IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellant,

vs.

WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC

Respondents.

Electronically Filed
Aug 30 2022 03:08 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 82174

PETITION FOR REHEARING

John W. Hofsaess, Esq. (*pro hac vice*)
WESTLAND REAL ESTATE GROUP
520 W. Willow Street
Long Beach, California 90806
Telephone: (310) 438-5147

Counsel for Respondents
Westland Liberty Village, LLC and Westland Village Square, LLC

VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for Respondents Westland Liberty Village, LLC and Westland Village Square, LLC; that he knows the contents of this Petition for Rehearing; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 29th day of August, 2022.

/s/ *John W. Hofsaess*
John W. Hofsaess

PETITION FOR REHEARING

I. INTRODUCTION

Respondents Westland Liberty Village, LLC, and Westland Village Square, LLC ("Westland") respectfully submit that this Court's August 11, 2022 Opinion reversing and remanding the District Court's order for a preliminary injunction and denial of a receiver (the "Opinion") should be reversed or clarified. As written, Federal National Mortgage Association ("Fannie Mae") appears to have unrestricted discretion to demand additional funds not agreed upon in the initial reserve schedules, which is a holding that would have far-ranging impacts on Nevada borrowers.

The unrestricted discretion provided for in the Opinion flows from three misapprehended or overlooked facts. First, the contractual provision addressing the process for challenges in Article 12 of the Loan Agreements only applies to Impositions, not additional lender repairs or replacements. Second, the borrower's representations on the property's condition in Article 9 only apply to insurance-related repairs not the general condition of the property.[1] Finally, Westland's reference to the differing standards employed in the Loan Agreement's reserve schedules that were tied to the CBRE PCA report and Fannie Mae's demand for payment tied to the f3 PCA report went unrecognized (specifically CBRE found

[1] The first two overlooked facts were not addressed by any of the parties.

vacant unit "turn costs" were not subject to reserve withholding, but f3 required $1.9 million be held for the same type of cost).

While this Court's ultimate opinion that there was an insufficient basis for the preliminary injunction and that a receiver should be permitted may remain unaltered, revising the opinion is still material and important.[2] As drafted, the Opinion gives the impression that Fannie Mae not only had the discretion to request additional reserves but also that it reasonably exercised that discretion in good faith. Respectfully, it did not.

This Court noted that Fannie Mae "observed a substantial decrease in occupancy rates and became *concerned* that this decline resulted from deterioration in the condition of the properties." (Opinion, at 6 [emphasis added].) Thereafter, Fannie Mae had f3 conduct a PCA, and Fannie Mae promptly demanded the entire amounts listed in those reports. (*Id*.) But, its demand was made without any attempt to justify the f3 reports to the findings of the earlier CBRE reports, upon which the

---

[2] As to this matter, the ruling appears to make factual determinations related to the contract based on an incomplete factual record from a preliminary injunction hearing. The ruling thereby would appear to materially affect Westland's claims, such as the good faith and fair dealing claim, without the opportunity for development of the full factual record. For that claim, the lack of any procedural challenge process in the loan agreement as to reserves (in contrast to Impositions), and the differing standards employed for reserves funding at the time of the initial loan schedules and the demand, which were incorporated directly from the CBRE PCA report and f3 PCA report respectively, are material and go to Lenders' good faith in servicing the loans.

loan's repair and replacement schedules were based. Without such a comparison, showing a decline in the physical condition of the properties (*i.e.*, deterioration) was not reasonable, and a decline in occupancy was not enough since Fannie Mae could only increase repair and replacement reserves for physical conditions not lower occupancy. Also, even after Westland requested Fannie Mae to identify the basis for its finding of deterioration it failed to do so for months. Instead, Fannie Mae first stated a decline in occupancy amounted to deterioration during this litigation. Further, since a decline in occupancy coupled with a "concern" is not a valid criterion to show deterioration, after improperly relying on occupancy Fannie Mae should have supported that its concern was justified by evidence of actual deterioration in the "condition of the Mortgaged Property"[3] as that term is defined in the Loan Agreement, but that was not done based on the factual record before this Court.

As such, Westland respectfully requests that this Court revise the Opinion to remove the references to: 1) Loan Agreement Section 12.02 and Westland's failure to utilize the correct challenge procedure on Opinion pages 5, 10, and 14 n.5; 2) the Article 9 related representation that the properties were "in good condition," were undamaged, and that any prior damage had been repaired on page 14 n.5; and 3) the finding that Westland did not make a specific argument regarding how the types of

[3] *Infra*., at Section III(c).

repairs and replacements were fundamentally dissimilar on page 14 n.5.

II. LEGAL STANDARD

Nevada Rule of Appellate Procedure 40 provides that the Court may consider rehearing when it has overlooked or misapprehended a material fact in the record or a material question of law in the case. Any party seeking rehearing "shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended." *Id.* Consistent with *Gordon v. District Court*, 114, Nev. 744, 745, 961 P.2d 142, 143 (1998), a rehearing must be for a matter of "practical consequence" or if "otherwise necessary to promote substantial justice." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 609, 245 P.3d 1182, 1184 (2010).[4]

III. ARGUMENT

A) Section 12.02(e) Applies to Impositions and is Inapplicable to Repair and Replacement Reserves, So There Was No Procedure Westland Failed to Follow

The Opinion states Westland could "contest any demand deposit's amount or validity by the appropriate legal process," and that "section 12.03(e) requires that

[4] NRAP 40 also provides that any claim that this Court overlooked a material fact shall be supported by a reference to the page in the brief where it was raised. Here, Westland raised the arguments addressed in Section III(b) herein on pages 7-9 and note 10 of the Answering Brief. *See, e.g., id.* ("Indeed, the PCA at the time of purchase did not treat routine maintenance on vacant units as requiring reserves whereas f3's PCA required $1.9 million be held in reserve for vacant units. By adopting this approach and deviating from the standards applied in the previous PCA in other respects, f3 caused the demanded reserves to skyrocket from $143,319.30 to $2.85 million . . .") (internal citations omitted).

Westland use the appropriate legal process and permits Fannie Mae to demand that Westland deposit the contested amount." Opinion, at 5, 10. The Opinion also notes "Westland did not deposit this amount or challenge the demand through the procedures set forth in the agreement – facts that it concedes – and thus defaulted." Opinion, at 10.

To be clear, Westland did not brief or address the procedure discussed in section 12.03(e), which is part of Article 12, and neither did any of the other parties. Westland's briefing focused on the requirements of Article 6 related to deterioration that were explicitly incorporated into Additional Lender Repair demands by section 13.02(a)(9)(B). Fannie Mae focused solely on Loan Agreement "Article 13 – REPLACEMENT RESERVE AND REPAIRS." APP082-92, APP286-96.[5] Article

[5] Fannie Mae argued that it "has sole discretion" in determining reserves, based on section 13, and stated "Westland, however has not – and indeed cannot – point to any provision of the Loan Documents that permits it to challenge or reject Fannie Mae's assessment of how much additional funding is needed to fund the reserve . . ." (Appellant's Reply Brief, at 10-12.) However, even if Fannie Mae were correct, "an implied covenant of good faith and fair dealing exists in all contracts." *A.C. Shaw Constr., Inc. v. Washoe County*, 105 Nev. 913,914, 784 P.2d 9, 10 (1989). So, a plaintiff can recover damages for breach of the covenant of good faith and fair dealing "[e]ven if a defendant does not breach the express terms of a contract." *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017). In cases where no express breach exists, the implied covenants of good faith and fair dealing applies to "prohibit arbitrary of unfair acts by one party that work to the disadvantage of another." *APCO Constr., Inc. v. Helix Elec. of Nevada, LLC*, 138 Nev. Adv. Op. 31, 509 P.3d 49, 53 (2022). Therefore, even if Fannie Mae had discretion over the reserve funding amount, the implied covenant of good faith would mitigate the unreasonable application Fannie Mae has done that failed to address deterioration from the prior owner.

13 shows repair and replacement reserves are prepaid expenses that are held by the lender, and after a borrower provides proof that the expense is paid, the borrower should be reimbursed.

In contrast, the section 12.03(e) procedure is contained in "Article 12 - Impositions." APP079; APP283. Impositions relate to charges such as taxes, insurance payments, special assessments, and "amounts and charges relating to the Mortgaged Property that have become due and payable" to parties other than Fannie Mae. *Id*. Article 12 does not address, or mention, repair or replacement reserves.

