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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-009477 02/17/2011

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

AARON B CHAUSMER

MINUTE ENTRY

The Court has read and considered Defendants' Motion for New Trial filed December 22, 2010, Plaintiff's Response filed January 24, 2011 and the Reply thereto filed February 10, 2011. The Court finds as follows.

To alter the outcome, Defendants' new evidence would have to demonstrate three things, at least to the level of creating a genuine issue of material fact: that the Bank, despite having been given sole discretion to decide the adequacy of the substituted collateral, was bound by the duty of good faith and fair dealing to give the substitution some minimum quantum of consideration, which it failed to do; that, had the substitution been properly considered, it would have been approved; and, had it been approved, the approval would have come in time to beat Defendants' deadline for closing their deal for Dynamite Section G and therefore avert the need to renegotiate the terms of the loan.

As the Kawell affidavit acknowledges, it is inaccurate to say that no consideration was given to the proposed substitution. In Ms. Kawell's own words, the "newly disclosed documents confirm a flurry of contradictory activity" by the Bank. Ms. Kawell's opinion that the proposed substitution was adequate is beside the point. The Bank was given "sole discretion." At a minimum, the "flurry of contradictory activity" indicates uncertainty on the adequacy of the substitution, an uncertainty further evidenced by the November 28 e-mail from Dave Cherry attached as Exhibit 4 to the motion, in which he said it was "reasonable to expect that the

[Paloma properties would] remain undeveloped/unsold in the near-term" and raised the question of whether the Bank wished to maintain a $10 million facility for which the entire collateral consisted of land. The Bank was free to resolve the uncertainty against Defendants. Defendants point to nothing in the loan documents requiring the Bank to suggest other collateral that might be substituted, so its failure to do so demonstrates nothing. Moreover, the time pressure facing Defendants was severe, only two months between the proposed substitution and the closing date on the Dynamite sale. Ms. Kawell stated that "a borrower needs months to obtain replacement lending." Thus, given the two-month window, it would have been impossible to obtain replacement financing if the Bank had delivered an immediate "no," or to prepare for possible rejection if it had given the substitution careful consideration (as by, for example, commissioning its own appraisal). Implicit, then, in Ms. Kawell's interpretation of the situation is that the Bank was under a legal obligation to rubber-stamp the proposed substitution. This is fundamentally inconsistent with the contractual provision that the Bank was to use its own discretion and was not required to rely on Defendants' assurances.

Finally, Defendants argue that they acted under duress in agreeing to the Bank's proposed modification, because they would otherwise have lost the sales proceeds and likely faced a breach of contract suit. Even assuming that the Bank knew of this pressure, this does not constitute duress under Arizona law. "Normally, duress does not exist merely because one party takes advantage of the financial difficulty of the other." *Inter-Tel, Inc. v. Bank of America, Arizona*, 195 Ariz. 111, 117 ¶ 37 (App. 1999). This rule does not apply when the first party's wrongful actions have undermined the economic condition of the other. *Id*., ¶ 38. However, Defendants have not shown, even to the level of creating a genuine issue of material fact, that the Bank committed any wrongful act. Thus, the general rule applies, and there was as a matter of law no duress.

The Defendants' request for oral argument is denied as the Court does not find a second oral argument would be of assistance in resolving the legal question presented. Based on the foregoing,

IT IS ORDERED denying Defendants' Motion for New Trial.

IT IS FURTHER ORDERED denying Defendants' alternative request to vacate the final judgment and re-enter without Rule 54(b) language.

/s/ HON. Dean Fink

JUDICIAL OFFICER OF THE SUPERIOR COURT

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.