

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRR CAPITAL FUNDING, LLC,
an Indiana limited liability company,

Plaintiff,

vs.

STEVEN D. BENNER,

Defendant.

Case No. 11-08297-CH

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE
ORDER OF DISMISSAL, REINSTATE CASE, AND ENTER CONSENT JUDGMENT

The emergence of cross-collateralization in commercial lending has enabled risky borrowers to obtain capital, but it has also ushered in an era of spectacular financial collapses. Here, Defendant Steven Benner structured his loan portfolio with Comerica Bank ("Comerica") in 2007, but his real-estate business subsequently became caught up in the undertow of the recession in 2008. As a result, despite his extensive real-estate holdings that generated substantial rental income, Benner took his companies into bankruptcy in 2011. Meanwhile, on September 1, 2011, Comerica filed the instant case against Benner individually, seeking to recover on personal guaranties that Benner had supplied in order to obtain the commercial loans from Comerica. Happily, on July 16, 2012, the Court filed a stipulated order of dismissal without prejudice, bringing the instant case to a conclusion.

Unfortunately, the parties' settlement that resolved the instant case proved to be short-lived. A fight erupted when Comerica attempted to enter a consent judgment based upon alleged defaults by Defendant Benner and his companies. At that juncture, however, the Court elected to defer to the United States Bankruptcy Court of the Western District of Michigan. That is, on October 18, 2013,

the Court entered an order denying, without prejudice, Comerica's motion to enter the consent order setting aside the order of dismissal, reinstating the case, and entering the consent judgment. As the Court explained:

Because the United States Bankruptcy Court for the Western District of Michigan at least has concurrent authority to address the issue of uncured default, and the Bankruptcy Court may well have exclusive authority to resolve that issue, the Court concludes that Plaintiff Comerica Bank's motion for entry of the consent judgment against Defendant Benner should be denied without prejudice at this point. If the Bankruptcy Court enters an order directing the Court to resolve the dispute about uncured default by S.D. Benner, L.L.C., the Court shall entertain a request for entry of the consent judgment against Defendant Benner. But until the Bankruptcy Court enters an order providing more guidance, the Court shall stay its hand.

See Order Denying, Without Prejudice, Plaintiff's Motion for Entry of Consent Order Setting Aside Order of Dismissal, Reinstating Case, and Entering Consent Judgment at 3 (Oct 18, 2013). Thus, the forum for Comerica's dispute with Benner shifted back to the Bankruptcy Court.

On April 27, 2014, Comerica entered into a settlement agreement with Defendant Benner and several of his companies. See Motion to Set Aside Order of Dismissal, Reinstate Case, and Enter Consent Judgment Against Steven D. Benner (July 8, 2015), Exhibit 2. Soon thereafter, the United States Bankruptcy Court for the Western District of Michigan formally approved the settlement and stated that the "Settlement Agreement shall be binding and enforceable in accordance with its terms and Comerica Bank shall be entitled to enforce all remedies described therein without further Order of this Court[.]" Id., Exhibit 3. Thus, from that date forward, the settlement agreement provided the exclusive definition of the terms of engagement between Comerica and Benner.

Several terms of the settlement agreement imposed clear obligations upon Defendant Benner and his companies. For example, the settlement agreement required Benner to supply to Comerica deeds in lieu of foreclosure for a passel of parcels of real estate. See Motion to Set Aside Order of

Dismissal, Reinstate Case, and Enter Consent Judgment Against Steven D. Benner (July 8, 2015), Exhibit 2 (Settlement Agreement, § 3.1(a)). In addition, the settlement agreement obligated Benner to sign a confession for appointment of a receiver. See id. (Settlement Agreement, § 3.1(c)). Also, the settlement agreement contained Benner's payment obligations. Finally, the settlement agreement set forth a list of events constituting a default. See id. (Settlement Agreement, § 10.1(e)). Under the express terms of section 10.1(e) of the settlement agreement, a default would occur if Benner or his companies "undertake any action which impedes Comerica's ability to enforce its rights under this Agreement or the Enforcement Documents[.]" Moreover, neither Benner nor his companies "shall have any right to cure defaults" under that subsection. See id. (Settlement Agreement, § 10.1).

Section 6.4 of the settlement agreement provided Defendant Benner and his companies with an important incentive to abstain from interfering with Comerica's enforcement of its rights under the settlement agreement. That is, if Benner and his companies stayed out of the way and permitted Comerica to exercise its rights under the settlement agreement, Comerica would release Benner from his personal guaranty and forbear from enforcing any remedy against him. See Motion to Set Aside Order of Dismissal, Reinstate Case, and Enter Consent Judgment Against Steven Benner (July 8, 2015), Exhibit 2 (Settlement Agreement, § 6.4). In the fullness of time, Benner and his companies failed to meet their payment obligations, so Comerica began exercising its rights under the settlement agreement by, *inter alia*, obtaining the appointment of a receiver and recording the deeds in lieu of foreclosure. All Benner had to do to avoid personal liability on his guaranty was to walk away.

Defendant Benner instead chose a path of massive resistance that calls to mind the immortal words of Winston Churchill: "We shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender[.]"

Benner seized every opportunity to oppose Comerica and then its successor in interest, Plaintiff GRR Capital Funding. Specifically, Benner opposed the appointment of a receiver and then contested the receiver's work in several crucial respects, he moved to vacate the deeds in lieu of foreclosure, he sought a contempt order against Comerica's successor in interest, and he opposed even the simplest requests, such as changing the named plaintiff from Comerica to GRR Capital Funding. Benner's actions truly constitute the antithesis of allowing Comerica to exercise its rights under the settlement agreement, so sections 6.4 and 10.1(e) of the settlement agreement dictate that Benner has forfeited his right to be excused from his personal-guaranty obligations.

According to section 10.2 of the settlement agreement: "Following an event of default under Section 10.1(e) of this Agreement, in addition to any other remedy that Comerica has, Comerica may pursue any and all of its remedies against Guarantor [*i.e.*, Defendant Benner], including the entry of the Consent Judgment[.]" See Motion to Set Aside Order of Dismissal, Reinstate Case, and Enter Consent Judgment Against Steven Benner (July 8, 2015), Exhibit 2 (Settlement Agreement, § 10.2). As Comerica's successor in interest, Plaintiff GRR Capital Funding now has the authority to exercise that right by insisting upon the entry of the consent judgment. Although GRR Capital Funding has the consent judgment in its possession and now has the Court's approval to file that document, GRR has generously suggested that the consent-judgment amount ought to be reduced by \$18.75 million to provide Benner with appropriate credit "to reflect the price [GRR Capital Funding] paid for the properties to which it took title by recording the Deeds in Lieu of Foreclosure[.]" As a result, Benner will only be bound by a consent judgment that reflects a deficiency balance, as opposed to his initial obligation from his lending arrangement with Comerica and the settlement agreement he signed with Comerica.

For all of the reasons set forth in this opinion, IT IS ORDERED that the “Stipulated Order of Dismissal Without Prejudice” entered by the Court on July 16, 2012, is hereby set aside in order to permit Plaintiff GRR Capital Funding to enter a consent judgment that includes all of the terms of the consent judgment provided by Defendant Benner to Comerica, but affords Benner a credit of \$18.75 million against the obligation stated in that consent judgment. Accordingly, the Court invites GRR Capital Funding to submit such a proposed consent judgment within seven days under the so-called seven-day rule. See MCR 2.602(B)(3).

IT IS SO ORDERED.

Dated: January 28, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge