IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EDGE OF THE WOODS, LIMITED PARTNERSHIP, a Delaware limited partnership, EDGE OF THE WOODS, INC., a Delaware corporation, WATER'S EDGE MARKETING CORPORATION, a Delaware corporation, and PENCADER DEVELOPMENT COMPANY, a Delaware corporation,	)	
Plaintiffs,	)	
v.	)	**C.A. No. 97C-09-281-JEB**
WILMINGTON SAVINGS FUND SOCIETY, FSB, a federal savings bank,	)	
Defendant.	)	

Submitted: June 15, 2001
Decided: August 16, 2001

- On Defendant's Motion for Summary Judgment - **GRANTED**
- On Defendant's Counterclaim - **GRANTED**

OPINION

Appearances:

Joseph Scott Shannon, Esquire, 710 N. King Street, First Federal Plaza, Suite 500, Wilmington, DE 19899
Attorney for Plaintiffs.

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Attorney for Defendant.

JOHN E. BABIARZ JR., JUDGE.

This case involves alleged breaches of loan agreements arising out of years of commercial loan transactions and dealings between the Plaintiffs and the Defendant. Plaintiffs allege seven causes of action. Defendant moves for summary judgment on all

claims, arguing that the Plaintiffs signed releases governing the all of the loans at issue and that the releases serve to relieve Defendant of all liability. Because the releases executed by the Plaintiffs are valid and binding, and there is no evidence of economic duress to render the releases voidable, Defendant's motion for summary judgment is **GRANTED**. Because Plaintiffs breached their contractual obligations not to sue, Defendant's motion for summary judgment on its counterclaim is also **GRANTED**.

I. FACTS

Plaintiff Edge of the Woods Limited Partnership ("EWLP") was formed for the purpose of constructing a condominium development in New Castle County, Delaware called "Water's Edge" (hereinafter "the project"). Plaintiffs Edge of the Woods, Inc. ("EWI"), Water's Edge Marketing Company ("WMECO"), and Pencader Development Company ("PDC") are all general partners of EWLP (hereinafter collectively referred to as "Plaintiffs"). Defendant Wilmington Savings Fund Society ("WSFS") is a savings bank.

In 1987, the parties began negotiating the financing of the project. In October 1987, WSFS sent a proposal letter to the Plaintiffs for an $11 million construction loan with a term of 18 months, to be followed by a five year permanent loan, subject to EWLP's fulfillment of certain conditions. On March 8, 1988, WSFS issued a commitment letter that reiterated the terms of the proposal.

On August 5, 1988, EWLP secured a line of credit from WSFS for approximately $11 million (the "Loan") to fund the project. This original loan agreement was written to cover 264 rental units that were to be sold as condominiums (an amount later reduced to

220 units and 44 lots). A "Building Loan Agreement" also provided that the construction term of the loan would mature on January 31, 1990, on which day all construction work would be finished, and that an independent appraisal would be performed on the completed Project. The Plaintiffs believed that the construction would be completed in 18 months and Plaintiffs understood WSFS to believe the same.[1]

On January 31, 1990, with construction incomplete and unable to repay the loan, EWLP requested an extension of the construction loan term and an increase in credit from WSFS. On July 23, 1990, the parties agreed to an amendment of the original agreement that: increased the principal amount by $500,000; extended the construction term for twelve months to February 5, 1991, with no change in the interest rate; and gave EWLP the unilateral right to extend this amendment for another six months (which EWLP subsequently did).

On August 5, 1991, with construction incomplete and still unable to repay the loan, EWLP requested a second extension of the construction loan term and additional time to repay the funds from WSFS. On August 22, 1991, the parties agreed to a second amendment of the original agreement and first amendment that: extended the construction term for twelve months to February 5, 1992, with no change in the interest rate; required EWLP to satisfy an average unit sales minimum; and included a general release in which EWLP promised not to sue WSFS on any claims relating to the loan.

