

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CIT SMALL BUSINESS LENDING
CORPORATION, a Delaware
corporation,

09-CV-400-BR

Plaintiff,

OPINION AND ORDER

v.

PAIN ASSOCIATES, P.C., dba
Oregon Pain Associates, an
Oregon professional
corporation; and CARL C.
BALOG, individually,

Defendants.

WILLIAM H. MARTIN
Gleaves Swearingen Potter & Scott, LLP
975 Oak Street
Suite 800
P.O. Box 1147
Eugene, OR 97440-1147
(541) 686-8833

Attorneys for Plaintiff

1 - OPINION AND ORDER

DONALD J. CHURNSIDE

Gaydos Churnside & Balthrop, PC
440 East Broadway
Suite 300
P.O. Box 1499
Eugene, OR 97401
(541) 343-8060

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Plaintiff CIT Small Business Lending Corporation's Motion for Summary Judgment (#21). For the reasons that follow, the Court **GRANTS** CIT's Motion.

BACKGROUND

On April 28, 2006, CIT loaned \$523,000 to Defendant Pain Associates, P.C., pursuant to a Loan Agreement and Note.

The Loan Agreement and Note provided in pertinent part:

Maturity: This Note will mature in 120 months from date of the Note.

Repayment Terms:

The interest rate on this Note will fluctuate. The initial interest rate is 9.750 % per year. This initial rate is the prime rate on the date SBA received the loan application, plus 2.000%. The initial interest rate must remain in effect until the first change period begins.

* * *

Borrower must pay principal and interest payments of \$6,840.00 every month, beginning 2 month(s) from the month this Note is dated;

payments must be made on the first calendar day in the months they are due.

Lender will apply each installment payment first to pay interest accrued to the day Lender receives the payment, then to bring principal current, then to pay any late fees, and will apply any remaining balance to reduce principal.

The interest rate will be adjusted every calendar quarter (the "change period").

The "Prime Rate" is the prime rate in effect on the first business day of the month in which an interest rate change occurs, as published in the Wall Street Journal on the next business day.

The adjusted interest rate will be 2.000% above the Prime Rate. Lender will adjust the interest rate on the first calendar day of each change period. The change in interest rate is effective on that day whether or not Lender gives Borrower notice of the change. The initial interest rate must remain in effect until the first change period begins.

* * *

Late Charge: If a payment on this Note is more than 15 days late, Lender may charge Borrower a late fee of up to 5% of the unpaid portion of the regularly scheduled payment.

* * *

DEFAULT

Borrower is in default under this Note if Borrower does not make a payment when due under this Note.

* * *

LENDER'S RIGHTS IF THERE IS A DEFAULT

Without notice or demand and without giving up any of its rights, Lender may:

- A. Require immediate payment of all amounts owing under this Note;
- B. Collect all amounts owing from any Borrower or Guarantor;
- C. File suit and obtain judgment;
- D. Take possession of any Collateral or
- E. Sell, lease, or otherwise dispose of, any Collateral at public or private sale, with or without advertisement.

Compl., Ex. 2 at 2-3.

Pain Associates also gave CIT a purchase-money security interest in a number of Pain Associates' assets pursuant to a Security Agreement. CIT perfected the Security Agreement by filing Financing Statements with the Oregon Secretary of State.

On April 28, 2006, Defendant Carl C. Balog also signed an Unconditional Guarantee in which he personally guaranteed

payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.

Compl., Ex. 6 at 1.

On September 1, 2008, Pain Associates failed to make the payment due under the Loan Agreement and Note. CIT demanded payment from Pain Associates and Balog and ultimately accelerated the balance due date on the Note.

On April 17, 2009, CIT filed an action in this Court seeking

(1) a judgment in favor of CIT against Pain Associates in the amount of \$444,574.71 plus interest and late charges, (2) a judgment against Balog in the amount of \$444,574.71 plus interest and late charges, (3) a declaration that CIT's security interest reflected in the Security Agreement constitute "valid and superior liens for the foregoing sums of money on" the assets secured by the Security Agreement, (4) a declaration that the Security Agreement is foreclosed and the assets noted in the Security Agreement are to be sold by the Multnomah County Sheriff, (5) authorization to have a Writ of Execution issued directing the Multnomah County Sheriff to take the assets noted in the Security Agreement into custody for sale, and (6) an order directing the proceeds of the sale to be applied in the manner set out by CIT.

CIT seeks summary judgment on all of its claims.

STANDARDS

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the

pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9th Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9th Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller*

Prod., Inc., 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

Defendants do not dispute their liability under the Loan Agreement and Note and Guarantee. Nevertheless, Defendants contend summary judgment is precluded because material issues of fact exist as to how Defendants' payments were credited and the interest rate that CIT used to determine the amount Defendants owe under the various agreements. Defendants also state they have submitted an Offer in Compromise to the Small Business Administration (SBA), and the SBA could pay some of Defendants' obligations. Thus, the amount Defendants owe under the various agreements may be less than CIT seeks.

I. A genuine issue of material fact does not exist as to the manner in which Plaintiff calculated the amount that Defendants owe under the various agreements.

As noted, Defendants contend summary judgment is precluded because material issues of fact exist as to how Defendants' payments were credited and the interest rate that CIT used to determine the amount Defendants owe under the various agreements.

As CIT notes, however, the Loan Agreement and Note specifically set out the manner in which interest is calculated:

The interest rate on this Note will fluctuate.

The initial interest rate is 9.750 % per year. This initial rate is the prime rate on the date SBA received the loan application, plus 2.000%. The initial interest rate must remain in effect until the first change period begins.

* * *

The interest rate will be adjusted every calendar quarter (the "change period").

The "Prime Rate" is the prime rate in effect on the first business day of the month in which an interest rate change occurs, as published in the Wall Street Journal on the next business day.

The adjusted interest rate will be 2.000% above the Prime Rate. Lender will adjust the interest rate on the first calendar day of each change period.

Compl., Ex. 2 at 2. The Loan Agreement also provides in pertinent part: "Lender will apply each installment payment first to pay interest accrued to the day Lender receives the payment, then to bring principal current, then to pay any late fees, and will apply any remaining balance to reduce principal."

Compl., Ex. 2 at 2. CIT asserts it applied Defendants' payments as set out in the agreements and Defendants received monthly statements informing them of how their payments were applied and the remaining balance on the loan. In addition, CIT filed a Payment History Report detailing all of Defendants' payments, the dates on which they were made, the portion of the payment that went to principal and the portion that went to interest, fees, the principal balance, and the applicable interest rates applied from May 2006 through February 2008. Decl. of Barry Sullivan,

Ex. 1 at 1-2.

Defendants do not point to any evidence in the record that supports its contention that CIT improperly applied Defendants' payments, charged Defendants an improper amount of interest, or improperly calculated the amount of principal remaining on the loan.

On this record, the Court concludes Defendants have not established a genuine issue of material fact exists as to the manner in which Plaintiff calculated the amount that Defendants owe under the various agreements.

II. Defendants' Offer of Compromise to the SBA does not create a genuine issue of material fact.

In their Response to Plaintiff's Motion, Defendants contend they submitted an Offer in Compromise to the SBA. According to Defendants, the SBA will pay a portion of Defendants' debt to CIT if the SBA accepts Defendant's Offer. Defendants, however, fail to include any terms of their offer to the SBA, and the record does not reflect the SBA has accepted Defendants' offer. Defendants, therefore, have not established they do not owe CIT the full amount demanded by CIT nor have they established a genuine issue of material fact exists that precludes summary judgment.

Accordingly, the Court grants Plaintiff's Motion for Summary Judgment.

CONCLUSION

For these reasons, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (#21). The Court **DIRECTS** Plaintiff to submit a form of Judgment that includes the condition that if the SBA pays CIT any portion of Defendants' debt, CIT will reduce Defendants' debt by that amount and refund any overpaid amounts to Defendants.

IT IS SO ORDERED.

DATED this 18th day of December, 2009.

/s/ Anna J. Brown

ANNA J. BROWN
United States District

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IT IS SO ORDERED.

DATED this 18th day of December, 2009.

/s/ Anna J. Brown

ANNA J. BROWN
United States District