Specifically, section 12.02(a)(1) states the borrower shall deposit "the Imposition Deposits with Lender . . . in [an] amount sufficient, in Lender's discretion, to enable Lender to pay each imposition before the last date upon which such payment may be made without any penalty," and the other sections on impositions discuss taxes and special assessments that Lender. APP079, APP283. The commonalities are that all of the Impositions are obligations to be paid to a third party, relate to a process in which the borrower is not reimbursed, and if unpaid the property may be lost due to a tax lien, HOA lien, or similar event. *See* APP080 [Section 12.03(a) notes imposition deposits are held for "Taxes, insurance premiums, and each other obligation of Borrower for which Imposition Deposits are required"]; APP284 [same]; APP081 [Section 12.03(c) provides "Imposition Deposits shall be required to be used by *Lender to pay* Taxes, insurance premiums

and other individual Imposition only if . . ."]; APP285 [same]. In contrast, a reserve is held for a borrower and is subject to being reimbursed. APP086 ["Each request by Borrower for disbursement from the Replacement Reserve Account or the Repairs Escrow must be in writing, must specify the Replacement or Repair *for which reimbursement is requested* . . . ."][emphasis added]. Thus, it makes sense Impositions would require an additional deposit while a dispute with an entity, such as a taxing authority, is pending.

While the term "Impositions" is not defined in the Loan Agreement, Schedule 1 of the Loan Agreement directs the reader to the Deed of Trust, which defines the term as:

> (a) any water and sewer charges . . . (b) the premiums for fire and other casualty insurance . . .; (c) Taxes; and (d) amounts for other charges and expenses *assessed against* the Mortgaged Property which Lender at any time *reasonably deems necessary* to protect the Mortgaged Property, to prevent the imposition of liens on the Mortgaged Property, or otherwise to protect Lender's interests, *all as reasonably determined* from time to time by Lender.

APP170 (emphasis added); APP433 (emphasis added).

Further, while the terms Required Repairs, Required Replacements, Additional Lender Repairs, and Additional Lender Replacements are contained in several sections of the Loan Agreements, and Fannie Mae could have easily included those terms in the definition of Impositions, those terms are noticeably absent from both the definition of Impositions and the entirety of Article 12. APP079-82,

APP170; APP283-86. In fact, no portion of the Loan Agreement identifies a "Repair Reserve" or "Replacement Reserve" as an "Imposition."

Finally, addressing the repair and replacement reserves as Impositions would also render provisions in sections 12 and 13 of the loan agreements either contradictory or redundant. For instance, Fannie Mae requested additional reserve funds on 30 days' notice. Section 13.02(a)(4) on reserves is consistent with a 30-day demand for funds, but Section 12.02(a)(2) on Impositions only provides for 10 days to deposit additional funds. APP085; *cf.* APP080. Similarly, "[t]he Replacement Reserve Account shall be an interest-bearing account" based on Section 13.02(a)(1)(A), but Section 12.03(b) provides "[n]o interest . . . on the Imposition Deposits shall be paid to Borrower. . . ." APP084; *cf.* APP080. Also, aside from contradictory sections, if Article 12 is deemed to apply to repair and replacement reserves then large portions of Article 13 would be deemed redundant and meaningless.[6]

Thus, Westland concedes it did not challenge the additional lender demands via section 12.03(e), but asserts the section is inapplicable to repair reserves, for which the Loan Agreements have no procedural challenge process.

---

[6] For example, Article 12 and Article 13 each have sections on covenants (Section 12.02 [APP080]; *cf.* Section 13.01 [APP082]), requirements for accounts holding funds (Section 12.03(b) [APP080]; *cf.* Section 13.02 [APP084]), and provisions for the final release of funds. (Section 12.03(f) [APP082]; *cf.* 13.02(a)(11) [APP090]).

B) The Types of Repairs and Replacements In The Loan Schedule and October 2019 Demand Were Fundamentally Dissimilar

As to the stated failure to establish "how the types of repairs and replacements in the initial schedules and the PCA were fundamentally dissimilar" (Opinion, at 14 n.5), Westland respectfully directs the Court's attention to its Opposition Brief, at 6-8. In the Answering Brief, Westland noted the items listed in the Loan Agreement's initial repair and replacement schedules were derived from the CBRE PCA report (Answering Brief, at 6), and the Additional Lender Repair and Additional Lender Replacement reserves sought by Fannie Mae's October 2019 demand repeated the content of the f3 PCA reports. (*Id*., at 8.) Moreover, Westland argued that the f3 PCAs were artificially inflated since they used "different standards than those used in the CBRE months earlier." (*Id*.)

