IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

MICHAEL LIBERTO,	)	SCIRE FACIAS SUR LE MORTGAGE
	)	
Plaintiff,	)	C.A. No. K10L-02-102 JJC
	)	
v.	)	Tax Map: SM-00-129.00-04-23.00-000
	)	
McKELVIN G. GILBERT,	)	Mortgage Book Re: VL-4223 PG-171
	)	VL-5221PG-93
Defendant.	)	
	)	IN PERSONAM ACTION
	)	Affidavit of Demand

Submitted: October 19, 2015
Decided: December 4, 2015

DECISION AFTER TRIAL ON THE MERITS

Michael G. Rushe, Esquire, Hudson, Jones, Jaywork and Fisher, LLC, Dover, Delaware for Plaintiff.

McKelvin G. Gilbert, *Pro se*.

Clark, J.

I. INTRODUCTION

Michael Liberto (hereinafter "Plaintiff") sued McKlevin B. Gilbert (hereinafter "Defendant") for breach of contract seeking $50,000, plus costs, interest, and attorney's fees. Defendant's primary defense is that his now concluded bankruptcy proceeding bars Plaintiff's claim. If the bankruptcy does not bar the claim, the parties also dispute whether Plaintiff is entitled to the face value of the note or is limited to the amount Plaintiff actually paid Defendant's creditor. For the reasons that follow, after trial, the Court finds in favor of Plaintiff and awards $50,000 in damages plus contractual interest, costs, and attorney's fees as provided in the note and mortgage. Plaintiff's request for additional attorney's fees compensating Plaintiff's attorney for lost opportunity because of a rescheduled trial date, however, is denied.

II. BACKGROUND AND FINDINGS OF FACT

The Court held a bench trial on October 16, 2015. The following reflects the Court's findings of fact. On December 7, 2004, Defendant filed a Chapter 13 bankruptcy petition. The bankruptcy plan required Defendant to resume payment of his mortgage directly as of January 1, 2005. By December 20, 2007, Defendant accumulated post-petition arrearage to his pre-petition mortgage in the amount of $19,190.41. On December 20, 2007, Defendant and Fast Cash Realty, LLC entered a contract designed to save Defendant's home from foreclosure.

The agreement provided that Plaintiff was to pay the foreclosing bank $19,190.41. In exchange, Defendant was to sell his home to Plaintiff either for the amount of the payoff of the first mortgage, or $100,000, whichever was less. This agreement provided that Defendant would still live in the house and pay rent to Plaintiff until Defendant could afford to re-purchase his home for a "discounted price."

To secure Plaintiff's interest in the home, Defendant signed a note and mortgage in the face value of $50,000 that was to be repaid without interest by no later than January 1, 2009. The face value of the $50,000 note was not advanced to Defendant. Rather, Plaintiff paid $19,190.41 to the foreclosing bank to keep Defendant's home out of foreclosure. Plaintiff testified unrebutted at trial that the $50,000 note and mortgage's purpose was to approximate his expected profit from the deed in the event the property was not transferred as promised. The note further provided that if Defendant were to default, interest would be due at a rate of ten percent (10%) per annum from the date of default.

Defendant neither transferred the land or paid Plaintiff the $50,000. Fast Cash Realty, LLC assigned its rights to the mortgage and note to Plaintiff on November 24, 2009. Plaintiff then filed suit on February 23, 2010. On September 8, 2010, Defendant was discharged after the completion of his Chapter 13 bankruptcy plan.

Defendant, as his only absolute defense, argued that the note and mortgage were void because Defendant was in Chapter 13 bankruptcy at the time the note and mortgage were created. Plaintiff, in response, argued that the note and mortgage were only voidable, not void. Defendant argued in the alternative that if bankruptcy did not bar Plaintiff's claim, then the amount due should not exceed the $19,190.41 actually paid by Plaintiff on Defendant's behalf.

