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05/05/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-009477 05/04/2010

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

FIRST INTERNATIONAL BANK & TRUST WILLIAM SCOTT JENKINS

v.

TRUST CREATED UNDER ITEM NINE OF THE WILL OF ARTHUR JESSE MERRILL, THE, et al. CATHERINE CONNER

MINUTE ENTRY

The Court took this matter under advisement following oral argument on March 22, 2010. The Court has considered Plaintiff's Motion for Summary Judgment.

Paragraph 48 of the deed of trust entitled the Trust to substitute collateral provided that, *inter alia*, the Bank "has received a satisfactory appraisal of the proposed Substitute Real Estate Collateral indicating that, in [the Bank's] sole discretion, the maximum loan to value ratio (assuming that the full outstanding principal balance of the Loan has been borrowed) shall not exceed 50%." This language left it to the Bank to determine the adequacy of the collateral to satisfy the substitution provision. According to Mr. Cherry's affidavit, the substitution constituted a "loss of a material portion of the collateral." Whether this was true is not material: the Bank was entitled to act upon its own evaluation of the collateral.

Defendants raise two objections. The first is that the Bank acted in bad faith by failing to approve the substitution of the Paloma-1 and Paloma-2 properties for the original Dynamite Mountain Ranch property. As in *Southwest Savings & Loan Assn. v. SunAmp Systems, Inc.*, 172 Ariz. 553, 559 (App. 1992), the issue is "whether the jury might reasonably have found that [the Bank] wrongfully exercised this power for a reason beyond the risks that [Defendants] assumed in [the] loan agreement, or for a reason inconsistent with [Defendants'] justified expectations"

(internal quotation marks and citations omitted). Again, the only "evidence" in the record in support of Defendants' position is paragraph 8 of the affidavit of Defendants' in-house counsel, Mr. Nowell. But Mr. Nowell does not claim to be an expert on real estate appraisal, nor can such expertise be assumed by virtue of a law degree; his opinion is therefore of no more than negligible value. Nor do Defendants show that the Bank acted out of spite, ill will, or any other non-business purpose; *compare id.*

Defendants also argue that, in restructuring the loan into secured and non-secured portions, the Bank went beyond the scope of the original loan agreement. This is true, but immaterial. Defendants made an offer to substitute the Paloma-1 and Paloma-2 properties as collateral under the terms of the original agreement; the Bank made a counteroffer to accept the substituted collateral while bifurcating the loan. Defendants were of course free to refuse the counteroffer by either submitting a new offer of their own or simply holding the Bank to the original agreement with the Dynamite Mountain Ranch property as collateral. But the Trust and the individual guarantors, all sophisticated investors, signed the counteroffer, at the same time extending the maturity date by some four months; Defendants do not show that they even objected to the new terms, then or in the eighteen months preceding the filing of this action. That the terms of the modified loan were not as favorable to Defendants as the original terms is not a basis to find duress or frustration of purpose.

Based on the foregoing, and for the reasons set forth in Plaintiff's briefing,

It is therefore ordered granting Plaintiff's Motion for Partial Summary Judgment as to Counts IV, V, and VI.

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