[1] See Def. Mot. for Summ. J., App. I, Ex. 24, Dep. of Hugh Martin at 61-62

On February 5, 1992, with construction incomplete, still unable to repay the loan, and having failed to accomplish the unit sales minimum, EWLP requested a third extension of the construction loan term and additional time to repay the funds from WSFS. On March 23, 1992, the parties agreed to a third amendment that: extended the construction term for two years; reduced the number of units from 264 to 220 with no reduction in the available loan proceeds; established a $230,000 interest reserve; established an excess sales proceeds account where surplus proceeds from unit sales could fund certain cost overruns up to $236,000; reduced the average unit sales minimum; removed Plaintiff WMECO as the project's marketing arm; and included a general release in which EWLP promised not to sue WSFS on any claims relating to the loan.

On March 31, 1994, with construction incomplete, still unable to repay the loan, and again having failed to accomplish the unit sales minimum, EWLP requested a fourth extension of the construction loan term from WSFS in order to finish the remaining project units, which was essential to converting the construction loan to permanent financing. On June 7, 1994 (but effective as of March 31, 1994), the parties agreed to a fourth amendment that: extended the construction term to September 1, 1994 to allow the project's completion and the parties' negotiation of a permanent loan; reduced the minimum interest reserve from $230,000 to $90,000; and included a general release in which EWLP promised not to sue WSFS on any claims relating to the loan.

In June 1994, construction was completed and certificates of occupancy were issued for all 220 units. Also in June 1994, the 77 unsold project units were appraised at

$4,335,000. This amount was used to assess the value of the property being offered as security on the "Mini-Perm" loan.

On September 30, 1994, the parties agreed on a "Mini-Perm" loan that essentially converted the construction term loan to a permanent loan. The "Mini-Perm" contained an

interest rate of 2 1/2% over the floating prime rate for a 20-year amortization period and included the personal guarantees of Hugh Martin, V ("Martin"), and David N. Levinson ("Levinson", and together the "Guarantors") the two presidents of EWI, WEMCO and PDC. The mortgage was secured by 65 unsold project units.

In February 1997, EWLP paid $779,855.83 in full satisfaction of all sums due WSFS.

On September 30, 1997, Plaintiffs commenced this action.

Plaintiffs allege that WSFS knowingly underfunded the 264 units that WSFS agreed to finance, at the inception of and continuing throughout the duration of the project. Plaintiffs allege that WSFS forced real estate appraisers to underrate the value of the units, resulting in an undercapitalization of the Project. Plaintiffs allege that this financial short-changing by WSFS resulted in "business duress" for the Plaintiffs.

Plaintiffs allege that WSFS misrepresented the loan terms and forced EWLP to accept inferior terms than those that were previously discussed.

Plaintiffs allege that WSFS required EWLP to sign releases of lender liability claims as a condition of rolling over the line of credit, and threatened default and lawsuits without intending to act on them.

Plaintiffs allege that in 1993 WSFS pressured EWLP into slowing its construction schedule, and then threatened default on the loan when EWLP did slow down, without intending to act on the threat.

Plaintiffs allege that WSFS disregarded its own credit policy, both by ignoring the WSFS policy that generally "construction loans for residential purposes" are considered "desirable loans" by WSFS, and by treating EWLP as a "problem loan", when in fact any perceived problems were solely the creation of WSFS.

Plaintiffs allege that WSFS unreasonably increased security at EWLP's expense by establishing an interest reserve account for deposits of all rental proceeds and an excess sales proceeds account that constituted a "seizure" of proceeds. These unreasonable security measures, argues EWLP, resulted in impairment of EWLP's cash flow "with the effect of bleeding EOTW white and draining all of the profit and while crippling EWLP's ability to finance and timely complete construction."[2]

Plaintiffs allege that WSFS imposed punitive interest rate increases on EWLP. Plaintiffs allege that WSFS required EWLP to change its marketing broker to a third-party realtor, causing a further loss of revenue. Plaintiffs allege that WSFS employed a "schizophrenic approach" in tying unit sales to disbursement of loan proceeds.

