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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-000989 01/06/2015

HON. JOHN REA

CLERK OF THE COURT
L. Gilbert
Deputy

DOBSON BAY CLUB I I, D D, L L C, et al. BRIAN J POLLOCK

v.

LA SONRISA DE SIENA L L C MARK A HANSON

MINUTE ENTRY

Following trial on the remaining issue of default interest the Court took the matter under advisement. The Court has reviewed the testimony and exhibits and is prepared to rule.

Facts. The Plaintiffs are four limited liability companies that own four parcels of real estate, purchased in 2006 with a loan from Canadian Imperial Bank. (For the sake of simplicity this decision will refer to all four entities collectively as Dobson Bay.) The loan was a three year bridge loan that matured September 8, 2009. The 2008 financial crash left the borrowers unable to obtain a permanent loan and the parties negotiated an amendment to the loan that extended the maturity for another three years. The Amended Loan (ex. 3) was executed October 15, 2009, but was effective September 9, 2009. Although the loan had been in default for over a month when the Amended Loan was executed, the effective date of the Amended Loan meant that no default interest was included.

The payments on the first loan were interest only. In entering into the Amended Loan, CIBC required payments of principal and interest.

The maturity date of the Amended Loan was September 8, 2012. In the spring of 2012 Dobson Bay enlisted the aid of Kevin Mulvaney, a loan broker, to find a permanent loan to take

out CIBC. Unhappy with the terms of the possible loans Mr. Mulvaney discovered, Mr. Dayan approached CIBC in July with a request to either extend the Amended Loan or turn it into a permanent loan.

CIBC agreed to meet with Mr. Dayan but required him to sign a Discussion Agreement prior to the meeting. Mr. Dayan received and signed the Discussion Agreement (ex. 9).

On July 12, Mr. Dayan and Farhad Abolfathi met with Greg Kiely and Barry Wood of CIBC at the College Park property. Mr. Wood, a managing Director at CIBC, expressed interest in renewing the Loan for another three years with an interest rate of 4% and at a loan-to-value of 75% to 80%. This structure required an appraisal of the property.

Following the meeting Mr. Dayan sent an email to Mr. Wood and Mr. Kiely expressing appreciation for the offer to extend the Loan for another three years. Mr. Kiely responded on July 24, clarifying that CIBC had agreed "to enter into discussions to potentially modify the loan" under certain conditions.

After the July 24 email exchange, Dobson Bay stopped looking for other sources of refinancing and focused all their effort on the CIBC extension. CIBC knew this and phrased its communications with Dobson Bay in such a way to, in the words of La Sonrisa's expert Mr. Medigovich, "keep them engaged in the process." CIBC meanwhile retained Cushman and Wakefield to perform an appraisal of the properties.

On September 12, 2012, Sean Kelly of Cushman and Wakefield inspected the four properties with a representative of Dobson Bay. By that time the Loan had matured.

CIBC continued to keep Dobson Bay engaged in the process. An invoice from CIBC to Dobson Bay for the September 10, 2012, payment was for the regular monthly payment, without including default interest or the balloon payment. This was consistent with Mr. Kiely's instructions to continue with the regular monthly payments. On September 20, Mr. Kiely emailed Dobson Bay a draft of a 90 day Forbearance Agreement. Mr. Kiely told Dobson Bay that the loan extension was moving forward and to continue making the regular monthly payments. This was confirmed in CIBC's October 3, 2012, invoice for the October 10 payment.

CIBC continued to keep Dobson Bay engaged in the process through October by requesting real estate schedules from the guarantors. On October 22, Mr. Kiely sent Dobson Bay a Notice of Event of Default. Prior to sending it, Mr. Kiely told Dobson Bay that the notice was coming but said it was not a demand for full payment, to keep making the regular payments, and that CIBC was still reviewing the appraisal and the guarantors' real estate schedules.

