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| **JOHN M. BERNARD AND SONIA MOTLAGH BERNARD** | * | **NO. 2001-CA-2234** |
| | * | **COURT OF APPEAL** |
| **VERSUS** | | |
| | * | **FOURTH CIRCUIT** |
| **IBERIA BANK** | | |
| | * | **STATE OF LOUISIANA** |
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**PLOTKIN, J. CONCURS IN PART, DISSENTS IN PART WITH REASONS**

For the reasons stated below, I concur with the majority to the extent that the petition for declaratory judgment, filed by John and Sonia Bernard ("Bernards") was properly dismissed on summary judgment. I respectfully dissent, however, from the holding of the majority affirming summary judgment in favor of Iberiabank on its reconventional demand whereby that holding was based on the proposition that a request for reduction in monthly payments was invalid pursuant to Title 9, sections 1122 and 1123 of the Louisiana Revised Statutes.

As recounted, in part, by the majority, this case involves the validity of an agreement to forbear the exercise of remedies under a prior credit agreement between the Bernards and Jefferson Savings and Loan

("Jefferson"), whose successor-in-interest is Iberiabank. The agreement is evidenced by two documents. The first document is a letter, dated October 25, 1990, ("the October document") wherein the Bernards requested Jefferson to "reconsidere [sic] your decision and adjuste [sic] our monthly notes to at least, at least [sic] $400.00 a month." On that letter, Jefferson, in a handwritten note dated October 31, 1990, and signed by the representative, stated: "OK, board, $400 per month." The second document, dated November 6, 1990, ("the November document") purported to reduce the interest rate to 7.00% (not mentioning the original rate of 13.25%). The November document also contained this additional language: "I/we understand and agree that our granting of this request will not operate as a novation of my/our existing obligation, nor will it in any manner modify or change my/our present contract or mortgage."

The summary judgment filed by Iberiabank seeks a money judgment and recognition of its mortgage, thereby seeking a dismissal of plaintiff's petition for declaratory judgment and a judgment as a matter of law on its own demand. The trial court granted Iberiabank's motion. The majority affirms, reasoning that subsequent agreement to forbear the exercise of remedies under the prior agreement, though written and signed by both parties, did not properly recite terms or consideration and was invalid under

sections 6:1122 and 1123.

I concur with the majority opinion as it relates to the trial court's disposition of the Bernards' petition for declaratory judgment. Sections 6:1122 and 1123 clearly require that, in order for a debtor to maintain an action on the forbearance of exercising remedies under a prior credit agreement, the agreement (1) must be in writing; (2) must express consideration; (3) must set forth relevant terms and conditions; and (4) must be signed by the creditor and debtor. La. R.S. 6:1122 & 1123. Although the agreement is evidenced by two documents that are both signed by both parties, neither document expresses consideration nor spells out the terms and conditions. Therefore, the trial court was correct in dismissing plaintiff's petition for declaratory judgment.

I dissent with the majority opinion as it relates to the trial court's disposition of Iberiabank's reconventional demand. The requirements of sections 6:1122 and 1123 do not apply to this claim and the language of the two documents evidencing the agreement are ambiguous and therefore create genuine issues of material fact with regard to the intent of the parties.

First of all, the requirements of section 6:1122 and 1123 do not apply to the Bernards' defenses to the reconventional demand of Iberiabank. The language of sections 6:1122 and 1123 apply only to actions on a credit

agreement **by a debtor**: the do not apply to a defense to a claim asserted by a creditor. La. R.S. 6:1122 ("A **debtor** shall not maintain an action on a credit agreement. . . ."); La. R.S. 6:1123 ("The following actions do not give rise to a **claim** that a new credit agreement is created. . . ."). In addition, the purpose behind the statute supports this contention, as it is concerned with the **liability** of financial institutions and not with the enforcement of those institution's claims against debtors. *See Whitney Nat'l Bank v. Rockwell*, 94-3049, p.8 (La. 10/16/95), 661 So. 2d 1325, 1330 ("The primary purpose of the statue was to establish certainty as to the contractual **liability** of financial institutions.").

Further, the Louisiana Supreme Court recognized the validity of the proposition that sections 6:1122 and 1123 were limited to debtor's claims on credit agreements and did not apply to a debtor's defense to a creditor's claim on such credit agreements:

> As to equitable defenses such as equitable estoppel, waiver, partial performance or bad faith, one court has held that the credit agreement statute only bars a borrower from maintaining an action based on an oral credit agreement, and does not necessarily bar the defenses in a suit by the lender. *See Brendowitz v. Central Nat'l Bank*, 597 So. 2d 340 (Fla. Ct. App. 2d Cist. 1992), interpreting the Florida statute, which, like the Louisiana statute, was patterned after the Minnesota statute.

*Whitney*, 94-3049 at p.10, 661 So. 2d at 1331. Therefore, while sections 6:1122 and 1123 bar the Bernard's petition for declaratory judgment, they

do not apply to preclude their defense to the reconventional demand of Iberiabank.

As the Bernard's are not bound to the requirements of sections 1122 and 1123 in asserting a defense to Iberiabank's reconventional demand, a review of the documents upon which the forbearance is allegedly based indicates the presence of genuine issues of material fact regarding the intent of the parties. When a contract can be construed from the four corners of the instrument without looking to extrinsic evidence, the question of contractual interpretation is answered as a matter of law, and summary judgment is appropriate. *Peterson v. Schimek*, 98-1712, p.5 (La. 3/2/99), 729 So. 2d 1024, 1029; *Brown v. Drillers, Inc.*, 93-1019, p.__ (La. 1/14/94), 630 So. 2d 741, 750. However, when a contract is determined to be ambiguous, an issue of fact exists, and the matter is not ripe for summary judgment. *Lankford v. Koch Gateway Pipeline Co.*, 98-0719, p.3 (La. 6/5/98), 713 So. 2d 464, 465-66; *Total Minitome Corp. v. Union Texas Products Corp*, 33,433, p.6 (La. App. 2 Cir. 8/23/00), 766 So. 2d 685, 690.

The intentions of the parties cannot be determined by the text of the two documents. On the one hand the October document purports to reduce the Bernard's monthly payments to $400 per month. The November document simply reduces the interest to 7.00%. Notwithstanding these

changes, the November document states that these changes are not changes and the agreement does not constitute a novation.

It is unclear whether the parties intended the monthly payments to be reduced to $400.00 per month, or whether the payments would be reduced to reflect the reduction in interest rate from 13.25% to 7.00%. It is also unclear whether the payment reduction entailed an extension of the original term of the mortgage such that the entire amount of the original loan would be repaid or whether the original term was unchanged and difference was simply forgiven. Finally, it is unclear whether the "no modification of our original agreement" clause contained in the November document serves to render forbearance completely voluntary and unenforceable on the part of Iberiabank, preserving a right by Iberiabank to demand a balloon payment of the balance of the original loan amount at the end of the term, or whether the clause is relevant on to preserve the date of the original agreement for purposes of mortgage priority.

Because these material issues cannot be determined by the text of the agreements, they are not properly determinable on a motion for summary judgment. I therefore dissent from the majority opinion affirming summary judgment as to Iberiabank's reconventional demand.