

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006912

09/04/2018

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

WELLS FARGO BANK N A

WADE M BURGESSON

v.

TERRENATE ENTERPRISES INC, et al.

DALE C SCHIAN

JUDGE BRODMAN

RULING AFTER TRIAL

A trial was held to the Court on August 30, 2018. The Court heard testimony from Dorothy Koster, Vice President of Wells Fargo Bank. The Court reviewed the exhibits.

For background purposes, the Court adopts the uncontested facts set forth on pages 2:5 – 10:8 in the Joint Pretrial Statement.

On May 20, 2015, Wells Fargo conducted a trustee's sale and took possession of the Pinal Property and Sunland Gin Property with credit bids.

Later, the parties negotiated a \$165,000 credit from defendants in exchange for a deed in lieu of the Eloy Property.

The Court has already determined that the fair market value of the Pinal Property is \$2,351,960 and that the fair market value of the Sunland Gin Property is \$523,780.16. On summary judgment, the Court determined that there are no triable issues about principal balances, that the various loan documents are valid and enforceable and that the various loans were in breach.

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The first issue presented is whether or not the Sunland Gin and Pinal Properties served as security for the CEI Loan. For reasons stated below, the Court is not persuaded that this determination makes a difference to the outcome of this case. Nevertheless, the Court concludes that the Sunland Gin Property and Pinal Property did not secure the CEI Loan.

The parties agreed that under the original 2007 loan documents, neither the Pinal Property nor the Sunland Gin Property served as security for the CEI Note. As such, in order for those properties to serve as security for the CEI Note, there must be granting language providing that these properties were to be security for the CEI Note.

The Court finds no such granting language with respect to either property. To be sure, the Statements of Breach (Exhibits 47 and 48) contain language suggesting that both properties are security for the CEI Note. However, the Statement of Breach is not a document that grants a security interest. It does not create a lien. It was not signed by anyone who had authority to grant a security interest in the Pinal Property or the Sunland Gin Property. While the Statements of Breach could theoretically serve as evidence of Wells Fargo's intent to secure, there still must be some language in the security documents that create a security interest.

There is no question that both the Pinal Property and the Sunland Gin Property were intended to secure the TEI Notes. If the parties had intended to have those properties serve as collateral for the CEI Note this would have been easy to do.

While the TEI Modification and addenda do reference cross-collateralization between the First TEI Note and the Second TEI Note, there is no comparable provision that relates to the CEI indebtedness.

Defendants contend that Wells Fargo is estopped from arguing that the CEI Note was not secured by the Pinal Property or the Sunland Gin Property. The Court rejects this claim. All three notes were in default for a long period of time. There is no persuasive evidence that Wells Fargo took a contrary position to the prejudice of the defendants, and there is no evidence that defendants were ever prejudiced.

Defendants next claim that Wells Fargo did not provide sufficient documentation to establish the amount of interest and late charges on the loans. The Court finds that Wells Fargo demonstrated by the preponderance of the evidence that interest and late charges are appropriate.

Banks make loans and charge interests. Interest is due on the principal.

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The loans include provisions for late fees. For example, if a payment is 15 days late or more, the Borrower is charged 5% of the unpaid portion of the regularly scheduled payment or \$15, whichever is greater. *See, e.g.* Exhibit 1, page 2. This provision reappears in multiple Loan Documents.

In addition, the Loan Documents provide that Wells Fargo is entitled to recover all costs, expenses and fees incurred in enforcing the obligations evidenced by the Loan Documents. The Loan Documents provide that the Borrower “also shall pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including, without limitation, all closing costs, fees, and disbursements, all expenses of Lender’s legal counsel, and all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.” *See, e.g.*, Exhibit 2, page 4.

In the event of a default, the Borrower is required to pay “Lender’s attorneys’ fees and Lender’s legal expenses, whether or not there is a lawsuit, including attorneys’ fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals.” *See* Exhibit 1, page 3. *See also* Exhibit 10, page 2 (in event of default, Lender may “[i]ncur expenses to collect amounts due under this Note, enforce the terms of this Note or any other Loan Document, and preserve or dispose of the Collateral. Among other things, the expenses may include payments for property taxes, prior liens, insurance, appraisals, environmental remediation costs, and reasonable attorney’s fees and costs”). Similar provisions are found in the TEI and CEI Loan Modification Agreements. *See* Exhibit 18 at page 11 and Exhibit 26 at page 7, subpart i.

If the Borrower fails to pay amounts when due, the Lender may take actions that the “Lender deems appropriate, to the extent permitted by applicable law on any Collateral and pay all costs for insuring, maintaining and preserving any Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note.” *See, e.g.*, Exhibit 2, page 4.

Undisputed evidence demonstrates that the interest rates on the TEI Notes were 7.56% and the interest rate on the CEI Note was 4.5%.

The Court observes that there are two parties to the loans. Both sides knew what the Loan Documents said. The Bank provided its calculation of interest and late charges. Defendants could have done their own calculations based on the Loan Documents. They did not, however, provide a competing calculation of what was owed. If defendants had presented some evidence indicating their own, lower, calculation, the Court would need to resolve a factual dispute. But defendants

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presented no such calculation, and Wells Fargo's calculations were credible. Defendants are seeking a windfall.

In any case, Wells Fargo timely provided more than sufficient documentation of the amount due. It provided payment histories for each loan, as well as transaction histories. Wells Fargo also prepared and provided the TEI Notes' balance spreadsheet and the CEI Note's balance spreadsheet, which detail the outstanding interest and late charges. *See* Exhibits 37-42.

The Court was persuaded by Ms. Koster's testimony and her calculations shown on Exhibit 43. As of May 20, 2015, the principal owed on the first TEI Note is \$1,473,962.32, the interest is \$253,219.86, and the late charges are \$19,450.84, for the total of \$1,746,633.02. As of May 20, 2015, the principal owed on the second TEI Note is \$1,077,155.14, the interest is \$41,688.31, and late charges are \$7,223.68, for the total of \$1,126,067.13.

In the pretrial statement, Wells Fargo sought non-legal costs of \$87,143.20. Pretrial at 19:1-2. At trial, Wells Fargo withdrew claims for \$9,625. In addition, defendants persuasively demonstrated that two of the insurance charges were not appropriate, so the Court will deduct an additional \$9,397. The Court awards Wells Fargo costs of \$68,121.20. These costs are recoverable under the terms of the Loan Documents.

In addition, under the terms of the Notes Wells Fargo is entitled to recover its reasonable attorneys' fees and costs. At the summary judgment stage, the Court held the attorneys' fees issue in abeyance pending a decision on the merits. As a result, the Court has not yet determined the amount of attorneys' fees to which Wells Fargo is entitled. The Court finds that Wells Fargo is entitled to an award for reasonable attorneys' fees and costs arising out of enforcing the obligations evidenced by the Loan Documents, including fees associated with the trustee's sales. Wells Fargo may also be entitled to its attorneys' fees, costs and expenses incurred in prosecuting the instant action.

The loans have cross-default provisions and the same guarantors. CEI guaranteed the TEI Notes. TEI guaranteed the CEI Note. All three notes are guaranteed by S. Cornejo, E. Cornejo, F. Cornejo and T. Cornejo. As a result, in performing calculations the Court takes a global perspective.

As noted above, the Court finds that Wells Fargo is entitled to \$68,121.20 in costs to be assessed against the Loans. In addition, Wells Fargo is entitled to recover its reasonable attorneys' fees (in an amount to be determined) for its pre-trustee's sale activities. What this means, then, is that the amount owed for the two TEI loans as of the date of the trustee's sale is \$1,746,633.02 plus \$1,126,067.13 plus \$68,121.20 plus an amount to be determined for attorneys' fees and expenses. The amount offset against the TEI Notes is the fair market

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valuation of the Pinal Property and the Sunland Gin Property, plus \$165,000. Thus, the accounting on the TEI Notes indicates that Wells Fargo is owed \$2,940,821.35 plus an undetermined amount of attorneys' fee. Offset against that amount is \$3,040,740.16.

In other words, not including the pending award of attorneys' fees, Wells Fargo has received \$99,919 more than it was owed on the TEI Notes. In post-trial motions, the Court will determine the amount of the attorneys' fees and expenses assessed against the TEI Notes. If the Court determines that the amount of attorneys' fees and expenses is less than \$99,919, the Court will apply the balance to the CEI Note. After all, TEI guaranteed the CEI Note.

The Court finds Ms. Koster credible and Exhibit 44 persuasive concerning the amount owed on the CEI Note. The Court finds that Wells Fargo is entitled to \$573,803.60 as of June 28, 2017 on the CEI Note, subject to an award of attorneys' fees, costs and expenses. If there is any offset from the TEI Notes, it will be applied to the amount due on the CEI Note.

The Court directs Wells Fargo to prepare a proposed final judgment consistent with this Order and to submit this proposed judgment to the Court within 10 days from the filed date of this Order. In addition, any party seeking an award of attorneys' fees, expenses or costs should submit their application, along with a *China Doll* affidavit, within 10 days from the filed date of this Order. If Wells Fargo asserts a claim for attorneys' fees, the application should differentiate between fees, costs and expenses incurred in enforcing the obligations evidenced by the Loan Documents (*i.e.*, events leading to the trustee's sale) from attorneys' fees, costs and expenses incurred in prosecuting the lawsuit filed on May 26, 2015.