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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Custom Homes by Via LLC et al,

No. CV 12-01017-PHX-FJM

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Plaintiffs,

ORDER

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vs.

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Bank of Oklahoma,

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Defendant.

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This is an action by a borrower (Custom) against a lender (Bank of Oklahoma or Bank) for breach of a loan agreement and for breach of the implied covenant of good faith and fair dealing inherent in every contract. The case was tried to the court without a jury.

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These are the court's findings and conclusions under Rule 52(a), Fed. R. Civ. P.

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I.

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In our Order of Oct. 25, 2013 (doc. 67) we granted summary judgment in favor of Custom on the liability portion of its claim for the failure of the Bank of Oklahoma to fund the May 27, 2008 draw request. All that remained of that claim was a determination of damages. The remaining claim to be tried included both liability and damages on Custom's claim that the Bank of Oklahoma failed to extend the maturity date to January 2009 even though all conditions for the extension had been satisfied.

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From the very beginning of the contact between Custom and the Bank of Oklahoma,

1 the Bank knew that the line of credit would extend to two years because it would take at least
2 that long for the Enclave project to be completed. In the words of Exhibit 62, the additional
3 12 months was to be “auto[matic].” An optimistic “quick estimate” of 19 months was given
4 to the Bank. Exhibit 59. The Bank was interested in offering a line of credit of \$4 million
5 for 12 months plus one 12 month extension as long as Custom was not in default, paid a fee,
6 and, if elected by the Bank, a reappraisal would reveal an 85% loan to value ratio. Exhibit
7 63.

8 On January 17, 2007, the parties entered into a binding loan agreement, Exhibit 28,
9 and accompanying promissory note, Exhibit 29, in which the Bank would lend \$1,908,250
10 for 12 months with an automatic extension of an additional 12 months if four conditions were
11 satisfied: (1) Custom gives the Bank written notice that it wants the extension, (2) Custom
12 pays a fee, (3) Custom is not in default, and (4), the Bank approves an updated appraisal on
13 the Enclave showing the 85% loan to value ratio. Exhibit 29 at 2. The appraisal is “as
14 defined in the Loan Agreement,” id., which is defined as an appraisal “ordered by the Bank.”
15 Exhibit 28 at 1. The collateral, however, was Gateway Norte, not the Enclave.

16 On September 28, 2007, 9 months into the first 12 month period, the parties amended
17 their contract to increase the loan amount to \$3,973,750, to provide working capital as well
18 as to fund infrastructure. Exhibit 27 at 5. The note was not modified to extend its term.
19 Either the Bank expected all \$3.9 million to be disbursed in 3 months or the Bank fully
20 expected to extend the term of the note at some point in the next 3 months. Obviously, the
21 Bank fully expected to extend the term. The funds were not limited to infrastructure. They
22 could be used for working capital.

23 The Bank knew all along that Custom wanted and needed the second year. The whole
24 course of dealings between the parties showed from beginning to end that the expectation
25 was for the second year. Why else did the Bank double the loan amount 9 months into the
26 first 12 months? Indeed, the Bank expected to do “the extension in Jan.,” Exhibit 136.
27 Custom asked for a second year and the Bank knew it. Exhibit 106.

28 On January 17, 2008, upon completion of the first year, the parties modified their

1 agreement to extend the term of the note to April 17, 2008. Exhibit 26. Both sides knew that
2 the project would not be completed in 3 months. Why such a piecemeal, short-sighted
3 approach? If the conditions had been satisfied to justify an extension at all, why for a period
4 that the Bank knew was insufficient to complete the project? Incredibly, the Bank did it
5 again on April 17, 2008, extending the loan term to June 1, 2008, for yet another piecemeal
6 45 days! Exhibit 25. It knew all along, in writing and otherwise, that Custom wanted the
7 second year. See, for example, Exhibit 106. The Bank failed to order an appraisal of the
8 correct property in time to satisfy itself, and yet claimed that the conditions for extension
9 under the note were not satisfied. The condition for an appraisal in the note referred to the
10 “Real Property,” defined in the Loan Agreement as *not* the “Secured Property.” Exhibit 28
11 at 2. And yet the Bank extended the term of the note by 45 days to get an appraisal on the
12 “Secured Property.” Exhibit 75. This was not even a condition of the extension. The Real
13 Property was the Enclave. The Secured Property was Gateway Norte. Even if an appraisal
14 on the Secured Property was a condition for the extension, the Bank did not even ask for an
15 appraisal until May 27, 2008, four days before the last extension was to expire. Exhibit 83.
16 The appraisal was at the Bank’s option. It can’t blame Custom for not satisfying the
17 condition.

18 To add insult to injury, the Bank was willing to extend the term for yet another 45
19 days, but at half the then existing loan amount. Exhibit 127.

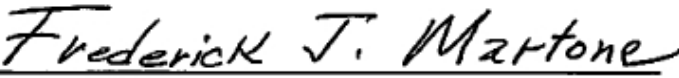
20 II.

21 The Bank had a contractual obligation to fund the loan for working capital. It had a
22 contractual obligation to extend the loan for a second year as long as the conditions were
23 satisfied. All conditions were satisfied. The Bank had written and oral notice all along.
24 Custom was ready, willing and able to pay the fee, if only the Bank identified the amount.
25 And the Bank had no right to condition the extension on an appraisal of anything other than
26 the Enclave. Even if the Bank had a right to condition the appraisal on Gateway Norte, the
27 Bank failed to exercise that right in a timely fashion. In essence, it waived its right. And,
28 of course, Custom was not in default.

1 lost—here, on the date of foreclosure. *Id.* (citation omitted). Given the rapidly falling
2 market, given the lack of confidence we have in any of the appraisals, we find the fairest
3 value to be that at which the Bank bid at foreclosure, \$2.1 million. And where, as here, the
4 breach causes the loan proceeds to be useless, no offset is warranted.

5 Accordingly, we find in favor of Custom and against the Bank of Oklahoma in the
6 amount of \$2,404,193.58. The clerk shall enter final judgment in favor of plaintiffs in this
7 amount. It is further ORDERED DENYING all pending motions for directed verdict.

8 DATED this 23rd day of December, 2013.

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11 **Frederick J. Martone**
12 **Senior United States District Judge**

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