

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

)	Chapter 11
)	
In re:)	Case No. 09-10899 (CSS)
)	
THE FAIRCHILD CORPORATION, <u>et al.</u> ,)	Jointly Administered
)	
Debtors.)	
)	
)	
THE FAIRCHILD LIQUIDATING TRUST,)	
)	
Plaintiff,)	
)	
vs.)	Adversary Proceeding No. ____
)	
WELLS FARGO BANK, N.A., AS TRUSTEE FOR)	
THE REGISTERED HOLDERS OF CREDIT)	
SUISSE FIRST BOSTON MORTGAGE)	
SECURITIES CORP., COMMERCIAL)	
MORTGAGE PASS THROUGH CERTIFICATES,)	
SERIES 2004-C2; KEYBANK NATIONAL)	
ASSOCIATION d/b/a KEYBANK REAL ESTATE)	
CAPITAL; LNR PARTNERS, INC., LNR)	
PARTNERS, LLC, AIRPORT PLAZA, LLC AND)	
KIMCO REALTY CORPORATION,)	
)	
Defendants.)	
)	

COMPLAINT

For its Complaint, the Fairchild Liquidating Trust (the “Trust”) alleges as follows:

Parties

1. At all relevant times, The Fairchild Corporation (“Fairchild”) has been a corporation duly organized under the laws of the State of Delaware. On or about March 18, 2009, Fairchild and sixty (60) of its affiliates (together, the “Fairchild Debtors”)

commenced voluntary Chapter 11 cases in the United States Bankruptcy Court for the District of Delaware. Republic Thunderbolt, L.L.C. (“Republic”) was one of the Fairchild affiliates that commenced such a case (collectively with Fairchild, the “Fairchild Parties”).

2. On or about December 17, 2009, this Court entered an Order confirming the Plan of Liquidation (the “Plan”) for the Fairchild Debtors. The Plan provided for, among other things, the substantive consolidation of the assets and liabilities of all of the Fairchild Debtors and the transfer of all of those assets to the Trust. The Plan became effective on January 7, 2010.

3. Upon information and belief, Defendant Wells Fargo Bank, N.A, as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass Through Certificates, Series 2004-C2 is a national bank with its principal place of business in Sioux Falls, South Dakota.

4. Upon information and belief, Defendant Keybank National Association d/b/a KeyBank Real Estate Capital (“KeyBank”) is a national bank with its principal place of business in Cleveland, Ohio.

5. Upon information and belief, Defendant LNR Partners, Inc. (“LNR Inc.”) is a Florida corporation with its principal place of business in Miami Beach, Florida. Upon information and belief, Defendant LNR Partners, LLC (“LNR LLC”) is a Florida limited liability company with its principal place of business in Miami Beach, Florida. (LNR Inc. and LNR LLC hereinafter collectively referred to as “LNR”).

6. Upon information and belief, Defendant Airport Plaza, LLC (“Airport Plaza”) is a Delaware corporation with its principal place of business in Nassau County, New York.

7. Upon information and belief, Defendant Kimco Realty Corporation (“Kimco”) is a Maryland corporation with its principal place of business in New Hyde Park, New York.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b).

9. This is a non-core proceeding but is related to the Fairchild bankruptcy cases. The Trust consents to entry of final order or judgment by the bankruptcy judge.

Factual Background

10. On or about December 26, 2003, Republic entered into a contract (the “Loan Agreement”) with Column Financial, Inc. (“Column”) whereby Column made a \$55,000,000 loan (the “Loan”) to Republic in connection with a financing of the property located in the Town of Babylon, County of Suffolk, State of New York commonly known as Airport Plaza Shopping Center (the “Property”). The Loan Agreement is secured by a Mortgage on the Property. *See* Loan Agreement attached as Exhibit A.

11. The Lenders’ rights under the Loan are now held by Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp, Commercial Mortgage Pass Through Certificates, Series 2004-C2 (the “Lender”).

