FIRST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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| GCCFC 2007-GG11 KA UKA BOULEVARD, LLC, a Hawaii limited liability company,<br><br>Plaintiff<br><br>vs.<br><br>IMUA BLUEHENS, LLC, a Hawaii limited liability company; JAMES K. KAI, an individual; CENTRAL PACIFIC BANK, a Hawaii corporation; HAWAII NATIONAL BANK, a national banking association; DOE CORPORATIONS 1-50; DOE PARTNERSHIPS 1-50; DOE ENTITIES 1-50; and DOE DEFENDANTS 1-50,<br><br>Defendants. | Civil No. 10-1-2007-09 (BIA)<br>(Foreclosure)<br><br>ORDER GRANTING PLAINTIFF GCCFC 2007-GG11 KA UKA BOULEVARD, LLC'S MOTION FOR SUMMARY JUDGMENT (FILED MARCH 21, 2011), FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DECREE OF FORECLOSURE<br><br><u>Hearing</u><br>Date: Wednesday, April 13, 2011<br>Time: 9:00 a.m.<br>Judge: Honorable Bert I. Ayabe<br><br>No trial date set |

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit

ORDER GRANTING PLAINTIFF GCCFC 2007-GG11 KA UKA BOULEVARD, LLC'S MOTION FOR SUMMARY JUDGMENT (FILED MARCH 21, 2011), FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DECREE OF FORECLOSURE

Plaintiff GCCFC 2007-GG11 KA UKA BOULEVARD, LLC ("***Plaintiff***")'s Motion for Summary Judgment, filed March 21, 2011 ("***Motion***"), came on for hearing on April 13, 2011 at 9:00 a.m. before the Honorable Bert I. Ayabe.

Sharon V. Lovejoy, Esq. and Zachary N. Gershuni, Esq. appeared on behalf of the Plaintiff. Todd Y. Hirai, Esq. appeared on behalf of Defendants IMUA BLUEHENS, LLC ("***Borrower***") and JAMES K. KAI ("***Guarantor***"). Defendants CENTRAL PACIFIC BANK ("***CPB***") and HAWAII NATIONAL BANK ("***HNB***") did not enter appearances.

Having reviewed the Motion and having considered the memoranda, declarations, exhibits, arguments of counsel, and records and files herein, and good cause appearing therefor, IT IS HEREBY ORDERED that the Motion is granted with prejudice. The Court hereby issues its findings of fact, conclusions of law, and order and decree of foreclosure as follows.

FINDINGS OF FACT

1. Greenwich Capital Financial Products, Inc. ("***Greenwich***") loaned the Borrower $10,250,000.00 (the "***Loan***") pursuant to the terms of a Loan Agreement, dated August 1, 2007, between Greenwich and Borrower (the "***Loan Agreement***"). *See* Motion, Ex. A (Loan Agreement).

2. In connection with the Loan, the Borrower executed a Promissory Note, dated August 1, 2007, in the original principal amount of $10,250,000.00, in favor of Greenwich ("***Note***"). *See* Motion, Ex. B (Note).

3. As security for payment of the Borrower's indebtedness under the Note, the Borrower executed a Mortgage, Assignment of Leases and Rents, Security Agreement Financing Statement and Fixture Filing, dated August 1, 2007 ("***Mortgage***"). *See* Motion, Ex. C (Mortgage). The Mortgage was recorded in the Office of Assistant Registrar of the Land Court of the State of Hawaii ("***Land Court***") on August 1, 2007, as Land Court Document Number 3636741, granting a mortgage in favor of Greenwich and its successors and assigns on, *inter alia*, all of the Borrower's right, title, and interest in and to the real property (identified as Tax Map Key Nos. (1) ~~(9)~~-4-127-029-0000 and (1) ~~(9)~~-4-127-028-0000 and described on Transfer Certificate of Title No. 870,018), the buildings, structures, fixtures and other improvements, as

described more fully in the Mortgage and the other property in which liens were granted to Plaintiff's successors under the Loan Documents (defined herein) (collectively, the "***Mortgaged Property***"). *See* Motion, Ex. C (Mortgage).

4. As additional security for payment of the Loan, the Borrower executed an Assignment of Leases and Rents, dated August 1, 2007, in favor of Greenwich ("***ALR***"). *See* Motion, Ex. D (ALR). The ALR was recorded in the Bureau of Conveyances of the State of Hawaii ("***Bureau***") as Document No. 2007-137396.