III. STANDARD OF REVIEW

In a bench trial, the Court is the "finder of fact and the parties must prove the elements of each claim by a preponderance of the evidence. Thus, the Court shall find in favor of the party upon whose side the greater weight of the evidence is found."[1]

[1] *Pouls v. Windmill Estates, LLC,* 2010 WL 2348648, at *4 (Del. Super. June 10, 2010)

Furthermore, "[b]ecause the Court is the finder of fact, it is up to the Court to weigh the credibility of witnesses and resolve conflicts in witness testimony."[2]

IV. DISCUSSION

Three issues are presented in this case. First, the Court must determine whether Defendant's bankruptcy voided the debt in question making it unenforceable. Second, if the debt is enforceable, the focus turns to whether Plaintiff is entitled to the benefit provided to Defendant or the face value of the signed note and mortgage. Finally, if judgment on behalf of the Plaintiff is appropriate, Plaintiff's claim for attorney's fees remain. For the reasons below, the Court finds that the bankruptcy proceedings in this case have no effect on the enforceability of the debt owed to Plaintiff. The Court further finds that Plaintiff is entitled to payment of the face value of the note, interest at ten percent (10%) per annum running from the date of the breach, and attorney's fees in the amount of twenty percent (20%) of the face value of the note and mortgage.

A. Defendant's bankruptcy action has no effect on the enforceability of the debt at issue here.

When an individual files for bankruptcy, a bankruptcy estate is created that encompasses every conceivable interest of the debtor, to which an uninterested trustee is assigned.[3] This trustee oversees and administers the assets of the estate.[4] A petition for bankruptcy "automatically stays any claims against the individual or their

---

[2] *Masterson-Carr v. Anesthesia Servs.*, 2015 WL 5168557, at *3 (Del. Super. Aug. 28, 2015)

[3] *Wells Fargo Bank, N.A. v. 1401 Condominiums Ass'n*, 2015 WL 1730932, at *2 (Del. Com. Pl. Mar. 24, 2015).

[4] *Id.*

property."[5] The automatic stay prohibits "any act to create, perfect, or enforce any lien against property of the estate."[6] The primary function of this stay is "to protect the assets of the estate for the benefit of creditors, so that an equitable distribution according to the statutory scheme can be affected. Upon dismissal, the need for this protection is eliminated."[7] Here, the Defendant executed the note and mortgage in 2007 during the Chapter 13 automatic stay. This post-petition debt was never identified in the plan or raised by either party in the bankruptcy proceedings.

The Superior Court examined this same issue in *Lewes Dairy, Inc. v. Walpole* and decided that a violation of an automatic stay makes the debt voidable, but not void.[8] In *Lewes Dairy*, the Court held that if the bankruptcy court did not take action to void the debt during its proceedings, then the debt survives the bankruptcy.[9] Furthermore, the Bankruptcy Code provides that at the completion of a debtor's payments under the plan, the bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title...".[10] In order to qualify for this discharge, a proof of claim must be filed by either party, which then is allowed or disallowed.[11] A debt that is not discharged survives

---

[5] Krapf Homes, LLC v. Sykes, 2009 WL 2007153, at *1 (Del. Super. June 30, 2009).

[6] *Id.*

[7] *Lewes Dairy, Inc. v. Walpole*, 1996 WL 111130, at *4 (Del. Super. Jan. 5, 1996).

[8] *Id.*

[9] *Id.* at *5

[10] 11 *U.S.C.A.* § 1328

[11] 11 *U.S.C.A.* § 501-02

bankruptcy and is enforceable and collectible.[12]

In the case at bar, Plaintiff and Defendant entered into an agreement that created post-petition debt for the Defendant. This note and the mortgage placed on the home potentially violated Chapter 13's automatic stay protection, as in *Lewes Dairy*. Like in *Lewes Dairy*, the debt was not voided during the bankruptcy proceedings, and the petition has since been dismissed and the case closed. Neither Defendant nor Plaintiff filed a claim or raised the issue of the debt during the bankruptcy proceedings. Consequently, the note and mortgage in this case were not affected by Defendant's bankruptcy proceedings and remain valid and enforceable.

B. Plaintiff is entitled to recover the face value of the note.

A note and a mortgage are written agreements binding a party to pay an amount certain. "In Delaware, the formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and consideration."[13] Furthermore, "a contract must contain all material terms in order to be enforceable."[14] If the contract is clear on its face as to its terms, and not ambiguous, the Court should rely solely on the clear, literal meaning of the words.[15] "Ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its

---

[12] *Chrysler Financial Corp. v. Fruit of the Loom*, 1993 WL 19659, *5 (Super. Ct. Jan. 12, 1993).

[13] *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006)

[14] *Id.*

[15] *Beal Bank, SSB v. Lucks*, 2001 WL 220252, at *3 (Del. Ch. Feb. 20, 2001)

meaning depends."[16]

In this case, the Plaintiff and Defendant entered into an agreement in which Plaintiff provided a benefit to the Defendant by paying Defendant's creditor. The Court finds the term of the agreement to be clear. Namely, the Defendant agreed to transfer his property to Plaintiff for (1) the lesser of $100,000 or the mortgage payoff amount owed to the bank, or in the alternative (2) to pay Plaintiff the sum of $50,000. There was no issue raised in either the pretrial stipulation or at trial contesting the Defendant's refusal to transfer the land at issue for the agreed consideration. The terms on the face of the note and mortgage are clear and do not present any ambiguity as to an obligation of payment. Since Defendant raised no defense other than the fact that this debt was created while he was in bankruptcy proceedings, the Court is bound to rely on the plain language of the terms in the note and mortgage. Based on the plain language of the documents, Plaintiff is entitled to the face value of the note and mortgage, in the amount of $50,000 and costs and interest as provided in those documents.

C. Attorney fees are granted in part, and denied in part

An attorney is entitled to reasonable attorney's fees and shall not charge or collect an unreasonable fee or amount for expenses.[17] By statute, "a mortgage holder who recovers judgment against the mortgagor may recover "reasonable" counsel fees provided that those fees do not exceed twenty percent (20%) of the amount adjudged for principal and interest."[18] Attorney's fees falling within the twenty percent limit

---

[16] *Id.*

[17] DE RPC 1.5.

[18] *In re Watson*, 384 B.R. 697, 706 (Bankr. D. Del. 2008) (citing 10 *Del. C.* § 3912).

are presumed reasonable.[19] Defendant bears the burden of rebutting the reasonableness of the fee.[20] If the reasonableness of the fee is objected to or rebutted by the Defendant, the agreed upon counsel fee will be subject to the control of the court to permit a reasonable sum measured by the facts and circumstances of the case.[21]

Here, Plaintiff is requesting attorney's fees in the amount of twenty percent (20%) of the judgment for principal and interest, as well as $225.00 for attending Defendant's motion to withdraw as counsel hearing, and $500.00 as compensation for moving a trial date on short notice. Attorney's fees of twenty percent (20%) were expressly provided for in the agreement between Plaintiff and Defendant. Defendant did not object to this provision, nor did he rebut the reasonableness of the claimed amount at trial. Therefore, attorney's fees of twenty percent (20%) of the note value and interest are recoverable. Plaintiff's request for $225.00 for attendance at a motion is subsumed within the contractual twenty percent (20%). Finally, Plaintiff's counsel's request for an additional five hundred dollars in fees based on lost opportunity due to a trial continuance is denied.

V. CONCLUSION

For the foregoing reasons, this Court finds in favor of Plaintiff and awards $50,000 plus pre-judgment interest at ten percent per anum running from January 1, 2009 until the time of judgment, together with attorney's fees in the amount of twenty percent of the judgment, and costs. Plaintiff's counsel shall submit a form of order

---

[19] *Id.*

[20] *Id.*

[21] *Petitions of Warrington*, 179 A. 505, 507 (Del. Super. 1935).

to this effect for entry as a final judgment.

SO ORDERED.

/s/ Jeffrey J Clark
Judge

JJC/dsc
Via File & ServeXpress & U.S. Mail
oc: Prothonotary
cc: Michael G. Rushe, Esquire
McKelvin G. Gilbert