

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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August 20, 2012

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Re: ***Wilmington Trust Company v. Laurence E. Jestice, Sr., Jestice Farms LLC, L. Edward Jestice, Jr., Robin Lynn Jestice, Golden Acres Limited Partnership and Laurence E. Jestice, Sr, Trustee of Trust "A" Under Will of Elizabeth W. Jestice***
C.A. No. S11C-02-005 RFS

Upon Plaintiff's Motion for Summary Judgment. Granted.

Submitted: June 14, 2012
Decided: August 20, 2012

Dear Counsel:

Plaintiff Wilmington Trust Company ("Plaintiff" or "Wilmington Trust") has filed a motion for summary judgment in this consolidated collection action.¹ Defendants executed certain notes and guaranties ("the Notes") in connection with three mortgages held by Plaintiff. This Court granted

¹Manufacturers and Traders Trust Company is the successor in interest to Wilmington Trust Company. For purposes of this Order, the Court uses either "Wilmington Trust" or "Plaintiff."

Plaintiff summary judgment on the mortgages (“the foreclosure action”) in January 2012.² On this collection action, judgment will be entered for Plaintiff.

Summary judgment is granted only when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact.³ If the moving party shows there are no material issues of fact, the burden shifts to the non-moving party to show the existence of such facts.⁴ If the non-moving party cannot show the existence of an essential element of his case, summary judgment is appropriate.⁵

Plaintiff argues that Defendants make the same argument here that was rejected by the Court under the parole evidence rule in the foreclosure action.⁶ In both actions, Defendants’ position has been that they believed they would never have to make final payment because Plaintiff would arrange for refinancing before the Notes came due.⁷ This belief was based, not on any provision or ambiguity in the Notes, but on Plaintiff’s employees/agents’ alleged representations to that effect and Defendants’ prior history with Plaintiff.

Parole evidence may be considered only when there is ambiguity in an agreement.⁸ There

²*Wilmington Trust Co. v. Jestice*, 2012 WL 1414282 (Del.Super.).

³*Dambro v. Meyer*, 974 A.2d 121, 138 (Del.2009).

⁴*Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del.1979).

⁵*Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991).

⁶*Wilmington Trust Co. v. Jestice*, *supra*. Plaintiff does not argue *res judicata*.

⁷Defendants do not dispute that the Notes are unpaid.

⁸*Dickinson Medical Group, P.A. v. Foote*, 1987 WL 8665, at *2 (Del.Super.).

is no room for parole evidence where there is no ambiguity and the agreement is fully integrated.⁹ Here, Defendants do not argue ambiguity or lack of integration and therefore concede these issues. Even if the Court had not rejected Defendants' argument in the foreclosure action, and even if Defendants identified specific representations, which they do not,¹⁰ the parole evidence rule would bar consideration of the alleged representations in this action.

Defendants assert that a fact question exists as to whether Plaintiff's employees made the alleged representations. This question is irrelevant because the Court has found that consideration of the alleged representations is barred.

Defendants argue without authority that the collection action is different from the foreclosure action because it is a personal judgment rather than a mortgage. This is legal argument and raises no issue of material fact. Defendants provide no basis for this argument, and it fails as a matter of law.

Plaintiff has met its initial burden, and Defendants have not demonstrated the existence of a genuine issue of material fact. The Court concludes as a matter of law that Defendants are liable for the amounts due under the Notes.

In the Complaint, Plaintiff sets forth the amounts due as of January 31, 2011, with accrued interest on the principal beginning in February 1, 2011 and continuing until the Notes are paid in full.

⁹*Greggo v. Wohl*, 241 A.2d 522, 523 (Del.1968).

¹⁰“Communications were by letter, telephone, or in person. The subject matter of the Communications include[d] the terms of the Notes and Guarantys [sic]. . . and representations concerning refinancing the balloon payments allegedly due under the Notes.” Def. Responses to Discovery ¶ 11.

Plaintiff also submits the affidavit of Richard Schmidt, Vice President at Manufacturers and Traders Trust Company. The affidavit, dated April 11, 2012, avers that Schmidt is responsible for the administration of the Notes and sets forth the amounts in default. Mr. Schmidt provided screen captures from Plaintiff's loan information system to support his affidavit.

Based on these submissions, the Court finds that Defendants are liable for the following amounts.

Note I and Guaranty. Principal of \$2,953,000.00, executed by Defendants Laurence E. Jestice, Sr. and Jestice Farms, LLC and guaranteed by Defendants L. Edward Jestice, Jr., Robin Lynn Jestice, Golden Acres Limited Partnership and Laurence E. Jestice, Sr., Trustee of Trust "A" Under Will of Elizabeth W. Jestice. Although Note I matured in March 2010, the borrowers and guarantors have not made the required payments. As of January 31, 2011, Note I was in default in the following amounts:

1. \$2,953,000.00 in principal.
2. \$20,096.78 in past due interest through January 31, 2011.
3. \$147,650.00 in late fees (5 percent of payment due).
4. Accrued interest on the principal balance beginning February 1, 2011 at the *per diem* rate of \$574.19 until Note I is paid in full.
5. \$5,000 in attorneys' fees.

These amounts are not disputed by Defendants.

Note II and Guaranty. Original principal of \$150,000.00, executed and guaranteed as listed above for Note I. Although Note II matured in March 2010, the borrowers and guarantors have not made the required payments. As of January 31, 2012, Note II was in default in the following

amounts:

1. \$140,000.00 in principal.
2. \$680.55 in past due interest through January 31, 2011.
3. Accrued interest on the outstanding principal balance beginning February 1, 2011 at the *per diem* rate of \$19.44 until Note II is paid in full.
4. \$5,000.00 in attorneys' fees.¹¹

Note III. Original principal of \$792,000.00, executed by Defendants L. Edward Jestice, Jr. and Robin Lynn Jestice. Although the loan matured in March 2010, the borrowers have not made the required payments. As of January 31, 2012, Note III was in default in the following amounts:

1. \$769,908.13 in principal.
2. \$5,815.86 in past due interest through January 31, 2011.
3. Accrued interest on the outstanding principal balance beginning February 1, 2011 at the *per diem* rate of \$171.09 until Note III is paid in full.
4. \$43,197.94 in late fees (5 percent of payment due).
5. \$5,000.00 in attorneys' fees.

Note IV. Original principal of \$100,000 executed by the Defendants who executed Note III. As of January 31, 2012, Note IV was in default in the following amounts:

1. \$92,954.78 in principal.
2. \$1,226.47 in past due interest through January 21, 2011.
3. \$342.79 in late fees (5 percent of payment due).
4. Accrued interest on the outstanding principal balance beginning February 1, 2011 at the

¹¹No late fees are requested for Note II. *See* Complaint ¶ 16; Schmidt affidavit ¶ 12.

per diem rate of \$12.91, beginning February 1, 2011 until Note IV is paid in full.

5. \$5,000.00 in attorneys' fees.

Schmidt's affidavit avers that Defendants have not disputed these amounts. Defendants answer, filed March 2011, denies liability but provides no support for the denial in either the answer or the brief.

The Court concludes that Defendants are liable to Plaintiff for the damages set forth above. Plaintiff shall submit to the Court a final itemization of damages no later than Tuesday, September 4, 2012.

For the reasons stated, Plaintiff's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary