STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-08

TD Banknorth, N.A.,

Plaintiff

v.

**DECISION AND ORDER**

Benjamin Hawkins and
Timothy Morse,

Defendants

This matter is before the Court on (a) Defendant Timothy Morse's Motion for Summary Judgment on Count I of Plaintiff TD Banknorth's Amended Complaint; (b) Plaintiff TD Banknorth's Motion for Default Judgment against Defendant Benjamin P. Hawkins on Count I of Plaintiff's Amended Complaint; (c) Plaintiff TD Banknorth's Motion for Summary Judgment on Defendants' Counterclaims; and (d) Defendant Hawkins' Motion for Discovery Sanctions.

Factual Background

Pursuant to a Loan Agreement dated March 16, 2001 ("Loan Agreement"), Plaintiff extended a line of credit in the amount of $3,000,000 to Morse Brothers Inc., a company that was in the business of manufacturing and selling mulch. At the time, Defendant Timothy Morse and Defendant Benjamin Hawkins were the principals of Morse Brothers. The parties agreed that the Loan Agreement "together with the commitment letter dated January 2, 2001 constitute the entire agreement between the parties with respect to the subject matter hereof and thereof . . .." (Exh. 1-B to Def.'s S.M.F. at p. 14.) The January 2, 2001, commitment letter and other commitment letters executed by the parties in later years required Morse Brothers to "maintain [its] primary deposit relationship with [Banknorth] during the term of the Loan." (Exh. 1-A to Defs' S.M.F. at p. 6. *See also* Pl.'s S.M.F. ¶ 146; and Defs.' O.S.M.F. ¶ 146).

At approximately the same time as the execution of the Loan Agreement, Defendants Morse and Hawkins each executed an "Unconditional Guaranty of Payment and Performance"

("Guaranty") pursuant to which each agreed that if Morse Brothers did not pay Plaintiff the amount due under the terms of the line of credit, Plaintiff could demand payment of any deficiency from Defendants Morse and Hawkins. The Guaranty reads, in relevant part:

> 1. Agreement to Pay and Perform; Costs of Collection. Guarantor does hereby agree that if the Note and Agreement are not paid and performed by Borrower in accordance with their terms, or if any and all sums which are now or may hereafter become due from Borrower to Bank under the Loan Documents are not paid by Borrower in accordance with their terms, of any and all other Obligations of Borrower to Bank under the Note, Agreement and the Loan Documents are not performed by Borrower in accordance with their terms, Guarantor will immediately make such payments and perform such obligations. . . .
>
> 7. Rights and Remedies of Bank. In the event of a default under the Note, Agreement or Loan documents, or any of them, which shall continue beyond any applicable cure or grace period, Bank shall have the right to enforce its rights, powers and remedies thereunder or hereunder or under any other agreement, document or instrument now or hereafter evidencing, securing or otherwise relating to the indebtedness evidenced by the Note, Agreement or secured by the Loan Documents, in any order, and all rights, powers and remedies available to Bank in such event shall be nonexclusive and cumulative of all other rights, powers and remedies provided thereunder or hereunder or by law or in equity.

Over time, the parties executed numerous amendments to the Loan Agreement. The final amendment was the "Sixth Amendment to Loan Agreement" ("Sixth Amendment), dated July 30, 2005. The Sixth Amendment recognized that "[Morse Brothers] has exceeded the Maximum Working Capital Line Availability . . . and Lender has not exercised any remedies in connection therewith but has reserved all of its rights; . . . " It further stated that

> [Morse Brothers] and [Defendants Morse and Hawkins] acknowledge that [Morse Brothers] has borrowed under the [line of credit] an amount in excess of the Maximum Working Capital Credit Line Availability, that such excess is beyond the obligation of [Plaintiff TD Banknorth], that the Agreement is not amended to allow such excess, that such excess is to be repaid by the Borrower and is secured by the Guaranties and all of the collateral, and that the Lender reserves all rights in connection with such excess, including the right to call an Event of Default.

In final relevant part, the Sixth Amendment declared that

> [t]he 'Working Capital Credit Line Expiration Date' shall be the date which is the first to occur of the following: (i) [Plaintiff TD Banknorth]'s demand for payment of all Working Capital Credit Line Advances outstanding hereunder; (ii) the occurrence of an Event of Default defined in Section 8 of the Agreement; or (iii) September 30, 2005 (if not sooner demanded) . . . .

In connection with the execution of the Sixth Amendment, Defendants Morse and Hawkins signed an "Omnibus Sixth Amendment to Unconditional Guaranties of Repayment and Performance; and Security Agreements" (hereinafter the "Sixth Guaranty"). Among other things, the Sixth Guaranty provided that "each of the [prior] Guaranties is hereby amended to remove any dollar limitation, making each of the Guaranties unlimited."

