SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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Re: ***The Bank of Delmarva v. South Shore Ventures, LLC, John E. O'Brien, and Clayton Evans***
C.A. No, S13C-05-008 THG

Upon Plaintiff's Motion for Summary Judgment. **GRANTED.**

Submitted: January 2, 2014
Decided: January 15, 2014

Dear Counsel:

This claim involves yet another development project that failed as a result of the economic downturn and bursting of the real estate bubble.

The Bank of Delmarva ("Plaintiff") has sued South Shore Ventures, LLC, ("South Shore"), John E. O'Brien ("O'Brien") and Clayton Evans ("Evans") for breach of a promissory note. As a result, default judgment has been taken against Evans. Plaintiff now seeks summary judgment on its claims against South Shore and O'Brien (together, "Defendants"). For the reasons set forth herein, Plaintiff's Motion for Summary Judgment is **GRANTED.**

FACTS[1]

In early 2005, the Defendants sought financing from the Plaintiff for a real estate development project in Greenwood, Delaware known as "The Cove." Subsequently, on June 1, 2005, the Defendants executed a bond in favor of the Plaintiff in the amount of $500,000.00. The bonds' maturity date was initially set for June 1, 2008, in which all principal and unpaid accrued interest were to be paid. The parties later executed three loan extension agreements extending that maturity date. Ultimately, the third extension set a maturity date of March 1, 2010.

Subsequently, in January 2010, the Defendants requested a loan modification. The modification would alter the loan terms and convert the obligation from a fixed maturity date to an obligation due on demand. The Plaintiff was receptive to the modification. Therefore, the Plaintiff's then outside counsel began to work on the loan modification documents. It was at this time that outside counsel discovered discrepancies in regard to the land title and the 2005 mortgage granted by the Defendants to the Plaintiff. As a result of such issues, the loan modification was abandoned and a written modification agreement never was executed by the parties.

The Defendants continued to make their payments on the loan obligation; however, the last payment was made in November 2011. Consequently, the Plaintiff filed suit alleging the loan was not paid on its maturity date of March 1, 2010. Subsequently, the Plaintiff amended its Complaint to allege also that if the January 2010 loan modification negotiations were found to have created a loan modification, then the new obligation was due on demand and the Plaintiff demanded payment in full.

The Defendants have not paid and now the Plaintiff requests the Court enter a judgment on

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[1] The facts herein have been derived from the uncontested and admitted portions of the pleadings and the affidavits of Plaintiff, which were not contested by affidavit.

the loan obligation in the amount of $494,252.43 in principal; $81,261.31 in unpaid accrued interest; $6,056.31 in late fees; past-judgment interest; and costs and attorneys' fees per calculations as of October 14, 2013.

The Defendants oppose the entry of summary judgment for the reasons discussed below. The Court finds their arguments are without merit as to their obligations to the Plaintiff.

STANDARD OF REVIEW

This Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] However, a motion for summary judgment should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[3] A dispute about a material fact is genuine "when the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[4] Therefore, the issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[5]

Although the moving party for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims, once the movant makes this showing, the burden "shifts" to the non-moving party to demonstrate that there are material issues of fact for resolution

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[2] Super. Ct. Civ. R. 56(c).

[3] *Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. May 1, 2013) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1962)).

[4] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 243 (1986).

[5] *Id.*

by the ultimate fact-finder.[6] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.[7]

DISCUSSION

The Plaintiff seeks a judgment based on alternative theories. It asserts that if the bond matured in March 2010, then the loan matured and has not been paid.[8] In the alternative, if the loan was modified into a demand loan in January 2010, the Amended Complaint makes that demand and payment has not been received.[9]

In the Plaintiff's Motion for Summary Judgment it argues, in turn, why each of the Defendants' affirmative defenses must fail as to Defendants' obligation on the note/bond.

Affirmative Defense #1

The Defendants' first affirmative defense is that the Complaint fails to state a claim.[10] It is apparent the Amended Complaint states a claim and the basis upon which relief may be granted is breach of the promissory note. Furthermore, the Defendants' Response to the Plaintiff's Motion for Summary Judgment does not dispute the fact that the Plaintiff has alleged a claim and the basis for same. Therefore, the Defendants' first affirmative defense is deemed without merit.