5. To further ensure payment of and performance of the Borrower's obligations under the Loan, the Guarantor executed a Guaranty of Recourse Obligations, dated August 1, 2007, in favor of Greenwich ("***Guaranty***"). *See* Motion, Ex. E (Guaranty).

6. After the execution of the Loan Agreement, Note, Mortgage, ALR, Guaranty and other Loan-related documents (the "***Loan Documents***"), Greenwich assigned its rights and interest in the Loan and Loan Documents to LaSalle Bank National Association, as trustee for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2007-GG11, Commercial Mortgage Pass-Through Certificates, Series 2007-GG11. *See* Motion, Exs. F, G, H, and U.

7. In October 2008, LaSalle Bank National Association merged with Bank of America, N.A. *See* Motion, Ex. I (Land Court Order granting Bank of America, N.A.'s "Petition for Order Re: merger of LaSalle Bank National Association and LaSalle Bank Midwest National Association Into Bank of America, National Association," recorded in the Land Court on February 12, 2009 as Land Court Order No. 177833). In June 2010, Bank of America, N.A., as successor by merger to LaSalle Bank National Association, as trustee for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2007-GG11, Commercial Mortgage Pass-Through Certificates, Series 2007-GG11, assigned its rights and interest in the Loan and Loan Documents to Plaintiff. *See* Motion, Exs. J, K, L, and V.

8. Plaintiff currently holds all of the rights and interest of the lender under the Loan and Loan Documents, has the standing, power, and right to enforce the Borrower's and Guarantor's respective obligations under the Loan Documents, and has the senior-most lien interests with respect to the Mortgaged Property.

9. Under the Loan Documents, the Borrower is required to make monthly payments of interest and reserve payments, which the Borrower has failed to do in full. More specifically,

the Loan Agreement and Note require Borrower to make: (1) interest only payments, due in arrears, on the sixth (6th) day of each and every month beginning on September 6, 2007 and continuing through and including August 6, 2010; and (2) interest and principal payments, due in arrears, on the sixth (6th) day of each and every month beginning on September 6, 2010 and continuing through and including August 6, 2017, the Loan's Maturity Date. *See* Motion, Ex. A (Loan Agreement § 2.2.1) and Ex. B (Note §§ A – C and § 1).

10. The Loan Agreement also requires the Borrower to fund, every month, certain reserves for taxes, insurance, capital expenses and rollover costs (collectively, the "***Reserves***"). More specifically, the Borrower is required to fund Reserves on the 6th day of each and every month, beginning on September 6, 2007 and continuing through and including the Loan's Maturity Date. See Motion, Ex. A (Loan Agreement §§ 3.3, 3.4, and 3.5.1).

11. Beginning in December 2008, the Borrower did not pay all interest and Reserves due and owing under the Loan Documents. Since that time, the Borrower has not fully paid the interest and Reserves. The Borrower's failure to pay interest and Reserves when due are Events of Default under the Loan Documents, and the Borrower continues to be in default under the Loan Documents. *See* Motion, Ex. A (Loan Agreement § 8.1(a)). These Events of Default entitle the Plaintiff to relief available under the Loan Documents, including, without limitation, foreclosure of the Mortgage.

12. In addition to not paying the Plaintiff all amounts due, the Borrower (a) granted to CPB mortgages on the Mortgaged Property to secure repayment of CPB's loan to a third party, and (b) granted to HNB a mortgage on the Mortgaged Property to secure repayment of HNB's loan to a third party, both mortgages having been placed on the Mortgaged Property without the required consent (collectively, the "***Non-Permitted Junior Mortgages***"). *See* Motion, Exs. N, O, Q, and R.

13. The Non-Permitted Junior Mortgages are junior and subordinate in all respects to Plaintiff's rights to, and interest in, the Mortgaged Property.

14. The Non-Permitted Junior Mortgages are not permitted under the Mortgage, *see* Motion, Ex. C (Mortgage §§ 4(a), 4(b), and 10), and are Events of Default by the Borrower under the Loan Documents. *See* Motion, Ex. A (Loan Agreement §§ 8.1(h), 5.13, 5.22, 5.27, 1.1, and Schedule 5, Definition of "Special Purpose Bankruptcy Remote Entity," Clauses xxii,

xxv, and ii, Pages Sch. 5-3 and 5-1). These Events of Default entitle the Plaintiff to relief available under the Loan Documents, including, without limitation, foreclosure of the Mortgage.