As of the end of August 2005, Morse Brothers had a deposit account with Key Bank ("Key Account") with a balance of more than $600,000. On September 20, 2005, Plaintiff asked Morse Brothers to relocate the money in the Key Account to Morse Brothers' account with Plaintiff. Morse Brothers did not comply with this request. Plaintiff then issued a notice of default and acceleration (dated September 22, 2005), and initiated the present suit.

On September 28, 2005, Morse Brothers filed a voluntary petition for bankruptcy. Following liquidation of Morse Brothers' assets in the bankruptcy proceeding, the bankruptcy court allowed Plaintiff a deficiency claim of $1,902,692 as a general unsecured claim. In this action, citing the Guaranty, Plaintiff seeks to recover the amount of the deficiency, plus attorneys' fees, interest and late fees from Defendants Morse and Hawkins.

Discussion

**I. Standard of Review**

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be

[1] After review and consideration of the parties' submissions in this case, the Court reminds the parties of the requirements of M.R. Civ. P. 56(h). Under that Rule, motions "for summary judgment shall be supported by a separate, short, and concise statement of material facts . . .", and opposing statements of fact "shall admit, deny or qualify the facts asserted by reference to each numbered paragraph . . . and unless a fact is admitted, shall support each denial or qualification by a record citation." M.R. Civ. P. 56(h)(1) & (2). Although the Court has accepted and considered the parties' submissions, for future reference, the Court directs the parties to the Law Court's opinion in *Stanley v. Hancock County Comm'rs*, 2004 ME 157, ¶¶ 13 & 27-29, 864 A.2d 169, 178-79. *See also Dyer v. Department of Transportation*, 2008 ME 106, ¶ 15, --- A.2d ---.

resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

**II. Defendant Morse's Motion for Summary Judgment on Count I**

In Count I of the First Amended Complaint (hereinafter "Amended Complaint"), Plaintiff seeks a judgment against Defendants Morse and Hawkins as guarantors of Morse Brothers' obligations. Defendant Morse argues that he is entitled to summary judgment on Count I because the event that purportedly generated Plaintiff's Notice of Default and Acceleration did not constitute a default under the Loan Agreement. According to Defendant Morse, Plaintiff cites Morse Brothers' maintenance of the Key Account as the event of default. Defendant Morse contends the existence of Morse Brothers' Key Account does not constitute a default because although the loan documents require Morse Brothers to "open and maintain [its] primary deposit relationship with [Plaintiff] during the term of the Loan," the Key Account was not Morse Brothers' "primary" account. Accordingly, Defendant Morse argues that Morse Brothers was not in default, and he cannot be responsible under the terms of the Guaranty.

Plaintiff argues that the Key Account was a primary account or at least an account that constitutes a default of the loan documents. Given the parties' contrary views of the Key Account, which views are supported to some degree by record evidence, there is a material issue of fact as to the nature of the Key Account and whether Morse Brothers was in default of the Loan Agreement. Despite the factual dispute, Defendant Morse contends that summary judgment on Count I is warranted because Plaintiff's September 22, 2005 Notice of Default and Acceleration was premature and failed to comply with applicable cure periods.

Defendant Morse specifically argues that under Section 7 of the Guaranty, Plaintiff could recover from Defendant Morse as a guarantor only if: (1) Morse Brothers was in default, and (2) the circumstances of the default continued past any applicable cure period. Defendant Morse thus maintains that any alleged default upon which Plaintiff could have based its Notice of Default would be a "declared default", which under the Loan Agreement requires a cure period of a minimum of 10 days. Defendant Morse asserts that he is entitled to judgment as a matter of law because by filing this action before it issued the Notice of Default, Plaintiff did not allow Defendant Morse the opportunity to cure the alleged default.

In response to Defendant Morse's arguments, Plaintiff notes that there were a number of events that constituted a default, including some that were "immediate defaults" to which no cure period applies. For example, Plaintiff cites the Key Account and argues that Morse Brothers' "transfer [of] working capital assets from the protection of the Bank's Security Agreement to an account in which the Bank did not have a perfected security interest constituted [an] 'assignment for the benefit of creditors.'" (Pl.'s Opp. at 10.) Plaintiff contends that because the "making of an assignment for the benefit of creditors" is an event of "immediate default"[2] to which no cure period

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[2] Section 7 of the Loan Agreement sets forth the following events of default:
Section 7. Events of Default.

