IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JO-EVE FARMS, INC., a Delaware corporation,	:	C.A. No: K10C-08-001(RBY)
Plaintiff,	:	
v.	:	
LLOYD F. ARNOLD, RICHARD POLM, LINDSAY DIXON and KOWINSKY FARM LLC, a Delaware Limited Liability Company,	:	
Defendants,	:	

Submitted: July 15, 2011
Decided: August 23, 2011

Upon Consideration of
Plaintiff's Motion for Partial Summary Judgment
DENIED

OPINION AND ORDER

Mark F. Dunkle, Esq., Parkowski, Guerke & Swayze, P.A., Dover, Delaware for Plaintiff.

John G. Harris, Esq., and Brian M. Gottesman, Esq., Berger Harris, Wilmington, Delaware for Defendants Lindsay Dixon, Richard Polm and Kowinsky Farm, LLC.

Michael A. Weidinger, Esq., Patricia R. Uhlenbrock, Esq., and Seton C. Mangine, Esq., Pinckney, Harris & Weidinger, LLC, Wilmington, Delaware for Defendants Lloyd F. Arnold and Lloyd and Nancy Arnold Limited Partnership.

Young, J.

SUMMARY

Jo-Eve Farms, the plaintiff, seeks a judgment on a promissory note pursuant to 10 *Del. C.* § 3901. The defendants are three business partners Lloyd Arnold, Richard Polm, Lindsay Dixon, as well as their business entity Kowinsky Farm, LLC. On May, 22, 2006, the defendants executed a promissory note ("note") for five million dollars which was secured by a second priority mortgage lien on Kowinsky Farm, located in Cheswold, Delaware. Arnold, Polm, and Dixon executed the note in their individual capacity. The defendants hoped to develop the property, and subsequently platted it as a residential subdivision called Saratoga.

Jo-Eve Farms along with Joseph, Fred, and Patricia Kowinsky contracted to sell the property. At the time of settlement, the plaintiff allegedly failed to give the defendants a full disclosure of the property's condition. That is, on May 25, 2004, the EPA issued a full report which stated a long list of concerns with hazardous materials on Kowinsky Farms, parts of which had been used for some years as a landfill. While the defendants knew that there was an easement for a landfill, they claim that the severity of the problem was never disclosed. The hazardous site sits adjacent to the defendants' prospective residential development, which could have an affect on the development's potential profitability.

The note became payable in full on January 31, 2007, but the defendants failed to pay. In consideration for forbearing the potential default, the plaintiff executed a Waiver of Right, stating: one million dollars was due on March 31, 2010; and interest would accrue at a 12% per annum from April 1, 2008 to March 31, 2010. The defendants failed to satisfy these conditions, and, on March 31, 2010, $1,254,400

became due; as well as, a $62,720 late fee.[1]

Dixon, Polm, and Kowinsky Farm LLC (together "DPK") filed an answer and counterclaim. While DPK admitted that they executed the note, they argue that the plaintiff failed to disclose that the property was situated next to a hazardous waste site, which may be subjected to an Environmental Protection Agency waste hazardous clean up project.

Lloyd Arnold independently filed an answer, along with counterclaims and cross-claims. Arnold filed separately because he claims to have invested a substantial sum of money in the property, but merely as a silent partner. All development decisions were the responsibility of Polm and Dixon. On April 23, 2008, Polm and Dixon promised and assured Arnold that he would assume no further liability, and he was to be released from the note and all personal guarantees. At oral argument, DPK stated that Arnold's arguments were unopposed, and agreed that they were the only parties with an interest in this litigation. For that reason, this opinion will address only DPK's response to the motion for summary judgment.

CONTENTIONS

Jo-Eve Farms now moves the Court to enter judgment against the defendants on the note. In support of the motion, the plaintiff contends that the defendants admitted by affidavit the execution of the note. The plaintiff argues that the numerous affirmative defenses and counterclaims are, actually, setoffs to the sum due and permissive counterclaims. Both of those are not defenses in a claim brought pursuant to 10 *Del. C.* § 3901.

In response, DPK contends that they dispute the alleged default and damages.

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[1] One million in principal; $261,273 in interest; and $62,720 in late charges.