12. KeyBank Real Estate Capital is the Master Servicer (“KeyBank” or the “Master Servicer”) with respect to the Loan.

13. LNR Partners is the Special Servicer (“LNR” or the “Special Servicer”) with respect to the Loan.

14. On or about December 21, 2005, Airport Plaza, LLC (“Airport Plaza”) and Republic entered into a Purchase and Sale Agreement (“Purchase Agreement”) by and between Republic and KRC Acquisition Corp. (“KRC”), as amended by that certain First Amendment to Purchase and Sale Agreement dated as of June 29, 2006, whereby Airport Plaza purchased the Property from Republic. Pursuant to that certain Assignment and Assumption of Purchase and Sale Agreement dated July 6, 2006, KRC assigned the Purchase Agreement to Airport Plaza. *See* Purchase and Sale Agreement attached as Exhibit B.

15. On or about July 6, 2006, Airport Plaza, Republic, Fairchild, the Lender, KUBS Income Fund I LP (“KUBS”) and Kimco Realty Corporation (“Kimco”) entered into a Note and Mortgage Assumption Agreement, pursuant to which Airport Plaza assumed the Note and Mortgage, and Republic and Fairchild were released from certain obligations (with certain exceptions), all with the Lender’s consent. *See* Note and Mortgage Assumption Agreement attached as Exhibit C.

Environmental Well Reserve

16. Section 7.6 of the Loan Agreement established an Environmental Well Reserve that required Republic to deposit with the Lender the sum of \$4,886,000 (the “Environmental Well Reserve”), which was to be held as security for the cost to create, install and complete an off site, temporary, granular activated carbon treatment system

(the “Temporary Treatment System”) and ultimately an off site Permanent Facility for the benefit of the Town of Babylon, New York (“Babylon”) for certain water wells (collectively the “Well 4-2”) owned and operated by Babylon. The Environmental Reserve represented an early estimate of the cost of the Temporary Treatment System and the Permanent Facility.

17. Pursuant to Section 7.6.2 of the Loan Agreement, Lender is required to disburse to Borrower the amount paid or incurred by Borrower in implementing, completing and monitoring the Temporary Treatment System (and if required by Lender or the New York State Department of Environmental Conservation (“NYSDEC”), the Permanent Facility), provided all such costs and expenses incurred in connection with the implementing, completing and monitoring of the Temporary Treatment System (and if required by Lender or the NYSDEC, the Permanent Facility) shall be approved by Lender in its good faith discretion. *See* Section 7.6.2 of the Loan Agreement.

18. Republic is the Borrower under Section 7.6 and Section 7.6.2 of the Loan Agreement.

19. Pursuant to Section 7.6.2 of the Loan Agreement, any funds remaining in the Environmental Well Reserve after the Temporary Treatment System and Permanent Facility are paid for, shall be released by the Lender to Republic upon presentation by Republic of a written determination by the appropriate authorities that no further treatment of the drinking water emanating from any of the municipal drinking water wells is necessary, including, but not limited to Well 4-2, or, if applicable, the Permanent Facility.

20. KeyBank is the Administrator of the two escrow accounts established under Sections 7.5 and 7.6 of the Loan Agreement.

21. Upon information and belief, LNR was engaged by KeyBank as its Special Servicer to assist in the discharge of its obligations as escrow agent under Sections 7.5 and 7.6 of the Loan Agreement.

22. On or about July 6, 2006, Republic and Airport Plaza entered into a Loan Assumption Agreement (“Assumption Agreement”) whereby Airport Plaza assumed all liabilities and obligations of Republic under the Loan Documents, except that Airport Plaza and/or its affiliates did not assume the obligations of Republic for the off site treatment facilities under Section 7.6. *See* Assumption Agreement attached as Exhibit D.

23. Pursuant to Section 2.2 of the Note and Mortgage Assumption Agreement, the parties agreed that Lender would continue to hold certain Escrow Balances, including the Environmental Well Reserve balance of \$4,633,133.77 in accordance with the terms of the Loan Documents.

24. Pursuant to Section 11(d) of the Purchase Agreement, Airport Plaza did not assume any obligations relating to the Environmental Reserve Funds, including the Environmental Well Reserve. Section 11(d) further required Airport Plaza to cooperate with Republic, reasonably and in good faith, so as to enable Republic to comply with its obligations with respect to the Environmental Well Reserve and obtain any applicable reimbursement from the Lender with respect of such obligations.

25. Section 4.10 of the Mortgage Assumption Agreement contains a “time is of the essence” provision with respect to all Loan Documents.

