

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TALMER BANK AND TRUST,

Plaintiff,

v

Case No. 2014-138212-CK

Hon. Wendy Potts

ERA INVESTMENTS, LLC, et al,

Defendants.

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On

SEP 18 2014

In October 2006, Defendant ERA Investment borrowed \$500,000 from “Metrobank, a branch of Citizens First Savings Bank.” Defendants Augustine Osagie and Aminia Osagie, the owners of ERA, personally guarantied the loan. ERA also granted Metrobank a mortgage and assignment of rents for an apartment building it owned in Walled Lake. In 2008, Citizens First Savings Bank changed its name to CF Bancorp. In April 2010, the Federal Deposit Insurance Corporation assumed control of CF Bancorp’s assets. In September 2010, the FDIC assigned ERA’s note and mortgage and the Osagies’ guaranties to First Michigan Bank, now known as Plaintiff Talmer Bank and Trust. Talmer claims that Defendants defaulted on their loan and guaranty obligations by failing to pay the full balance owed by October 30, 2011. As a result of the defaults, Talmer foreclosed on the mortgaged, which was sold at a sheriff’s sale on December 17, 2013. Talmer filed this action on January 7, 2014, alleging Defendants’ breached their loan agreements and guaranties. Talmer also sought a deficiency judgment and appointment of a receiver to manage the assignment of rents.

Talmer now moves for summary disposition of its claims for breach of the loan agreements and guarantees under MCR 2.116(C)(9), which tests the legal sufficiency of the defense, *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000), and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Defendants first assert that Talmer failed to present evidence establishing the amount owed. However, Defendants failed to timely respond to Talmer's requests to admit, thereby admitting that as of December 17, 2013 the amount owed was \$628,089.60 and the foreclosed property was worth \$472,481.00. Further, Talmer attached to its motion an affidavit of its employee Wayne Jannette who testifies that as of January 7, 2014, the amount owed including interest, late charges, and collection costs was \$156,294.42. Jannette also claims that as of May 16, 2014, when the motion was filed, Talmer incurred \$8,608.30 in attorney fees and collection costs. Because Defendant presents no evidence to contradict Talmer's affidavit, there is no question of fact that as of May 16, 2014, the amount owed was \$164,902.72.

The Osagie Defendants also assert that their guaranties were obtained by fraud because they did not knowingly sign them during the loan closing. However, Osagies do not deny that they signed the guaranties, and they cannot avoid enforcement of their agreements because they did not read them or understand the terms. *Stopczynski v Ford Motor Co*, 200 Mich App 190, 193; 503 NW2d 912 (1993). Moreover, the Osagies cite no evidence of anything the lender did to prevent them from reading the guaranties or seeking legal advice. The Osagies fail to demonstrate a question of fact whether their guaranties were procured by fraud.

Defendants next assert that Talmer failed to mitigate its damages by pursuing foreclosure and failing to accept Defendants' offer to turn over the deed to the property in lieu of foreclosure. Although Talmer has a general duty to take reasonable measures to mitigate its damages, *Morris*

v Clawson Tank Co, 459 Mich 256, 263-264; 587 NW2d 253 (1998), Defendants cite no contractual obligation or other duty that required Talmer to accept the deed when offered. In fact, in their guaranties the Osagie Defendants waived the right to demand that the lender proceed against the collateral in lieu of collecting from the guarantors. Defendants fail to demonstrate that Talmer acted unreasonably in pursuing its contractual right of foreclosure.

Defendants also assert that Talmer fails to present evidence that the FDIC assigned it the guaranties because the allonge was backdated and does not state that the assignment included the guaranties. However, Defendants cite no authority holding that an allonge is invalid because it is backdated. As for the claim that there is no evidence of the assignment, Defendants acknowledge that Talmer presented the assignment has an attachment that references the Osagies' guaranties. Although Defendants question the validity and authenticity of Talmer's documents, they present no evidence of their claims. Thus, Defendants fail to demonstrate a question of fact whether the guaranties were assigned to Talmer.

Defendants also contend that granting a judgment for Talmer will result in a windfall. Defendants are correct that Talmer is not entitled to be placed in a better position than it would be if Defendants had not breached their obligations. *Goodwin, Inc v Coe*, 62 Mich App 405, 413; 233 NW2d 598 (1975). However, they point to no damages sought by Talmer that are not authorized and supported by the loan documents and the uncontested evidence. Defendants have not demonstrated a question of fact on their windfall theory.

For all of these reasons, the Court grants Talmer's motion and enters judgment in its favor and against Defendants in the amount of \$164,902.72 plus accrued interest and costs.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated:

SEP 18 2014

Hon. Wendy Potts