

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

VIII - HOTEL II P LOAN :
PORTFOLIO HOLDINGS, LLC, : C.A. No. K12C-06-023 WLW
 :
 Plaintiff, :
 :
 v. :
 :
 MICHAEL A. ZIMMERMAN and :
 SALVATORE J. LEONE, :
 :
 Defendants. :

Submitted: June 24, 2013
Decided: September 19, 2013

ORDER

Upon Plaintiff's Motion for Summary Judgment.
Granted.
Upon Plaintiff's Motion to Supplement Affidavit Pursuant
to Superior Court Civil Rule 56(e). *Granted.*

Lisa B. Tancredi, Esquire of Gebhardt & Smith, LLP, Wilmington, Delaware;
attorney for Plaintiff.

Peter K. Schaefer, Jr., Esquire of Avenue Law, Dover, Delaware; attorney for
Defendants.

WITHAM, R.J.

ISSUE

Before the Court is whether the Plaintiff's Motion for Summary Judgment (and accompanying Motion to Supplement Affidavit) on the issue of whether the Plaintiff can enforce two loans guaranteed by the Defendants should be granted.

FACTS AND CONTENTIONS

This is an action to enforce commercial guaranty agreements made by Defendants Michael A. Zimmerman (hereinafter "Zimmerman") and Salvatore J. Leone (hereinafter "Leone," collectively "the Defendants"). The Defendants guaranteed loans made by Mercantile Peninsula Bank (hereinafter "Mercantile") to Riverwalk Hospitality Group, LLC (hereinafter "Riverwalk") pursuant to two promissory notes for \$5,300,000 and \$300,000, respectively. Both Zimmerman and Leone were members of the Riverwalk LLC with membership interests in Riverwalk. The notes—issued on January 11, 2005 and December 13, 2006, respectively—were secured by two mortgages granted by Riverwalk to Mercantile. The Defendants do not dispute that they each guaranteed the two loans made by Mercantile pursuant to the two promissory notes.¹ The parties do not disagree as to what happened next, but rather dispute the sufficiency of proof of the following transactions under 6 *Del. C.* § 3-309(b).

Mercantile merged with PNC Bank, National Association (hereinafter "PNC")

¹ Copies of the two promissory notes are attached to Plaintiff's Motion for Summary Judgment as "Exhibit A." Copies of the two guaranty agreements executed by Zimmerman and Leone are attached as "Exhibit C" and "Exhibit D," respectively.

in 2007.² On July 25, 2011 the promissory notes, guaranty agreements, and mortgages pertaining to Mercantile's loans to Riverwalk were assigned by PNC to VIII-Hotel II P Loan Holdings, LLC (hereinafter "Plaintiff").³

On February 14, 2012 Riverwalk filed a petition for Chapter 11 bankruptcy with the United States Bankruptcy Court for the District of Delaware. Plaintiff participated in the bankruptcy proceedings as a secured creditor of Riverwalk, and on July 20, 2012 the Bankruptcy Court granted Plaintiff's motion for relief from the automatic stay. On August 20, 2012 the Court of Chancery appointed a receiver over the real and personal property of Riverwalk.⁴ On September 19, 2012 this Court

² Plaintiff has attached a copy of a letter from the Comptroller of the Currency certifying the merger of Mercantile into PNC as "Exhibit E" to Plaintiff's Motion for Summary Judgment. The Defendants dispute the sufficiency of the letter as proof of the merger by characterizing it as a contingent application for merger approval. This characterization appears to be without merit or support in Delaware law.

³ Plaintiff has attached a copy of the "Loan Sale Agreement" between PNC and Plaintiff as "Exhibit F" to Plaintiff's Motion for Summary Judgment. The agreement purports to assign PNC's interest in notes held by PNC to Plaintiff. A list of all loans being sold to Plaintiff includes, in detail, the loans made by Mercantile to Riverwalk, and describes the promissory notes, guaranty agreements, and mortgages pertaining to the loans. The Defendants do not contest the sufficiency of Exhibit F.

