

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

November 9, 2012

John G. Harris, Esquire
David B. Anthony, Esquire
Berger Harris
1201 North Orange Street
One Commerce Center, 3rd Floor
Wilmington, Delaware 19801

Stephen W. Spence, Esquire
Stephen A. Spence, Esquire
Phillips, Goldman & Spence, P.A.
1200 North Broom Street
Wilmington, Delaware 19806

Re: *TBC Dewey Hotel, LLC v. Tamari Sand Palace, LLC*,
C.A. No. S12L-02-002

On Defendant's Motion to Apply Maryland Law:	DENIED
On Defendant's Motion for Summary Judgment:	DENIED

Date Submitted: August 8, 2012
Date Decided: November 9, 2012

Dear Counsel,

Pending before the Court are Defendant's Motion to Apply Maryland Law and Defendant's Motion for Summary Judgment. The parties have briefed the issues and the matters are ripe for decision. Both motions are denied for the reasons set forth below.

Factual Background

On or about April 25, 2006, Tamari Sand Palace, LLC ("Sand Palace") executed a promissory note in favor of Mercantile Peninsula Bank ("Mercantile") in the original principal amount of \$4,240,000.00 ("the Note"). The Note was secured by, among other

things, a mortgage for property located at 1710 Highway One, Dewey Beach, Delaware (“Mortgage”), upon which the Sand Palace Motel (“Motel”) is located. The Note was also secured by six guarantees of the owners of Sand Palace, Robert Sipple and Chaitanya Gadde, their wives, Sand Palace, and its affiliates (together with the Note and Mortgage, “the Loan Documents”).

The Loan Documents were assigned to PNC Bank (“PNC”) when PNC acquired Mercantile through a merger in 2007.

The Note matured on April 25, 2008, when the principal on the interest-only loan came due. Failure to make payment in full when due constitutes default under the terms of the Note. The Note contains a choice of law provision stating that the Note “is governed by the laws of Maryland, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, [unless preempted].” The Mortgage, securing payment of the Note, contains an identical choice of law provision. The Mortgage provides for foreclosure as a remedy for default for failure to make payments when due.

After Sand Palace defaulted on the Note by failing to pay the principal due on the maturity date of April 25, 2008, PNC and Sand Palace negotiated the first of what eventually numbered four temporary forbearance agreements, all of which altered the payment schedule and maturity date of the underlying Note. The final forbearance agreement, the “Third Amended Temporary Forbearance Agreement” (“FA4”), was

executed on July 30, 2010. It extended the maturity date to October 31, 2010, and established yet another amended payment schedule. Like the previous forbearance agreements, FA4 includes a Delaware choice of law provision. Specifically, FA4 provides: “This Agreement shall be construed and enforced in accordance with the domestic, internal law, but not the law of conflict of laws, of the State of Delaware.”¹

Sand Palace defaulted on FA4 by failing to pay back the loan by the extended maturity date. The parties endeavored to reach an additional forbearance agreement but Sand Palace did not execute the agreement drafted by PNC.

On April 14, 2011, PNC sent a default letter to Sand Palace. The letter informed Sand Palace that it was in continual default, that the entire loan balance was due and payable, that PNC may exercise its right to foreclose on the Motel, and that the letter did not serve to waive any of PNC’s rights or remedies.

PNC assigned the Loan Documents to TBC Dewey Hotel, LLC (“Dewey Hotel”) in December of 2011. Due to Sand Palace’s alleged default of payments due on the Note, Dewey Hotel filed this foreclosure action on February 17, 2012.

The Parties’ Positions

Sand Palace argues that because the Note and Mortgage contain a Maryland choice of law provision, Maryland law governs the issue of whether Sand Palace breached the

¹ FA4 at ¶ 6.02.

terms of the Note. Sand Palace asserts that, under Maryland law, Sand Palace and PNC modified the terms of the Note and Mortgage through their course of dealing. Sand Palace contends it complied with these modified terms and, therefore, PNC waived its remedy to foreclose. Dewey Motel, as PNC's successor-in-interest, is bound by this waiver.

Dewey Hotel, however, argues the terms of FA4 govern the parties' current relationship. Because FA4 contains a Delaware choice of law provision, Delaware law controls. Dewey Hotel also asserts Maryland and Delaware law are consistent and, therefore, the choice of law question is inconsequential and need not be addressed.

Subsequent to the completion of briefing on the choice of law matter, Sand Palace filed a Motion for Summary Judgment, arguing it is entitled to judgment as a matter of law because Dewey Hotel improperly filed suit on the basis of Sand Palace's breach of the Note when Dewey Hotel cites the FA4 as the agreement governing the parties' relationship. If FA4 controls, Sand Palace contends it superceded the Note and, therefore, breach of the Note cannot serve as the basis for foreclosure. Dewey Hotel responds that the forbearance agreements merely supplemented the rights and duties of the parties pursuant to the Loan Documents.

Merits

Choice of Law

As the parties observe, Delaware follows the "most significant relationship test" in the Restatement (Second) of Conflict of Laws when conducting a choice of law analysis.² However, this test must be used only in the absence of a contract between the parties

² *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010).

specifying a choice of law.³ Delaware courts generally give deference to a choice of law provision, providing the jurisdiction selected bears some material relationship to the transaction.⁴ “A material relationship exists where a party’s principal place of business is located within the foreign jurisdiction, a majority of the activity underlying the action occurred within the foreign jurisdiction, and where parties to a contract performed most of their services in the foreign state.”⁵ However, a foreign jurisdiction’s laws may not be used to interpret a contractual provision in a manner “repugnant” to the public policy of Delaware.⁶

In this case, the Note contains a Maryland choice of law provision and FA4 contains a Delaware choice of law provision. The question before this Court is limited to which provision applies. Should the Maryland choice of law provision apply, the Court must also determine whether Maryland has a material relationship to the transaction and whether Maryland’s applicable law unduly offends Delaware’s public policy.

³ *Lagrone v. American Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super.).

⁴ *Deuley v. Dyncorp Int’l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

⁵ *Id.* (citations omitted).

⁶ *J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520-21 (Del. 2000).

The Court concludes the Delaware choice of law provision contained in FA4 applies. As evidenced by Sand Palace's Motion for Summary Judgment, the parties agree FA4's terms control the current obligations of the parties. FA4, along with the other previously executed forbearance agreements, specifically preserved PNC's right to pursue relief under FA4 and/or the Loan Documents in the event of Sand Palace's default thereon. FA4 provides:

5.02 **Remedies.** Immediately upon the occurrence of an Event of Default, and without the requirement of providing any notice:

- (a) The Bank shall have no further obligations under this Agreement;
- (b) The Bank may charge, from the date of the Initial Default, interest on the outstanding principal balance of the Indebtedness at a default rate equal to five per cent [sic] (5%) in excess of the non-default rate of interest in effect on the date on which an Event of Default occurs; and/or
- (c) The Bank shall be entitled to take any and all actions permitted by law, equity, the Loan Documents, this Agreement and/or otherwise.

Dewey Hotel chose to sue on the underlying Note, as was its prerogative. Nevertheless, the temporary forbearance agreements altered the obligations of the parties. The Loan Documents must be considered together with the subsequent amendments thereto. Sand Palace argues that Dewey Hotel improperly attempts to amend the pleadings by introducing the forbearance agreements in response to argument on the choice of law issue. However, the fact that Dewey Hotel properly brought suit based on the Loan Documents does not undermine the admission or relevance of supplemental

negotiations between the parties. The fact that the parties subsequently agreed to a Delaware choice of law provision controls and Delaware law applies.

Motion for Summary Judgment

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁷ The moving party bears the burden of establishing the non-existence of material issues of fact.⁸ Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁹ Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.¹⁰ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.¹¹ “A complete failure of proof concerning an essential element of the nonmoving party’s

⁷ *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

⁸ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁹ *Id.* at 681.

¹⁰ Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

¹¹ *Burkhardt v. Davies*, 602 A.2d 56, 59 (Del. 1991).

case necessarily renders all other facts immaterial.”¹² If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.¹³

As summarized above, Sand Palace asserts that because Dewey Hotel has conceded that the terms of FA4 control the parties’ obligations, Sand Palace is entitled to judgment as a matter of law because Dewey Hotel has no right to proceed against Sand Palace under the Note independently of the parties’ subsequent agreements. Dewey Hotel argues that FA4 did not supersede the Note but supplemented the Note. The Court agrees. The Loan Documents must be considered in light of the subsequent negotiated efforts of PNC and Sand Palace to continue their business relationship. Sand Palace has indicated a desire to show the parties modified their original agreement and Dewey Hotel has admitted the parties did so. These modifications, however, preserved the right of PNC, and its successor-in-interest, to foreclose on the property secured by the Mortgage under the Note. Dewey Hotel, as it is entitled to, seeks to do so. A Motion for Summary Judgment is not appropriate in light of these facts.

Conclusion

¹² *Id.* at 59 (quoting *Celotex*, 477 U.S. at 322-23).

¹³ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

For the reasons set forth above, Defendant's Motion to Apply Maryland Law is denied, as is Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary