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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-018372 07/19/2010

HON. EDWARD O. BURKE

CLERK OF THE COURT
L. Nixon
Deputy

JENBERLY L L C FRANKLYN D JEANS

v.

GABRIEL MARTINEZ, et al. CATHERINE A SIMS

MINUTE ENTRY

The court, having heard oral argument on plaintiff, Jenberly, LLC's Motion for Summary Judgment against defendants Gabriel Martinez, Edward Gutzman, III, and Phoenix 83RD, LLC, and, having had the same under advisement, issues the following ruling.

Plaintiff, Jenberly, LLC's Motion for Summary Judgment is GRANTED.

Facts

On May 18, 2007, plaintiff's predecessor M&I Marshall & Ilsley Bank ("M&I Bank") entered into a Construction Loan and Land Development Agreement (the "Agreement") to lend the maximum sum of $23,800,000.00 (the "Construction Loan") to Capri I, LLC ("Capri"). In connection with the Construction Loan, Capri as Maker, executed a promissory note dated May 18, 2007, in favor of M&I Bank (the "Note").

The Note is secured by a Construction Deed of Trust, Assignment of Rents, Security Agreement and Financing Statement which cover real and personal property located at the southeast corner of 83rd Avenue and Interstate 10, in Phoenix, Arizona. Defendants, Gabriel Martinez, Edward Gutzman, III, Jeffrey Chain and Linda Chain, husband and wife, and PHOENIX 83rd LLC, a Nevada limited liability company executed personal guaranties of the loan.

On March 26, 2009, M&I Bank assigned its rights in the loan documents, and guaranties to plaintiff.

The loan matured on June 1, 2009.

In a June 4, 2009, letter, plaintiff's counsel notified Capri and the guarantors that the Note had matured, Capri was in default, and Capri was obligated to pay plaintiff $20,645,697.91, which represented the principal balance, accrued interest and late charges due under the Note.

Issues

Defendants claim that there are material issues of fact which prevent the entry of summary judgment.

Defendants argue that plaintiff and its predecessor, M&I Bank, materially breached the Agreement, which suspended their obligation to pay the Note. At the time the Agreement was negotiated, M&I Bank required the borrower to provide an "as-if-constructed" appraisal valuing the property at not less than $35,100,000.00 (the "First Appraisal"). The First Appraisal gave an "as-is" value of the property of $29,450,000.00 and an "as-if-constructed" value of $39,700,000.00. M& I Bank accepted the appraisals and funded the amounts provided for under the loan agreement.

Paragraph 30(w) of the Agreement provides:

> "If Lender determines that the loan to value ratio of the Property at any time prior to the Loan being paid in full is less than 65% loan to value ratio and Borrower shall have failed to provide additional collateral satisfactory to Lender in sole and absolute discretion so as to establish a loan to value ratio of 65% with respect to all collateral securing the Note and Loan."

On August 4, 2008, the lender obtained an "as-is" appraisal (the "Second Appraisal") which valued the property on an "as-is" basis at $15,500,000.00 and M&I Bank did not seek an "as-if-constructed" opinion nor did it consult Capri or the guarantors. The Second Appraisal appraised the property as if dedicated for industrial use, notwithstanding the fact that the property is zoned for Planned Community Development and no industrial land uses are permitted under that zoning. After receiving the Second Appraisal, M&I Bank informed Capri that the 65% loan to value ratio required in the Agreement was not met and, therefore, it declared Capri in default.

On September 22, 2008, Capri informed M&I Bank of the difference in the valuation methods used in the First and Second Appraisals as well as the zoning designation error in the Second Appraisal. M&I Bank did not obtain a corrected appraisal, withdraw its default notice, meet with the defendants regarding the Second Appraisal, or discuss alternate approaches to cure the alleged default.

Defendants contend that plaintiff and its predecessor, M&I Bank, both breached the implied covenant of good faith and fair dealing in the Agreement by, in addition to their claim about the Second Appraisal, declaring the Note to be in default, contacting potential buyers of the property after being assigned the Note, and taking actions that indicated their intent to develop the property before the Note's maturity date of June 1, 2009.

Defendants claim that M&I put the loan documents in a bulk sales package marketed by Mission Capital Advisors, LLC, which prepared a report which defendants claim was "replete with false and misleading information."

On February 19, 2009, M&I Bank subsequently assigned the loan agreement, note, guaranties and loan documents to plaintiff. Defendants were notified of the assignment on March 30, 2009. Defendants were not given notice of the sale or the opportunity to purchase the Note.