Additionally, DPK outlined the agreement of sale, the misrepresentations, and the alleged breaches concerning that agreement. DPK states that while authenticity is not being challenged, that is merely one of the basic elements of a breach of contract cause of action. Also, they argue that the granting of summary judgment would not quickly adjudicate the counterclaim with which the note is inextricably intertwined.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] The moving party bears the burden of establishing the non-existence of material issues of fact.[3] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[4] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[5] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[6] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[7]

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[2] Super. Ct. Civ. R. 56(c).

[3] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[4] *Id.*

[5] *Pierce v. Int's Ins. Co. Of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[6] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[7] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. Jan. 31, 2007).

DISCUSSION

The purpose of 10 *Del. C.* § 3901"is to assure a speedy disposition of claims of the type specified in the statute by permitting defenses only in those instances where the defendants states under oath that he believes he has a valid defense and sets forth the defense."[8] The Delaware Supreme Court has consistently held that there are limited defenses available in an action on a note,[9] which include only those defenses which attack the validity of the underlying instrument.[10] In a claim brought under Section 3901 a defendant "may plead satisfaction, or payment, of all, or any part of the mortgage money, or any other lawful plea in avoidance of the deed ...."[11] A plea in avoidance includes: "acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver."[12]

Generally, the validity of a note may be attacked, in a foreclosure proceeding, for illegality, fraud, duress, or other such matters which undermine its very foundation.[13] The *Darnell v. Myers* case provides a proper illustration of where an

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[8] *First Fed. Sav. and Loan Assoc. v. Damnco Corp.*, 310 A.2d 880, 882 (Del. Super. 1973).

[9] *American Nat. Ins. Co. v. G-Wilmington Assoc.'s, LP*, 2002 WL 31383924, at *2 (Del. Super. 2002); *see People Bank & Trust Co. v. Gatta*, 1982 Del. LEXIS 956, at *4 (Del. Super. 1982).

[10] *Christiana Falls, LP v. First Fed. Sav. & Loan Ass'n of Norwalk*, 520 A.2d 669 (Del. 1986), *aff'g* 1986 WL 9916 (Del. Super.)(citing *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 896 (Del. Super. 1973)).

[11] *American Nat. Ins. Co. v. G-Wilmington Assoc.'s, LP*, 2002 WL 31383924, at *2 (Del. Super. 2002)(citing Rev. Code, c. 111, § 56 (1852)).

[12] *American Nat. Ins. Co.*, 2002 WL at *2.

[13] 59 C.J.S. Mortgages § 696.

avoidance defense, to a foreclosure action, prevented the court from granting a motion for summary judgment.[14] There, the plaintiff attempted to foreclose on the defendants who recently purchased a home from the plaintiff. The defendants pled the defense of misrepresentation, in that, the home had a structural defect which made the property unsafe. The defendants argued that the plaintiff knew of the defect at the time of the sale because she had an independent inspection done, which contradicted statements in the Seller's Disclosure of Real Property Condition Report. Additionally, the defendants claimed that the plaintiff knew that the defendants relied upon her representations. The court held that when defendants admit failure to make payments due under a note, but assert misrepresentations of material fact by the seller, that assertion of misrepresentations can preclude summary judgment.[15]

Jo-Eve Farms does not challenge DPK's assertions regarding the condition of the property, the duration of those conditions, or the representations made in the documents relied upon by the defendants. For the purposes of this motion, it is assumed that the conditions existed, and were in existence before the note was created. The defendants have asserted a misrepresentation defense to the mortgage foreclosure action. They claim that: the seller made a misrepresentation of fact; that the seller knew or should have known was false; that the buyer reasonably relied on the misrepresentation; and suffered pecuniary harm as a result. This misrepresentation defense undermines the note's very foundation, and therefore,

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[14] 1996 WL 757220, at *1 (Del. Ch. 1996); *vacated* 1996 WL 757231 (Del. Ch. 1996)(Order was vacated due to the discovery of new evidence, but, ultimately, the crux of the original order was affirmed in *Darnell v. Myers*, 1997 WL 382984 (Del. Ch. 1997). With the defendant's motion for summary judgment being denied due to the fact that there was a material issue of fact involving whether the seller made representations that were contrary to an earlier inspection).

[15] *Darnell v.* Myers, 1996 WL 757220, at *1 (Del. Ch. 1996).

presents a valid defense to the foreclosure action.

CONCLUSION

The alleged condition of the property prior to the note creates a material issue of fact, and is a proper defense in avoidance of the note. For the aforementioned reasons, the motion for partial summary judgment is ***DENIED.***

SO ORDERED this 23rd day of August, 2011.

/s/ Robert B. Young
J.

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