

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-RE-14-01 ✓

OCEANIC INN, INC. and ARMAND VACHON,)
)
Plaintiffs,)
)
v.)
)
SLOAN'S COVE, LLC,)
)
Defendant)
)
and)
)
PETER FESSENDEN, Chapter 13 Trustee, and JEFF CORBIN)
)
Parties-in-Interest)
)

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
REGARDING PLAINTIFF'S ACCOUNTING CLAIM

The Motion for Summary Judgment filed by Defendant Sloan's Cove, LLC ["Sloan's Cove"] regarding Count IX-Action for Accounting of the Plaintiffs' Complaint is before the court, together with the Plaintiffs' opposition and Sloan's Cove's reply memorandum. The court elects to decide the Motion without oral argument, *see* M.R. Civ. P. 7(b)(7).

The parties agree that, in context, the Plaintiffs' claim for an accounting is simply a claim for justification of any and all amounts claimed and/or received by Sloan's Cove in connection with the Note and Mortgage, as modified by the Allonge and Modification Agreement ["the Allonge"] between Sloan's Cove and Plaintiff Armand Vachon, now held by Sloan's Cove and the power of sale foreclosure conducted by Sloan's Cove of the Oceanic Inn property owned by Mr. Vachon.

The Note was originally given in January 2006 by Proulx Real Estate Investment Limited Liability Company [“Proulx Real Estate”], an entity controlled by Mr. Vachon’s mother and stepfather, to TD BankNorth, N.A. [“TD”]. The Note was secured by mortgages given by Proulx Real Estate Investment Company and Plaintiff Oceanic, Inn, Inc. In November 2009, TD assigned its rights under the Note and mortgages to Sloan’s Cove. Around the same time, Sloan’s Cove as the lender’s assignee and Mr. Vachon entered into the Allonge and Modification Agreement. By virtue of the Allonge, which is dated November 12, 2009, Mr. Vachon agreed to assume the borrower’s obligations on the Note, as modified by the Allonge. The mortgages remained in place.

The underlying facts culminating in Sloan’s Cove’s sale of the Oceanic Inn property through a power of sale foreclosure are summarized in detail in the court’s Order on Amended Motion for Summary Judgment of Defendant Sloan’s Cove dated October 15, 2014. That summary is incorporated by reference here rather than being repeated.

Sloan’s Cove claims that it is entitled to recover and retain the following amounts against Mr. Vachon:

- \$284,500 reflecting the principal balance due on the Note. This is the same amount that the Allonge between Sloan’s Cove and Mr. Vachon identifies as the outstanding balance due as of the date of the Allonge, November 12, 2009.
- Accrued interest on the Note at both a regular interest rate and a default interest rate
- Attorneys fees and costs of collection
- \$2,990 for “insurance reimbursement” alleged to be due to Sloan’s Cove under a settlement agreement between it and Mr. Vachon

Mr. Vachon disputes all of these claims except that for the principal amount due.

The remaining three are addressed in the order just stated. Because Sloan's Cove's Motion seeks summary judgment, Sloan's Cove must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See* M.R. Civ. P. 56.

1. *Sloan's Cove's Interest Claim*

The Note given by Proulx Real Estate to TD called for an "interest rate" of 7.47% annually and a "default interest rate" of 6% annually over and above "the rate of interest otherwise payable." The Allonge includes the following pertinent provisions:

2. Terms of Note. The Lender and the Borrower hereby agree to modify the terms of the Note as follows:

(a) *Amount . . .*

(b) *Interest:* Interest under the Note shall accrue on the amount specified in subparagraph (a), or such other amount as may be outstanding under the terms of the Note from time to time after the effective date, at the rate per annum equal to the Wall Street Journal Prime Rate plus three percent (3%), adjusted monthly.

(c) *Payment Schedule: . . .*

(d) *Payment Address . . .*

3. No Other Modifications. The Borrower and the Lender hereby agree that the indebtedness evidenced by the Note, as modified hereby, shall be and hereby is the same indebtedness evidenced by said Note, and this Allonge represents a modification and renewal of the original indebtedness evidenced under the Note and the Security Documents and is not a novation. The Note shall otherwise remain unmodified, and the Borrower hereby affirms its obligations under the Note and stipulates that the Note as modified by this Allonge is in full force and effect and that there are no offsets or defenses with respect to the amounts outstanding and due hereunder.

The dispute relating to Sloan's Cove's claim for interest on the Note centers on the fact that the default interest provisions of the Note are omitted from the above-quoted interest provision at section 2(b) of the Allonge. Mr. Vachon construes section 2(b) of the Allonge to replace the interest provisions of the Note, whereas Sloan's Cove asserts that section 2(b) only modifies the regular interest rate due under the Note and leaves the default interest provision unchanged.

Neither party's filings contend that the omission of any reference to default interest in the Allonge is ambiguous. The court agrees: the Allonge is by no means ambiguous—it clearly provides for interest on the Note to accrue at prime plus 3%, and it clearly contains no reference to, or provision for, default interest. In other words, there is no ambiguity regarding default interest on the face of the Allonge; any ambiguity arises only when the interest provision in the Allonge is compared to the counterpart provision in the Note.

Moreover, even to the extent that comparison is deemed to raise an ambiguity that could be resolved by extrinsic evidence, neither party has proffered any extrinsic evidence to resolve it. Sloan's Cove's filings include an affidavit from its principal, Pauline Beale, and Mr. Vachon's opposition includes his own affidavit, but neither addresses the question of what was intended by the Allonge modification of the Note interest provisions.

