IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

READS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-03-117 WCC CCLD
	)	
WBCMT 2006-C29 NC OFFICE LLC, and LNR PARTNERS, LLC,	)	
	)	
Defendants.	)	

Submitted: October 20, 2014
Decided: February 3, 2015

Defendants' Motion to Dismiss – GRANTED

MEMORANDUM OPINION

John G. Harris, Esquire, David B. Anthony, Esquire, Benjamin J. Berger, Esquire, Berger Harris LLP, 1105 N. Market Street, Wilmington, DE 19801. Attorneys for Plaintiff Reads, LLC.

Darek S. Bushnaq, Esquire, Daniel A. O'Brien, Esquire, Gregory A. Cross, Esquire, Colleen M. Mallon, Esquire, Venable LLP, 1201 N. Market Street, Wilmington, DE 19801. Attorneys for Defendants WBCMT 2006-C29 NC Office, LLC and LNR Partners, LLC.

CARPENTER, J.

Before this Court is Defendants' WBCMT 2006-C29 NC Office LLC and LNR Partners, LCC's (collectively "Defendants") Motion to Dismiss Plaintiff Reads, LLC's ("Plaintiff" or "Reads") Complaint. For the foregoing reasons, the Defendants' Motion to Dismiss is hereby GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

On or about November 2, 2006, Plaintiff borrowed $18,800,000.00 (the "Loan") from original lender Wachovia Bank, N.A.[1] The Loan is governed by a promissory note (the "Note") and a Mortgage, Security Assignment and Fixture Filing (the "Mortgage"; collectively with the Note and other documents with respect to the Loan, the "Loan Documents").[2] Pursuant to the Mortgage, the Loan is secured by certain commercial property referred to as 11, 13, and 15 Reads Way, New Castle, Delaware (the "Property").[3]

The Loan was subsequently assigned on four separate occasions to Wells Fargo Bank, Bank of America, U.S. Bank National Association and finally to Defendant WBCMT 2006-C29 NC Office LLC. It has been transferred and deposited into a securitized pool (the "Pool") of mortgage loans in which various classes of bondholders and investors were issued certificates to evidence their

[1] Complaint at 10, *Reads LLC v. WBCMT, et al.*, C.A. No. N14C-03-117 (Del. Super. Mar. 3, 2014) (No. 55143881).
[2] *Id*. at 9-10.
[3] *Id*. at 9.

respective ownership interests in the Pool.[4] LNR is the special servicer for the Pool.[5]

Plaintiff failed to make payments required under the Loan Documents, and on April 20, 2013, Defendant LNR sent a Notice of Default to Plaintiff.[6] On May 7, 2013, Plaintiff and Defendant LNR signed a Pre-Negotiation Letter Agreement (the "PNL Agreement" or "Agreement") governing "all discussions and/or negotiations" regarding "the status of the loan and the possible modification of the Loan Documents."[7]

After signing the PNL Agreement, Plaintiff continued to manage the property, secured additional tenants and according to the Complaint invested over $200,000 to cover capital expenditures. Also, under the terms of the Note, they were remitting all rents and profits, less ordinary and necessary operating expenses, from the property to Defendant LNR.[8]

It is unclear what negotiations or discussions occurred to potentially settle or compromise the outstanding debt since May 7, 2013 when the PNL Agreement was executed, but on December 5, 2013, Plaintiff sent Defendant LNR a proposal

[4] *Id*. at 11.
[5] *Id*. at 14.
[6] Exhibit B to Complaint, *Reads LLC v. WBCMT, et al.*, C.A. No. N14C-03-117 (2014) (No. 55143881).
[7] *Pre -Negotiation Letter, attached* as Exhibit A to Complaint, *Reads LLC v. WBCMT, et al.*, C.A. No. N14C-03-117 (2014) (No. 55143881).
[8] Complaint at 19; Exh. B to Complaint, *Reads LLC v. WBCMT, et al.*, C.A. No. N14C-03-117 (2014) (No. 55143881).

for a loan modification.[9] Defendant LNR rejected Plaintiff's proposal in its entirety on December 18, 2013.[10] No counter-offer was made by Defendant LNR. On or about December 26, 2013, Defendant WBCMT moved to foreclose on the Property in a separate case captioned *WBCMT 2006-C29 NC Office, LLC v. Reads LLC*, Case No. N13L-12-080 WCC (the "Foreclosure Action").