Plaintiffs allege that WSFS employed negotiation tactics that were more "dictation" than bargaining.

[2] See Pls. Ans. Br. in Opp'n to Def. Mot. for Summ. J. at 18.

Plaintiffs allege that WSFS used inconsistent asset risk classification and subjective ratings of the EWLP loans, including reviews of the loan performance and the Plaintiffs' management of the project.

Plaintiffs allege that WSFS gave unnecessary scrutiny and management to the loan as a result of "WSFS's own plummeting financial circumstances."[3] As a result, Plaintiffs argue, WSFS sought ways to generate additional revenue, including squeezing monies from borrowers like the Plaintiffs, who had effectively become "prisoner[s] of the bank."[4]

Plaintiffs have asserted from the above allegations the following counts in their Amended Complaint:

(1) breach of contract by WSFS for alleged violations of the loan agreement;

(2) breach of the implied covenants of good faith and fair dealing by WSFS under the Delaware Uniform Commercial Code, 8 Del. C. § 1-203;

(3) tortious interference by WSFS with the contracts between EWLP and its contractors;

(4) fraudulent conduct by WSFS, as detailed in the above allegations;

(5) breach of fiduciary duty by WSFS;

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[3] Id. at 37.

[4] Id. at 38.

(6) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq., ("RICO") by WSFS's conspiracy to extort and defraud EWLP in "a pattern of racketeering activity"; and

(7) violations of 5 Del. C. § 929 ("Regulations Governing Business of Banks and Trust Companies: Tying arrangements prohibited") by WSFS in using its position as lender to improperly influence EWLP's decisions concerning the marketing and refinancing of the project.

In response, Defendant argues in its motion for summary judgment that the three releases executed by EWLP serve to insulate WSFS from all claims stemming from the loans. Defendant argues that the Plaintiffs have failed, as a matter of law, to sufficiently plead duress to render the releases unenforceable. Defendant has also filed a counterclaim for breach of contract, arguing that EWLP sued WSFS when EWLP expressly covenanted not to do so in the three separate releases.

II. STANDARD OF REVIEW

The Court may grant summary judgment if it concludes that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[5] The moving party bears the initial burden of showing that no material issues of fact are present.[6]

[5] **Super. Ct. Civ. R. 56(c); Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991).**

[6] **Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680 (1979).**

Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.[7] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.[8] The Court's decision must be based solely on the record presented and not on all evidence "potentially possible."[9]

III. DISCUSSION

A. PLAINTIFFS' BREACH OF FIDUCIARY DUTY, FRAUD, RICO, AND 5 DEL. C. § 929 CLAIMS

As a preliminary matter, Plaintiffs "mak[e] no answer to WSFS's requests for summary judgment as to Count 4, 'Fraud'; Count 6, 'Violations of RICO'; nor Count 7, 'Violation of 5 *Del. C. §* 929 [improper tying]." As such, summary judgment is granted on these claims. Regardless, because of the releases signed by Plaintiffs, these three claims would be subject to dismissal by summary judgment, as discussed below.

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[7] **Id. at 681.**

[8] **Burkhart, 602 A.2d at 59.**

[9] **Rochester v. Katalan, Del. Supr., 320 A.2d 704, 708 (1974) (citing United States v. Article Consisting of 36 Boxes, D. Del., 284 F. Supp. 107 (1968), aff'd, 415 F.2d 369 (3d Cir. 1969))**.

Plaintiffs' Breach of Fiduciary Duty claim, Count Five, is also subject to dismissal by summary judgment as a claim made pursuant to the valid releases, as outlined below.

