sale or other disposition of real property; payment of related closing costs and reimbursement of
12 amounts advanced to maintain the property; borrowing necessary funds secured by the property; and
13 loan collection, administration, and enforcement.

14 Asset Resolution argues that the case requires the attention of a receiver to protect the
15 collateral properties and to make decisions regarding the notes, deeds of trust, and LSAs. Asset
16 Resolution requests that Mr. Grimmett be given the same power that he had when acting as receiver
17 for the Brookmere Loan Interests, with some modifications. The thrust of Asset Resolution's
18 argument in support of appointment of a receiver is that Plaintiff Direct Lenders, who represent only
19 some of the Direct Lenders with interests in the relevant loans, are through the present litigation
20 frustrating the ability of all parties to manage and liquidate the secured properties. Asset
21 Resolutions accuses the Plaintiff Direct Lenders of pursuing their own interests at the expense of
22 both Defendants and non-party Direct Lenders by preventing any recovery on the loans at all.

23 The Direct Lenders object to the appointment of a receiver. They argue that the interests in
24 the loans are not unduly fractured in such a way as to frustrate decision-making for the best interests
25 of the lenders, pointing out that the Court itself recognized on August 13, 2009 (when it denied

1 another party's motion to appoint a receiver) that it hasn't been shown that agreement of 51% of
2 Direct Lenders as to decisions on the properties cannot be achieved. (#1340 at 2 n.1). The Direct
3 Lenders argue that the Motion to Appoint Equity Receiver (#1318) is essentially a maneuver
4 designed to frustrate the pending Motion to Terminate Compass and Asset Resolution as Servicer
5 (#1178). They also argue that a receivership will impose duplicate costs and a financial burden on
6 the Direct Lenders. Additionally, they argue that a receiver is not necessary because the Preliminary
7 Injunction already gives the Court control of the properties at issue, and that Asset Resolution
8 presents no basis for the necessity of a receiver.

9 Asset Resolutions does not explain why it is inappropriate for Plaintiffs to pursue their
10 interests in legal ways when Defendants and interested non-parties are not frustrated from protecting
11 their own interests in this Court. But so long as Plaintiffs do not violate the law or this Court's
12 orders, or act inequitably, Plaintiffs remain the best judge of what course of action is in their best
13 interests. Asset Resolutions has not shown that putting the properties into receivership will better
14 preserve their value for liquidation or that it is impracticable to obtain a 51% consensus between the
15 Direct Lenders. In fact, as noted above, the Direct Lenders have reached a consensus as to twenty-
16 nine of the properties, at least as to termination of Asset Resolution as servicer. The Court in its
17 discretion declines to appoint a receiver at this time.

18 **CONCLUSION**

19 IT IS HEREBY ORDERED that the Motion to Terminate Compass and Asset Resolution
20 as Servicer (#1178) is GRANTED, and the Motion to Appoint Equity Receiver (#1318) is DENIED.

21 DATED: January 21, 2010

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25 Robert C. Jones
United States District Judge