⁴ Plaintiff has attached to its Motion for Summary Judgment a number of exhibits pertaining to the foregoing proceedings as evidence that PNC was Mercantile's successor-in-interest, that PNC assigned its interest in the Riverwalk loans and guaranty agreements to Plaintiff, and that the Defendants are personally liable to Plaintiff for Riverwalk's obligations. The most pertinent of these exhibits are discussed *infra*. It is worth noting now that in Zimmerman's Declaration in Support of First Day Motions from the Bankruptcy proceedings (attached to Plaintiff's Motion for Summary Judgment as "Exhibit G"), Zimmerman indicates that Riverwalk made payments to Plaintiff on both promissory notes prior to the institution of bankruptcy proceedings, though it is unclear if those payments were made to Plaintiff.

granted Plaintiff judgment in default in its foreclosure case against Riverwalk. By letter dated June 8, 2012 Plaintiff then made demand for payment from the Defendants pursuant to the guaranty agreements, and on June 18, 2012 commenced this action to enforce the guaranty agreements.

Plaintiff has lost the original copies of the two promissory notes, as well as the original copies of the guaranty agreements obtained from PNC. Plaintiff executed a Lost Instrument Affidavit on November 8, 2012, which Plaintiff has attached to its Motion for Summary Judgment as “Exhibit X.” On June 4, 2013 Plaintiff filed the instant Motion for Summary Judgment on the issue of whether Plaintiff has the ability to enforce the promissory notes against the Defendants. Plaintiff asserts the doctrines of judicial estoppel, collateral estoppel, and *res judicata* as applying based on the prior Bankruptcy Court and Court of Chancery proceedings, thereby precluding Defendants from re-litigating this issue.

The Defendants respond that “until the original wet-ink instruments are produced, Defendants demand adequate protection from enforcement of the terms obligating Defendants” pursuant to 6 *Del. C.* § 3-309(b). The Defendants contends that the “adequate protection” requirement of § 3-309(b) requires a “binding release from Mercantile/PNC as to their rights to enforce the instrument.” Without such a release, the Defendants argue they are subject to incurring double liability on the promissory notes, and without such protection, summary judgment cannot be

granted.⁵ The Defendants do not dispute their obligations under the promissory notes and guaranty agreements, nor do they dispute whether Mercantile’s merger into PNC or the assignment of PNC’s loans to Plaintiff actually occurred. The thrust of Defendants’ argument seems to be that the exhibits attached to Plaintiff’s Motion for Summary Judgment are insufficient to constitute “adequate protection” pursuant to § 3-309(b).

On June 26, 2013 Plaintiff filed a Motion to Supplement Affidavit pursuant to Civil Rule 56(e).⁶ The Supplemental Affidavit submitted by Plaintiff is sworn by Anne C. Romano (hereinafter “Romano”), Managing Director and Vice President of PNC. Romano’s affidavit provides that PNC is the successor-in-interest to Mercantile, and PNC assigned the Riverwalk promissory notes and guaranty agreements to Plaintiff pursuant to the Loan Sale Agreement. Romano states that “PNC has no rights, title or interest” in any of the instruments pertaining to the Riverwalk loans.

STANDARD OF REVIEW

Superior Court Civil Rule 56(c) provides that a motion for summary judgment will be granted when “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 initially bears the

⁵ The Defendants cite no legal authority for these propositions other than the language of 6 *Del. C.* § 3-309(b).

⁶ *See Del. Super. Ct. Civ. R.* 56(e).

⁷ *Del. Super. Ct. Civ. R.* 56(c).

burden of establishing both of these elements; if there is such a showing, the burden shifts to the non-moving party to show that there are material issues of fact.⁸ This Court shall consider the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” in determining whether to grant summary judgment.⁹ If supporting or opposing affidavits are provided, they “shall be made on the basis of personal knowledge.”¹⁰ Summary judgment will only be appropriate when, upon viewing all of the evidence in a light most favorable to the nonmoving party, the Court finds there is no genuine issue of material fact.¹¹ When material facts are in dispute, or “it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances,” summary judgment will not be appropriate.¹²

DISCUSSION

While the parties both address the same general issue—whether Plaintiff should be able to enforce the promissory notes against the Defendants—they focus on different and distinct arguments. Plaintiff’s Motion for Summary Judgment focuses

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

⁹ Del. Super. Ct. Civ. R. 56(c).