ECONOMIC DURESS AND THE PARTIES' RELEASES

The issue in this case is whether or not there is a genuine issue of material fact as to the enforceability of the releases[10]; specifically: Is there evidence of economic duress to render the releases voidable? The court answers both questions in the negative.

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The release in the Third Amendment to Building Loan Agreement states:

> "Borrower hereby remises, releases and forever discharges Lender, its agents, officers, servants, employees, successors and assigns (collectively the "Released Parties"), of and from any and all manners of action, causes of action, suits, debts, dues, agreements, obligations, liabilities, claims, accounts, and/or demands whatsoever, whether at law or in equity, or any other claims Borrower may have or could have against the Released Parties, known or unknown, which the Borrower now has, can have, ever had, or which their successors or assigns or any of them hereafter can, shall or may have arising out of or relating to the Project, the Loan and this Agreement, including, by way of illustration and not of limitation, any of the foregoing which relates in any way to the allocation, budgeting, and disbursement of the Loan proceeds during the period from August 22, 1991 through and including the date hereof."

The release in the Fourth Amendment to Note, Mortgage, and Guarantys [sic] states:

> "Obligor and Guarantors hereby expressly release Obligee from liability for any claims, defenses, causes of action, damages, losses, whether known or unknown, now or previously existing, with respect to the loan, the Loan Documents, the Guarantors or any acts or omissions to act of Obligee related to or arising out of the loan, Loan Documents, Guarantys [sic] or this Amendment."

General releases are valid and enforceable in Delaware.[11] The party seeking to nullify a release bears the burden of proving by clear and convincing evidence that the release is invalid.[12] **Where the release is clear and unambiguous and supported by consideration, it only will be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries.**[13] In Delaware, duress can render a contract voidable where there is a (1) a wrongful act which (2) overcomes

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[11] See Sabatoro Constr. Co., Inc. v. Formosa Plastics Corp., Del. Super., C.A. No. 92L-08-030-SCD, **1996 WL 453460, at *3**, Herlihy, J. (June 10, 1996) (clear and unambiguous language in the release should be given its ordinary and usual meaning); Fox v. Christiana Square Assoc., Del. Super., C.A. No. 91L-04-61-MT, 1994 Del. Super. LEXIS 141, Alford, J. (April 5, 1994) (release is final and binding where there is a meeting of the minds, consideration, and no fraud, misrepresentation, mistake, duress or undue influence); Egan and Sons Air Conditioning Co. v. General Motors Corp., Del. Super., C.A. No. 86L-MY-18, 1988 Del. Super. LEXIS 166, Gebelein, J. (April 27, 1988) (same).

[12] **Hob Tea Room v. Miller, Del. Supr., 89 A.2d 851, 856, Tunnell, J. (1952) ("As we view it, however, it was the plaintiff's burden to prove, by evidence 'in every respect clear and convincing, and free from doubt,' that the actual agreement of the parties was that the release should not be the general one it purports to be.") (citing Colvocoresses v. W. S. Wasserman Co., Del. Ch., 4 A.2d 800, 803 (1942)).**

[13] Id.

the free will of the person (3) who has no adequate legal remedy to protect his interests.[14] Economic duress is duress directed against a person's business interests, and is often referred to as "business compulsion."[15]

1. DURESS **- WRONGFUL ACTS**

[14] E.I. Du Pont de Nemours and Co. v. Custom Blending International Inc., Del. Ch., C.A. No. 16295-NC, **1998 WL 842289, at *4,** Strine, V.C. (Nov. 24, 1998); Cianci v. Jem Enterprise, Inc., Del. Ch., C.A. 16419-NC, 2000 WL 1234647, at *9, Lamb, V.C. (Aug. 22, 2000); Way Road Development Co. v. Snavely, Del. Super., C.A. No. 89C-DE-48, **1992 WL 19969**, at *3, Toliver, J. (January 31, 1992).

[15] Hanna Sys., Inc. v. Capano Group, L.P., Del. Ch., C.A. No. 7408, **1985 WL 21128**, at *3, Walsh, J. (Nov. 29, 1985) (citing Fowler v. Mumford, Del.Super., 102 A.2d 535 (1954)).

In the defense of duress, the actions complained of must be wrongful, but not necessarily unlawful.[16] In claiming economic duress, one must be deprived of the free exercise of his will through wrongful threats or acts directly against a person's business interest.[17] Generally, the threat to exercise a legal or contractual right that the maker of the threat clearly holds is not, in and of itself, improper.[18] Threats of litigation are likewise typically **permissible so long as the threat was done with a good faith belief that a viable cause of action existed.[19]**

In this case, Plaintiffs argue that the releases are not binding because they were procured under duress consisting of wrongful actions by WSFS, including: threats of foreclosure and default; threats against Levinson's personal interests; WSFS's insistence upon certain loan conditions; assigning eight different loan officers to the project; linking the disbursement of funds to unit sales; requiring WMECO to

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[16] Fowler at 538.

[17] R.M. Williams Co. v. Frabizzio, Del. Ch., C.A. No. 9834, **1990 WL 18399, at *4, fn 3,** Chandler, V.C. (Feb. 22, 1990) (Mem. Op.) (citing Fowler).

[18] Cianci at *9.

[19] Way Road, at *4; E.I. Du Pont de Nemours at *4.

subcontract the marketing to a third party; unreasonably denying EWLP the cash flow from the unit sales and rentals; and requiring EWLP to sign releases.

In response, Defendant argues that the actions complained of by Plaintiffs do not constitute "wrongful acts" under economic duress analysis. Defendant argues that any "threats" were only warnings of WSFS's intentions to exercise legal or contractual rights, and any such "threats" were made with a good faith belief in the validity of WSFS's rights.

I find that the "threats" and related activity attributed to the Defendant consist of nothing more than hard-bargaining business tactics, lawful attempts to force EWLP to comply with its loan obligations, and the aggressive protection of WSFS's financial interests.WSFS's insistence on certain conditions such as the execution of releases or the use of a certain marketing body by EWLP are merely terms that WSFS rightfully elected to insist upon during the bargaining process.[1] "Mere hard bargaining is insufficient to constitute duress, even when one of the parties is in financial difficulty."[2] Claims of economic duress based on such a record of threats of contractual and legal rights are not sustainable.[3]

1. DURESS **- DESTRUCTION OF FREE WILL**

[1] Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., D.Del., 769 F.Supp. 671, 738 (1991) ("In every contract negotiation there is an implied threat that the party will not perform unless his terms are accepted. This type of implied threat is a necessary part of the bargaining process.")

[2] Id.

[3] E.I. Du Pont de Nemours at *4.

The word "threat" does not equal "duress."[4] The party seeking to nullify an otherwise valid release must show that he was compelled to accept the demands for a release through improper threats that "destroyed [his] free will."[5]

In this case, Plaintiffs argue that WSFS's tactics to "wring concessions" and "force Draconian loan terms and conditions" on the Plaintiffs were sufficient to break the free will of David Levinson, who testified as to the personal emotional toll he suffered.

In response, Defendant argues that any economic duress felt by the Plaintiffs was the result of poor outside economic conditions, not by any conduct of WSFS. Defendants further argues that EWLP was a sophisticated commercial borrower who had the availability of legal counsel.

[4] Coca-Cola Bottling Co. at 739.

[5] Vassallo v. Haber Electric Co., Del. Super., 435 A.2d 1046, 1050 (1981).

