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CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE, AS SUCCESSOR IN INTEREST
TO BANK OF AMERICA, NATIONAL
ASSOCIATION, 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-TOP28

Plaintiff,

and

CHARLESTON URBAN RENEWAL
AUTHORITY,

Intervenor and Third Party Plaintiff,

and

CITY OF CHARLESTON,

Intervenor,

v.

CHARLESTON TOWN CENTER SPE, LLC

Defendant,

and

CHARLESTON TOWN CENTER COMPANY,
LIMITED PARTNERSHIP, CHARLESTON
TOWN CENTER PARKING LIMITED
PARTNERSHIP, and UMB, N.A.,
AS SUCCESSOR TRUSTEE FOR THE SERIES 1996C
SUBORDINATE CAPITAL APPRECIATION
PARKING FACILITY REFUNDING BONDS,

Third Party Defendants.

Civil Action No. 17-C-1527

Judge Tabit

492-493

ORDER GRANTING MOTION TO REOPEN CIVIL ACTION AND ENFORCE PRIOR
ORDERS OF THE COURT

On June 13, 2022, the Court conducted a hearing on the Motion to Reopen Civil Action and Enforce Prior Orders of the Court (“Motion”) filed by Charleston Urban Renewal Authority (“CURA”) and UMB, N.A., as Successor Trustee for the Series 1996C Subordinate Capital Appreciation Parking Facility Refunding Bonds (“Bond Trustee), the Response of Charles WV Mall, LLC to Motion (“Response”) and the Reply filed by CURA and Bond Trustee (“Reply”).

The Court heard opening remarks and arguments by counsel for CURA and Charles WV Mall, LLC (“CWV”). Having considered the papers presented in the Motion, Response and Reply, and having been made aware of another civil action pending in the Circuit Court of Kanawha County, 22-C-128, where CWV is a named defendant which involves matters related to the interpretation and enforceability of the COREA as hereinafter defined, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Charleston Town Center (“Mall”) opened its doors for business in 1983 in downtown Charleston. The Mall entered into written leases with its tenants, and commonly included “additional rent” for parking garage charges for the operation and maintenance of the parking garages. See Paragraphs 1-4, Findings of Fact, of the Order entered January 14, 2019 (“Order”).

2. Original to the development of the Mall is the Construction, Operation and Reciprocal Easement Agreement (“COREA”), by and among CTC, CURA, and the four (4) original anchor parcels held by Sears, Macy Department Stores, Montgomery Ward Group, and the J.C. Penney Group. The COREA was executed on or about April 20, 1982 and recorded by the Clerk on May 10, 1982 in Deed Book 2002 at Page 122. Section 10.9 of the COREA concerns the

operation of the parking garages and refers to them as the "Parking Facility." Section 10.9(b)(ii) provides that occupants, such as tenants, may be required to pay parking charges pursuant to their respective leases or other separate agreements. See Paragraph 8, Findings of Fact, of the Order.

3. The Court found in its Order that "[t]here is a clear history of more than three decades in which tenants paid specific parking charges, pursuant to their lease, for the operations and maintenance of the parking garages [and] there is a clear history of more than three decades of the Mall remitting the collected tenant parking charges to the parking garage on a monthly basis to support parking garage operations and maintenance." See Paragraph 6, Findings of Fact, of the Order.

4. The Court found in its conclusions of law that the "preponderance of the evidence shows a longstanding custom, practice, and course of performance regarding the collection and remittance of Mall tenant parking charges to the parking garages, such that it should be honored and resume forthwith" [and] "[t] here is no evidence that the Mall tenant parking charges were ever levied upon tenants, or paid by tenants, for something other than to support the operations and maintenance of the parking garages. See Paragraph 3, Conclusions of Law, of the Order.

5. In anticipation of U.S. Bank selling its interest in the Mall, the Court stated: "the Court ORDERS the new Mall owner to both remit to the Garage Receiver all tenant parking charges collected or received after the Mall sale date, and also provide a written report to this Court and all counsel of record as to the amounts collected or received and then paid to the Garage Receiver." See Paragraph 13, Conclusions of Law, of the Order.

6. Since January 2019, the Order was never amended, revoked, terminated or appealed and, subsequent to entry of the Order and dismissal of the Civil Action, U.S. Bank dutifully turned over and accounted for the Parking Garage Tenant Charges to the Parking Garage Receiver during

the Parking Garage Receivership for the benefit of the parking garages. Neither CURA nor the Bond Trustee received any of these funds as they were utilized for the operation of the parking garages.

7. In January 2020, all of the remaining parties to the Civil Action, except U.S. Bank, entered into a prolonged mediation of issues relating to the Parking Garages. After many months, the parties entered into a Settlement Agreement in April 2020. U.S. Bank was not a party to the Settlement Agreement ("Settlement Agreement").