The Declaration of Gabriel Martinez states in part:

> "43. It is believed that Plaintiff, after being assigned the Loan Documents, but before the Maturity Date, contacted certain of those same Potential Buyers in an attempt to induce them to wait to purchase and/or lease the Property from Plaintiff until after the Maturity Date and subsequent foreclosure proceedings."

No factual basis is given to support Mr. Martinez's belief.

Defendants argue that plaintiff contacted defendants' engineering firm to obtain copies of master plans, infrastructure plans and ALTA surveys on the property.

Defendants finally claim that plaintiff failed to mitigate its damages by not proceeding with the deed of trust sale before filing this action.

Discussion

None of the issues raised by defendants prevent the entry of summary judgment in plaintiff's favor.

First, defendants argue that Capri's obligation to pay the Note was suspended because M&I Bank was required to obtain an "as if constructed" appraisal for the Second Appraisal instead of an "as is" appraisal of the property for industrial use. The court has carefully reviewed the Agreement and finds no such requirement. There are no specifications as to how M&I Bank was to make its loan to value determination. Defendants produced no evidence that an appraisal on the basis they suggest would have been more favorable to them. M&I Bank's appraiser was independent, and there is no evidence that M&I Bank directed the appraiser's work in any way. Finally, and most importantly, M&I Bank had the right, upon determining that the loan to value ratio had fallen below 65%, to exercise several rights after declaring the Note to be in default including immediately declaring the Note due and foreclosing its deed of trust on the property, but it did not do so. Therefore defendants can not claim that they were damaged by any alleged defect in the Second Appraisal or by plaintiff's declaring the default.

Second, defendants' argument that the implied covenant of good faith and fair dealing was breached was not supported by admissible evidence. The basis for defendants' claim that plaintiff contacted potential buyers of the property after being assigned the Note is Mr. Martinez' declaration. Mr. Martinez' declaration states that "It is believed.…" is not supported by any fact.

The claim that plaintiff took actions which indicated the intent to develop the property before the Note's maturity date of June 1, 2009, is based on plaintiff's April 14, 2009, e-mail confirming its request for the ALTA survey from defendant, which it wanted for "loan and design purposes." (Exhibit L, defendants' Statement of Facts). Plaintiff was entitled to this survey under paragraph 23(a)(vii) of the Agreement. The court finds as a matter of law that plaintiff's mention that its request for an ALTA survey, to which it was entitled, six weeks prior to the maturity date of a $20,645,697.91 loan in part for "design purposes" is not the bad faith required for a breach of the covenant of good faith and fair dealing in a construction loan agreement under Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No.395 Pension Trust Fund, 201 Ariz. 417, 491-492, 38 P.3d 12 (2002). "Acts in accord with the terms of one's contract cannot, without more, be equated with bad faith." 201 Ariz. 417, 492.

Third, defendants claim that M&I put the loan documents in a bulk sales package marketed by Mission Capital Advisors, LLC, which prepared a report that defendants claim was "replete with false and misleading information." Their Statement of Facts states in part:

> "30. Notably, the Report is replete with false and misleading information. For example, both the Principal/Guarantor section and the Executive Summary section refer to an entity called 'Land Baron Investments.' See DSOF, Exhibit H.
>
> 31. Despite what is written in the Capital Report, Land Baron does not own an interest in the Property, nor are any of the Guarantors members of Land Baron."

The report states that Land Baron Investments was sold a 25% interest in the property. Whether this is true or false, defendants fail to demonstrate in any way why this statement, authored by a third-party broker, constitutes a breach of the implied covenant of good faith and fair dealing and/or how it could possibly have damaged defendants. In fact, Exhibit H is most revealing regarding the parties' positions in this case because it recites that in 2006 Centex Homes had submitted a letter of intent to buy the property for $51,372,000.00, but due to the downturn in the housing market, Centex Homes cancelled its offer.

Fourth, defendants argue that the loan was sold to plaintiff without giving them an opportunity to purchase the loan themselves. There is no such requirement in the Agreement, and defendants have cited no authority to support this argument.

Finally, defendants argue that plaintiff has failed to mitigate its damages by not holding a trustee's sale of the property before filing suit against them. Absent a contractual provision, there is no legal requirement that a lender must foreclose on its collateral before pursuing guarantors and, in fact, paragraph 3 of each of the guaranties specifically allows this course of conduct.

> "The Lender shall have the right to proceed against the Guarantor, either before or after proceeding against the Borrower or under the Deed of Trust or otherwise against any collateral held by Lender as security for repayment of the sums due under the Note or the Deed of Trust." Exhibit C, defendants' Statement of Facts.

For the foregoing reasons, plaintiff's motion for summary judgment must be granted.