

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INDEPENDENT BANK,
Plaintiff,

v.

Case No. 13-135818-CK
Hon. James M. Alexander

3BS LAND CO, LLC, ET AL,
Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's Motion for Summary Disposition. Plaintiff's Complaint alleges that, on March 31, 2009, it entered into a Business Loan Agreement and two Promissory Notes with Defendants 3BS and Lofts at 11 to refinance prior debt. The original loans totaled \$500,000 (Loan A) and \$1,245,636.90 (Loan B) respectively. The loans were guaranteed by Defendants B-N-S Electric, and Michael, Steven, Norman, Julie, Cythia, and Lisa Barjktarovich.

Plaintiff claims that Defendants defaulted on the loans by failing to pay the balance owed on the maturity date. On March 22, 2013, the parties amended the agreements and acknowledged that Loan A was paid in full, but there remained a \$681,285.58 balance on Loan B. This amendment also contained a release and waiver – by which Defendants acknowledged that they had no claim or defense to payment of the remaining amount.

On March 22, 2013, \$100,000 was paid on the debt – leaving a balance of \$581,285.58. This loan matured on April 1, 2013. Plaintiff claims that no further payments were made, and Defendants are now in default. Plaintiff the filed the present suit on claims of breach of contract, action on guarantees, and account stated – seeking a judgment for \$581,285.58, plus interest and

attorney fees. To that end, Plaintiff now moves for summary disposition under MCR 2.116(C)(9) and (C)(10).

A (C)(9) motion tests whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). A motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In response, Defendants argue that an August 15, 2012 email from Plaintiff's agent, Steven Valice (Vice President), constituted an offer to release all claims in return for a \$100,000 payment and a \$150,000 promissory note payable over ten years. Defendants now claim that they accepted this offer with their \$100,000 payment in March 2013.

As Plaintiff points out, however, Defendants acknowledged the \$681,285.58 balance owed and waived any claim or defense to payment of the same under the March 22, 2013 Amendment. As a result, they cannot rely on any purported August 2012 offer. The March 22, 2013 Agreement is the controlling document.

Defendants remaining argument is that Plaintiff fails to account for an additional \$10,352.05 paid on the same date as the \$100,000 payment. Again, however, the March 22, 2013 Settlement Statement provides that the \$10,352.05 payment was to be applied toward "Legal Fees incurred by Bank" and not toward the loan balance – unlike the \$100,000 payment, which was "To Be Applied Toward Term Loan – Loan B." This Settlement Statement was signed by representatives for 3BS and Lofts at 11. As a result, the Court is unconvinced that the \$10,235.05 payment was intended to further reduce the remaining \$581,285.58 balance.

The Court will also note that Defendants claim that Plaintiff's motion is premature because discovery will reveal evidence to substantiate its defense to this suit. Indeed, summary

disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

In this case, however, Defendants cannot dispute the unambiguous terms of the Agreements and otherwise fail to identify any specific outstanding discovery requests that will help defend this case. Because Defendants have failed to identify any specific outstanding discovery, this Court cannot conclude that further discovery stands a fair chance of uncovering factual support for Defendants' defenses.

For all of the foregoing reasons, the Court finds that defendants' defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. As a result, Plaintiff's motion for summary disposition under (C)(9) is GRANTED.

In addition, viewing the evidence in the light most favorable to Defendants, this Court is convinced that there are no material facts in dispute, and Plaintiff is entitled to judgment as a matter of law under MCR 2.116(C)(10).

Plaintiff is entitled to a Judgment in the amount of \$581,285.58 plus continuing interest at the statutory rate from today's date.

IT IS SO ORDERED.

January 22, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge