



Street in Philadelphia, Pa. The property consists of four multi-tenant buildings and parking garage in the Chestnut Street Building. The fee interest is owned by the Estate of Stephen Girard.

In the summer of 2006, TCA engaged ML&B to provide legal representation and advice in connection with the potential acquisition of Girard Square. ML&B's responsibilities included preparing, reviewing, negotiating a number of transactional documents and instruments and offering advice to effect the lending transactions necessary to enable TCA to acquire its interest in Girard Square.

On October 17, 2006, a 75 year Ground Lease Agreement was entered into between the City of Philadelphia, Trustee under the Will of Stephen Girard, and TCA. From April 2007 through June 2007, the material terms and conditions of the Loan Agreement and supporting documentation were negotiated by potential lender United Bank of Scotland (hereinafter "UBS") and ML&B on behalf of TCA.

On June 18, 2007, the loan closed. UBS funded a loan for \$112.5 million for a term of one year, set to expire on July 9, 2008, with a one year extension option if Girard Square met certain financial benchmarks.<sup>1</sup> The Loan Agreement provided that \$2.5 million of the amount borrowed should be deposited with UBS and designated as an Interest Shortfall Reserve Fund for the purpose of funding an escrow fund for the payment of Debt Service and any other amounts due under the loan agreements.<sup>2</sup>

On June 18, 2007, Girard Square entered into a Cash Management Agreement with UBS and Wells Fargo, the loan servicing agent. This agreement required all rent to be deposited into

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<sup>1</sup> The financial benchmarks were set forth in the June 18, 2007 Loan Agreement §2.3.2 (b).

<sup>2</sup> June 18, 2007 Loan Agreement § 6.8.

a deposit account and then be disbursed according to a certain priority set forth within the Cash Management Agreement.<sup>3</sup>

During the course of the year term, TCA made its debt service payments, however the payment of debt service left insufficient cash to pay operating expenses. The Loan Agreement and the Cash Management Agreement did not permit TCA to have access to reserves sufficient to pay the operating expenses. In order for TCA to access the Interest Shortfall Reserve Fund, TCA would have to have zero dollars left to pay operating costs. Hence, if after paying out the first items as set forth in the Cash Management Agreement's priority list, taxes, insurance etc., a small amount of revenue remained, TCA could not access the Interest Shortfall Reserve Fund, even though the amount remaining was insufficient to cover the operating expenses.

Upon becoming aware of the results of this restriction, TCA began renegotiating the loan agreement with UBS.

On December 14, 2007, the loan agreement was amended. The loan agreement required TCA to repay \$11 million of the original \$112.5 million by reducing certain reserve amounts and breaking off the \$7.5 million mezzanine loan, reducing the mortgage loan balance to \$94 million. The amended loan agreement also changed the loan maturity date from July 9, 2008 to May 9, 2008 and removed the one year renewal option.

The Cash Management Agreement was also amended to change the disbursement order. Taxes, insurance, debt service and default payments were the top priority, operating expenses became the fifth priority. Additionally, the amendments permitted TCA to draw up to

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<sup>3</sup> The order of disbursement was as follows: 1. Taxes, 2. Insurance, 3. Debt Service, 4. Capital Expenditures if funds on reserve for such expenditures are less than \$100,000, 5. Rollover Funds if funds on reserve for such expenditures are less than \$100,000, 6. Any default rate interest or late payment charges, 7. Operating Expenses, 8. Extraordinary Expenses, 9. Excess Cash Flow Account and 10. Borrower Remainder Account.

\$1,050,000 from the interest shortfall reserve fund for the payment of utilities and payroll.

Girard Square made five draws of \$210,000 in 2008.

In January 2008, UBS assigned the mezzanine loan to Joss Realty Partners (“Joss”). By April 2008, TCA drew the maximum amount permitted by the December 2007 Amendment from the Interest Shortfall Reserve. On July 15, 2008, TCA relinquished its interest in the Girard Square Property and entered into a Loan Assumption, Substitution and Mortgage and Assignment of Leases and Rents Modification Agreement with UBS. Joss ultimately assumed the mortgage on Girard Square and took over the property including all outstanding payables on the property. The pledges of additional collateral and the guarantees on the loan by TCA and certain other individuals were released.

On May 12, 2010, TCA instituted suit by writ of summons against ML&B and the various attorneys who worked on the TCA matter alleging legal malpractice. Specifically, TCA alleged that the Loan and Cash Management Agreements were not drafted consistent with TCA’s best interest, that ML&B failed to properly advise it of the risk inherent in the documents as drafted and failed to appreciate the legal and practical implications of the agreements including but not limited to accessing the reserve fund to pay operating expenses.