Affirmative Defense #2

Secondly, the Defendants allege that their contractual obligation on the loan is void as a result

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[6] *Hughes ex rel. Hughes v. Christina Sch. Dist.,* 2008 WL 73710, at *2 (Del. Super. Jan. 7, 2008) (citing *Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 879-80 (Del. Super. 2005)).

[7] *Joseph v. Jamesway Corp.,* 1997 WL 524126, at *1 (Del. Super. July 9, 1997) (citing *Billops v. Magness Const. Co.,* 391 A.2d 196, 197 (Del. Super. 1978)).

[8] Pl.'s Mot. for Summ. J. at para. 8.

[9] *Id.*

[10] Defs.' Answer, Countercl., Third Party Compl. at "Affirmative Defenses" para. 1.

of material misrepresentation. However, the Defendants have failed to provide any detail to support their claim[11] and therefore this defense has not been pled with particularity as required by Superior Court Civil Rule 9(b).[12] In the Defendants' Response to this Motion they claim the Plaintiff's selected appraiser produced an inaccurate appraisal of the real property in 2005.[13] The Defendants argue that the Plaintiff, together with the Defendants, relied upon the accuracy of the appraisal and had it been accurate there would have been sufficient value in the land to pay the loan.[14] As a result, the Defendants claim they have suffered damages because "the property did not have the value as set forth in the appraisal."[15] Unfortunately, this argument seems to ignore the harsh economic realities of the real estate development market. If property values had maintained their pre-recession values the Defendants, along with many others, would not be in dire financial straits.

Additionally, as to the claim that the Defendants' obligation to the Plaintiff is void as a result of material misrepresentation, that claim appears to now have been changed by the Defendants into a claim that the Plaintiff made a *negligent misrepresentation* to the Defendants by way of the alleged faulty appraisal.[16] However, the issue with this defense is that there is nothing to support any false

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[11] Defs.' Answer, Countercl., Third Party Compl. at "Countercl." at para. 13.
The Defendants point to paragraph 13 of their Counterclaim to support their allegation of misrepresentation. Paragraph 13 states: "Upon information and belief the appraiser provided to Plaintiff an appraisal on the lot or lots indicating that each lot had a value of approximately $52,000.00 for a total lots value of approximately $1,092,000.00.

[12] Sup. Ct. Civ. R. 9(b) requires that "in all averments of fraud...the circumstances constituting fraud... shall be stated with particularity."

[13] Defs.' Resp. at 3.

[14] *Id.*

[15] *Id.* at 5.

[16] Defs.' Resp. at 4 (emphasis added).

statement made by the Plaintiff which was relied upon by the Defendants. Certainly, the Plaintiff did not use the appraisal in such a way as to induce the Defendants into borrowing money from the Plaintiff. In fact, the Defendants came to the Plaintiff to obtain a $500,000.00 loan and the appraisal was required by the Plaintiff as part of the due diligence of a lending institution. Based on the above, it is evident the Defendants have failed to establish the elements needed to establish this affirmative defense.[17]

The Defendants also maintain that the validity of the bond is affected by the fact that they were third-party beneficiaries to the contract between the Plaintiff and the appraiser. Whether this is true or not, it is not a defense to the Plaintiff's Motion. Additionally, whether the appraisal was accurate or not based on 2005 market conditions is a not a defense to the Plaintiff's Complaint. Any third-party benefit the Defendants may have obtained in receiving the loan based on the alleged inferior appraisal could perhaps give rise to an action against the appraiser, but it does not rise to an affirmative defense on the loan.[18]

Affirmative Defense #3

Thirdly, the Defendants claim the statute of limitations is a defense to the Plaintiff's claims. It is clear that the obligation either matured in March 2010 or become a demand instrument upon the filing of the Plaintiff's Amended Complaint. It is evident that the Complaint is timely filed pursuant

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[17] *Corkscrew Mining Ventures, Ltd. v. Preferred Real Estate Invs., Inc.,* 2011 WL 704470, at *4 (Del. Ch. Feb 28, 2001). Therein, the elements are set forth as follows: (1) Plaintiff made a false statement or representation; (2) Plaintiff had knowledge that the statement was false, or made the statement with reckless indifference to as to the truth of the statement; (3) Plaintiff intended to induce Defendants into action; (4) Defendants justifiably relied on the representation; and (5) Defendants suffered resulting injury.