I find that Plaintiffs were not forced to execute the releases because their free will was somehow destroyed by WSFS. Parties are generally held to an agreement even though one may have taken advantage of another's adversity, as long as the contract has been shaped by prevailing market forces.[6] Plaintiffs admit that the "general economic conditions affected the alternative financing available to EWLP"[7], yet in the same breath reiterate *ipse dixit* statements that only WSFS is to blame for EWLP's economic troubles. As the Court in Cianci put it:

> No breaking of the will should be found where outside forces independent of and not created by the maker of the threat compel the contract's immediate acceptance, and the victim otherwise could have walked away and considered the terms more deliberately.[8]

Here, the admittedly poor market conditions for obtaining financing for commercial construction projects in the early 1990's should not fall on the shoulders of WSFS.

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[6] See Cianci at *10 (quoting Restatement (Second) of Contracts, § 176 cmt. f, 486); Coca-Cola Bottling Co. at 739 (quoting E. Farnsworth, Farnsworth on Contracts § 4.17 at 437-38 (1990)) .

[7] See Pls. Ans. Br. in Opp'n to Def. Mot. for Summ. J. at 55.

[8] Cianci at *10.

Further, EWLP was a sophisticated commercial borrower when it negotiated the loan terms. The Guarantors and heads of EWLP, Mr. Levinson and Mr. Martin, were hardly commercially unsophisticated, and in fact both had extensive experience in the real estate development business, both as builders and borrowers.[9]

Finally, EWLP at all times had available to it legal advice such that its free will was reasonably and vigorously protected. In Delaware, "the availability of disinterested advice" is a consideration in analyzing whether a threat broke the will and caused the assent of the aggrieved party.[10] In this case, Mr. Levinson and Mr. Martin were represented by competent counsel at every turn, and both men discussed each of the three releases during each of the negotiation proceedings for the Second, Third, and Fourth Amendments.

2. DURESS **- NO ADEQUATE LEGAL REMEDY AVAILABLE**

[9] See Sabatoro Constr. Co. **at *4 (denying a duress claim and noting that plaintiff was commercially sophisticated party);** E.I. Du Pont de Nemours at *4 (ruling that defendant's economic duress claim failed as a matter of law in part because defendant was a "sophisticated commercial party").

[10] Cianci at *10.

In economic duress analysis, "[t]he third prong focuses on whether the coercive conduct creates or takes advantage of an exigent circumstance such that the victim could not reasonably be expected to resist and seek legal relief to protect his interests."[11] Further, "[a] threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it."[12]

Because I have already concluded that the releases are not voidable due to economic duress, it is unnecessary to for me to consider the question of whether Plaintiffs' claim satisfies the last element of the defense of duress.[13]

The Court finds, as a matter of law, economic duress was not employed here. Accordingly, the Court must award judgment as a matter of law to the Defendant.

3. WSFS'S COUNTERCLAIM FOR BREACH OF CONTRACT

Defendant has filed a counterclaim against Plaintiffs for breach of contract, based on Plaintiffs filing of this lawsuit in contravention of Plaintiffs' contractual promises not to sue under the three releases.

A release is a type of a contract.[14] In this case, the consideration for the three releases was Plaintiffs' surrender of all claims and causes of action in exchange for the Defendant's

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[11] Cianci at *9.

[12] Id. (citing Restatements (Second) of Contracts, § 175, cmt. b. (1981)).

[13] Cianci at *11.

[14] E.I. Du Pont de Nemours and Co. v. Florida Evergreen Foliage, Del. Supr., 744 A.2d 457, 462 (1999).

repeated extension of the loan relationship with Plaintiffs. Defendant bargained for and relied on Plaintiffs' promises not to sue. By the institution and maintenance of this action, Plaintiffs are in breach of the contracts to release Defendant from liability.

Accordingly, the Court awards judgment in favor of the Defendant's counterclaim for breach of contract. Plaintiff is ordered to pay the costs and expenses, including attorneys' fees, incurred by the Defendant in this lawsuit.

IV. CONCLUSION

For the foregoing reasons, Defendant WSFS's Motions for Summary Judgment are **GRANTED.**

IT IS SO ORDERED.

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Judge John E. Babiarz, Jr.

JEB,jr/SR/BJW
Original to Prothonotary