

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
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January 11, 2012

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Re: *Wilmington Trust Co. v. L. Edward Jestice, Jr., aka Laurence Edward Jestice, Jr., et al.*;  
C.A. No. S11L-02-022 (CONSOLIDATED)

On Plaintiff's Motion for Summary Judgment: GRANTED  
Date Submitted: December 28, 2011  
Date Decided: January 11, 2012

Dear Counsel:

This decision involves another sad outcome resulting from the present economic recession. For the reasons stated herein, Wilmington Trust Company's Motion for Summary Judgment on all of the mortgages implicated in these consolidated cases must be granted.

(1) This decision concerns three separate mortgage foreclosure actions that were consolidated because of the overlap between the parties and the common defenses raised.

(2) (i) C.A. No. S11L-02-020 concerns a mortgage foreclosure action filed against

L. Edward Jestice, Jr. and Robin L. Jestice. On June 28, 2007, they executed a mortgage in favor of Wilmington Trust Company (“Plaintiff”) in the amount of \$792,000.00. The maturity date for the loan was March 28, 2010, when payment in full was due.

(ii) In August of 2007, title to the mortgaged real property was transferred to “Laurence Edward Jestice, Jr., Trustee Under Revocable Trust Agreement of Laurence Edward Jestice, Jr.” and “Robin Lynn Jestice, Trustee Under Revocable Trust Agreement of Robin Lynn Jestice.”

(iii) The mortgagors admit they failed to pay the indebtedness due on March 28, 2010.

(iv) The defendants in this action assert Plaintiff is not entitled to summary judgment because L. Edward Jestice, Jr. and Robin L. Jestice “believed, based on representations from Plaintiff’s employees and agents at the time of the signing of the mortgage, and based on [the Jestice family’s] past dealings with the Plaintiff, that Defendants would never be expected to pay the final balloon payment of the loan as the Plaintiff would arrange for Defendants to refinance that loan and replace it with a new Wilmington Trust Company (‘WTC’) loan as had been done repeatedly in my family’s past dealings with WTC.” Defendants offer no written documentation in support of this defense.

(3) (i) C. A. No. S11L-02-021 involves a mortgage foreclosure action filed against Jestice Farms, LLC. The mortgage was executed on June 27, 2007, by Laurence E. Jestice,

Sr., Edward Jestice, Jr., and Robin Lynn Jestice, all members of the LLC. The mortgage was executed in favor of Plaintiff in the amount of \$2,953,000. Pursuant to the mortgage, payment in full was due on March 27, 2010.

(ii) Jestice Farms, LLC, admittedly failed to pay the indebtedness due on March 27, 2010.

(iii) The defense is the same as contained in paragraph (2)(iv), *supra*, i.e., past dealings with Plaintiff and representations from the bank's employees assured the LLC members that refinancing would be available to Jestice Farms, LLC.

(4)(i) C.A. No. S11L-02-022 involves a mortgage foreclosure filed against Golden Acres Limited Partnership and Laurence E. Jestice, Sr., Trustee of Trust “A” Under Will of Elizabeth W. Jestice. The mortgage was executed on June 27, 2007, in favor of Plaintiff in the amount of \$2,953,000. The maturity date for the loan was March 27, 2010, when payment in full was due.

(ii) It is undisputed that the mortgagor failed to pay the indebtedness on March 27, 2010.

(iii) The defense raised by the defendants in this case is the same as contained in paragraph 2(iv), *supra*, i.e., past dealing with Plaintiff and representations made by the bank’s employees assured the defendants that refinancing would be available.

(5) As previously observed, the cases were consolidated. Plaintiff filed a Motion for Summary Judgment as to the consolidated case on November 1, 2011. The issue of whether the defenses raised in these foreclosure actions creates a question of fact precluding summary judgment has been briefed. The Plaintiff’s Reply Brief was received by the Court on December 14, 2011. The matter is now ripe for decision.

(6) Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>1</sup> The moving party bears the burden of establishing the non-existence of

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<sup>1</sup> *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

material issues of fact.<sup>2</sup> Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>3</sup> Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>4</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.<sup>5</sup> “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”<sup>6</sup> If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.<sup>7</sup>

(7) In *Baffone v. Brady*,<sup>8</sup> Judge John A. Parkins, Jr. noted that, absent an ambiguity, the parole evidence rule prohibits a court from looking at matters outside of

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<sup>2</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>3</sup> *Id.* at 681.

<sup>4</sup> Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

<sup>5</sup> *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>6</sup> *Id.* at 59 (quoting *Celotex*, 477 U.S. at 322-23).

<sup>7</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

<sup>8</sup> 2011 WL 2165136 (Del. Super.).

the mortgage document.<sup>9</sup> If a document is clear on its face, the court is not to embark on a search for a party's intentions to interpret the document. As Judge Parkins concluded in *Baffone*, I find the mortgages in the present case are essentially identical documents and each is fully integrated, in that each can be construed completely and clearly without reference to outside evidence. I do not find that any history of past dealings between the parties or any oral representations made

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<sup>9</sup> *Id.*, at \*3.

by any bank employee would serve to rewrite the agreement to *require* a finding that Plaintiff waived its right to foreclosure.

(8) Additionally, the statute of frauds bars an oral modification of a contract or document related to real estate, including a mortgage.<sup>10</sup> The defendants do not allege any part performance nor can the Court envision such a claim or how the defendants' position could be enforced. The defendants' position is, basically, that they relied on a promise or guarantee made by a representation by Plaintiff or past dealings with Plaintiff that refinancing would be available. But what were the terms of the new refinancing to be? What would the term of the new mortgage be? At what interest rate? This inability to enforce the defendants' position is a perfect example of why the statute of frauds requires any assurances or perceptions of assurances to be reduced to writing. The financial circumstances of the defendants, Plaintiff, and the economy significantly changed between 2007 and 2010. Regardless, there can be no waiver of Plaintiff's right to foreclose under these circumstances without a written agreement.

(9) Additionally, the mortgages each contain the following language in its "Miscellaneous Provisions":

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Mortgage unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Mortgage shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that

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<sup>10</sup> *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984); 6 *Del. C.* § 2715.

provision or any other provision of this Mortgage. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Mortgage, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Plaintiff is entitled to rely upon the mortgage language that provides, absent a written waiver signed by the Plaintiff, Plaintiff has not waived any of its rights under the terms of the mortgages. Also, the course of dealing between the parties does not give rise to any waiver or abandonment of the right contained in each mortgage to seek foreclosure if the obligation was not repaid.

Therefore, the court enters a judgment on behalf of the Plaintiff as to each implicated mortgage because neither the past dealings between the parties nor Plaintiff's alleged oral representations give rise to a viable claim of waiver.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary