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SOUTH STREET MORRISTOWN LLC, Plaintiff, vs. SOUTH & HEADLEY ASSOCIATES, LTD., and HAROLD I. WACHTEL, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-5463-12 CIVIL ACTION OPINION

Argued: March 6, 2015
Decided: March 31, 2015

Honorable Robert C. Wilson, J.S.C.

Christopher M. Hemrick, Esq., appearing for Plaintiff South Street Morristown, LLC (Connell Foley LLP; Stephen V. Falanga, of counsel).

William J. Pinilis, Esq., appearing for Defendant Harold I. Wachtel (Pinilis Halpern LLP).

Gregory J. Cannon, Esq., appearing for Defendant South & Headley Associates, Ltd. (Berger & Bornstein, P.A.).

FACTUAL BACKGROUND

THIS MATTER arises out of a dispute concerning a note and commercial mortgage entered into between Columbia Bank, predecessor-in-interest to the Plaintiff South Street Morristown, LLC (hereinafter referred to as "SSM"), and Defendants, South & Headley Associates, Ltd.[1] (hereinafter referred to as "SHA") and Harold I. Wachtel (hereinafter referred to as "Wachtel" or "Mr. Wachtel") on September 23, 2005. The security for the underlying

[1] South & Headley Associates, Ltd. filed for protection under Chapter 11 of the U.S. Bankruptcy Code. As such, the matter is stayed as regards defendant South & Headley Associates, Ltd., pursuant to 11 U.S.C. § 362(a). This motion is addressed only to defendant Harold Wachtel's liability under the parties' Guaranty.

mortgage loan is an office building located at 237 South Street, Morristown, New Jersey (hereinafter referred to as the "Property").

The Promissory Note dated September 23, 2005 (hereinafter referred to as the "Note") was in favor of Columbia Bank as consideration for and to secure a mortgage loan from Columbia Bank to SHA in the principal amount of $3,000,000, plus interest at a rate of 6.250% per annum payable in 119 monthly installments of principal and interest in the amount of $19,790.08, commencing November 1, 2005 and containing one final balloon payment for all outstanding principal, unpaid interest and all other applicable fees and expenses due and owing on October 1, 2015. Mr. Wachtel executed the Mortgage and Note on behalf of SHA as Managing Member of South & Headley GP, LLC, the General Partner of SHA.

The Mortgage and Note provide that the Borrower shall timely pay all taxes, assessments and other charges on account of the Property and required SHA to maintain the Property free of all liens having priority over or equal to the interest of SSM. Mr. Wachtel claims that these taxes and fees were to be paid from a tax escrow account as countenanced by the Note and Mortgage. The Mortgage and Note further provide that if SHA failed to perform the covenants and agreements in the Mortgage including the timely payment of taxes, assessments, and other charges on account of the Property, that SSM/Columbia Bank may disburse such sums as are necessary to satisfy the taxes, assessments or other charges and protect SSM's security interest. These amounts are added to the amount due on the Mortgage debt and secured by the Mortgage. The failure by SHA to perform any covenant or agreement contained in the Mortgage, including those aforementioned as well as water and sewer charges, constituted an event of default under the Note and Mortgage. Mr. Wachtel claims that the implied covenant of good faith and fair dealing limits Plaintiff's ability to declare default, and that it "did not have the unlimited right to

unreasonably declare an event of default in connection with an escrow account dispute that Columbia Bank created through its own inequitable conduct." Defendant Wachtel's Counterstatement of Material Facts, at ¶ 11.

As part of this mortgage and loan transaction, Columbia Bank and Mr. Wachtel entered into a Guaranty, which memorialized the agreement of the parties that Mr. Wachtel's obligation to personally guarantee the loan would be substantially reduced if the Township of Morristown confirmed that the lower level of the Property was legally usable office space. Mr. Wachtel guaranteed fifty percent of the amounts due from SHA to Plaintiff under the Note and Mortgage with a maximum liability in the principal amount of $1,500,000.00, plus all interest threon, plus all of Plaintiff's costs, expenses, and attorneys' fees. The Guaranty specifically provided that:

> Harold Wachtel shall guarantee 50% of the outstanding balance of the loan. The percentage will be reduced to 15% of the outstanding balance after the township of Morristown issues a final Certificate of Occupancy for the lower level of the subject property.

Mr. Wachtel contends that "[l]ess than two years after the closing of the underlying mortgage loan, by Resolution dated July 6, 2007, the Morristown Board of Adjustment affirmed the legality of the use and occupancy of the Property's lower level as office space." Defendant Wachtel's Brief in Opposition of Summary Judgment, p. 2 (citing the Certification of Harold I. Wachtel, Exh. B). "To that end, the Board of Adjustment passed a written Resolution." Id. For purposes of the instant motion, the Court notes that this resolution appeared to resolve that the lower level of the Property could continue to be rented. Mr. Wachtel further argues that "there was no need to obtain a 'final Certificate of Occupancy,'" as contemplated by the plain language of the Guaranty at issue herein.

