

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

June 24, 2008

James D. Heisman, Esquire
Connolly Bove Lodge & Hutz, LLP
1007 N. Orange Street
P.O. Box 2207
Wilmington, Delaware 19899

Daniel F. Wolcott, Jr., Esquire
Potter Anderson & Corroon, LLP
1313 N. Market Street, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899

**Re: Wilmington Savings Fund Society, FSB, a Delaware corporation v. 37
The Circle, LLC, a Delaware limited liability company, Gary A.
Moore, Sr., an individual, and River Basin Engineering, Inc., a
Delaware corporation
C.A. No. 07L-12-046 THG**

Submitted: May 16, 2008

Decided: June 24, 2008

On Plaintiff Wilmington Savings Fund Society's
Request for Assessment of Late Fees

DENIED

Dear Counsel:

Wilmington Savings Fund Society, FSB ("WSFS") filed this action against 37 The Circle, Gary A. Moore, Sr., and River Basin Engineering, Inc. (collectively, "the Defendants") seeking the foreclosure of a mortgage used to secure a loan WSFS made to 37 The Circle. The loan was for the principal amount of \$400,000 and was memorialized by a Promissory Note executed on October 12, 2005 ("the Note"). Moore and River Basin guaranteed the Note by way of Commercial Guarantees executed on October 12, 2005. WSFS also sought an *in personam* judgment against Defendants, jointly and severally, for the debt. Defendants did not file an answer to the Complaint and WSFS moved for a default judgment pursuant to Superior Court Rule of Civil Procedure 55(b)(2). In its

Motion for Default Judgment, WSFS requests that late fees be awarded “until the judgment is paid in full”. WSFS cites the “Late Charge” provision of the Note, which reads: “Late Charge. If a payment is 15 days or more late, Borrower will be charged 5.000% of the unpaid portion of the regularly scheduled payment.” Note at p. 1. WSFS then argues, “Accordingly, WSFS is entitled to the ongoing taxation of late fees as provided in the Note until the judgment is paid in full.” Defendants answered WSFS’s Motion for Default Judgment for the sole purpose of arguing that the imposition of late fees was improper in this case because WSFS had demanded payment of the loan balance pursuant to the Note’s acceleration clause.

The parties appeared before the Court on May 16, 2008. At that time, the Court requested the parties submit any argument or legal support for their positions on the issue of late fees. On June 16, 2008, the parties filed a Stipulated Judgment with the Court. Despite the entry of a Stipulated Judgment, however, Defendants allege WSFS is not entitled to late fees pursuant to the loan documents and whether WSFS is entitled to these fees remains at issue. The parties have declined to submit any additional material for the Court’s consideration.

The parties have offered the Court little legal guidance and the Court has been unable to locate any illuminating case law. Accordingly, I take a common sense approach to the issue before me. When contract language is clear on its face, the Court will afford the language of the contract its plain and ordinary meaning. *Universal Studios, Inc. v. Viacom, Inc.*, 705 A.2d 579 (Del. Ch. 1997). Defendants argue that full payment has been demanded and full payment is not a “regularly scheduled payment”; accordingly, Defendants assert, late fees may not be assessed. I agree with Defendants’ position. I read the Note to apply to the payment of regularly scheduled payments made pursuant to the Note. I do not read this provision to apply to a demand for full payment of the

balance due on the Note pursuant to the Note's acceleration clause. Once the balance on the loan was accelerated, regularly scheduled payments were no longer due and late fees may not be assessed.

For the foregoing reasons, WSFS's request for ongoing late fees to be assessed against Defendants is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

oc: Prothonotary
cc: Judge Richard F. Stokes
Judge Fred S. Silverman
Sussex County Civil Action No. 07L-12-047(RFS)
New Castle County Civil Action No. 07C-12-185(FSS)