

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

TWIN GC, LLC,

Plaintiff,

v

Case No. 2013-134770-CH

Hon. Wendy Potts

OAKLAND GOLF PROPERTIES, LLC,
et al,

Defendants.

OPINION AND ORDER RE:
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF THE COMPLAINT
AND FOR SUMMARY DISPOSITION OF DEFENDANTS' COUNTERCLAIM
AND
THE ORCTA DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S
COMPLAINT

At a session of Court
Held in Pontiac, Michigan

On

OCT 03 2014

The matter is before the Court on the parties' cross motions for summary disposition under MCR 2.116(C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Because the Court has already addressed the substantive and procedural history of this case in earlier decisions, the Court will note only the facts pertinent to the issues.

The essential issue in these motions and this case is how much the Defendant Oakland Golf Properties, LLC owes on the loan Plaintiff Twin GC, LLC acquired from Talmer Bank. Defendants Michelle Cottone, the Michelle A. Cottone Living Trust, Twin Lakes, and Angel Development, LLC guaranteed that loan, and thus their liability is tied to the determination of

how much Oakland Golf owes. Oakland Golf concedes that it owes at least \$2.4 million, however, Twin GC and Oakland Golf raise the following issues regarding calculation of interest, late fees, and collection costs.

1. Interest and Late Fee Calculation

There is no dispute that the primary interest rate of 6.6% reflected in the Talmer loan documents applies. However, the loan agreement allowed two interest surcharges: a 2% increase in the event of a default (including nonmonetary defaults) and another 2% increase if the loan was not paid in full on the December 31, 2011 maturity date. Twin GC claims that both interest surcharges apply because Oakland Golf defaulted on its loan obligations and failed to pay the loan by December 31, 2011.

A. Default Interest

Defendants first assert that Twin GC cannot prevail on its claim regarding the default interest penalty because it has not presented evidence of a default. However, Twin GC claims the State of Michigan placed a lien on Defendants' property for nonpayment of unemployment insurance in April 2012 and presents evidence of this fact. This event qualifies as a nonmonetary event of default under the language of the loan agreement. Because there is evidence of default, Defendants cannot avoid the default interest penalty on this ground.

Defendants next assert that under the loan agreement they were entitled to notice of a default and a 30-day window to cure the default, and neither Talmer nor Twin GC satisfied this requirement. Twin GC claims that Talmer sent Defendants a notice of default on November 6, 2012, however, it did not attach a copy of the alleged notice of default to its motion or response to Defendants' motion. Because there is no evidence that Talmer complied with the notice of default provision and allowed Defendant an opportunity to cure its default, the Court cannot

decide as a matter of law that the default interest penalty applies. To the extent that Twin GC can present evidence that Talmer gave Defendant notice of default and an opportunity to cure, it will be allowed to do so at trial.

B. Maturity Interest

Because Defendants have not asserted or presented evidence that they paid the loan before the maturity date, there is no question of fact that the maturity interest penalty applies. Defendants only argument against application of the maturity interest penalty is that Talmer waived all penalty interest and late fees, which the Court will address later in this opinion.

C. Interest Suspension

Defendants also argue that any interest accrual should be suspended because they have been willing and able to pay off an “accurate” loan balance since Twin GC acquired the loan. However, the only payment Defendants tendered was the escrow payment ordered by the Court. Although Defendants may be entitled to a reduction in interest accruing after the escrow payment was made, they fail to demonstrate any factual or legal grounds for suspending all interest accrual.

D. Late Fee

The loan agreement states that any late “payment” is subject to a 5% late fee. However, it does not state whether the fee applies only to installment payments, or to the final balloon payment as well. Although Defendants cite authority holding that late payment fees are applicable only to installment payments, the key consideration here is the parties’ intent when they entered into the agreement. Intent is usually determined from the plain language of the agreement. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The agreement refers only to “payment” and does not distinguish between

installment payments and the final balloon payment. Thus, the parties could have intended that the late fee apply only to installment payments or to all payments, including the final payment. Because the term “payment” in this context is reasonably susceptible to more than one interpretation, the language is ambiguous. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Thus, the Court cannot conclude as a matter of law whether the late fee applies to the final balloon payments.

