

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CXA-10 CORPORATION, a
Texas corporation, a subsidiary
of LNV corporation and successor
by merger of CXA-6 corporation,

Plaintiff,

vs.

Case No. 2015-1079-CB

D&T CONSTRUCTION COMPANY
a Michigan co-partnership, MARKET
STREET DEVELOPMENT, INC., a
Michigan corporation, VICENT
DILORENZO, and ANGELA TINERVIA,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

This matter arises out of several loan transactions. On August 16, 2005, Defendant Market Street Development, Inc. ("Defendant Market") executed a promissory note in favor of Plaintiff's predecessor in interest in the original amount of \$2,475,000.00 ("Note 1"). Note 1 is was secured by a construction mortgage ("Mortgage 1"), dated August 16, 2005, on real property located in Shelby Township, MI ("Subject Property 1"). Pursuant to Note 1, Defendant Market was to make interest payments each month, and was required to pay the principal balance and all accrued interest no later than March 5, 2007. (See Exhibit 5 to Complaint.)

On February 14, 2008, Defendant Market and Plaintiff's predecessor in interest executed a modification of Note 1 ("Modified Note 1"). (See Exhibit 5 to Complaint.) Pursuant to Modified Note 1, the maturity date of Note 1 was extended to February 5, 2011. (Id.) Defendant Market has not made any payments since August 2007 in connection with Note 1 and has not made any payments in connection with Modified Note 1. On November 10, 2011, a foreclosure sale of Subject Property 1 took place and Subject Property 1 was sold for \$700,000.00. The redemption period expired on May 10, 2012.

On February 14, 2008, Defendant D&T Construction Company ("Defendant D&T") executed a mortgage note in favor of Plaintiff's predecessor in interest in the original amount of \$1,200,000.00 ("Note 2"). Note 2 was secured by a mortgage ("Mortgage 2") encumbering real property in Shelby Township, MI ("Subject Property 2"). Pursuant to Note 2, Defendant D&T was to make interest payments each month, and was required to pay the principal balance and all accrued interest no later than February 5, 2011. (See Exhibit 1 to Complaint.) Defendant D&T has not made any payments since May 2008. On August 3, 2012, a sale of Subject Property 2 took place and Subject Property 2 was sold for \$500,000.00. The redemption period expired on February 4, 2013.

On February 14, 2008, Defendant Market executed a mortgage note in favor of Plaintiff's predecessor in interest in the original amount of \$200,000.00 ("Note 3"). Note 3 was secured by a February 14, 2008 mortgage ("Mortgage 3") that encumbered other real property in Shelby Township, MI ("Subject Property 3"). Pursuant to Note 3, Defendant Market was required to make interest payments each month, and was

required to pay the principal balance and all accrued interest no later than March 5, 2011. (See Exhibit 3 to Complaint.) Defendant Market has not made any payments in connection with Note 3. On December 8, 2011, a foreclosure sale of Subject Property 3 took place. Subject Property 3 sold for \$250,000.00. The redemption period expired on June 8, 2012.

Notes 1, 2, and 3 (collectively, "Notes") are each partially guaranteed by personal guaranties executed by Defendants Vincent DiLorenzo ("Defendant DiLorenzo") and Angela Tinervia ("Defendant Tinervia") on February 14, 2008 ("DiLorenzo Guaranties"). (See Exhibit 7 to Complaint.)

On March 31, 2015, Plaintiff filed its complaint in this matter seeking to recover the deficiency amounts owed in connection with the Notes. On April 27, 2015, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(7). On July 9, 2015, Plaintiff filed its response and requests that the motion be denied. On August 24, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must

consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

III. Arguments and Analysis

In their motion, Defendants contend that Plaintiff's claims are barred by the statute of limitations. It is undisputed that the applicable statute of limitations is set forth in MCL 600.5807(8), which provides that a plaintiff must bring an action within 6 years for all damages due for a breach of contract. In their motion, Defendants contend that they first breached the terms of the Notes more than 6 years before the complaint was filed in this matter, and that as a result Plaintiff's claims are barred.

Each of the Notes required the debtor to make interest only payments each month until the Notes matured, at which time all outstanding interest and principal would become due. (See Exhibits 1, 3 and 5 to the Complaint.) Claims on an installment contract do not accrue until the installment becomes due in the absence of an exercised acceleration clause. *Visioneering Inc. Profit Sharing Trust v Belle River Joint Venture*, 149 Mich App 327, 333; 386 NW2d 185 (1986). In its complaint, the only payments Plaintiff seeks to recover are the final payments for all outstanding interest and principal. Those payments were not due until 2011 for Modified Note 1, as well as Notes 2 and 3, which is less than 6 years before Plaintiff filed its complaint. Consequently, Plaintiff's

claims in connection with Notes 2 and 3 are not barred by the statute of limitations. As a result, the portions of Defendants' motion related to Notes 2 and 3 must be denied.

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary disposition under MCR 2.116(C)(7) is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: OCT 19 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge