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NY Entitled To $11.5M For GGP Loan Default, 2nd Circ. Hears

By **Richard Vanderford**

Law360, New York (November 26, 2012, 7:12 PM ET) -- New York state on Monday urged the Second Circuit to uphold a decision giving it an extra $11.7 million fromGeneral Growth Properties Inc. after the mall operator went bankrupt and defaulted on a loan, arguing that the restructured GGP could afford it.

The state, whose retirement fund loaned GGP $254 million, is entitled to get extra interest money promised to it in the loan documentation, a lawyer for the state said at oral arguments in Manhattan.

The state would normally have been entitled to $25.3 million in interest, but a provision of its deal with GGP said the mall operator had to pay a premium if it defaulted by going into bankruptcy, and a bankruptcy court awarded it an extra $11.7 million over GGP's objections.

“The debtor did rehabilitate, it did emerge solvent,” Andrew C. Gold of Herrick Feinstein LLP told a panel of judges. “There's no reason the debtor should not have to pay default interest.”

The company, one of the largest shopping center operators in the U.S., wants a bankruptcy court's approval of the interest payment overturned, saying it should have been voided by the reorganization.

But GGP emerged from bankruptcy with enough money to pay all its creditors and $6 billion to give to equity investors, the state has argued. A clause in its contract saying it should pay more on the loan if it goes bankrupt, known as an ipso facto clause, should be honored, the state argued.

GGP argued that two sections of the Bankruptcy Code, 363 and 561, working together, make the pre-bankruptcy amount of its payment obligation “property” protected by bankruptcy.

“'Property' of the debtor has been construed very broadly,” Adam P. Strochak of Weil Gotshal & Manges LLP argued. “The terms of this contract are not enforceable under the provisions of the Bankruptcy Code.”

The state entity that loaned GGP the money is New York State Common Retirement Fund.

The judges said they would rule later.

GGP finished an overhaul of its financial structure and emerged from Chapter 11 bankruptcy in November 2011, at the same time launching a public offering of 135 million shares of common stock.

GGP split into two separate entities as part of the reorganization plan, including the new GGP — the second-largest shopping mall owner and operator in the U.S., with more than 183 malls in 43 states.

In resolving the largest real estate bankruptcy in U.S. history, GGP consensually restructured about $15 billion in project-level debt, paid all creditor claims in full and ensured a substantial return for equity holders, the company said.

In April 2009, GGP and 158 of its more than 200 U.S. malls filed voluntary petitions for bankruptcy protection, listing $29.6 billion in assets and more than $27 billion in liabilities as of Dec. 31, 2008.

Circuit Judges Raymond Lohier and Denny Chin and District Judge Paul Gardephe sat on the panel for the Second Circuit.

GGP is represented by Adam P. Strochak of Weil Gotshal & Manges LLP.

Andrew C. Gold of Herrick Feinstein LLP represents New York.

The case is In re: General Growth Properties, case number 12-497, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Lisa Uhlman. Editing by Jeremy Barker.