7.1 Immediate Defaults. Upon the occurrence of any of the following Events of Default:
(a) The termination of existence, bankruptcy or insolvency of, or the making of an assignment for the benefit of creditors by, Borrower or Guarantors; or
(b) The institution of bankruptcy, reorganization, liquidation, receivership or similar proceedings by or against Borrower of Guarantors and, if against, consent thereto by Borrower or Guarantors or the pendency thereof for sixty (60) days;
then the principal of and all interest on the Loans, and all sums owing hereunder shall become forthwith due and payable without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived.

7.2 Declared Defaults. Upon the occurrence of any one of the following Events of Default:
(a) Default in the payment of any interest, principal, or other charges when due and payable hereunder or under the Loans and the continuance thereof for then (10) days;
(b) Default in the payment or performance of any liability, obligation or covenant of Borrower hereunder, other than as set forth in Section 7.2(a), and the continuance thereof for thirty (30) days after written notice of such default has been given;
(c) Default in any of the terms or conditions of the Security Documents, or of any other security documents from time to time given to secure this Agreement, as the same may be amended, extended or otherwise modified from time to time, not cured within any applicable grace period therein or if no specific grace period is stated, then within thirty (30) days after written notice of such default is provided;
(d) Default in the payment or performance of any liability or obligation of Borrwer for money borrowed or under any of Borrower's leases, unless in any such event such default is cured within any applicable grace period or is waived in writing by the party to which such obligation is owed before Lender declares an Event of Default hereunder;
(e) Any representation, warranty, statement, certificate, schedule or report made or furnished to Lender by Borrower shall prove to have been false or erroneous in any material respect at the time of the making thereof;
(f) the entry by any court of a final judgment against Borrower in excess of $100,000 which shall not within forty-five (45) days of the date thereof be satisfied, discharged, vacated or set aside or the attachment of any property of Borrower in excess of $100,000 which shall not within thirty (30) days after the making thereof be released or otherwise provided for in a manner approved in writing by Lender;
(g) The occurrence of such a change in the condition or affairs (financial or otherwise) of Borrower as, in the good faith judgment of Lender, materially impairs the collateral from time to time held as security herefor or the prospect of payment due Lender under this Agreement or any documents given as security herefor and the failure of Borrower to satisfy Lender that such change does not materially impair such collateral or such prospect of payment within ten (10) days after the date of Lender's written notice to Borrower concerning such change;

then or at any time thereafter while such Event of Default is continuing, Lender may declare all indebtedness of Borrower hereunder and under Loans due and payable, whereupon it shall become

applies, Plaintiff could pursue a judgment against Defendant Morse without affording Defendant Morse the opportunity to cure the default. Plaintiff also argues that Morse Brothers' filing of th bankruptcy petition and Morse Brothers' acknowledged over-borrowing[3] constituted events of immediate default entitling Plaintiff to recover against the guarantors.

As the parties' arguments demonstrate, the principal issues generated by Count I of the Amended Complaint are whether Morse Brothers defaulted under the terms of the Loan Agreement, and if so, whether the default was subject to a cure period. By definition, resolution of the issues requires the Court to resolve certain factual disputes, including whether by establishing the Key Account, Morse Brothers failed to maintain its "primary deposit relationship" with Plaintiff, and whether under the circumstances, Plaintiff waived, as Defendant Morse argues, its ability to declare Morse Brothers' over-borrowing as an event of default. Given the existence of these fundamental factual disputes, Defendant is not entitled to summary judgment on Count I of Plaintiff's Amended Complaint.

**III. Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims.**

Plaintiff seeks summary judgment on each count of Defendants' Counterclaims.

A. Count I

In Count I of the Defendants' Counterclaims, Defendants ask the Court to define the scope and enforceability of the Sixth Guaranty. Defendants specifically seek a declaration that the Sixth Guaranty supercedes the prior agreements between the parties and, therefore, is the only contract governing the parties' relationship. Defendants also contend that the Sixth Guaranty is void because Plaintiff failed to honor Plaintiff's oral promise to extend and increase Morse Brothers' line of credit and grant Morse Brothers additional long-term financing, which promise Defendants maintain served as consideration for Defendants' execution of the Sixth Guaranty. Finally, Defendants allege that the Sixth Guaranty has been discharged by operation of 11 M.R.S. §§ 3-1601, 1604, & 1605.

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forthwith due and payable, without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived.

[3] Morse Brothers acknowledged the over-borrowing in the Sixth Amendment.

In support of its Motion for Summary Judgment on Count I of the Defendants' Counterclaim, Plaintiff argues that: (1) the Sixth Guaranty merely amended, and did not replace, the prior Guaranties and, therefore, Defendants are bound by all of the Guaranties, subject to the applicable amendments; (2) because Plaintiff was entitled to terminate Morse Brothers' ability to draw on the line of credit under the express and unambiguous terms of the Sixth Amendment, Plaintiff did not breach the Sixth Amendment; and (3) any alleged oral promise is unenforceable and thus any evidence regarding the alleged promise is inadmissible.