In October CIBC and La Sonrisa began negotiations for the purchase of the Note by La Sonrisa. On November 1, 2012, CIBC sent Dobson Bay another invoice. Like its predecessors, this invoice did not demand the balloon payment or default interest.

CIBC gave Dobson Bay notice on November 28, 2012, that La Sonrisa had purchased the Note and related instruments. La Sonrisa quickly recorded a Notice of Trustee's Sale and took over management of the College Park property.

Dobson Bay immediately began searching for refinancing from other sources and was able to close on a new loan, sufficient to pay all undisputed and disputed amounts of the CIBC Note on March 5, 2013.

The contract documents. The 2006 Promissory Note (and related security instruments), the 2009 Amended Note, and the Discussion Agreement (the Forbearance Agreement does not appear to have been signed by both parties) all have relevant provisions. The Notes both have articles that call for default interest that is computed from the occurrence of an event of default until cure. The notes provide that the failure of Lender to exercise any option granted by the note does not constitute a waiver of the right to exercise the same option later. The acceptance of partial payment is not a waiver of any right.

The Discussion Agreement, which CIBC required Dobson Bay to execute before the July meeting at College Park, is clear and comprehensive. "All Discussions previously had, or which may occur, are without prejudice and will not be raised or disclosed in any present or future litigation . . .." Subsection b states that "neither the Discussion, nor any proposals (whether written or oral), correspondence, or documents of any kind generated during the period of and in connection with the Discussions . . . shall be binding upon the parties, or be raised, disclosed or admissible in any litigation for any purpose, nor shall the Discussions be used by the Obligors as a defense or counter-claim in any action."

Subsection c acknowledges that the Discussions "may be lengthy and complex" but no preliminary agreements are binding until Definitive Documentation "is duly executed and delivered by all appropriate parties with respect to all issues subject to the Discussions."

Subsection f states that no "action or inaction on the part of the Lender" shall constitute or represent a commitment or intention by Lender to "waive, modify, or forebear from exercising any of its rights, powers, privileges or remedies in respect of the Loan."

Dobson Bay's argument. Dobson Bay does not dispute the meaning of the default interest provision in the notes but contends that CIBC waived or is estopped from enforcing it. The facts supporting the argument are: CIBC did not charge default interest when the 2006 Note

was amended after the maturity date had passed. Mr. Kiely told Dobson Bay at the College Park meeting in July to continue making the regular monthly payments. Mr. Kiely told Dobson Bay after the maturity date passed that the Forbearance Agreement was not intended to demand the balloon payment and to continue making the same monthly payments. The three invoices sent to Dobson Bay after the maturity date did not include default interest.

Resolution. The statements made by Mr. Kiely and the invoices, all of which occurred after the execution of the Discussion Agreement, cannot be reasonably viewed as anything other than the "proposals (whether written or oral), correspondence, or documents of any kind generated during the period of and in connection with the Discussions" or the kind of "action or inaction on the part of the Lender" that shall not constitute a waiver or be binding or even be raised in any litigation for any purpose.

The cases cited by Dobson Bay deal with situations different from the application of the Discussion Agreement. *USF&G v. Powercraft*, for instance, involved the effect of a non-waiver clause in an insurance policy and an implied waiver by denial of coverage. The other cases only support the general proposition that a waiver can be found in some contract cases even if the contract has a non-waiver provision.

Dobson Bay's position would be more persuasive if we were only talking about the Notes and Deeds of Trust. The Discussion Agreement, however, is a focused instrument. Its only purpose is to apply to the type of argument made by Dobson Bay. CIBC would never have participated in the July meeting at College Park without Dobson Bay's execution of the Discussion Agreement. The three post-maturity invoices would not have been sent if CIBC could not rely on the Discussion Agreement.

The Court finds that CIBC did not waive the right to enforce the default interest clause of the Amended Noted. The Court also finds that CIBC was not estopped from enforcing the provision.

FILED: Exhibit Worksheet