2. Waiver

Defendants also assert that, regardless whether the penalty interest rates or the late fee applies, Talmer Bank waived the application of penalty interest and the late fee by presenting Defendants with payoff letters or other loan calculations that did not apply penalty interest or the late fee. Waiver occurs where a party intentionally relinquishes a known right. *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970). As Twin GC notes, the loan documents have an anti-waiver provision requiring all modifications or waivers to be in writing. However, Defendants satisfied this requirement by presenting evidence of several payoff statements in writing, signed by agents of Talmer, that are not calculated with penalty interest or the late fee. Whether Talmer’s conduct constitutes a waiver is a question of fact that cannot be decided on a motion. *Cascade Electric Co v Rice*, 70 Mich App 420, 425; 245 NW2d 774 (1976). Thus, the Court cannot decide this question as a matter of law.

3. Attorney Fees and Collection Costs

Defendants do not dispute that the loan documents entitle Twin GC to reasonable attorney fees and costs for having to bring this action and collect on the loan. However, Twin GC has not provided admissible evidence of the reasonableness of its fees. Thus, the Court cannot conclude, as a matter of law, whether Plaintiff’s claimed fees and costs are reasonable.

4. Application of Seized Assets

While Talmer held the loan, it seized more than \$900,000 in assets and applied those assets to the principal. Twin GC asserts that the seized assets must be applied to interest citing the loan documents as support. However, Twin GC cites no authority for the notion that it can alter Talmer's determination of the principal balance owed at the time it sold the loan to Twin GC. Even if the loan documents required that seized assets be applied to interest first, Talmer appears to have waived this requirement by choosing to apply it to the principal. Thus, the Court grants Defendants summary disposition of Twin GC's claim that assets seized by Talmer must be applied to the interest owed at the time the assets were seized.

5. Twin GC's Claims Regarding Security for the Loan

The Court discharged the mortgage that Defendants granted to Talmer, and that Talmer assigned to Twin GC, when Defendants placed \$2.6 million in escrow. Twin GC did not seek reconsideration of this decision. Further, there is no dispute that the parties discharged all of Twin GC's security interests including liens on personal property. To the extent that Twin GC is still asserting claims pertaining to secured assets, those claims are moot. Thus, the Court dismisses Twin GC's claims for foreclosing the mortgages (Count I), assignment of rents (Count III), appointing a receiver (Count IV), and repossessing secured personal property (Counts VI and VII).

6. Defendants' Counterclaims

A. Breach of the implied covenant of good faith and fair dealing.

Defendants allege that Twin GC breached this implied covenant because its owner is a direct competitor of Oakland Golf's owner and it purchased Talmer's loan with the express purpose of putting Defendants out of business. Defendants further assert that Twin GC gave

Defendants conflicting and inaccurate payoff information, refused to provide a detailed accounting for several months, and calculated the amount owed based on issues of questionable factual or legal merit. However, a claim for breach of the implied covenant of good faith and fair dealing generally applies only if the contract made the manner of Twin GC's performance a matter of its own discretion. *Burkhardt v City National Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Because Defendants fail to explain how Twin GC's performance under the loan agreements was discretionary, Twin GC is entitled to summary disposition of this claim.

B. Extortion

Twin GC asserts that Defendants' extortion claim fails as a matter of law, and Defendants present no argument or evidence supporting their claim. Thus, Twin GC is entitled to summary disposition of Defendants' in extortion.

C. Accounting

Twin GC asserts that this claim is moot because it provided Defendants with an updated statement. To the extent that Defendants are still seeking an accounting, the Court agrees with Twin GC that the claim is moot. To the extent that Defendants are claiming that Twin GC unreasonably delayed in providing them with loan calculation and payoff information, Defendants may present evidence of these delays as a defense to Twin GC's claims regarding accrued interest, attorney fees, and collection costs.

7. Conclusion

For all of these reasons, the Court grants Defendants summary disposition of Twin GC's claim that assets seized by Talmer must be applied to interest owed. The Court grants Twin GC summary disposition of Defendants' counterclaims for an accounting, for extortion, and for breach of the implied covenant of good faith and fair dealing. The Court dismisses as moot Twin

GC's claims for foreclosing the mortgages (Count I), assignment of rents (Count III), appointing a receiver (Count IV), and repossessing secured personal property (Counts VI and VII). In all other respects, summary disposition is denied.

IT IS SO ORDERED.

Hon. Wendy Potts

OCT 03 2014

Dated: