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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-007217 12/09/2011

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

JPMORGAN CHASE BANK N A — JEFFREY B MESSING

v.

E GROUP LANDSCAPE ARCHITECTURE/ ENVIRONMENTAL DESIGN INC, et al. — CONI RAE GOOD

JEFFREY A MCKEE

MINUTE ENTRY

The Court received and considered Plaintiff's Motion For Summary Judgment, against Defendants E Group Landscape Architecture/Environmental Design, Inc. (Defendant E Group), Mark J. Swartz and Claudia L. Swartz (Defendants Swartz), and Robert W. Thompson and Cynthia Thompson as husband and wife and as Trustees of the Robert W. Thompson and Cynthia S. Thompson Family Trust dated August 16, 2000, hereinafter referred to collectively as Defendants Thompson, the responsive pleadings filed by all Defendants and the reply to those pleadings filed by Plaintiff.

In the interest of expediting the Court's business and pursuant to Ariz. R. Civ. P. Rule 7.1(c)(2), the Court herein waives oral arguments. The briefing presented adequately frames the parties' respective legal positions. Further argument would not assist the court in its determination of the issues presented.

General Background. These parties entered into two separate promissory notes, a Deed of Trust and, in the case of Defendants Swartz and Defendants Thompson, guaranty agreements securing the indebtedness of Defendant E Group. Briefly stated, on or about February 14, 2008 Defendant E Group executed a promissory note evidencing a $750,000.00 loan from Plaintiff. In connection with this loan, Defendants Thompson executed a Deed of Trust granting Plaintiff a

secured interest in real property located in Carefree, Arizona. Also on February 14, 2008, Defendant E Group executed a second promissory note evidencing a loan of $150,000.00 from Plaintiff. As consideration for these two promissory notes, Defendants Swartz and Defendants Thompson executed continuing guaranty agreements of all of Defendant E Group's indebtedness to Plaintiff. In addition, on September 20, 2010 Defendant E Group executed a modification of the initial promissory note in the amount of $723,721.84.

It is undisputed that Defendant E Group has failed to pay as required by the two separate loan agreements it executed with Plaintiff and further that these loans have been and continue to be in default. In addition, it is also undisputed that Defendants Swartz and Defendants Thompson have failed to cure Defendant E Group's default and they have been and continue to be in default under the terms of the guaranty agreements executed with Plaintiff.

The Declaration of William Sarver has established that as of July 12, 2011 the outstanding principle balance due under the terms of the first promissory note was $666,412.36, plus accrued interest and fees. Further, the outstanding balance due on the second promissory note was $60,767.04, plus accrued interest and fees.

Discussion. Plaintiff in this matter has made a prima facie showing that it is entitled to judgment against these collective Defendants on the two underlying promissory notes, the Deed of Trust and the guaranty agreements. Defendants have failed to substantively set forth specific facts that show that there exist genuine issues of fact for trial on these issues.

Defendants may not simply rest on the pleadings, but must show by competent evidence specific facts that create a genuine issue of fact for trial. A.R.C.P., Rule 56(e) clearly provides that when a motion for summary judgment has been filed and appropriately supported, "…an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits…must set forth specific facts showing that there is a genuine issue for trial."

Defendants have failed to comply with A.R.C.P., Rule 56(e). By failing to do so, Defendants have waived any procedural or evidentiary arguments or objections that could have been made in response to the motion.1

The Court finds as follows:

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[1] Johnson by Johnson v. Svidergol, 157 Ariz. 333, 335 [App. 1988]; Kelly v. NationsBanc Mortgage Corp.,199 Ariz. 284, 287[Sup. 2000].

- That these Defendants entered into two separate promissory note agreements, a Deed of Trust and guaranty agreements with Plaintiff;

- That Plaintiff is the holder of these promissory notes and further that pursuant to the terms of these agreements Plaintiff has performed its obligations;

- That these Defendants have failed to repay these agreements as required by these loan documents and as a consequence are in default of the terms of these agreements and have to date failed to cure these defaults;

- That the principle balance amount due as of July 12, 2011 on the first note totaled $666,412.36, together with accrued pre-judgment interest and late fees incurred to date;

- That the principle balance amount due as of July 12, 2011 on the second note totaled $60,767.04, together with accrued pre-judgment interest and late fees incurred to date; and

- That pursuant to the terms of the first and second promissory notes, the Deed of Trust and the Guaranties executed by Defendants Swartz and Defendants Thompson, these Defendants are collectively in breach of these agreements, and contractually obligated to repay the loans executed with Plaintiff.

Defenses. These Defendants have asserted in response to this motion that Plaintiff breached the implied covenant of good faith and fair dealing by refusing to modify the terms of these promissory notes to allow Defendants to execute a Short Sale. The Court concurs with Plaintiff that a party does not breach the implied covenant of fair dealing by choosing to enforce the explicit rights it has secured under an agreement.[2]

The Court having considered Defendants' defenses finds that they do not form a substantive legal basis for challenging Plaintiff's dispositive motion.

The Court having reviewed the motion does find that there is no genuine issue as to any material fact and further that the Plaintiff, the moving party, is entitled to judgment as a matter of law on all issues of liability and the right of Plaintiff to recover a money judgment against these defendants.

The Court further finds that Plaintiff is entitled to attorney fees in this matter.

[2] Southwest Savings and Loan Association v. Sunamp Systems, Inc.,172 Ariz.553, 838 P.2d 1314 [App.1992].

IT IS ORDERED granting Plaintiff's Motion For Summary Judgment.

IT IS FURTHER ORDERED awarding judgment in favor of Plaintiff JPMorgan Chase Bank, N.A. and against these collective Defendants.

IT IS FURTHER ORDERED that Plaintiff shall submit a form of judgment, together with an Affidavit of Fees and Statement of costs for this Court consideration in this matter and in conformity with A.R.C.P., Rule 58.

Dated: December 12, 2011

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 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.