In or about June 2012, a dispute arose between SHA and Columbia Bank regarding the amount of escrow payments that SHA was being required to make to Columbia Bank in

connection with the subject mortgage loan. SHA had successfully prosecuted a tax appeal which reduced the Property's real estate tax assessment, and thereupon sought a corresponding reduction in the monthly escrow payments due to Columbia Bank. Despite SHA's request for a reduction in these monthly escrow payments, Columbia Bank refused to consider a reduction in the amount of the escrow. Nevertheless, by letter dated July 17, 2012, SHA unilaterally remitted a reduced mortgage payment to Columbia Bank for the month of July 2012, reflecting the amount of taxes to be paid for the remainder of 2012, and again requested a reduction in its monthly escrow payments. Columbia Bank rejected this request and demanded full payments, late charges, and reimbursement for an additional $8,129.32 sewer utility payment made by Columbia Bank from SHA's escrow account. In August of 2012, Columbia Bank notified Defendants that it had performed an escrow analysis of SHA's mortgage loan. Notwithstanding the reduction in SHA's tax obligations, Columbia Bank demanded the full escrow payment of $7,958.20 for July and August of 2012, and agreed to reduce the remaining four monthly escrow payments for September through December of 2012 to $4,526.56 each. Furthermore, Columbia Bank dropped its request for reimbursement of the sewer utility payment. Mr. Wachtel contends that this arrangement still left SHA paying approximately $40,000 in tax escrow payments in excess of the year's obligations.

On September 28, 2012, Columbia Bank filed a Complaint for Foreclosure against SHA in the Morris County Superior Court. This action was filed based on SHA's failure to pay the entire tax escrow for July 2012, the month in which SHA had unilaterally reduced its escrow payment. On November 20, 2012, SHA filed an Answer and set forth certain affirmative defenses, including that Columbia Bank had violated the implied covenant of good faith and fair dealing. On May 13, 2013, Columbia Bank assigned the mortgage loan to SSM. Plaintiff SSM

was granted summary judgment in the foreclosure action, said judgment being currently on appeal before the Appellate Division.

On July 19, 2012, Columbia Bank filed its Complaint in this action, alleging that SHA defaulted upon the note and mortgage. Plaintiff contends that it is entitled to a judgment from Mr. Wachtel for 50% of the outstanding loan balance of the subject mortgage loan under the Guaranty. Mr. Wachtel argues that this contention flies in the face of the obvious intentions of the parties who negotiated the Guaranty. SHA initially defaulted by failing to make the payment due in July 2012, resulting in the filing of the Complaint. However, the July default was subsequently resolved between the parties. Immediately thereafter, however, SHA defaulted by failing to make the payment due in August of 2012, and has been in default ever since. No claim is made that this August 2012 payment, or any curative payment thereafter, was ever made.

As of July 31, 2014, the sum of $3,069,211.43 was claimed to be owed on the Note, including attorneys' fees accrued in connection with the prosecution of this action to collect on the debt.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if 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 challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. The New Jersey procedural rules state that a court shall grant summary judgment "if 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 challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

> "The determination whether there exists a genuine issue with respect to a material fact challenged requires the motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra at 523.

DECISION

This matter involves the interpretation and enforcement of a plainly written and unambiguous Note and accompanying personal Guaranty. The parties do not dispute the existence or enforceability of the Note itself, nor do they dispute the existence or enforceability of the Guaranty. Moreover, none of the material facts regarding default under the Note or liability under the Guaranty are in dispute. Mr. Wachtel, as Guarantor, opposes the instant motion with two arguments: first, that any default of the loan was wrongful and unreasonable; and second, that even if default did in fact occur, Mr. Wachtel is liable only for 15% of the total

indebtedness plus costs under the Note, and not 50% of those costs. The Court finds these arguments unpersuasive, and addresses each of them in turn.

I. Default Under the Note Unambiguously Occurred In Both July and August of 2012.

The parties do not dispute the existence of the Note, the validity of the Guaranty, or any of the other binding contractual terms. Rather, Defendant Wachtel contends principally that default was unreasonably declared by the Plaintiff and that, even if the default is legitimate, the Guaranty should only apply in the amount of 15% of the indebtedness, and not 50%. A companion foreclosure action filed in the Chancery Division has already been finalized, with the court therein finding that the Note and Mortgage were valid and enforceable; that there exists an indebtedness owed by SHA to the Plaintiff under the Note; and that SHA defaulted under the plain terms of the Note by non-payment.

The Court's mandate in this matter is clear. Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. See, e.g., Marini v. Ireland, 56 N.J. 130, 143 (1970) "A guaranty is a contract and must be interpreted according to its clear terms so as to effect the objective expectations of the parties." Housatonic Bank and Trust Co. v. Fleming, 234 N.J. Super. 79, 82 (App. Div. 1989). It is well settled that a cause of action against a guarantor of payment accrues immediately upon the default of the debtor. Silverman v. Christian, 123 N.J. Eq. 506, 560 (N.J. Ch. 1938); see also Crestar Mortg. Corp. v. Peoples Mortg. Co. Inc., 818 F. Supp. 816, 820 (E.D. Pa. 1993) ("an absolute guarantor of payment becomes liable when the primary debtor defaults").

Preliminarily, the Court addresses Mr. Wachtel's argument that this matter, which was filed in July of 2012, cannot properly be aimed at addressing damages due to a default occurring in August of 2012. To recount the pertinent facts, there was a July 2012 default, upon which this

action was first filed. That first default was cured between the parties. However, a second default occurred in August of 2012, and it is Plaintiff's contention that the matter has been in default ever since, with not a single payment forthcoming. There has never been a genuine question as to what monies were sought by prosecution of this action, or of the factual predicates for the cause of action. Defendant's raising of this issue at this late date is unavailing.

Mr. Wachtel further argues that Columbia Bank, the original lender, acted unreasonably by demanding escrow payments from SHA that were far in excess of what was needed to satisfy tax payments and other payments on account of the Property. First, the Court finds no evidence on the record before it to find that Columbia Bank acted unreasonably in setting the escrow amount to be paid for the amount that was established. Columbia Bank did ultimately agree to reduce the escrow obligations of SHA, beginning in September of 2012. SHA was notified of this fact by letter dated August 2, 2012. It is clear and undisputed that there was some controversy between the parties as to what the proper escrow payments were to be each month. That alone does not justify SHA's unilateral decision not to pay anything in August of 2012. If SHA's position was truly that the escrow payment was too high under the circumstances, SHA could easily have made the full payment of principal and interest, and reduced the amount of the payment to be contributed to escrow. No payment, either partial or in full, was ever made by SHA. Indeed, no payment has been made on this Note or Guaranty since July of 2012.

There is no dispute that defendant SHA is in default of its obligations under the Note. The idea that the declaration of default was wrongful is simply incredulous under these circumstances. If SHA were to make *any* payment in August of 2012 or thereafter, and to then argue that it was not truly in default, such an argument might raise a genuine dispute of material fact. However, there is simply *no* dispute that SHA has not paid *any* aspect of its Note

obligations for over two years. As such, the Court clearly finds that SHA is and was in default of the Note.

II. Mr. Wachtel's Liability Under the Commercial Guaranty Is Undisputed.

Mr. Wachtel, as Guarantor of the Note, argues that his liability pursuant to the Commercial Guaranty should be limited to 15%, instead of 50%, of the principal indebtedness. Mr. Wachtel further argues that he is not liable for any amount under the Guaranty insofar as he is entitled to a fair market value credit for the value of the Property, and that the Property is worth more than the outstanding balance under the Note, thus relieving him of any obligation under the Guaranty.

The construction and effect of a written instrument may be determined as a matter of law on summary judgment where the terms are clear and unambiguous. Mango v. Pierce-Coombs, 370 N.J. Super. 239, 256 (App. Div. 2004) (internal citations omitted). "It is of course not the province of the court to make a new contract or to supply any material stipulations or conditions which contravene the agreement[] of the parties." Marini, supra, 56 N.J. 130, 143. Extrinsic evidence of the situation of the parties and the surrounding context is not admissible for the purpose of altering the express terms of a written contract." See, e.g., Casriel v. King, 2 N.J. 45 (1949).

The plain and unequivocal terms of the Commercial Guaranty clearly and unambiguously dictate that Mr. Wachtel guaranteed 50% of the Note, with a maximum liability not to exceed $1,500,000, plus all interest and all of Plaintiff's costs, expenses, and attorneys' fees. The Commercial Guaranty only provides for a lower liability of 15% of the principal indebtedness "after the Township of Morristown issue[d] a final Certificate of Occupancy for the lower level of the subject property." Mr. Wachtel relies upon a June 6, 2007 Resolution of the Board of

Adjustment of the Township of Morristown for the proposition that the "ability to utilize the lower portion of the property" preexisted the Commercial Guaranty. Mr. Wachtel's reliance on this resolution is wholly misplaced, insofar as the plain language of the contract is undisputed and clear.

In 2014, Continuing Certificates of Occupancy were issued by the Township of Morristown for the lower level office space of the Property. Mr. Wachtel argues that these Continuing Certificates of Occupancy clearly constitute "Certificate[s] of Occupancy" that satisfy the condition of the Guaranty that reduces Mr. Wachtel's personal liability from 50% to 15%. As has been stated previously by this Court, the guarantor's liability arose at the moment of the default. SHA has been in default since August of 2012. The fact that, approximately eighteen to twenty-four months after default, a Certificate of Occupancy which *might*, arguably, satisfy the terms of the Guaranty was issued, does not obviate the liability of Mr. Wachtel under the clear and precise terms of the Guaranty. Defendant's suggestion that "there is a clear factual dispute as to the amount, if any, for which Mr. Wachtel is liable under the Guaranty" is erroneous. The facts implicating the terms of the Guaranty are undisputed, and there is no ambiguity in the Guaranty to warrant the consideration of extrinsic parol evidence such as what non-conforming Certificates of Occupancy might have satisfied the intent of the parties.

For the aforementioned reasons, Plaintiff South Street Morristown, LLC's Motion for Summary Judgment is **GRANTED**.