¹⁰ Del. Super. Ct. Civ. R. 56(e).

¹¹ *Singletary v. Amer. Dept. Ins. Co.*, 2011 WL 607017, at *2 (Del. Super. Ct. Jan. 31, 2011) (citing *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at *2 (Del. Super. Ct. Feb. 22, 1994)).

¹² *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

on precluding relitigation of the issue of whether Plaintiff has the right to enforce the promissory notes—i.e., whether Plaintiff is a person entitled to enforce the instruments. By contrast, Defendants’ response does not dispute this argument, but rather contends that there is no adequate protection under § 3-309(b) from potentially incurring double liability on the notes.

I. Plaintiff’s estoppel arguments

To the extent that the Defendants’ argument can be perceived as challenging Plaintiff’s right to enforce the promissory notes, Plaintiff’s claims of judicial estoppel, *res judicata*, and collateral estoppel may apply. The doctrine of judicial estoppel applies when: (1) a litigant advances a position inconsistent with a position taken in the same or earlier legal proceeding; and (2) the court was persuaded to accept the previous argument as a basis for its earlier ruling.¹³ *Res judicata* and collateral estoppel (also called “issue preclusion”) are similar doctrines: the former bars a court from “reconsidering conclusions of law previously adjudicated” whereas the latter “bars relitigation of issues of facts previously litigated.”¹⁴ There are four elements to collateral estoppel: (1) the issue previously decided is identical to the one in the instant proceeding; (2) a final judgment on the merits was reached on the previous issue; (3) the party against whom collateral estoppel is invoked is the same party from the prior adjudication, or is in privity with the prior party; and (4) the present party

¹³ *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859-860 (Del. 2008) (citations omitted).

¹⁴ *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000) (citations omitted).

against whom the doctrine is raised had a “full and fair opportunity to litigate the issue in the prior action.”¹⁵ A party is in privity with another when they control an action even though they are not parties to it, or when their interests are represented by a party in the previous action.¹⁶

Plaintiff has provided numerous exhibits in a somewhat anfractuous path in support of its estoppel and *res judicata* claims. The most relevant of these include: a Declaration made by Zimmerman during the Bankruptcy Court proceedings in which Zimmerman states PNC was Mercantile’s successor-in-interest and Plaintiff was the “current holder” of the promissory notes (“Exhibit G”); Interim Orders issued by the Bankruptcy Court in which Riverwalk stipulated that Plaintiff was owed the amounts secured by the notes (“Exhibits J and K”); transcripts of Leone’s deposition from the Bankruptcy Court proceedings in which Leone states he and Zimmerman guaranteed Mercantile’s loans to Riverwalk, and were liable to Plaintiff for those loans (“Exhibit L”); Bankruptcy Schedule H, in which Zimmerman and Leone are listed as codebtors to Plaintiff (“Exhibit Q”); and the Court of Chancery’s Order Appointing Receiver, in which the court states that Mercantile granted the notes, the Defendants guaranteed the notes, PNC was Mercantile’s successor-in-interest, and PNC assigned the notes and guaranty agreements to Plaintiff (“Exhibit R”).

Judicial estoppel is satisfied by the Bankruptcy Court’s Interim Orders, in

¹⁵ *See id.* (citing *State v. Machin*, 642 A.2d 1235, 1239 (Del. 1993)).

¹⁶ *PSL Air Lease Corp. v. E.B.R. Corp.*, 1972 WL 124882, at *5 (Del. Super. Ct. Sept. 28, 1972).

which the court relied on Riverwalk's stipulations that Plaintiff is the party who can enforce the loans against the Defendants. The doctrine is also satisfied by the Court of Chancery's Order Appointing Receiver, in which the court specifically states that PNC, as Mercantile's successor-in-interest, assigned the notes and guaranty agreements to Plaintiff. Further, because the issue of who holds the notes appears to have been treated as a factual issue in the Bankruptcy Court and Court of Chancery proceedings, collateral estoppel, rather than *res judicata*, applies. The foregoing exhibits appear to satisfy all four elements of collateral estoppel. As to the third element, even though Riverwalk was the named party to the Bankruptcy and Court of Chancery proceedings, Zimmerman and Leone were in privity with Riverwalk as controlling-interest holders in the Riverwalk LLC and guarantors of Mercantile's loans to Riverwalk.