15. The Non-Permitted Junior Mortgages also constitute "Springing Recourse Events" under the Loan Documents, which entitles the Plaintiff, among relief, to obtain (a) a money judgment against the Borrower for all amounts due and owing under the Loan Documents, including any and all deficiency/shortfall amounts following the foreclosure and sale of the Mortgaged Property (*see* Motion, Ex. A, Loan Agreement § 10.1), and (b) a money judgment against the Guarantor for all amounts due and owing under the Loan Documents (*see* Motion, Ex. E, Guaranty §§ 2(a), 1(b), and 5(a)).

16. The Borrower and Guarantor are jointly and severally liable for all amounts due and owing under the Loan Documents. *See* Motion, Ex. E, Guaranty §§ 5 ("Unconditional Character of Obligations of Guarantor"), 17 ("Joint and Several Obligations"); Ex. A, Loan Agreement § 8.2.2 ("Remedies Cumulative").

17. By letter dated December 16, 2009, Plaintiff sent the Borrower and Guarantor a notice of default, which the Borrower and Guarantor received. *See* Motion, Ex. M (notice of default).

18. As of March 6, 2011, the total amount of $14,483,485.95 is due and owing to Plaintiff from Borrower and Guarantor under the Loan Documents, consisting of the following: $10,250,000 in principal, $792,22.50 in contract interest at a current rate of 7.08%, $777,291.67 in default interest at a rate of 5%, $2,688,170.91 in prepayment premium, and $74,673.90 in late fees (5%), and less $90,560.71 in administrative and recording fees, less $135,071.07 credit suspense funds, and less $54,362.67 credit escrow funds – all as permitted under the Loan Documents. *See* Motion, Ex. S (Payoff Statement).

19. Under the Loan Documents, on and after March 6, 2011, the per diem interest that is accruing on the above-described $14,483,485.95, and that is due and owing to Plaintiff from Borrower and Guarantor, is $3,439.44 per day.

20. As of January 18, 2012, the total amount of $15,577,227.87 is due and owing to Plaintiff from Borrower and Guarantor under the Loan Documents, consisting of (a) the above-described $14,483,485.95 plus (b) per diem interest between March 6, 2011 and January 18, 2012 (i.e., 318 days times $3,439.44 per day equals $1,093,741.92).

21. Plaintiff is not required to first proceed against the Property before collecting the above monetary amounts from the Borrower and/or Guarantor. The Borrower and Guarantor waived any such arguments, including, without limitation, "security first," "election of remedies," and "one action" arguments. *See* Motion, Ex. A (Loan Agreement § 8.2.2) and Ex. E (Guaranty § 5(a)).

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes as a matter of law as follows:

22. The Court has jurisdiction of the parties and subject matter of this action, and venue is proper in this Circuit.

23. A valid, binding, and enforceable Loan exists between the Plaintiff and Borrower, as evidenced by the Loan Agreement, Note, Mortgage, Guaranty, and other Loan Documents.

24. The Loan Documents are valid, binding, and enforceable in all respects.

25. The Borrower defaulted, and remains in default, on its obligations to Plaintiff under the Loan Documents, including, without limitation, by (a) failing to pay all interest and Reserve amounts to Plaintiff when due, and (b) by granting the Non-Permitted Junior Mortgages to CPB and HNB.

26. Based on the Borrower's defaults under the Loan Documents, the Plaintiff is entitled to, among other relief, foreclosure of the Mortgaged Property and to have the Mortgaged Property sold in the manner as provided by law, the Mortgage being a valid, first, and senior-most lien upon the Mortgaged Property.

27. The Non-Permitted Junior Mortgages are junior and subordinate in all respects to Plaintiff's rights to, and interest in, the Mortgaged Property.

28. The Borrower's Non-Permitted Junior Mortgages constitute "Springing Recourse Events" under the Loan Documents, which entitle the Plaintiff to, among other relief, (a) a money judgment against the Borrower for all amounts due and owing under the Loan Documents, including any and all deficiency/shortfall amounts following the foreclosure and sale of the Mortgaged Property, and (b) a money judgment against the Guarantor for all amounts due and owing under the Loan Documents.

29. The Borrower and Guarantor were duly served with a notice of default based on the Borrower's defaults under the Loan Documents, and Plaintiff has complied with all notice requirements to the Borrower and Guarantor.

30. There is due, owing, and unpaid to Plaintiff from the Borrower and Guarantor, jointly and severally, a total of $15,577,227.87 as of January 18, 2012, consisting of principal, interest, default interest, prepayment premium, late fees, and legal fees and costs, which amounts are permitted under the Loan Documents.

31. The $15,577,227.87 figure is exclusive of amounts accruing on and after May 10, 2011, including, without limitation, (a) per diem interest in the amount of $3,439.44 per day, (b) additional legal fees and costs, and (c) advances to protect the Mortgaged Property, including payments of property expenses, operating expenses, and/or amounts related to the foreclosure and sale of the Mortgaged Property, as described more fully below in the Order and Decree of Foreclosure. For those additional amounts accrued on and after January 18, 2012, the Plaintiff will be entitled to a monetary award from the Borrower and Guarantor, jointly and severally, in an amount to be later determined by the Court.

32. LNR Partners, LLC (formerly known as LNR Partners, Inc.) is Plaintiff's agent and has authority to act on Plaintiff's behalf, including, without limitation, with respect to Plaintiff's rights and interests under the Loan Documents.

33. There is no genuine issue as to any material fact raised in the briefing and argument on the Plaintiff's Motion, and the Plaintiff is entitled to judgment as a matter of law.

34. There is no just reason for delay and so the judgment in the Plaintiff's favor shall be a final judgment under Rule 54(b) of the Hawaii Rules of Civil Procedure.

35. If any of the conclusions of law stated herein shall be deemed to be findings of fact, they are hereby incorporated by reference in the findings of fact section above. If any findings of fact stated herein shall be deemed to be conclusions of law, they are hereby incorporated by reference in this conclusions of law section.

ORDER AND DECREE OF FORECLOSURE

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

36. Summary judgment in favor of the Plaintiff in the above-captioned matter is hereby granted.

37. The Borrower is in default under its Loan Documents to the Plaintiff. There is due, owing, and unpaid from the Borrower and Guarantor, jointly and severally, to the Plaintiff a total amount of $15,577,227.87 as of January 18, 2012, with per diem interest accruing on and after January 18, 2012 in the amount of $3,439.44 per day.

38. The Court will determine at a later time (a) the amounts of interest and legal fees and costs that hereafter accrue and that are awardable in favor of the Plaintiff and against the Borrower and Guarantor, and (b) if any, the amounts of advances to protect the Mortgaged Property, property expenses, and/or operating expenses that may hereafter accrue and that are awardable in favor of the Plaintiff and against the Borrower and Guarantor.

39. All of the aforementioned sums due from the Borrower and Guarantor to Plaintiff constitute a valid, first, and senior-most lien on the Mortgaged Property as described herein.

40. The Mortgage shall be and hereby is foreclosed as prayed. All Defendants named by the Plaintiff herein and all other persons or entities claiming through said parties shall be and hereby are barred and forever foreclosed from any and all right, title, interest, and claims at law or in equity in and to the Mortgaged Property.

41. The interests of tenant space lessees at the Mortgaged Property are not foreclosed by virtue of this action, even though said interests are junior and subordinate in all respects to the Plaintiff's interests.

42. The Mortgaged Property shall be sold at public auction, without an upset price, and as authorized by law and under the provisions of the Loan Documents, or by way of private sale. The sale shall not be final until approved and confirmed by this Court.

43. George W. Van Buren, Esq. – whose address is 745 Fort Street, Suite 1950, Honolulu, Hawaii 96813, whose telephone number is (808) 599-3800 – is hereby appointed as Commissioner by this Court. The Commissioner shall henceforth hold all equitable and legal title to the Mortgaged Property and is hereby authorized and directed to sell the Mortgaged Property and to make, execute, and deliver to the order of the purchaser or purchasers, such conveyance of the Mortgaged Property as may be appropriate in the premises, and to let such purchaser or purchasers, or their designee(s) or nominee(s), into possession of the Mortgaged Property upon the production of said instrument. Such sale shall be by private sale or by public Commissioner's sale, without an upset price, in accordance with this Decree of Foreclosure. No public Commissioner's sale shall occur until after notice of such sale is given by the

Commissioner by publication in the classified section of a daily newspaper of general circulation in the City and County of Honolulu, State of Hawaii. The notice shall give the date, time, and place of such sale, and an intelligible description of the property to be sold, and shall disclose all terms of sale herein mentioned. The sale of the Mortgaged Property shall be advertised once a week for three (3) consecutive weeks, with the auction to take place no sooner than fourteen (14) days after the appearance of the third advertisement. The Commissioner may continue the sale from time to time in his discretion. No bond shall be required of the Commissioner. The Commissioner shall be awarded his rate of $275 per hour for his work as commissioner. The Commissioner's fees and costs shall be deemed secured by the Mortgage on the Mortgaged Property. In the event that Mr. Van Buren by this order declines or becomes unable to act as Commissioner, the Court shall appoint another person to serve as Commissioner, without further notice or hearing.