Sloan's Cove's interpretation finds some support in the fact that the Note contains two headings relating to interest: "Interest Rate" and "Default Interest Rate," whereas the Allonge purports to modify "interest" but not "default interest."

Sloan's Cove also points to the section 3 "No Other Modifications" provision in support of its argument that the modification of "interest" does not include default interest. Sloan's Cove notes that section 3 recites that the Allonge effectuates a modification, not a novation. However, the interest provisions of the Note could be modified to eliminate default interest without constituting a novation. Ultimately, the "No Other Modifications" provision begs the question presented here.

Mr. Vachon's interpretation finds strong support in the fact that the Allonge is clear within its four corners, in providing for "[i]nterest under the Note" to accrue at the stated prime plus 3% rate. Moreover, even were there deemed to be an ambiguity raised by comparing the interest terms of the Allonge with those of the Note, Mr. Vachon's

interpretation is further bolstered by what the Law Court has termed the “bedrock rule of contract interpretation [] that ambiguities in a document are construed against its drafter.” *Barrett v. McDonald Investments, Inc.*, 2005 ME 43, ¶17, 870 A.2d 146, 150, *citing* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12 at 471-72 (4th ed. 1999) (“Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.”). Mr. Vachon’s affidavit recites, without contradiction by Sloan’s Cove, that the Allonge was drafted by Sloan’s Cove’s counsel.

In *McDonald*, the court explained the justification for construing contracts against the drafter by quoting from its decision in *Monk v. Morton*, 139 Me. 291, 30 A.2d 17 (1943):

The rule that an ambiguous contract will be construed more strongly against him who uses the words concerning which doubt arises, is more than an arbitrary rule. Its purpose is to give effect to the intention of the parties. To the maker of an instrument is available language with which to adequately set forth the terms thereof. It is presumed that he will not leave undeclared that which he would claim as his right under the agreement; and the absence of a requirement against the obligee is evidence that such requirement was not within the understanding of the parties. He who speaks should speak plainly, or the other party may explain to his own advantage.

Id. at 295-96, 30 A.2d at 19 (quotation marks omitted).

The fact that the Allonge modifies the Note by defining “interest under the Note” without reference to default interest is evidence, as stated in the *Monk* opinion, “that such requirement was not within the understanding of the parties.” *Id.*

For all of the above reasons, the court construes the Allonge to entitle Sloan’s Cove to interest at the only rate specified in the Allonge—prime plus 3% interest. This outcome makes it unnecessary to address Mr. Vachon’s alternative arguments against default interest—that Sloan’s Cove never effectively triggered it, and that it is an unenforceable penalty.

2. Sloan's Cove's Claim For Attorney Fees and Costs

Mr. Vachon presents two primary arguments against Sloan's Cove's claim for attorney fees and costs. One is that the fees and costs attributable to Sloan's Cove's involvement in the first bankruptcy proceeding initiated by Oceanic Inn, Inc. should be excluded. The other is because the fees reflect "block billing" and duplicative effort on the part of Sloan's Cove's attorneys.

The first argument has facial plausibility because it was Mr. Vachon, not the debtor in bankruptcy, Oceanic Inn, Inc., who owned the property that Sloan's Cove ultimately foreclosed upon. However, Oceanic Inn, Inc. identified itself as the owner of the mortgaged property, and Oceanic Inn, Inc. had given the original mortgage securing the Note. Thus, at a minimum, Sloan's Cove would likely have needed to obtain relief from the automatic stay in order to proceed with the power of sale foreclosure. Also, as Sloan's Cove points out, Mr. Vachon bears at least partial responsibility for the confusion about which entity owned the property ultimately foreclosed on because he identified Oceanic Inn, Inc. as the owner.

The court concludes that Sloan's Cove should be entitled to recover some, but not all of the attorney fees it incurred in the first Oceanic bankruptcy proceeding, and also concludes that Sloan's Cove's is not entitled to recover all fees incurred by all attorneys and other timekeepers who worked on the matter over its entire course. The court awards Defendant \$59,000 in attorney fees based on the contractual entitlement contained in the Allonge and Modification Agreement, together with all costs requested by Defendant. Oceanic's and Mr. Vachon's other objections to fees do not require separate discussion.

3. Sloan's Cove's Claim for Insurance Reimbursement

In addition to its claim for attorney fees, costs and interest, Sloan's Cove has claimed \$2,990 allegedly due to it from Mr. Vachon pursuant to a settlement agreement. Mr. Vachon

disputes the claim. The court does not view this claim as being within the scope of the accounting, which addresses the foreclosure. The Comprehensive Settlement Agreement is not before the court, and, as noted above, the court has always understood the accounting to be limited to the amounts claimed by Sloan's Cove under the note and mortgage as modified by the Allonge. Were the court to consider the insurance reimbursement claim on its merits, it would deny summary judgment to either party. However, because the court does not view the claim as being within the scope of this case, the court is dismissing the claim and thus making no determination of any kind on the merits of the claim. As a result, this order constitutes a final, appealable order as far as the court is aware because it adjudicates all claims within the scope of the case that remained pending after the previous summary judgment ruling.

IT IS ORDERED, ADJUDGED AND DECLARED AS FOLLOWS:

1. The Motion for Summary Judgment filed by Defendant Sloan's Cove, LLC regarding Count IX-Action for Accounting of the Plaintiffs' Complaint is hereby granted in part, and otherwise denied. A comprehensive Judgment on all claims is being entered separately.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated January 2, 2015



A. M. Horton, Justice

Entered on the Docket: 1/5/15
Copies sent via Mail Electronically