

THIRD DIVISION
March 30, 2012

No. 1-11-1299

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, NATIONAL)
ASSOCIATION, Successor by Merger to)
LaSalle Bank National Association, f/k/a)
LaSalle National Bank, as Trustee for the)
Registered Certificateholders of Morgan)
Stanley Capital I Incorporated Commercial)
Mortgage Pass-Through Certificates Series)
1998-HF2,)

Plaintiff-Appellant,)

v.)

BASSMAN, FBT, LLC, a Delaware Limited)
Liability Company; GERSHON BASSMAN;)
BASSMAN FAMILY BEVERLY TRUST, an)
Illinois Irrevocable Trust under Trust Agreement)
dated August 20, 1984; and MAXIMUM)
MANAGEMENT LLC, an Illinois Limited Liability)
Company,)

Defendants-Appellees.)

Appeal from the
Circuit Court of
Cook County.

No. 10 CH 33673

The Honorable
Nancy J. Arnold,
Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's motion to dismiss where plaintiff's allegations relied upon a supposed grant of rights in the mortgage provisions at issue which violated public policy. The circuit court dismissed counts I, II, and III of plaintiff's complaint. We affirm.

¶ 2 This is an appeal of the trial court's order granting a motion filed by defendant-appellee Bassman, FBT, LLC, pursuant to section 2-615 (775 ILCS 5/2-615 (West 2010)) of the Code of Civil Procedure, and dismissing counts I, II and III of plaintiff-appellant Bank of America, National Association's (Bank of America) complaint. In its ruling, the trial court relied upon *Comercia Bank-Illinois v. Harris Bank Hinsdale*, 284 Ill. App. 3d 1030 (1996). Bank of America now appeals, contending the court improperly dismissed the action and that *Comercia Bank* does not apply. We affirm.

¶ 3 **BACKGROUND**

¶ 4 Bank of America¹ appeals an order granting the motion to dismiss filed by the Bassman defendants.² Bassman held an office in Cook County, Illinois, and held two mortgages for real property known as the Roosevelt Glen Corporate Center located at 739, 751, and 799 Roosevelt

¹Bank of America became successor by merger to LaSalle Bank National Association (LaSalle Bank). LaSalle Bank was trustee for the registered certificateholders of Morgan Stanley Capital I Incorporated commercial mortgage pass-through certificates, series 1998-HF2.

²Bassman collectively refers to Bassman, FBT, LLC (Bassman), a Delaware limited liability company; Gershon Bassman; and Bassman Family Beverly Trust (Trust), an Illinois irrevocable trust.

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Road in Glen Ellyn, Illinois. Bank of America is the mortgagee of the property. Bassman defaulted on the mortgage when it failed to make monthly payments. Bank of America commenced an action to foreclose and later petitioned the court to appoint a receiver. The receiver notified Bank of America that after the default, but before the receiver was appointed, Bassman made payments totaling \$781,418.26 to its management company, Maximum Management, and the Trust and its attorneys. Paragraph 13 of each of the mortgages granted Bassman a revocable license to collect the rents from the property and directed Bassman to hold the rents in trust to be applied in a specific order: first to the payment of all impositions, levies, taxes, assessments and other charges upon the property; second to the maintenance of insurance policies upon the property required; third to expenses of property operations including maintenance and repairs required hereby; fourth to the payment of that portion of the indebtedness then due and payable; and fifth the balance, if any, to or as directed by Bassman.

¶ 5 Bank of America brought this action to recover the amount of payments. Bassman moved for dismissal. The trial court dismissed counts I, II and III of Bank of America's verified complaint with prejudice, because Bank of America relied on "a supposed grant of rights obtained under paragraph 13 of the mortgages at issue, which is against public policy pursuant to *Comercia Bank*."

¶ 6 Paragraph 13 of the mortgage agreement between Bank of America and Bassman states:
"13. Lease of the Property/Absolute Assignment, License to Receive and Apply Rents.

The parties intend that the Mortgage grants a present, absolute, and unconditional assignment of the Rents and shall, immediately upon execution, give Lender the right to

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collect the Rents and to apply them in payment of the principal, interest and all other sums payable under the Loan Documents. Such assignment and grant shall continue in effect until the Indebtedness is paid in full and all Obligations are fully satisfied. Subject to the provisions set fourth herein and provided there is no Event of Default, lender grants to Borrower a revocable license to enforce the Leases and collect the Rents as they become due (excluding, however any Lease termination, cancellation or similar payments which Borrower agrees shall be held in trust and turned over to Lender for credit to principal under the Loan, without payment of any Yield Maintenance Amount) and Borrower shall hold the same, in trust, to be applied first to the payment of all impositions, levies, taxes, assessments and other charges upon the Property, second to the maintenance of insurance policies upon the Property required hereby, third to the expenses of Property operations, including maintenance and repairs required hereby, fourth to the payment of that portion of the Indebtedness then due and payable, and fifth, the balance, if any to or as directed by Borrower. Borrower shall deliver such Rents to Lender as are necessary for the payment of principal, interest and other sums payable under the Loan Documents are such sums become due.

Borrower shall comply with and observe Borrower's obligations as landlord under all Leases. Borrower will not lease any portion of the Property for use other than for office purposes except with the prior written approval of Lender. Borrower, at Lender's request, shall furnish Lender with executed copies of all Leases, and all Leases and amendments thereto hereafter entered into will be on a form of Lease previously approved

by Lender. All renewals of Leases and all proposed Leases for space in the Property shall provide for rental rates comparable to existing local market rates and shall be arms-length transactions. All Leases other than for space in the Property shall be terminable on not less than 60 days' notice, unless approved in writing by Lender prior to Borrower's execution thereof.