Request for Release of Funds

26. On February 26, 2010, Fairchild informed Mr. Robert Vanbiber of KeyBank that the Temporary Treatment System will soon be supplanted by a Permanent Facility approved by all relevant governmental agencies. Republic has agreed with Babylon to pay the full cost of the Permanent Facility, which is \$3,987,225 (the “Payment”), and Babylon has agreed that the Payment will fully satisfy the obligations of Republic for which the “Environmental Well Reserve” was established. Babylon will execute a release of Republic and its affiliates in connection with the wells. The Payment will leave a balance in the Environmental Well Reserve of approximately \$752,805, which should be released to Republic. No further discussion concerning this notification could take place with KeyBank because for several weeks, its account liaison refused to respond to numerous telephone calls and emails from Republic. After almost a month of silence, Republic received its only substantive communication from either KeyBank or its agent, LNR, in the form of a terse email as follows: “We have been advised by the Borrower (sic.) (meaning Airport Plaza/Kimco) on the subject that all communications are to be directed through their office. Please direct all future communications through your contact there.”

27. On June 15, 2010, Fairchild sent a Reserve Withdrawal Request Form (“Escrow Release Request”) to KeyBank, together with the appropriate supporting documentation, for \$3,900,015 payable to Fairchild and the Town of Babylon.

28. Despite repeated telephone calls, emails and inquiries, to date, Keybank and LNR have yet to provide Fairchild with any response to its Escrow Release Request.

29. On July 28, 2010, KeyBank directed that all further communications be directed to LNR.

30. On July 29, 2010, counsel for the Trust attempted to contact LNR. In response, counsel for LNR returned the call but indicated that LNR refused to speak directly with Fairchild and would only communicate with Kimco, despite the fact that the escrow account under Section 7.6 was established for the benefit of the Town of Babylon, and not Kimco, and that Kimco has no interest in these funds.

31. On information and belief, Kimco has interfered with Republic's Escrow Release Request and has instructed LNR not to release the funds or communicate with Republic, or has otherwise conspired with LNR to slow or impede communications between and among Republic and its escrow agent KeyBank.

32. The actions of the Lender, the Special Servicer and the Master Servicer in refusing to release the escrow funds in accordance with the terms of the Loan Documents have directly and proximately injured the Trust by subjecting it to a damage claim by the Town of Babylon.

33. The funds whose disbursement has been requested are to be utilized by the Town of Babylon solely for the purpose for which the Section 7.6 escrow was established.

34. Funds from the Environmental Escrow Reserve have been dispersed to Republic in the same manner as requested here on multiple prior occasions.

COUNT I

(Specific Performance)

35. For Paragraph 35 of its Complaint, the Trust incorporates by reference Paragraphs 1 through 34, as if such paragraphs were set forth fully herein.

36. The Trust has duly performed all of the obligations under the Loan Documents that it can perform prior to the release of the funds from the Environmental Well Reserve.

37. The Lender, LNR and Keybank have failed to perform all of the obligations that they must perform under the Loan Documents despite the fact that they have the capacity to do so.

38. The Trust has no adequate remedy at law and is entitled to an order of specific performance requiring the Lender to release the funds to the Town of Babylon immediately.

COUNT II

(Breach of Contract)

39. For Paragraph 39 of its complaint, the Trust incorporates by reference Paragraphs 1 through 38, as if such paragraphs were set forth fully herein.

40. By and through Airport Plaza and Kimco's bad-faith refusal to cooperate with Fairchild to facilitate the release of the funds from the Environmental Well Reserve, Airport Plaza and Kimco have breached Section 11(d) of the Purchase Agreement, for which breach the Fairchild Debtors are owed compensatory damages in an amount to be determined by the Court, but in no event less than \$1,000,000.

Relief Requested

WHEREFORE, the Trust respectfully requests that the Court enter a judgment in its favor and against the Defendants:

1. Ordering that the Lender specifically perform the Loan Documents by releasing \$3,900,015 from the Environmental Well Reserve to the Town of Babylon and the remainder to the Trust not later than seven calendar days after the date of entry of judgment;
2. In an amount to be determined by the Court, but in no event less than \$1,000,000 for the damages the Trust has suffered by virtue of Airport Plaza and Kimco's failure to cooperate and interference with the release of the funds from the Environmental Well Reserve; and
3. For an award of attorney's fees and costs; and
4. For such further relief as the Court deems just and proper.

Dated: August 17, 2010
Wilmington, Delaware

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