Westland noted the fundamental dissimilarity by stating: "Indeed, the PCA at the time of purchase did not treat routine maintenance on vacant units as requiring reserves whereas f3's PCA required $1.9 million be held in reserve for vacant units. By adopting this approach and deviating from the standards applied in the previous PCA in other respects, f3 caused the demanded reserves to skyrocket . . . ." (*Id*.)

Westland notes the initial required repair schedules were directly integrated from the CBRE PCA as of the effective date of the loan. An examination of Schedule 6 of the Loans shows the same exact items in need of repair and the same

exact cost for those repairs as the information in the CBRE PCA reports.[7]

Moreover, CBRE's report for each property was accepted by Fannie Mae without any set aside for vacant unit repairs. As to unit repairs the CBRE reports noted that the condition of the Liberty Village and Village Square units were "generally good to poor condition[,] . . . [m]aintenance appears to be generally adequate and is addressed as part of unit turns, tenant request, or periodic inspections. . . . [and] finish components can be maintained as part of the normal maintenance operations during the term." SA0403-07; SA0515-18.[8] Notably, the vast majority of the vacant units at Village Square were listed as "undergoing renovations," but still no reserve was deemed required. *Id*. Also, despite several Liberty Village vacant units being listed as in "poor condition" or susceptible to "water intrusion" such repairs were still able to "be addressed as the unit is turned

---

[7] As to Village Square see SA494-95 [$68,073 immediate repairs - CBRE Village Square PCA]; *cf*. APP145-149 [$68,073 required repairs - Schedule 6, Village Square Loan Agreement]. As to Liberty Village, see SA0381-83 [$136,108 immediate repairs – CBRE Liberty Village PCA]; *cf*. APP349-53 [$132,508 required repairs – Schedule 6, Liberty Village Loan Agreement, including all repairs except on fence repair, but increasing estimate by 125% cost factor].

[8] CBRE's exception of such repairs from the scope of work to be addressed is also consistent with standard set by the Loans' terms. Section 6.03(c) addressing the standard for an inspection, PCAs and deterioration limits those findings to "the condition of the Mortgaged Property [that] has deteriorated (ordinary wear and tear excepted) since the Effective Date." APP054. Such vacant unit repairs are ordinary wear and tear, otherwise a tenant would have had to pay for those costs.

through in-house maintenance staff" without a reserve. SA406. In contrast to CBRE, the f3 PCA sought reserves for the same types of vacant unit repairs for which no reserves were required by the CBRE PCA. In fact, over $1.9 million of the reserves sought in the Lenders' demand (which is roughly two-thirds of the $2.85 million demanded) are based on those vacant unit charges. APP503 [$711,215 for Village Square vacant unit renovations]; APP814 [$1,197,545 for Liberty Village vacant unit renovations]. Ultimately, Fannie Mae's demand integrated this differing standard from the f3 PCA report.[9] [10]

Finally, the Opinion appears to have relied on the same purported corrective procedure to procedurally negate "the different type of expense" argument, stating "Westland argues that section 13.02(a)(4) only permits increases for repairs of the types listed in the initial repair and replacement schedules and that those stated in the PCA exceed that limit. While this observation is accurate, the agreements set forth procedures by which Westland could challenge the propriety of Fannie Mae's

---

[9] Fannie Mae's servicer integrated the f3 PCA reports. (APP503 [f3 listing $1.092,835 of immediate repairs for Village Square]; *cf*. APP1264, APP1267-68 [demand for $1,092,835 and attaching f3 report excerpt]); (APP813-15 [f3 listing $1,753,145 of immediate repairs for Liberty Village]; *cf*. APP1257, APP1260-62 [demand for $1,753,145 and attaching f3 report excerpt]).

[10] Presently, the issue of whether utilizing differing standards invalidated the demand and default notices has not been developed, because this ruling was based on the court's record related to a preliminary injunction without the benefit of a discovery or a fully developed record at this early stage of the case.

demand, which Westland did not do. Further, it does not appear that any such challenge would have merit because the initial schedules and PCA cover similar types of repairs. We note that Westland did not make a specific argument regarding how the types of repairs and replacements in the initial schedules and the PCA were fundamentally dissimilar." (Opinion, at 14 n5.) For the foregoing reasons, the quoted language should be removed.