Plaintiff filed the instant action on March 13, 2014 alleging lender misconduct and seeking declaratory judgment. Defendants have moved to dismiss the Complaint for failure to state a claim and to enforce a forum selection clause in the PNL Agreement requiring that suit be brought in Florida.

CONTENTIONS

Plaintiff's claims arise out of the PNL Agreement signed by the parties on May 7, 2013. Specifically, Plaintiff claims that Defendant LNR coerced Plaintiff into signing the Agreement and has acted in bad faith in their execution of such.[11] Plaintiff contends that they relied on LNR's assurances that there would be reasonable discussions regarding modifying the Loan Documents and based on those assurances, Plaintiff took action in obtaining new tenants to the detriment of other properties which they own; and that they made capital outlays to maintain

[9] *Id*. at 33
[10] *Id*. at 34
[11] It appears that Defendant WBCMT was named as a Defendant because it is the holder of the Loan Documents. However, the Court perceives this dispute as one between LNR and Reads arising out of the PNL Agreement to which WBCMT was not a direct party.

the property. Plaintiff asserts that the PNL Agreement is unenforceable because Defendant LNR did not incur a legal detriment by signing the Agreement. Furthermore, Plaintiff contends that the forum selection clause contained in the Agreement is unenforceable because Florida, the forum selected in the Agreement, has no material relationship to the transaction.

Defendants argue that the PNL Agreement was established to create a framework by which the parties could conduct settlement negotiations, and that Plaintiff knowingly gave up the rights to bring a claim relating to those negotiations when signing the Agreement. Defendants contend that the PNL Agreement is valid and that they did not act in bad faith when summarily rejecting the modification proposed by Plaintiff. They assert the contractual obligation under the PNL Agreement was simply to engage in talks about a loan modification with Plaintiff and they were not contractually obligated to agree to a loan modification. Defendants also claim that because the PNL Agreement is valid and because Defendant LNR is a Florida company with its principal place of business in Florida, the forum selection clause in the agreement is enforceable and controls where this litigation is to be brought.

DISCUSSION

While the Court must admit the allegations set forth in the Complaint are very concerning and raise serious issues regarding the conduct of Defendant LNR, the resolution of this matter is rather simple. There is really no dispute that the parties here are sophisticated business entities, with Plaintiff at least, having a long history in real estate development and management in Delaware. The original Loan exceeded 18 million dollars and Plaintiff has defaulted on that Loan. The default was not caused by any action of Defendants, and the Court can only surmise that Plaintiff was the victim of the recent economic downturn.

Desperate to avoid foreclosure and to continue to maintain the properties, Plaintiff entered into the PNL Agreement. Obviously, it was Plaintiff's hope that they would be able to work out a modification agreement to allow them to continue their interest in these properties and there is also no dispute that Plaintiff's bargaining position was minimized by their non-payment on the Loan. That, however, does not convert sophisticated business entities into a mom and pop store mindlessly entering into an agreement.

It is also not unreasonable for the parties to establish a framework for settlement discussions, and it was clearly appropriate for the parties to agree to the forum that would resolve disputes arising from that Agreement. While the Court

would hope and suggest to counsel that Delaware should always be the preferred forum to resolve business disputes, not all litigants share this enlightened perspective and prefer to litigate in their "home" venue. The PNL Agreement requirement that Florida be the forum is rational as Defendant LNR is a Florida limited liability company with its principal place of business in Florida. The forum provision of the agreement states:

> This agreement and all issues arising hereunder shall be governed by Florida law, without giving effect to principals of conflicts of law. A borrower irrevocably waives the right to a jury trial and consents to the jurisdiction and venue of the state and federal court sitting in the City of Miami, Florida and agrees not to object to such jurisdiction or to the laying of venue in such courts.[12]

