

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT
L. Stogsdill
Deputy

WELLS FARGO BANK NATIONAL
ASSOCIATION

ZACHARY LAPRADE

v.

SUPERSTITION COMMERCE PARK L L C, et al. MARK W ROTH

UNDER ADVISEMENT RULING

The Court has under advisement, following a trial to the Court on July 18, 2013 and July 19, 2013 and written closing briefs by both parties.

The central issue in this case is the interpretation of Section 2.9 of the Building Loan Agreement concerning Re-Margin Rights. Plaintiff Lender argues that the Re-margin calculation is made by using the loan commitment amount to calculate the loan to value percentage. Defendants Borrower and Guarantor argue that the calculation is made by using the actual loan balance to calculate the loan to value percentage.

Lender argues that the loan commitment amount is the only logical figure to use because the stabilized value estimate is used as the value portion. The stabilized value is the estimated value of the property using an assumed lease percentage to estimate the value of the property in a leased-up condition, whether there are any leases or not. The purpose of using stabilized value is to estimate the value of the completed leased-up project. Lender is correct that the loan commitment amount logically correlates with the stabilized value.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

However, the loan documents do not define the loan portion of the calculation as the “loan commitment amount”. Borrower’s position that “loan” means the current loan balance is bolstered by the pre-loan negotiations between the parties represented by Trial Exhibit 80 that shows negotiation over the use of “loan commitment amount” in the document. Ultimately, the loan portion of “loan to value” used in Section 2.9 was not defined.

Therefore, Borrower’s argument is that the demand by Wells Fargo for a Re-margin payment in excess of that called for by the documents was an anticipatory breach of the Building Loan Agreement when there was no other default. Borrower argues that there was no default at the time of the demand and that Borrower was willing to pay the lower Re-margin amount. There is no evidence that Borrower objected to the amount calculated by the Bank at the time of the Re-margin demand on December 28, 2009. (Trial Exhibit 35). Defendants have presented no letters, e-mails or other evidence contesting the amount. The only evidence, other than the testimony of Mr. Wall, who is the principal and a guarantor, supports an attempt to restructure the loan.

The Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. On or about March 28, 2008, Borrower sent a Request for Construction Financing to Wells Fargo to obtain a loan to construct office and/or warehouse buildings in Mesa, Arizona, located at or in the vicinity of Lot 3, Lot 4 and Lot 5, Superstition Commerce Park, according to Book 958 of Maps, Page 10, records of Maricopa County, Arizona (the “Project”).

2. The total equity that the Borrower was proposing to contribute to the Project in March 2008 was \$4.9 million.

3. Mr. Wall was involved in preparing the Request for Construction Financing.

4. On July 2, 2008, Borrower signed a Summary of Terms and Conditions (“Term Sheet”) dated June 30, 2008, in connection with the discussions of the Loan terms.

5. Among other things, the Term Sheet provided:

- a. A loan amount of \$13.5 million; and
- b. A re-margin right to Wells Fargo that provided:

Upon the second anniversary of closing (month 24), if less than 75% of the project is leased (95% of Proforma rents required), then Lender may require a new Appraisal of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

the Project and a principal pay-down in an amount sufficient (a) to restore an 80% loan to value based on the 'as is' value estimate contained in the new Appraisal and (b) to produce an Appraisal DSCR of not less than 1.10x. Borrower shall pay all appraisal expenses associated with this Re-Margin right.

6. On July 11, 2008, Wells Fargo and Borrower began working on Loan Documents.
7. According to the testimony of Mr. Wall, prior to entering the Loan Documents, neither Borrower nor anyone affiliated with the Guarantors had ever seen a re-margin provision in any of their loan documents.
8. Wells Fargo's counsel drafted the initial version of the Loan Documents.
9. On August 6, 2008, the Bank's counsel sent a draft of the Building Loan Agreement to Borrower's counsel that provided the following with respect to the re-margin term:

If these minimums are not met, Lender may require a new appraisal and a principal pay-down in an amount sufficient (a) to achieve an 80% loan to value based on the 'as is' value estimate contained in the new appraisal and (b) to produce an Appraisal DSCR of not less than 1.10x based on the new appraisal.
10. On August 7, 2008, Jim Muir, the senior vice-president and division head that managed the Chicago office of Wells Fargo told Alan Brown, the bank officer responsible for communicating with Borrower, that he wanted to "kill the deal."
11. No one from the Bank told the Borrower or Mr. Wall that Mr. Muir or the Bank did not want to go forward with the deal.
12. On August 11, 2008, the Bank lowered the amount they were willing to fund from \$13.4 million to \$12.55 million.
13. The lowering of the loan commitment amount required the Borrower to put another \$850,000.00 of equity into the Project, which it agreed to do.
14. On August 13, 2008, the Bank's credit department indicated to Alan Brown that in order to approve the Loan, in addition to lowering the total loan commitment amount, the credit department would also need the Re-Margin Provision to be changed to allow a re-margin calculation at twelve months instead of at twenty-four months.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

15. On or around August 13, 2008, Mr. Brown had a discussion with Mr. Guenther and Mr. Wall regarding changing the Re-Margin Provision to allow a re-margin calculation at twelve months.

