IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

M & T BANK,	)	
	)	C.A. No. K11C-12-005 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
KOWINSKY FARM, LLC, AUTUMN LEAF LLC, AMERICAN CLASSIC COMMUNITIES, LLC, LLOYD ARNOLD, LINDSAY E. DIXON and RICHARD E. POLM,	)	
	)	
Defendants.	)	

Submitted: November 29, 2012
Decided: January 8, 2013

James H.S. Levine, Esq., Pepper Hamilton, Wilmington, Delaware. Attorney for Plaintiff.

Brain Gottesman, Esq., Berger Harris, Wilmington, Delaware. Attorney for Defendants.

Seton C. Mangine, Esq., Pinckney, Harris & Weidinger, Wilmington, Delaware. Attorney for Trustee of Lloyd F. Arnold's Survivors' Trust.

Upon Consideration of Plaintiff M&T Bank's
Motion for Summary Judgment Against Defendants Kowinsky,
Autumn Leaf, American Classic Communities, Dixon and Polm
GRANTED

VAUGHN, President Judge

M& T Bank v. Kowinsky Farm, et al.
C.A. No. 11C-12-005 JTV
January 8, 2013

OPINION

This is an action to recover on two promissory notes and related guaranties executed by the defendants in connection with two mortgages. One of the defendants, Lloyd Arnold[1] ("Arnold") has also asserted cross-claims for indemnification, misrepresentation and promissory estoppel against certain co-defendants. Before the Court are three motions for summary judgment: (1) the Plaintiff, M&T Bank ("M&T" or "the Bank"), successor in interest to Wilmington Trust Company, moves for summary judgment against defendants Kowinsky Farm, LLC ("Kowinsky"), Autumn Leaf, LLC ("Leaf"), American Classic Communities, LLC ("ACC"), Lindsay E. Dixon ("Dixon") and Richard E. Polm ("Polm"); (2) Arnold moves for summary judgment against co-defendants Kowinsky, Dixon and Polm; and (3) M&T separately moves for summary judgment against Arnold. Only the first motion, M & T's motion for summary judgment against Kowinsky, Leaf, Dixon and Polm is addressed in this opinion. The other two motions will be addressed in separate opinions to follow.

FACTS

It appears from the record that on May 21, 2004, Joe-Eve Farms, Inc. ("Jo-Eve"), Joseph S. Kowinsky, Fred R. Kowinsky and Patricia A. Kowinsky (collectively, "Sellers") entered into an agreement of sale to sell to Lloyd F. Arnold (One), LLC certain real property ("the Property") located in or near the town of Cheswold in Kenton Hundred, Kent County at a price of $45,000 per acre. It further

[1] Mr. Arnold passed away in January 2012. His interest in this action is represented by Christo Bardis, the Trustee of Lloyd F. Arnold's Survivors' Trust.

appears that a little less than two years later, on May 16, 2006, before any settlement had taken place on the May 21, 2004 agreement, Jo-Eve granted and conveyed a 56.182 acre portion of the property to the State of Delaware, and the deed was recorded the same day. It further appears that about a week later, on May 22, 2006, several significant events occurred: Lloyd F. Arnold (One), LLC assigned all of its right, title and interest in the agreement of sale to Kowinsky Farm, LLC; the Sellers in the May 21, 2004 agreement granted and conveyed the remaining premises, consisting of 351.714 acres to Kowinsky;[2] Kowinsky executed and delivered to M&T a Promissory Note in the original principal amount of $9,763,000 ("Note I"); two Written Consent resolutions for Leaf and ACC ("Written Consents") were signed by Dixon and Polm;[3] Leaf, ACC, Dixon, Arnold and Polm (collectively, "Guarantors") each executed and delivered to M&T guaranties in which they guaranteed all amounts owed by Kowinsky to M&T; and, Kowinsky granted a mortgage lien to M&T on the 351.714 acre parcel as collateral for the indebtedness set forth in the Note I.[4]

The Written Consents pertain to Leaf's and ACC's agreements to guarantee the Note I debt and state that the property to be mortgaged as security for said debt

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[2] The conveyance of the 351 acres was accomplished by four deeds, different parts of the property apparently being owned by different grantors.

[3] The defendants' sworn affidavits and interrogatory responses identify the date of the Written Consents as *May 26, 2006*, but the documents, themselves, are dated May 22, 2006. Dixon and Polm are the only members of Leaf and ACC.

[4] Why there would be a delay of two years from the signing of the agreement of sale until settlement is not explained.

consisted of 407+/- acres.