This Mortgage shall not be deemed to impose upon Lender any of the obligations or duties of the landlord or Borrower provided in any Lease. Borrower hereby acknowledges and agrees: (I) Borrower is and will remain liable under the Leases to the same extent as though this Mortgage had not been made; and (ii) Lender has not by this Mortgage assumed any of the obligations of Borrower under the Leases, except as to such obligations which arise after such time as Lender shall have assumed full ownership or control of the Property. This Mortgage shall not make Lender responsible for the control, care, management, or repair of the Property or any personal property or for the carrying out of any of the terms of the Leases. Lender shall not be liable in any way for any injury or damage to person or property sustained by any person or persons, firm, or corporation in or about the Property."

After dismissal, Bank of America filed a timely appeal with this court.

¶ 7

DISCUSSION

¶ 8 In this case, Bank of America asserts the trial court erred in dismissing its complaint.

Specifically, Bank of America argues that the court erroneously relied upon *Comercia Bank* in dismissing the complaint.

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¶ 9 "The question a reviewing court must determine when considering the propriety of a section 2-615 motion to dismiss is whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 45 (2001).

Generally, public policy strongly favors the freedom to contract. *In re Estate of Feinberg*, 235 Ill. 2d 256, 265 (2009). Courts will not enforce contract terms that violate public policy. *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶39 (2011). Courts will invoke the power to invalidate part or all of a contract on public policy grounds sparingly so as not to needlessly interfere with private parties' freedom to enter contracts. *Bruzas v. Richardson*, 408 Ill. App. 3d 98, 102 (2011).

¶ 10 In *Comercia*, a first and second mortgagee asked the court to review the trial court's order awarding rents to a mortgagor who defaulted on its first and second mortgages. *Comercia*, 284 Ill. App. 3d at 1031. Comercia Bank-Illinois recorded a mortgage and an assignment of rents and leases as security for the loan. *Id.* at 1031. The assignment of rents provided that Comercia could collect rents from the property without taking possession of the property and without exercising its other options under the mortgage. *Id.* at 1031. Upon default, Comercia sent a notice to the mortgagor who failed to cure the default. *Id.* at 1032. Comercia then chose to exercise its rights under the assignment of rents by collecting rents from the property without foreclosing, seeking the appointment of a receiver, or obtaining authorization from a court. *Id.* This option permitted Comercia to reduce the debt without assuming responsibility for the property or the large tax obligation. *Id.* The trial court ruled that the rent should be returned to

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the mortgagor because the mortgagor was in possession of the property at the time the rent was collected. *Id.* The appellate court affirmed the trial court's ruling. *Id.* at 1031. At issue was whether Comercia's assignment of rents, allowing it to collect rent without any other action, superseded the common law requirement of possession. *Id.* at 1033. The court noted that "[t]he possession requirement reflects the public policy in Illinois which seeks to prevent mortgagees from stripping the rents from the property and leaving the mortgagor and the tenants without resources for maintenance or repair." *Id.* at 1034. The court held that the mortgagee in a foreclosure action is not entitled to rents until judgment has actually been entered unless the mortgage agreement permits the mortgagee to obtain prejudgment possession. *Id.* at 1034.

¶ 11 Here, the trial court's reliance upon *Comercia* to find counts I, II, and III of Bank of America's complaint violated public policy was correct. As the trial court stated in its order, Bank of America relies on a supposed grant of rights obtained under paragraph 13 of the mortgage agreements at issue. Paragraph 13 contains an assignment of rents, as well as a clause vacating Bank of America from all obligations or duties of the landlord. Paragraph 13 reads, in pertinent part:

"The parties intend that this Mortgage grants a present, absolute and unconditional assignment of the Rents and shall, immediately upon execution, give Lender the right to collect the Rents and to apply them in payment of the principal, interest and all other sums payable under the Loan Documents. ***This Mortgage shall not be deemed to impose upon Lender any of the obligations or duties of the landlord or Borrower provided in any Lease. ** Lender has not by this Mortgage assumed any of the obligations of

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Borrower under the Leases, except as to such obligations which arise after such time as Lender shall have assumed full ownership or care, management, or repair of the Property or any personal property or for the carrying out of any of the terms of the Leases."

Here, paragraph 13 violates public policy by contracting for the assignment of rights absent the liabilities of ownership. Further, Bank of America had not taken full possession, ownership or care of the property when Bassman collected rents.

¶ 12 We agree with Bank of America that the mortgage required Bassman to hold the rents it collected in trust and apply the rent to five specific purposes in a certain order. However, the mortgage contract is against public policy, and we can not overlook this threshold problem. Because paragraph 13 of the mortgage agreement provides an assignment of rights to Bank of America without the liabilities, the provision violates the ruling in *Comercia* and violates public policy. Therefore, Bank of America's complaint was properly dismissed. As a result, we neither reach the issue of whether Bassman applied the rents it collected in accordance with the provisions in paragraph 13 of the mortgage nor the issue of whether Bank of America sufficiently alleged Bassman breached any of the loan documents.

CONCLUSION

¶ 13 In sum, the trial court properly dismissed counts I, II, and III of Bank of America's complaint, because the allegations relied upon a provision in the mortgages that violated public policy. Additionally, the trial court correctly relied upon *Comercia* in dismissing the complaint with prejudice. Based upon the foregoing, we affirm the judgment of the circuit court of Cook County.

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¶14 Affirmed.