8-5-2011

Order on Motions for Summary Judgment Regarding Claims Related to Zions First National Bank (MACKE)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL MACKE,	)(	
	)(	
Plaintiff,	)(	
	)(	
v.	)(	Civil Action No. 2008-CV-158015
	)(	
CADILLAC JACK INC., SMART GAMES GROUP CORP., EUGENE CHAYEVSKY, OLEG BOYKO, AND ZIONS FIRST NATIONAL BANK	)(	
	)(	
Defendants.	)(	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT REGARDING CLAIMS RELATED TO ZIONS FIRST NATIONAL BANK

On July 14, 2011, counsel appeared before the Court to present oral argument on Defendants Cadillac Jack, Inc.'s ("Cadillac Jack") and Zions First National Bank's ("Zions") Motions for Summary Judgment. After having considered the motions, the briefs submitted on the motions, and the oral arguments presented by counsel, the Court finds as follows:

In 2003, Plaintiff Michael Macke ("Macke") assumed a loan from Zions in the amount of $2,145,997.50, which was secured by commercial real property located in Duluth, Georgia. Defendant Cadillac Jack leased the property from Macke and also guaranteed the loan. The lease expired on September 30, 2009. Cadillac Jack remained in the premises until August, 2010, but made no rent payments after September, 2009. In October and November, 2009, Macke failed to make his mortgage payments, but by early December, he had made up these mortgage payments to Zions. Nevertheless, Macke made the December, 2009, payment on schedule, and as of December 10, 2009, Macke's loan with Zions was in good standing.

On December 11, 2009, Cadillac Jack submitted a letter to Zions stating that "each of the Cadillac Jack Entities hereby revokes any and all guaranties of any loans, obligations or

indebtedness to the Bank." The loan documents provide that an event of default occurred if a "Guarantor ... revokes ... any Guaranty of the Indebtedness."

Macke learned of the Cadillac Jack revocation letter upon receipt of a December 22, 2009, letter from Zions notifying him that he was in default due to Cadillac Jack's revoking its guaranty and that Zions was accelerating the entire indebtedness—approximately $2,000,000. The letter also provided that any payment made by Macke would be applied to the entire indebtedness. Between January and April, 2010, the parties engaged in efforts to negotiate terms upon which Zions would agree to reinstate the loan to permit Macke to continue making monthly payments. On April 13, 2010, Zions sent Macke a second letter declaring that the December revocation by Cadillac Jack and the failure to make monthly payments were events of default. On April 28, 2010, Zions sent Macke a third letter notifying him of the same events of default and, for the first time, the right to cure said defaults. That letter also set forth terms under which Zions would reinstate the loan, which included Macke's payment within 15 days of approximately $90,000.00 of "payment defaults" including late fees, Cadillac Jack's withdrawal of its revocation, and Macke's payment of Zions' attorneys' fees. Macke did not accept these terms and made no further payments to Zions following the acceleration of his loan in December, 2009. Zions never withdrew the acceleration from the time Zions originally notified Macke that he was in default on December 22, 2009. On July 6, 2010, Zions foreclosed on the property.

Defendants Cadillac Jack and Zions have each moved for summary judgment. A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrants summary judgment as a

matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

1. Zions' Motion For Summary Judgment

Zions moved for summary judgment on Macke's claims of wrongful foreclosure and conspiracy to wrongfully accelerate the loan on the basis that Macke was in default under three separate provisions of the loan documents[1] and that Macke was not entitled to the right to cure prior to acceleration. Additionally, because it was entitled to accelerate Macke's loan, Zions contends that there can be no actionable conspiracy. Furthermore, Zions argues that Macke has failed to point to evidence of conspiracy sufficient to withstand summary judgment.

Wrongful Foreclosure

A claim for the wrongful exercise of a power of sale may arise when the creditor has no legal right to foreclose. Brown v. Freedman, 222 Ga. App. 213 (1996). Where a creditor does not possess the right to accelerate a loan and forecloses on the secured property, a cause of action for wrongful foreclosure will lie. Gilbert v. Cherry, 136 Ga. App. 417 (1975).

Zions accelerated Macke's loan pursuant to the letter dated December 22, 2009. At that time, the stated reason for the acceleration was Cadillac Jack's revocation of its guaranty, which Zions contends amounts to an event of default. In its letter, Cadillac Jack stated "to the extent allowable under the Guaranties and applicable law, each of the Cadillac Jack Entities hereby revokes any and all guaranties." In Utah, a guaranty revocation is effective where a guarantor

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[1] The December 22, 2009, letter refers to revocation of the guaranty; the April 13, 2010, and the April 28, 2010 letters both refer to revocations of the guaranty and the failure to make mortgage payments. None of the three letters specifically refer to "adverse change." They simply refer to "among other things."

has signed a continuing guaranty. Cessna Financial Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978). A guarantor has the ability to stop accruing additional liability by "revoking" the continuing guaranty going forward. Mule-Hide Products Co., Inc. v. White, 40 P.3d 1155, 1159-60 (C.A. Utah 2002). Here, there is no evidence that the Cadillac Jack guaranty was continuing in nature. Moreover, Cadillac Jack's "revocation" was expressly limited to what was permissible under the terms of the guaranties and the law. In contrast to displaying an intent to disclaim its obligations under the guaranties, the letter merely expressed Cadillac Jack's intent to limit its liability to the extent possible under the guaranties. The Court holds that the December 11, 2009, letter from Cadillac Jack does not amount to a "revocation" to constitute an event of default under the loan documents.