[18] Pl.'s Reply at para. 18 *(*citing *Browne v. Robb,* 583 A.2d 949, 954 (Del. 1990) (A third-party beneficiary may sue to collect damages fro breach of contract).

to 10 *Del. C.* § 8109[19] and 6 *Del. C.* § 3-118(a)[20], both of which provide for a period of six years to file suit. Furthermore, the bond was filed under seal. An action on an instrument under seal will be governed by the common law twenty-year statute of limitations.[21] This affirmative defense fails.

Affirmative Defense #4

The Defendants also assert that the Plaintiff had a right of indemnification pursuant to a title insurance policy issued by Old Republic National Title Insurance Company (the "title company") in 2005, and that the Plaintiff "botched" any claim on that title policy. However, the Defendants have neither explained nor provided any legal authority as to how or why the Plaintiff's handling or mishandling of any title claim could possibly release the Defendants from their obligation on the bond, in which the Defendants agreed to make payment on a loan of $500,000.00. Furthermore, it is black letter law that the Defendants are primarily responsible for the note/bond and the Defendants' obligations are not released based on a collateral third-party matter. The Plaintiff may have several options to pursue in its effort to make itself whole, but none are a condition precedent to suing on the note.

Affirmative Defense #5

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[19] 10 *Del. C.*§ 8109 states:

When a cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, *the action may be commenced at any time within 6 years from the accruing of such cause of action* (emphasis added).

[20] 6 *Del. C.* § 3-118(a) states:

[A]n action to enforce the obligation of a party to pay a note payable at a definite time *must be commenced within six years after the due date or dates stated in the note* or, if a due date is accelerated, within six years after the accelerated due date (emphasis added).

[21] *Whittington v. Dragon Group, LLC.,* 991 A.2d 1, 10 (Del. 2009).

Lastly, the Defendants argue the Complaint must be dismissed due to the Plaintiff's failure to identify and include necessary parties. However, the Defendants fail to recognize this defense is aimed solely at the title company and Tunnell & Raysor, P.A., the law firm that undertook the title work back in 2005. As the Plaintiff addressed in its Motion, the action before the Court is based on the note/bond executed by the Defendants. The law firm and title company are strangers to the note/bond instrument and, therefore, are not necessary parties. Additionally, the Defendants' Response fails to address the Plaintiff's position. Accordingly, the Defendants' affirmative defense must fail.

Miscellaneous Defenses[22]

The Defendants also maintain that if the loan arrangement was in fact modified in January 2010 from having a fixed maturity date to becoming a note on demand, then there was no formal demand made by the Plaintiff other than the filing of the Amended Complaint.

The problem with the Defendants' position is that it is based solely on a January 2010 letter from the Plaintiff to the Defendants advising that the Defendants' request had been approved and that the loan would be modified to be due on demand instead of due on a maturity date.[23] However, the modification was abandoned when alleged title problems were discovered and a written modification agreement was never executed fully.[24] Therefore, *if* the loan somehow became a demand obligation by way of the January 2010 letter, then there is no agreement or terms on how demand was to be made or the time-frame the Defendants had to make payment after the demand

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[22] In the Defendants' Response to Plaintiff's Motion, they raise several additional reasons as to why the Motion should be denied.

[23] Pl.'s Mot. for Summ. J. at para. 3.

[24] *Id.* at para. 4.

was made. These details presumably would have been contained in the new loan documents. Lastly, the Defendants have offered no legal authority as to why the demand made in the Complaint is insufficient, even assuming a demand obligation somehow was created in January 2010.

Finally, the Defendants argue that summary judgment should not be granted on the note/bond because the Plaintiff's Motion ignores the Defendants' counterclaims. As the Plaintiff notes, the merits of the Defendants' counterclaims have nothing to do with the merits of the issue directly before the Court– whether or not the Defendants executed the loan documents and failed to pay down the loan. Therefore, the counterclaims either will prevail or fail solely on their merits and are not defenses which would deny the Plaintiff from obtaining a judgment on its claims.

CONCLUSION

The Plaintiff's Summary Judgment Motion is **GRANTED.** The Plaintiff's counsel shall submit to the Court a form of order with updated numbers by **January 29, 2014.**

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary's Office