44. The Commissioner shall hold all proceeds of the sale of the Mortgaged Property to the credit of this cause subject to the directions of this Court. A further hearing shall be held herein to consider confirmation of the foreclosure sale. At the hearing, the Court will allow reopening of the auction by accepting higher bids, the first of which must be at least one-hundred five percent (105%) of the highest bid at the Commissioner's sale; anyone may reopen the auction by bidding, including all parties to this action and any other interested person, whether or not any such party or interested person had bid, or could have bid, at the Commissioner's sale.

45. At the confirmation hearing, the Court shall determine the additional amounts to which the Plaintiff is entitled from the Borrower and Guarantor, including, without limitation (a) per diem charges on and after January 18, 2012 and legal fees and costs, and (b) if any, advances to protect the Mortgaged Property, property expenses, and/or operating expenses. The Commissioner, after payment of all necessary costs and expenses of such sale, including the Commissioner's fee, shall make application of the sale proceeds first to the payment of sums found due and owing to the parties hereto in the priorities determined by the Court and, second, if there is surplus, as the Court finds appropriate. Upon distribution of the sale proceeds according to the directions of the Court, the Commissioner shall file an accurate accounting of receipts, expenses, and distributions. If the proceeds of such sale are insufficient to pay the aforesaid amounts to the Plaintiff, the Court shall direct that a judgment be entered for such deficiency in favor of the Plaintiff and against the Borrower and Guarantor, jointly and severally.

46. With the exception of any governmental authority enforcing a lien for unpaid real property taxes as to the Mortgaged Property, all Defendants to this action and all persons or entities claiming by, through, or under them are forever barred of and from any and all right, title, interest, or claim at law or in equity or to the Mortgaged Property and every part thereof.

47. All parties are hereby authorized to purchase the Mortgaged Property at the foreclosure sale. The Plaintiff shall be entitled to credit bid the amount of its judgment, which judgment is and shall be no less than $15,577,227.87, without any requirement of a down payment. Any other successful bidder at the sale shall make a down payment to the Commissioner in an amount not less than ten percent (10%) of this highest successful bid price. This payment shall be in cash, money order, by cashier's check or by certified check. Prior to bidding, any person not hereby authorized to credit bid must show the Commissioner such person's present ability to make the required down payment, in the required form, immediately upon the closure of the bidding. At the Court's discretion, the 10% down payment may be forfeited in full or in part if the purchaser shall fail to pay the balance of the purchase price as hereinafter set forth. In no event shall the purchaser be liable for damages greater than the forfeiture of the 10% down payment. The balance of the purchase price shall be paid to the Commissioner upon the Court's approval and confirmation of the sale, provided that, if the Plaintiff or its designee(s) or nominee(s) is/are the purchaser at the foreclosure sale, the purchaser may satisfy the balance of the purchase price by way of offset up to the amount of its secured debt.

48. The Commissioner may require that the sale close through an escrow, even if the purchaser does not require one. All costs and expenses of closing, including, without limitation, the costs of conveyance (e.g., preparation of the conveyance document), conveyance tax, escrow and recording fees, any proof of title or title insurance, and notary fees, as well as the costs of securing possession of the Mortgaged Property, shall be the responsibility of and paid by the purchaser; provided, however, that if the Plaintiff is the successful bidder, all said costs and expenses shall be the responsibility of the Borrower and shall be added to the amounts due and owing from the Borrower to the Plaintiff. Neither the availability of title insurance nor securing possession of the Mortgaged Property shall be a condition of closing.

49. Pursuant to Rule 54(b), Hawaii Rules of Civil Procedure, the Court directs that summary judgment and interlocutory decree of foreclosure be and are hereby entered as a final

judgment as to Plaintiff's Complaint (filed September 20, 2010) as there is no just reason for delay. FEB 15 2012

BERT I. AYABE

THE HONORABLE BERT I. AYABE

APPROVED AS TO FORM:

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