However, even if it did, the Court finds that Zions was obligated to give Macke the right to cure such default prior to accelerating his loan. Under the Security Deed, Zions is permitted to accelerate the loan immediately upon an "Event of Default." The Security Deed lists a series of events that could constitute an "Event of Default" but provides a right to cure such an event, with the effect that an "Event of Default" would not have occurred.[2]

Zions argues that the right to cure is conditioned upon Zions' demand that the borrower cure the default and that such demand to cure is optional. The Court is not persuaded by this

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[2] Specifically, the "Right to Cure" provision located at the end of the list of "Events of Default" and before "Lender's Remedies and Power of Sale" provides: "If such a failure is curable and if Grantor has not been given a notice of a breach of the same provision of this Security Deed within the preceding twelve (12) months, it may be cured (and no Event of Default will have occurred) if Grantor, after Lender sends written notice demanding cure of such failure: (1) cures the failure within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps sufficient to cure the failure and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical."

interpretation of the right to cure provision. The only express conditions placed on the right to cure are whether the default is "curable" and whether the borrower "has not been given a notice of a breach of the same provision... within the preceding twelve months." To the extent that the clause "after Lender sends written notice demanding cure of such failure" could be interpreted to further subject the right to cure to the option of the lender, the Court finds that such a reading merely evidences the ambiguity of the provision. "The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement." Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982). Therefore, construing the loan agreements in favor of Macke, the Court holds that Macke was entitled to the opportunity to cure an event of default prior to Zions' acceleration.

It is undisputed that Zions did not give Macke the right to cure any purported default in December, 2009, prior to accelerating Macke's loan. Accordingly the Court finds that the acceleration was wrongful, even if, as Zions now argues, Cadillac Jack's intention to vacate the property and not renew the lease amounted to a "material adverse change in circumstances," which is a separate ground for default under the loan documents.[3]

Furthermore, because the loan was accelerated and Zions expressly told Macke that any payments would be applied to all outstanding indebtedness, the Court cannot view Macke's failure to make continued monthly payments after the December, 2009, acceleration as a further event of default, as Zions urges. Macke cannot fall into default of a loan already in default and

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[3] The only event of default specifically identified in the December 22, 2009 letter was Cadillac Jack's purported revocation of its guaranty, and the only events of default identified in the April 13, 2010, and April 28, 2010, letters were Mr. Macke's failure to make monthly payments following the acceleration of the loan in December, 2009, and Cadillac Jack's purported revocation.

already accelerated, and under Utah law, Macke was not required to tender further payments. Kixx, Inc. v. Stallion Music, Inc., 610 P.2d 1385, 1389-1390 (Utah 1980).

Finally, the letter dated April 28, 2010, which provided Macke a right to cure, does not remedy Zions's wrongful acceleration in December, 2009. The loan was never reinstated. Thus, the belated right to cure after acceleration was of no effect.

Zions conceded both in its brief and at oral argument that the parties are in agreement as to all the operative facts in this case and therefore, that this matter is appropriate for resolution by summary judgment. See Builder Marts of America, Inc. v. Gilbert, 257 Ga. App. 763 (2002) ("The trial court has authority to sua sponte grant summary judgment and can also grant summary judgment to the nonmoving party"). Accordingly, because the Court holds that acceleration of Macke's loan in December, 2009, was wrongful, the Court **GRANTS**, sua sponte, summary judgment in favor of Macke as to Zions's liability on Macke's claim of wrongful foreclosure. However, the extent of Macke's damages will be subject to determination by the trier of fact.

2. Cadillac Jack's Motion for Summary Judgment/ Zions' Motion for Summary Judgment Regarding Conspiracy to Accelerate the Loan

Both Cadillac Jack and Zions argue that Macke's claim for conspiracy to accelerate the loan fails for the reason that Macke has failed to come forth with evidence from which a jury could find that there was a conspiracy between the Defendants.

"To recover damages for a civil conspiracy claim, a plaintiff must show that two or more persons, acting in concert, engaged in conduct that constitutes a tort." J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell, 284 Ga. App. 552, 560 (2007). "The essential element of conspiracy is the charge of a common design. It is sufficient to charge that two or more persons

in any manner, either positively or tacitly, arrive at a mutual understanding as to how they will accomplish an unlawful design." Parrish v. Jackson W. Jones, P.C., 278 Ga.App. 645, 649 (2006).

The Court recognizes that "civil conspiracy is an act which is by its very nature covert and clandestine, and usually not susceptible of proof by direct evidence." Mixon v. Phoenix Landscaping, Inc., 136 Ga. App. 344 (1975). Nevertheless, there must be sufficient circumstantial evidence from which a "common design" can be inferred, based on the "nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." Hyperdynamics Corp. v. Southridge Capital Management, LLC, 305 Ga. App. 283 (2010). Here, Macke has failed to point to any evidence from which the trier of fact could infer that the parties shared a common interest in the acceleration of Macke's loan. While Macke can easily persuade the Court to infer an interest in his harm on the part of Cadillac Jack, which is managed by individuals with whom Macke has had a series of bitter business disputes, Macke has pointed to no evidence, circumstantial or otherwise, that would support an inference that Zions would somehow benefit by Macke's default and its subsequent foreclosure on the commercial property during the worst property market in decades. Accordingly, summary judgment with respect to Macke's claim for conspiracy to accelerate the loan is **GRANTED** in favor of Zions and Cadillac Jack.

SO ORDERED this 4th day of August, 2011.

Elizabeth E. Long

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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