Regardless of how skillfully the Complaint may be drafted, the claims here all relate to the parties' duties, obligations and responsibilities under the PNL Agreement. While the merit of Plaintiff's claims is unclear, the Court can confidently find that all are based and arise from conduct contemplated by the parties under the PNL Agreement. The "governing" section of the Agreement clearly requires that disputes that arise under the Agreement be resolved in Florida.[13] It is well settled in Delaware that the courts will enforce the parties' clear intention in a forum selection clause as long as the chosen jurisdiction has

[12] *Pre- Negotiation Letter*, *supra* note 7, at 12.

some material relationship to the transaction.[14] Defendant LNR is a Florida limited liability company with its principal place of business there and that alone is enough to establish the material relationship requirement.[15]

The only exception to the enforcement of these provisions by Delaware courts is where the law of the foreign jurisdiction is repugnant to the public policy of Delaware.[16] Plaintiff argues that since Florida interprets the concept of good faith and fair dealing differently than that found in Delaware court decisions, that alone would require a finding that the former provision is unenforceable. The Court disagrees. The public policy of the State is created by Delaware's General Assembly in the laws that they pass. Therefore, if there is a significant statutory difference in the laws of different states, that may be sufficient to find the forum selection violates the public policy of our state. However, the concept of good faith and fair dealing is not a statutory claim but is one that is recognized and has been developed in our jurisprudence regarding the rights of the parties involved in contractual relationship. This common law created claim, while clearly implanted

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[13]*Id.*

[14]*Deuley v. DynCorp Int'l Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

[15]The Court in *Deuley v. DynCorp.*, held that 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." *Deuley v. DynCorp Int'l Inc.*, 8 A.3d 1161. Despite Plaintiffs assertion that all three factors must be met to determine a material relationship with the selected forum, it is clear to the Court from the case law cited by the Court in *Deuley v. DynCorp.* that satisfaction of just one of these factors is sufficient to establish a material relationship. *See E.I. du Pont de Nemours & Co. v. Bayer CropScience L.P., 958 A.2d 245, 249 n.9 (Del. Ch. 2008); Maloney-Refaie v. Bridge at Sch., Inc., 958 A.2d 871, 879 n. 16 (Del. Ch. 2008); Knight v. Caremark Rx, Inc., 2007 WL 143099, at *5 n.7 (Del. Ch. Jan. 12, 2007); Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC, 2006 WL 1375106, at *7 (Del. Ch. May 8, 2006) (Del. Ch. July 11, 2006; Hills Stores Co. v. Bozic, 769 A.2d 88, 112 (Del. Ch. 2000).*

in our jurisprudence, is not a public policy mandate from the General Assembly. Thus, even if there is a difference in how Florida and Delaware courts may interpret the good faith and fair dealing concept, this alone does not mean that it is repugnant to our state's public policy.[17]

Plaintiff attempts to circumvent the general requirement of enforcing forum selections in contracts by arguing that since the underlying Loan Documents, Lender, Borrower and Property are all located in Delaware, Delaware law should apply and is the proper forum to litigate this dispute. This argument would perhaps be persuasive if the dispute here was about the parties' obligations under the Loan Documents. However, that is not the case as the alleged misconduct relates to the PNL Agreement and the obligation of the parties thereto. The foreclosure action has been filed in this jurisdiction but the obligations derived from the Loan Documents are not the conduct that has been asserted in this Complaint. While the actions are related, they are distinctive and clearly involve very different issues. The inconvenient, impractical, and prejudicial assertions made in Plaintiff's Complaint are simply not persuasive enough to overcome the enforcement of a forum provision agreed to by the parties.

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[16] *Deuley v. DynCorp Int'l Inc.*, 8 A.3d 1161.
[17] *J.S. Alberici Constr. Co., Inc. v. Mid-West Constr. Co., Inc.*, 750 A.2d 518, 520 (Del. 2000).

While the Court continues to have concerns about Defendant's conduct asserted by Plaintiff, it cannot ignore the negotiated forum selection by the sophisticated business entities. Plaintiff may continue to have a valid claim relating to this Agreement but it lies in Florida, not Delaware.

As such, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.