On December 31, 2007, a Change in Terms agreement was executed by the parties (it was not signed by Arnold, although he was still a member of Kowinsky at the time) that extended the maturity date of the loan. The Note matured on December 31, 2008, at which time payment of the full outstanding principal balance, plus interest, costs and expenses, was due. Kowinsky failed to pay the debt owed.

On April 23, 2008, Kowinsky executed and delivered to M & T another promissory note in the original principal amount of $2,100,000 ("Note II"). Note II matured on May 1, 2010, at which time payment in full of the outstanding principal balance, plus interest, costs and expenses was due. Kowinsky failed to pay the debt owed on Note II. The Guarantors have also failed to pay any amounts owed under Note I or Note II.

Defendants Leaf, ACC, Dixon and Polm contend that their understanding was that 407± acres, not 351.714, would be the collateral, and that the note guaranties are invalid because they would not have guaranteed Kowinsky's indebtedness had they known of the acreage discrepancy. Kowinsky also claims mistake with respect to the acreage of the mortgaged property and asserts that it would not have borrowed the money had it known that the guaranties might be invalid.

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.[5] "[T]he

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

moving party bears the burden of establishing the non-existence of material issues of fact."[6] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[7] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[8] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[9] 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."[10]

DISCUSSION

_____All defendants contend that it was the intent of all parties, including the plaintiff, that the mortgage was to encumber the original 407+/- acre parcel. M&T contends that there is no dispute as to the mortgage, the notes, the guaranties, or the amounts alleged to be owed thereunder. The Bank states that it always understood the collateral to be 351.714 acres. M&T contends that the defendants have not offered evidence to support essential elements of their mistake defenses. M&T

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

[7] *Id.*

[8] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

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

[10] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

contends that the defendants' alleged error regarding the acreage arose solely as a result of their own inexcusable negligence.

Guarantors contend that their understanding and expectation that Kowinsky would secure payment of its indebtedness with 407+/- acres of land is documented by the Written Consents for Leaf and ACC. The Written Consents identify the collateral for the loan as 407+/- acres of land, and the defendants allege that they were among the documents given to and viewed by M&T prior to execution of the mortgage and Note I on May 22, 2006. Guarantors also suggested at oral argument that the documents executed on May 22, 2006 were largely controlled and prepared by the Bank, and that the sloppiness of its representatives created the allegedly unintended acreage discrepancy. In sum, they argue that there is a genuine issue of material fact as to whether both parties actually intended for the pledged collateral to be 407+/- acres, not 351.714.

Defendants assert several affirmative defenses in their answer, but only adduce facts in support of their mutual mistake and unilateral mistake defenses, both of which "must be proven by clear and convincing evidence."[11] Mistake defenses disregard the traditional framework of contract interpretation, and look beyond the four corners of a clear and unambiguous contract.[12] The defendants here are arguing that the "clear meaning" of the contract, i.e., the agreement for the making of the

[11] *Bryant v. Way*, 2012 WL 1415529, at *13 (Del. Super. Apr. 17, 2012) (citing *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151-52 (Del. 2002)).

[12] *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *15 (Del. Ch. June 30, 2004).

mortgage between the plaintiff and Kowinsky—351.714 acres as collateral—"is not *really* the meaning the parties intended."[13] In *Snyder v. Jehovah's Witnesses, Inc.*, the Superior Court concisely summarized both theories of mistake:

> Mutual Mistake requires both parties to be mistaken as to a material portion of a written agreement. Unilateral mistake requires that one party be mistaken and that the other party know of the mistake but remain silent. Both theories of mistake, however, require a showing that 'the parties came to a specific prior understanding that differed materially from the written agreement.'[14]

In Delaware, "a party must satisfy three elements to establish mutual mistake: (1) both parties were mistaken as to a basic assumption; (2) the mistake materially affects the agreed-upon exchange of performances; and (3) the party adversely affected did not assume the risk of the mistake."[15] Additionally, "the mistake 'must be as to a fact which enters into, and forms the very basis of, the contract; it must be of the essence of the agreement, the *sine qua non* or, as it is sometimes expressed, the efficient cause of the agreement.'"[16]

To avoid summary judgment on a unilateral mistake theory, the defendants

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[13] *Id.*

[14] 2005 WL 2840285, at *4 (Del. Super. Oct. 28, 2005) (citations omitted) (quoting *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *6 n.35 (Del. Ch. Aug. 3, 2004)).

[15] *Am. Bottling Co. v. Crescent/Mach I Partners*, 2009 WL 3290729, at *2 (Del. Super. Sept. 30, 2009).

[16] *Id.* (quoting *Fed. Land Bank of Baltimore v. Pusey*, 1986 WL 9041, at *3 (Del. Super. July 21, 1986)).

must demonstrate to the Court that a rational fact-finder could find:

> [The existence of] a specific prior understanding which is materially different from the written agreement by clear and convincing evidence. [Defendants] must also demonstrate that [defendants were] mistaken and that the opposing party knew of the mistake and remained silent. Rescission of an agreement based upon unilateral mistake is available if (1) enforcement of an agreement is unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) it is possible to place the other party in the status quo.[17]

I conclude that defendants Kowinsky, Leaf, ACC, Dixon and Polm have failed to offer evidence sufficient to show a genuine dispute of fact regarding an essential requirement of both mistake defenses: the existence of a specific prior understanding regarding the collateral to be pledged that differs materially from the 351.714 acreage term in the mortgage.[18] Despite ample opportunity during discovery to obtain testimonial or documentary evidence regarding what happened during the negotiations and build-up to the deal of May 22, 2006, the defendants do not advance a mistake defense that amounts to more than mere speculation.[19] The Court is not

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[17] *Bryant*, WL 1415529, at *11 (citing *Cerberus*, 794 A.2d at 1151-52); *See also Am. Bottling Co.*, 2009 WL 3290729, at *4.

[18] The defendants also fail to proffer evidence that suggests that M&T was mistaken regarding assumptions of the parties' obligations.

[19] I indicated at the oral argument that the Court would be receptive to the filing of supporting documentation, such as the loan commitment letter, that would help provide clarification and context regarding the negotiations. M&T asserted, by letter, that it is not in possession of a loan

required to accept as true the defendants' conclusory statements that "[u]pon information and belief, [M&T] knew or should have known that 407+/- acres of land was not pledged by Kowinsky . . . as collateral for the indebtedness" and "[u]pon information and belief, [M&T] knew or should have known that its representation to the guarantors regarding the actual acreage pledged by Kowinsky . . . as collateral for the indebtedness was not materially accurate."[20] These allegations are unsupported by the record of the case. The defendants never articulate what the purported "representation" offered by M&T to Guarantors encompassed.

The only tangible evidence provided to the Court in support of defendant's mistake defenses are the Written Consents. Although they contend that the documents were in the possession of and therefore known to or knowable by M & T, facts which I accept for purposes of the plaintiff's motion, they are essentially offered in isolation. No context or appurtenant facts and circumstances are offered. Even if the documents were seen by a loan officer, no inference is created that the lender, borrower and guarantors had agreed that the collateral was to be 407+/- acres. The defendants have not presented any actual facts or circumstances regarding the negotiation of the loan terms between the parties. The defendants have failed to support sufficiently the contention that there was a specific prior agreement at odds

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commitment letter and is unsure if one exists. The defendants did not submit any supplemental materials.

[20] Kowinsky Aff. ¶¶ 19-20; Leaf Aff. ¶¶ 20-21; ACC Aff. ¶¶ 20-21; Dixon Aff. ¶¶ 18-19; Polm Aff. ¶¶ 18-19; Pl. Mot. Summ. J., D.I. 22, Ex. F (statements are repeated in Kowinsky's Answers to Interrogatories 7-30, 40 and 41).

with the unambiguous mortgage. Accordingly, the defendants mistake defenses must fail as a matter of law because they have not offered sufficient evidence that shows there existed a prior specific understanding between these parties.[21]

The affidavits and interrogatory responses relied upon by the defendants really only support the proposition that they, themselves, or some of them, acted under the mistaken belief that the collateral was 407+/- acres. The most obvious explanation for this appears to be that it was simply an oversight.[22]

Based on the summary judgment record, even when the facts are considered in the light most favorable to the defendants, a rational trier of fact (the Court in this instance) could not find that M&T shared the defendants' mistaken belief regarding the acreage pledged as collateral. The mortgage clearly states that the land pledged by Kowinsky as collateral for Note I consists of 351.714 acres, and the defendants have not sufficiently shown that M&T may have believed or understood otherwise.

CONCLUSION

The defendants have failed to satisfy their substantive evidentiary burden with respect to elements of both mistake defenses, and have failed to adduce facts in

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[21] *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super. Jan. 11, 2012) (quoting *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.")).

[22] So far as I can surmise from the parties' submissions and arguments, the "missing" 56 acres was conveyed to the State of Delaware on May 16, 2006, and was not actually owned by Kowinsky at the time Note I and the mortgage were executed. The circumstances surrounding this transaction would appear to be singularly important to the mistake defenses asserted by the defendants, but it is never explained by either party.

support of their other affirmative defenses. M&T's motion for summary judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File