

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.

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OPINION AND ORDER RE: THE ORCTA DEFENDANT'S MOTION FOR SUMMARY  
DISPOSITION AS TO ALL COUNTS IN THE COMPLAINT AND PARTIAL SUMMARY  
DISPOSITION AS TO COUNTS I AND II OF THE COUNTERCLAIM

At a session of Court  
Held in Pontiac, Michigan

**NOV 27 2013**

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This case arises from a 2008 loan the defunct Community Central Bank extended to Defendant Oakland Golf Properties, LLC. The bank loaned Oakland Golf \$4 million at a 6.6% interest rate, although the loan documents allowed a 2% interest rate increase if the borrower defaulted and a separate 2% increase if the loan was not paid by the December 31, 2011 maturity date. The loan was secured by mortgages on a golf course, condominium development, and other property owned by Defendant Resco, Inc. As additional security, Oakland Golf granted the Bank an assignment of rents and Defendant Twin Lakes Banquet, LLC granted a security interest in its liquor license. In addition, Defendants Michelle Cottone, the Michelle A. Cottone Living Trust, Twin Lakes, and Angel Development, LLC guaranteed the loan. For the purpose of this motion,

the Court will refer to Oakland Golf, Resco, Cottone, Cottone Trust, Twin Lakes, and Angel as the ORCTA Defendants.

In April 2011, the FDIC took over Community Central Bank and transferred its assets, including this loan, to Talmer Bank on April 29, 2011. When the loan matured in December 2011, Oakland Golf did not pay the balance. Talmer sent the ORCTA Defendants a written demand for payment. The ORCTA Defendants claim that they continued to make payments on the loan and were negotiating a payoff. On May 23, 2013, Talmer's counsel sent the ORCTA Defendants an email with a payoff amount of \$2,439,378.37 in unpaid principal and \$316,793.63 in accrued interest as of May 20, 2013. According to the ORCTA Defendants, Talmer continued to calculate interest at the 6.6% rate.

Talmer sold the loan to Plaintiff Twin GC, LLC on June 7, 2013. Twin GC's counsel wrote the ORCTA Defendants on June 13<sup>th</sup> demanding payment and claiming a balance due of \$3,292,297.29 as of June 7, 2013. The ORCTA Defendants claim they asked Twin GC for a payoff letter on June 17<sup>th</sup> and, when they did not receive one, again asked for a payoff letter on July 1<sup>st</sup>. The ORCTA Defendants claim that they never received a payoff letter, but on July 2<sup>nd</sup>, Twin GC gave them a ledger claiming a 10.6% penalty interest rate retroactive to September 2011. Twin GC filed this action on June 27, 2013, asserting several counts including breach of the loan and guaranties, claim and delivery, and judicial foreclosure. The ORCTA Defendants counterclaimed asserting breach of contract and attempted extortion and seeking an accounting and a declaratory judgment for satisfaction of the liens.

The ORCTA Defendants now move for summary disposition of Twin GC's claims and their counterclaims under MCR 2.116(C)(8), which tests the legal sufficiency of the claims, and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-

120; 597 NW2d 817 (1999). The Court is deciding the matter without oral argument. MCR 2.119(E)(3).

The ORCTA Defendants contend that Twin GC cannot impose the default and maturity interest rate increases because Talmer waived the right to enforce these loan terms. Waiver occurs where a party intentionally relinquishes a known right. *Fitzgerald v Hubert Herman, Inc.*, 23 Mich App 716, 718; 179 NW2d 252 (1970). Because the loan documents at issue here cannot be modified without the express written consent of the lender, the ORCTA Defendants must establish their waiver defense through clear and convincing evidence. *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 364; 666 NW2d 251 (2003). However, the only evidence to date of the alleged waiver is Talmer's continuing calculation of interest at the 6.6% rate after the loan maturity date and the May 2013 payoff amount. The Court cannot conclude, as a matter of law, that this constitutes clear and convincing evidence that Talmer waived its right to assess penalty interest. The ORCTA Defendants are not entitled to summary disposition on the ground of an alleged waiver.

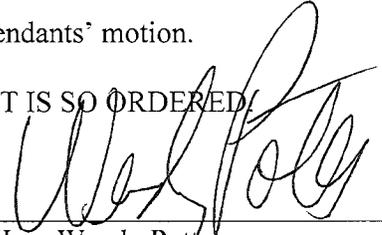
The ORCTA Defendants also argue that Twin GC cannot show that Defendants defaulted on the loan agreements because there is no evidence that Talmer or Twin GC gave them written notice of default or an opportunity to cure the default. However, it is premature for the Court to render a decision on this issue because discovery is ongoing. Summary disposition on this issue is denied without prejudice.

The ORCTA Defendants also contend that Twin GC breached its loan obligations by failing to provide them with a payoff letter. However, the ORCTA Defendants cite no provision of the loan agreements that obligates the lender to provide a payoff amount. Even if Twin GC had this obligation, Twin GC will be providing a payoff amount within 30 days. The ORCTA

Defendants may revisit this issue after they receive the payoff letter and the parties complete facilitation.

For all of these reasons, the Court denies Defendants' motion.

IT IS SO ORDERED/



Hon. Wendy Potts

Dated:

NOV 27 2013

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