16. On or about August 26, 2008, Plaintiff and Borrower entered into a Building Loan Agreement (the "Building Loan Agreement").

17. On or about August 26, 2008, Borrower executed and delivered a Promissory Note (the "Note") payable to the order of Plaintiff to evidence the Loan.

18. The Loan was secured by, among other things, a Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing (the "Deed of Trust"), recorded on August 26, 2008, at Recorder's No. 2008-0742049, records of Maricopa County, Arizona (the "Property"). The Loan was used to take out the existing financing on the Project and to finish the infrastructure for the vacant lots at the Project.

19. The Loan was guaranteed by Wall, the Wall Trust and TAREF (collectively, the "Guaranty"). (Hereafter, the Building Loan Agreement, Note, Deed of Trust, UCC, Wall Repayment Guaranties, TAREF Repayment Guaranty and any other documents executed and delivered in connection with the Loan will be referred to collectively as the "Loan Documents").

20. Section 2.9 of the Building Loan Agreement required Borrower to meet certain leasing requirements 12 months following execution of the Buildings Loan Agreement, and contained re-margin provisions that the Bank could trigger if the leasing requirements were not met.

21. Borrower did not meet the leasing requirements in Section 2.9 of the Building Loan Agreement.

22. The executed version of Section 2.9 of the Building Loan Agreement states as follows (the "Re-margin Provision"):

If these minimums are not met [the leasing requirements], Lender may require a new appraisal and a principal pay-down in an amount sufficient to (a) achieve a seventy-five percent (75%) loan-to-value ratio based upon the stabilized value estimate of the Property and Improvements contained in the new appraisal, and (b) to produce a ten percent (10%) Return based upon the stabilized NOI in the new appraisal.

23. The last paragraph of Section 2.9 of the Building Loan Agreement states as follows (the "Pledged Account Provision"):

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

The monies secured as the “Pledged Account” (as defined in the Cash Security Agreement) by that certain Security Agreement by and between Lender and Borrower and executed on or about the date hereof (the “Cash Security Agreement”) may be used to reduce the Loan Commitment Amount for the purpose of the calculations in this Section 2.9.

24. The Building Loan Agreement does not define “loan” or “loan to value” for purposes of Section 2.9(a).

25. The Building Loan Agreement defines “Loan Commitment Amount” as \$12,550,000.00.

26. Plaintiff obtained updated appraisals in October 2009 concluding the “as if stabilized” value of the Property was \$11,710,000.00 (the “October 2009 Appraisals”).

27. On December 28, 2009, Plaintiff sent the Borrower a letter demanding a Re-margin payment in the amount of \$3,767,500.00 pursuant to Section 2.9(a) of the Re-margin Provision (the “Re-margin Demand”).

28. The Bank never demanded a re-margin payment under Section 2.9(b).

29. At the time of the Re-margin Demand, the Current Loan Balance due under the Loan was approximately \$9,270,000.00.

30. The Re-margin Demand indicated that the Current Loan Balance was \$12,550,000.00.

31. In the Re-margin Demand, Plaintiff used \$12,550,000.00 as the basis of the “loan” component of the “loan-to-value ratio” for calculating the payment due pursuant to Section 2.9(a).

32. Based on the October 2009 Appraisals, Plaintiff used the “as if stabilized” value of the Property of \$11,710,000.00 for purpose of “value” component of the “loan-to-value ratio” for the Re-margin Demand.

33. The Re-margin Demand provides that 75% of the “as if stabilized” value in the October 2009 Appraisals is \$8,782,500.00.

34. After the Re-margin Demand, Borrower continued making interest payments on the Loan through August 2010.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

35. At the time of the Re-margin Demand, the Bank held \$1,000,000.00 of Borrower's funds in a secured account.

36. The Re-margin Demand did not include deducting the \$1,000,000.00 in Borrower's cash held in reserve by Plaintiff from the Loan Commitment Amount.

37. Whether to apply the \$1,000,000.00 cash held in reserve to the loan principal was in the discretion of the Bank.

38. If Wells Fargo had used the Current Loan Balance or outstanding loan amount for the Re-margin Demand, the amount due would have been \$487,000.00.

39. If Wells Fargo had deducted the \$1,000,000.00 in reserved from the Current Loan Balance or outstanding loan amount, there would not have been any sum due under the Re-margin Demand.

40. At the time of the Re-margin Demand, Borrower was not otherwise in default of any of the provisions of the Loan.

41. Failure to meet the lease requirements of Section 2.9 of the Building Loan Agreement was not a default, but allowed the Bank to trigger the Re-margin Demand. Failure to re-margin was a default under the Building Loan Agreement.

42. The Borrower offered to restructure the loan by paying Wells Fargo \$1.6 million, allowing the Bank to take the \$1,000,000.00 held in reserve, and continuing to pay the interest payments on the Loan. The restructure negotiations occurred from early 2010 through early August 2010.

43. In August 2010, Plaintiff informed Defendants, in writing, that it planned to initiate a trustee's sale of the Property in the event the Defendants failed to comply with the Re-margin Demand.

44. After the Re-margin Demand, the Borrower told the Bank that they had sufficient funds to continue paying the monthly interest payments due under the Loan.

45. There is no evidence that, soon after the Re-margin Demand, the Borrower advised the Bank in writing that it had incorrectly calculated the Re-margin Demand. Mr. Wall testified about various telephone conversations where he alleges that the calculation of the Re-margin

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

Demand was discussed (Transcript, Day 2 at 96:13-20; 104:21-15; 182:9-183:7; 105: 12-24; 201:2-14. There was no evidence to corroborate Mr. Wall's testimony on the subject.

46. On August 5, 2010, Plaintiff demanded a payment of \$3,767,500.00 pursuant to the Re-margin Provision (the "Second Re-margin Demand).

47. The Borrower never identified or tendered the amount that it believed to be due at the time of the Re-margin Demand.

48. The Borrower never sought declaratory relief to interpret the Re-margin provision before a declaration of default and issuance of a Notice of Trustee Sale.

49. In a letter dated August 9, 2010 from Ann Ustad Smith, counsel for Defendants, to Michael F. Ripp, counsel for the Bank, Ms. Smith expresses concern about the size of the Re-margin Demand, but does not propose an alternative calculation. (Trial Exhibit 40).

50. On or around August 18, 2010, Plaintiff applied the \$1,000,000.00 pledged account in its control to the principal balance of the Loan.

51. As of August 18, 2010, the approximate outstanding actual loan balance was \$8,270,050.36.

52. Plaintiff noticed a Trustee's Sale on September 2, 2010 (the "Foreclosure Notice").

53. As of January 24, 2011, prior to the Trustee's Sale (defined below), the principal amount of the loan was \$8,258,385.35, accrued interest was \$265,675.64, and late charges were \$9,106.97 (the "Indebtedness").

54. On January 24, 2011, the trustee under the Deed of Trust conducted a duly noticed trustee's sale (collectively, the "Trustee's Sale") under the terms of the Deed of Trust and Arizona law, and sold the Property and related personal property to Plaintiff for \$6,470,000.00 (the "Credit Bid").

II. CONCLUSIONS OF LAW

1. "A general principle of contract law is that when parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, 218 P.3d 1045, 1050 (App. 2009) (citations omitted).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

2. Section 2.9(a) of the Re-margin Provision is ambiguous in that it does not define how to calculate the “loan” portion of the loan to value ratio. The “value” portion is defined as the stabilized value of the Property.

3. [A]ny ambiguity in the documents is subject to a factual determination concerning the intent of the parties and is to be resolved conclusively by the trier of fact which, in this case, was the trial court. *Id.*, 140 Ariz., at 260.

4. The Bank improperly used the Loan Commitment Amount in calculating the Re-margin Demand.

5. The Bank was entitled to demand re-margin at the time of the Re-margin Demand.

6. The Borrower was not in other material breach of the Building Loan Agreement when Wells Fargo issued the Re-margin Demand.

7. Wells Fargo breached the Building Loan Agreement by issuing the Re-margin Demand for an excessive amount.

8. Borrower breached the Building Loan Agreement by not tendering what it believed was the correct Re-Margin amount.

9. An anticipatory repudiation is a breach of contract giving rise to a claim for damages and also excusing the necessity for the non-breaching party to tender performance. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 283, 681 P.2d 390, 435 (1983) (citing *Kammert Bros. Enters., Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 428 P.2d 678 (1967); Restatement (Second) of Contracts Â§ 277 (1981); 4 Corbin on Contracts § 977 (1951)).

Thomas v. Montelucia Villas, LLC, 232 Ariz. 92, 302 P.3d 617, 620 (2013).

10. A distinction between a party seeking affirmative relief and a party trying to retain damages in the face of another’s claim is unwarranted. Restatement § 254(1) states that a “[repudiating] party’s duty to pay damages” is discharged if the “injured party” would have failed to perform. This language does not distinguish between damages sought by the injured party and damages already obtained from the repudiating party which the injured party seeks to retain.

Id. 232 Ariz., at page 93.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-004432

11/08/2013

11. The Borrower's failure to repay the loan is a retention of damages because the Borrower is enriched and the Lender is impoverished by the Borrower's failure to repay the loan.

12. Defendants have not shown that they could perform by tendering their claimed Re-margin amount to Wells Fargo.

13. Wells Fargo's improper Re-margin Demand did not excuse further performance by the Borrower because the Borrower did not show that it could perform by tendering what it calculated as the proper Re-margin amount.

14. Judgment is granted in favor of Wells Fargo.

FILED: Exhibit Worksheet, Exhibit Release form(s).

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.