Thus, on the issue of whether Plaintiff is the person entitled to enforce the promissory notes against the Defendants, both judicial estoppel and collateral estoppel bar preclude relitigation of the issue.

II. Defendants' § 3-309(b) argument

Defendants do not expressly contest Plaintiff's status as holder of the promissory notes and guaranty agreements. Rather, the Defendants contend that there is not adequate protection pursuant to 6 *Del. C.* § 3-309(b) against incurring potential double liability on the lost promissory notes.

A person may be a person entitled to enforce an instrument even when he is not in possession of the instrument, such as when the person cannot reasonably obtain the

instrument because the instrument has been destroyed or lost.¹⁷ Such person must prove both the “terms of the instrument and the person’s right to enforce the instrument.”¹⁸ This Court may not enter judgment in favor of the person seeking enforcement “unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.”¹⁹ Adequate protection “may be provided by any reasonable means.”²⁰ The Uniform Commercial Code Comments to § 3-309 clarify that “the court is given discretion in determining how adequate protection is to be assured.”²¹ The comments explain that adequate protection is a “flexible concept” and that “the type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case.”²²

Setting aside the estoppel issues raised by Plaintiff, summary judgment should still be granted based on the merits (or rather, the lack thereof) of the Defendants’ argument, because there does not even appear to be a genuine issue of material fact. Defendants acknowledge that they guaranteed the loans made by Mercantile to

¹⁷ See 6 *Del. C.* § 3-301; 6 *Del. C.* § 3-309(a)(iii).

¹⁸ 6 *Del. C.* § 3-309(b).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Comment 1 to 6 *Del. C.* § 3-309.

²² *Id.*

Riverwalk, and do not contend that Plaintiff was never assigned the notes or guaranty agreements. Their argument seems to be a purely legal one: that they are not adequately protected against incurring double liability on the lost notes. Defendants' contention that a written release from PNC is required to provide adequate protection is utterly without merit, because adequate protection is a flexible concept within the discretion of the Court to determine.

Adequate protection depends on the certainty of the facts presented, which in this case are overwhelming. Plaintiff has executed a Lost Instrument Affidavit, and has submitted copies of both promissory notes, copies of the guaranty agreements executed by Zimmerman and Leone, a copy of a letter certifying the merger of Mercantile into PNC, and copies of the Loan Sale Agreement showing that PNC assigned its interest in the Riverwalk loans to Plaintiff. Further, pursuant to Civil Rule 56(c), this Court can consider "admissions on file" when deciding a Motion for Summary Judgment. Here, Plaintiff has provided several admissions made by Zimmerman and Leone in the course of the Bankruptcy Court proceedings indicating that Plaintiff is the present holder of the promissory notes and that the Defendants are liable to Plaintiff for the Riverwalk loans.

Finally, the Supplemental Affidavit of Romano should also be considered in determining adequate protection. It should be noted that Romano never explicitly states that her affidavit is based on her own personal knowledge, which may render her affidavit inadequate under Superior Court Civil Rule 56(e) as to Romano's descriptions of the Mercantile/PNC merger and PNC's assignment of the Riverwalk

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loans to Plaintiff.²³ However, Romano's affidavit does state that "PNC has no rights, title or interest in or to any of the Instruments." This can be construed as a release made pursuant to Romano's authority as PNC's Managing Director and Vice President, rather than an affirmation of fact based on personal knowledge. Such a release is exactly what the Defendants seek.

Regardless, Romano's affidavit, when considered with the foregoing documents and admissions, provides a sufficient basis for this court to determine that the Defendants are adequately protected from incurring double liability on the notes. Even if Romano's affidavit was not considered, there are sufficient grounds to conclude that adequate protection exists. Accordingly, there is no genuine issue of material fact.

CONCLUSION

Plaintiff's Motion to Supplement Affidavit is **GRANTED**. Plaintiff's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

²³ See *Lynch v. Atley Prods. Corp.*, 505 A.2d 42, 44 (Del. Super. Ct. 1985).