8. On August 26, 2020, U.S. Bank and CURA entered into an Amended and Restated Joint Development Agreement ("JDA") to set forth the continuing obligations from the Mall to CURA. The same was recorded and made of record on September 24, 2020 in Deed Book 3077, Page 277. The JDA did not amend any of the obligations arising out of or from the COREA, nor did it provide any releases of any parties including any successors to the Mall. CWV incorrectly relies on Section 4.2 of the JDA as a release of the obligations under the COREA which continue to run with the land. Since CURA does not own the parking garages it is not entitled to directly receive payments regarding the Parking Garage Tenant Charges or the maintenance required to be performed by CWV pursuant to the COREA.

9. On September 25, 2020, the Civil Action was dismissed.

10. U.S. Bank foreclosed on its loan, acquired the Mall with a credit bid at the foreclosure sale, and sold the Mall in May 2021 to CWV. Upon information and belief, CWV knew and was made aware of the obligations relating to the Mall including, but not limited to, the JDA and COREA as the same run with the land and are of record. CWV was also provided or had access to the record in this Civil Action.

11. Section 16.2 of the COREA provides that a purchaser at a foreclosure sale and its successors and assigns “shall be deemed to have assumed and to be bound to perform” the obligations of a party to the COREA. *See* Deed Book 2002, page 225-26,

12. Since the Civil Action was dismissed, the former Parking Garage Receiver, Boyd Real Estate Resources, LLC (“Boyd”) was engaged by CBC and CURA to continue to manage the parking garages.

13. Despite numerous requests from Boyd, CWV has not turned over the Parking Garage Tenant Charges to Boyd or CBC since its purchase of the Mall in May 2021. CWV falsely claims that it is a beneficiary of the releases in the Settlement Agreement by way of successorship to the prior Mall Entities even though it did not purchase the Mall from the prior Mall Entities nor is it a corporate successor to the prior Mall Entities.

14. Upon information and belief, in another civil action pending in the Circuit Court of Kanawha County before Judge Akers, CWV has acknowledged its continuing obligations under the COREA subsequent to its purchase of the Mall as evidenced by its reliance on the enforceability of certain provisions in the COREA as it relates to a dispute regarding the demolition of the former Sears building. However, before this Court, CWV states that it is not bound by the COREA and this Court’s prior findings regarding the COREA. Such inconsistent stances between two different Circuit Courts in Kanawha County are irreconcilable. CWV cannot rely on the COREA as a successor in interest to the Mall in one action without being bound by the COREA this action. *See* Civil Action 22-C-128, and the Motion for Preliminary Injunction attached hereto as Exhibit A.

15. CURA filed its Motion to Reopen and Enforce Prior Orders of this Court, and CWV filed a response claiming the Order is not enforceable as to CWV as a result of (i) it being a

successor to the prior Mall Entities and being released in the Settlement Agreement, or (ii) in the alternative, it being released from obligations under the COREA by virtue of the JDA.

CONCLUSIONS OF LAW

In view of the foregoing findings of fact, the Court makes the following conclusions of law:

1. This Court has the authority to reopen this civil action and enforce its prior orders.
2. The Order remains enforceable as to CWV by virtue of its purchase of the Mall from U.S. Bank.
3. CWV is not a successor or third party beneficiary to the Settlement Agreement and therefore, CWV is not released from any continuing obligations arising from the COREA or JDA. The JDA did not release any obligations due and owing from CWV as the same arise under the COREA.
4. CWV is hereby ORDERED to turn over the Parking Garage Tenant Charges it has collected since its acquisition of the Mall in May 2021 to Boyd within ten (10) days of entry of this Order, and to continue such collections and payments monthly for as long as it owns the Mall pursuant to the terms of the COREA.
5. CWV is hereby ORDERED to provide a full and detailed accounting of the Parking Garage Tenant Charges (including receipt dates and names of tenants) along with copies of any tenant leases which provide for the Parking Garage Tenant Charges to Boyd within twenty (20) days of entry of this Order.
6. This civil action shall remain open until such time as CWV has satisfied its obligations hereunder.
7. This Court takes judicial notice of the pleading attached hereto as Exhibit A as filed in Civil Action 22-C-128 in the Circuit Court of Kanawha County.

8. In reopening this civil action, the Court does so without necessity of the inclusion, participation and attendance of any other prior parties named in the civil action with the exception of the City of Charleston, Charleston Urban Renewal Authority, U.S. Bank, N.A. and UMB, as Bond Trustee, and Charles WV Mall, LLC. Specifically, any other party to the Settlement Agreement not named herein is released from further proceedings herein, since such parties were released and dismissed from this matter with prejudice.

9. The Court notes that other actions and claims may exist between the parties. Any rights, interests and remedies to pursue such actions and claims are not released or prejudiced by this Order.

The Court notes the exceptions and objections of the parties to its rulings herein.

The Clerk is directed to mail a certified copy of this Order to all counsel of record.

ENTERED this 9th day of July, 2022.

Joanna I. Tabit
Honorable Joanna I. Tabit

Prepared by:

[Signature]
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7/12/2022
Date: _____
Certified copies sent to:
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_____ parties
_____ other (please indicate)
By: certified/fel class mail
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_____ hand delivery
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Other/discount method completed:
[Signature]
Deputy Court Clerk

a Starcher
S. Kemerski
C. Schueller
A. Spitz
K. Bifer
M. Darney
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J. Mount