C) The Article 9 Insurance Representation, Does Not Establish The Condition of the Mortgaged Property Was Generally Good

The Court held that Westland assumed a representation of the prior owner at the time the loan was issued that the two properties "were in good condition, were undamaged, and that any prior damage had been repaired. (§ 9.01(b)(1)-(2))." (Opinion, at 14 n.5.) Notably, no party addressed Article 9, because no party disputed that the properties were not in good condition at the inception of the loans,[11] and consistent with its title, "Article 9 – Insurance," the article only applies to insurance.

To be considered properly, Section 9.01(b) requires a review of both subsections 1 and 2, otherwise, subsection 2 would be taken out of context. Section 9.02(b) reads: "(1) The Mortgaged Property has not been damaged by fire, water,

---

[11] See Opening Brief, at 24-25 [Fannie Mae arguing damage before the Loan Agreements was "irrelevant," ignoring section 6.03(c)'s requirement that the condition of the property "deteriorated (ordinary wear and tear excepted) since the Effective Date," and recognizing Westland assumed the properties' poor condition.

wind or other cause of loss; or (2) if previously damaged, any previous damage to the Mortgaged Property has been repaired and the Mortgaged Property has been fully restored." APP062-63. The "if previously damaged" language in subsection 2, appears to apply in conjunction with subsection 1, and on that basis is limited to damage from insurable events.

To be clear, the Opinion's reading of Article 9 would be contrary to the other terms of the loan agreement, including the schedules for immediate repair reserves that were specifically drafted related to the condition of these properties, for several reasons. First, the designation of items on those repair schedules evidence that repairs were pending and that the properties could not have been "repaired . . . [and] fully restored" at the time the loans were issued, because otherwise, those repairs would not be outstanding. Second, despite the language in the Opinion, the term "good condition" is not contained in section 9.01(b). APP062-63. Finally, the Opinion's language ignores section 6.01(d),[12] which is related to the "condition of

[12] The term used in relation to deterioration, which is "condition of the Mortgaged Property" is address in Section 6.01(d) and in the Answering Brief at 23, but was not referenced by the Court. That provision is in "Article 6 – Property Use, Preservation and Maintenance" that deals with the property's condition generally as opposed to related solely to insurance claims. APP048. Section 6.01(d) discusses the physical condition of the property, alluding to claims related to "construction" or "any structural or other material defect," but makes no mentioned to occupancy. APP049. Whereas, the "Property Condition" section addressed by this court is within the section of the loan limited to insurance. APP062.

the Mortgaged Property," and would be unnecessary if the loan agreements had a representation that the property had no damage.

IV. CONCLUSION

Based on the foregoing, Westland requests the Court to grant this Motion for Rehearing, and either to reverse its decision or at a minimum make the requested changes to the language of the Opinion on pages 5, 10, and 14 n.5, which are addressed above.

DATED this 29th day of August 2022

WESTLAND REAL ESTATE GROUP

By /s/ *John W. Hofsaess*

JOHN W. HOFSAESS, ESQ.
(admitted *pro hace vice*)

JOHN BENEDICT, ESQ. (5581)
The Law Offices of John Benedict

Attorneys for Respondents Westland Liberty Village, LLC and Westland Village Square, LLC

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a), and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 point font. I also certify that this brief complies with the page-word limitations set forth in NRAP 40(b) because it has 4,443 words (less than the 4,667-word limit).

DATED this 29th day of August 2022

WESTLAND REAL ESTATE GROUP

By: /s/ *John W. Hofsaess*
JOHN W. HOFSAESS, ESQ.
(admitted *pro hac vice*)

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 30th day of August 2022, I caused true and correct copies of the foregoing Petition for Rehearing to be delivered to the following counsel and parties:

VIA ELECTRONIC AND U.S. MAIL:

Kelly H. Dove, Esq.
Nathan G. Kanute, Esq.
David Edelblute, Esq.
Jeffrey Willis, Esq.
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 110
Las Vegas, Nevada 89169

Leslie Bryan Hart, Esq.
John D. Tennert, Esq.
Fennemore Craig, P.C.
7800 Rancharrah Parkway
Reno, Nevada 89511

Joseph G. Went, Esq.
Lars K. Evensen, Esq.
Sydney R. Gambee, Esq.
Holland & Hart L.L.P.
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

VIA U.S. MAIL:

The Honorable Mark Denton
District Court Judge, Dept. XIII
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ *Maria Scandalios*
An employee of Westland Real Estate Group