On June 3, 2010, after the filing of a rule by ML&B, TCA filed a complaint alleging claims for professional negligence and for breach of contract. On August 12, 2010, the defendant ML&B filed an answer to the complaint with new matter and counterclaims for breach of contract and unjust enrichment based on unpaid services. On August 13, 2010, defendant ML&B filed a joinder complaint against Trinity Advisors, Inc.

TCA retained Lawrence M. Goodman to provide expert testimony to illustrate that the operating expense deficit was the result of TCA’s inability to access funds in the Interest

Shortfall Reserve Fund since TCA was unable to access said reserve. Goodman was also retained to calculate Debt Service Coverage Ratio (“DSCR”) using projected financial results for the year ended December 31, 2008 to determine if Girard Square would have been in compliance with the DSCR requirement for a one year renewal option in its June 18, 2007 Loan Agreement with UBS.<sup>4</sup> Goodman opined that the DSCR requirement would have been met for the one year loan extension.<sup>5</sup> In rendering this opinion, Goodman assumed the DSCR would be calculated using net operating income for the year ended December 31, 2008 based on actual results for the months January 2008 through June 2008 and projected results from July 2008 through December 2008.<sup>6</sup>

On December 30, 2011, ML&B filed a motion for summary judgment. On July 2, 2012, the court denied the motion for summary judgment. On October 1, 2012, ML&B filed three motions in *limine* to exclude the testimony of TCA’s experts, including the opinion of Lawrence Goodman.

On December 14, 2012, after receiving TCA’s response and after oral argument, the court granted in part and denied in part defendants MLB’s motion in *limine* as it pertained to Lawrence Goodman. The court ruled Mr. Goodman was not permitted to testify with regard to the DSCR using any forward looking projection beyond June 30, 2008, the date in which Joss assumed control of the property. The court granted TCA leave to submit an additional report for the appropriate period using historical data only.

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<sup>4</sup> Goodman issued two reports, one dated November 2, 2011 and January 17, 2012 as well as an affidavit to support his opinions.

<sup>5</sup> TCA was only pursuing damages based on this theory of liability.

<sup>6</sup> Goodman made additional assumptions in reaching his opinion including but not limited to using the prevailing July 2008 LIBOR rate.

On December 21, 2012, TCA informed the court that there would be no supplemental report forthcoming. As a result, ML&B renewed its motion for summary judgment which was granted by the court.<sup>7</sup> ML&B subsequently withdrew its counterclaim for unpaid fees by stipulation and this timely appeal followed.<sup>8</sup>

## DISCUSSION

TCA complains this court committed reversible error when it granted in part and denied in part ML&B's motion in *limine*. A motion in *limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered.<sup>9</sup> Questions concerning the admissibility of evidence are within the sound discretion of the trial court, whose rulings will not be disturbed on appeal absent an abuse of discretion.<sup>10</sup> Specifically at issue is Goodman's use of projected net operating income from July 2008 through December 2008 to calculate DSCR.

The June 18, 2007 Loan Agreement provides in pertinent part as follows:

Borrower shall have one (1) option to extend the Maturity Date of the Loan for a consecutive one (1) year period....The Maturity Date shall be extended pursuant to Borrower's notice as aforesaid, provided that the following conditions are satisfied: (i) no Event of Default shall be in existence [either] at the time of the Borrower's notice or at the then-current Maturity Date, (ii) Borrower shall enter into an Interest Rate Protection Agreement through the term of the extension under the same terms and conditions of the initial Interest Rate Protection

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<sup>7</sup> Although the question of legal malpractice is disputed, TCA agreed it would not have damages if forward looking calculations were not permitted to determine DSCR. DSCR had to be made based upon the annualized actual figures for the first six (6) months. TCA wanted the calculations to be based upon the first six (6) months of actual figures and what Goodman estimated the next six (6) months figures to be using certain favorable projected assumptions rather than only annualizing the actual first six (6) months.

<sup>8</sup> Plaintiff filed a Statement of Matters Complained of on Appeal in accordance with the court's instruction.

<sup>9</sup> *Yacoub v. Lehigh Valley Med. Associates, P.C.*, 2002 Pa. Super. 251, 805 A.2d 579, 588 (Pa. Super. Ct. 2002)(*Meridian Oil & Gas Enters., Inc. v. Penn Cent. Corp.*, 418 Pa. Super. 231, 614 A.2d 246, 250 (1992)).

<sup>10</sup> *Turner v. Valley Hous. Dev. Corp.*, 2009 PA Super 72, 972 A.2d 531, 535 (Pa. Super. Ct. 2009)(citing *Yankowsky v. Katz, Inc.*, 443 Pa. Super. 494, 662 A.2d 665, 667 n. 5 (1995)).

Agreement...(iii) the Debt Service Coverage Ratio of the Property shall not be less than 1.05 to 1.0 and (iv) either (x) the Interest Shortfall Reserve is adequately funded as reasonably determined by Lender or (y) the Net Cash Flow as calculated by Lender is at least \$8,200,000.

DSCR is defined by the Loan Agreement to mean the ratio for the applicable period in which:

- (i) the numerator is the Net Cash Flow for such period as set forth in the financial statements required in accordance with this Agreement; and
- (ii) the denominator is the aggregate amount of principal and interest due and payable on the Loan and Mezzanine Loan, if applicable.

The Loan Agreement further defines New Cash Flow to mean, for any period, the amount obtained by subtracting Operating Expenses for such period from gross Income from Operating for such period. Operating Expenses is also defined as follows:

...for any period, the total of all expenditures, computed in accordance with GAAP, of whatever kind during such period relating to the operation, maintenance and management of the property that are incurred on a regular monthly or other periodic basis, including without limitation, utilities, ordinary repairs and maintenance, insurance, license fees, property taxes and assessments, advertising expenses, management fees, payroll and related taxes, computer processing charges, tenant improvements and leasing commissions (which tenant improvements and leasing commissions for the purposes of this definition shall be calculated based upon an amount no greater than the actual or assumed expense of \$97,000.00 per month) operational equipment or other lease payments as approved by Lender, and other similar costs, but excluding depreciation, Debt Service, Capital Expenditures, and contributions to the Capital Expenditure Funds, the Tax Funds, Insurance Funds, the Rollover Funds and any other reserves required under the Loan Documents.

The Loan Agreement specifically requires the monitoring of DSCR based on historical financials, not forward looking projections. Specifically, § 4.1.6 of the Loan Agreement requires TCA to provide the lender with monthly and quarterly reports that include historical DSCR calculations. Additionally, the Loan Agreement defines DSCR Trigger Event: "...as of any Debt Service Coverage Ratio Determination Date, the Debt Service Coverage Ratio based on the

trailing six (6) month period (annualized) immediately preceding the date of such determination is less than 1.00 to 1.00.”

Goodman’s projection of net operating income from July 2008 through December 2008 ignored the clear language of the Loan Agreement. Under Pennsylvania law, there must be some factual predicate for the expert opinion identified on the record.<sup>11</sup> An expert may not express his opinion upon facts which are not warranted in the record, regardless of the expert's skill and experience.<sup>12</sup> Where an expert's opinion is based on an assumption that is contrary to the established facts of record, that opinion is worthless.<sup>13</sup>

In *Commonwealth v. Rounds*, 518 Pa. 204, 209; 542 A.2d 997, 999 (Pa. 2005), the Pennsylvania Supreme Court explained the reasons why the conclusions of an expert must be based upon facts found in the record. The Court stated:

expert opinion testimony is proper if the facts upon which it is based are of record.... An expert's function is to assist the jury in understanding the problem so that the jury can make the ultimate determination. If a jury disbelieves the facts upon which the opinion is based, the jury undoubtedly will disregard the expert's opinion. Likewise, if a jury accepts the veracity of the facts which the expert relies upon, it is more likely that the jury will accept the expert's opinion. At the heart of any analysis is the veracity of the facts upon which the conclusion is based. Without the facts, a jury cannot make any determination as to validity of the expert's opinion. To hold otherwise would result in a total and complete usurpation of the jury's function in our system of justice.<sup>14</sup>

The Loan Agreement is clear. Where the words of the contract are clear and unambiguous, the intent of the parties must be determined exclusively from the agreement

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<sup>11</sup> *Starr v. Veneziano*, 560 Pa. 650, 663 n.10, 747 A.2d 867, 874 n. 10 (Pa. 2000).

<sup>12</sup> *Jones v. Wilt*, 2005 Pa. Super. 97, 871 A.2d 210, 215 (Pa. Super. 2005).

<sup>13</sup> *Taylor v. Workers' Comp. App. Bd.*, 883 A.2d 710, 713 (Pa. Cmmw. 2005).

<sup>14</sup> *Commonwealth v. Rounds*, 518 Pa. 204, 209; 542 A.2d 997, 999 (Pa. 2005).

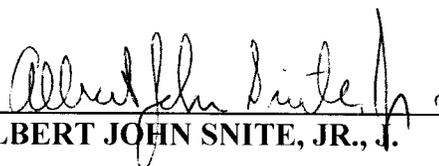
itself.<sup>15</sup> Goodman's projection of operating expenses to determine the DSCR was contrary to the facts of record and the clear language of the Loan Agreement; consequently, ML&B's motion in *limine* was granted with leave to supplement.

### CONCLUSION

For the foregoing reasons, this court's order dated December 14, 2012 should be affirmed.

Date: 7/10/2013

BY THE COURT,

  
ALBERT JOHN SNITE, JR., J.

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<sup>15</sup> *Metzger v. Clifford Realty Corp.*, 327 Pa. Super. 377, 385, 476 A.2d 1, 5 (1984)(citing *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957)).