The essence of Count I of the Counterclaims is Plaintiff's alleged oral promise. If Defendants can establish the existence of an enforceable oral agreement, and that Plaintiff breached the agreement, Defendants could potentially avoid liability under the terms of the Sixth Guaranty. Plaintiff argues in part that assuming, *arguendo*, a promise was made, Defendants have failed to prove that the material terms of the alleged promise are sufficiently definite to establish a binding agreement. As such, Plaintiff contends that neither the Sixth Amendment nor the Sixth Guaranty were repudiated and, therefore, Plaintiff is entitled to a judgment as a matter of law on Count I of the Counterclaims.

Although the Court recognizes that "[t]he existence of a contract is a question of fact," *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 9, 760 A.2d 1041, 1044 (citations and internal quotation marks omitted), "[w]hen a motion for summary judgment, supported by a proper statement of materials facts, asserts that a claim is legally insufficient, the party opposing a summary judgment has the burden to establish a prima facie case for each element of their claim or defense in order to avoid a summary judgment." *Reid v. Town of Mount Vernon*, 2007 ME 125, ¶ 13, 932 A.2d 539, 543-44 (citing *Reliance Nat'l Indem. v. Knowles Indus. Servs. Corp.*, 2005 ME 29, ¶ 9, 868 A.2d 220, 224-25). In order to make out a prima facie claim for breach of contract, Defendants must first establish that a contract in fact existed and that a material term of that contract was breached. *See Maine Energy Recovery Co. v. United Steel Structures, Inc.*, 1999 ME 31, ¶ 7, 724 A.2d 1248, 1250.

In order to establish the existence of a contract, Defendants must demonstrate the mutual assent by the parties "to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties." *Forrest Assocs.*, 2000 ME 195, ¶ 9, 760 A.2d at 1044. The record, when viewed in the light most favorable

to Defendants, reveals at best that additional financing had been "proposed" and that Plaintiff's representatives indicated that a cure to Morse Brothers' default "could be found." The record does not contain some essential material terms of the alleged agreement such as the amount of any additional financing, the term of the loan, the monthly payment amount, or the applicable interest rate.[4] *See e.g.* Defs.' S.A.M.F. ¶¶ 22, 23, 25, 29. Absent a statement of material facts and record citations demonstrating a meeting of the minds on these material terms, Defendants cannot satisfy their burden to establish the existence of a contract or a prima facie claim for its breach. *See Searles v. Trustees of St. Joseph's College, et al.,* 1997 ME 128, ¶ 13, 695 A.2d 1206, 1212 ("[A] statement of intent given as reassurance, and 'an intention to do an act is not an offer to do it . . . a mere expression of intention or general willingness to do something. . . does not amount to an offer.'") (quoting 17A Am. Jur. 2d Contracts § 43 (1991)); and *Jordan-Milton Machinery, Inc. v. F/V Teresa Marie II*, 978 F.2d 32, 35 (1st Cir. 1992).

Defendants also seek a declaration that the Sixth Guaranty replaced all prior Guaranties and is, therefore, the only contract governing the parties' relationship. Contrary to Defendants' assertion, the unambiguous language of the Sixth Guaranty demonstrates otherwise. The interpretation of unambiguous contract language is a question of law. *See Benton Falls Assoc. v. Central Maine Power, Co.*, 2003 ME 99, ¶ 13, 828 A.2d 759, 763. Here, the Sixth Guaranty expressly states that "[e]xcept as set forth herein, each Guaranty and each Security Agreement shall remain unchanged and is hereby ratified and confirmed." Under this clear and unambiguous language, the Sixth Guaranty amended or supplemented, but did not render void, the prior Guaranties or other agreements between the parties.

Finally, Defendants contend that their obligations under the Guaranty were discharged pursuant to 11 M.R.S. §§ 3-1601, 1604 & 1605. As Plaintiff correctly notes, the Guaranties in this case are not "negotiable instruments" as defined by the UCC and, therefore, Title 11 does not apply. *See* 11 M.R.S. § 3-1104 (defining a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money . . .."); and *Prime Fin. Group v. Smith*, 623 A.2d 757, 759 (N.H. 1993) (holding that guaranties are not negotiable instruments because, "[a] guaranty is by its very nature a conditional promise to pay. That is, a guarantor promises to pay only on the condition that the

[4] Although Defendants purport to assert the terms of the alleged agreement, after review of the record, the Court concludes that they have failed to do so with sufficient specificity or evidentiary support. *See e.g.* Defs.' R.S.M.F. in Opposition to Pl.'s M.S.J. at ¶ 117F (alleging a "substantial increase in the interest rate" but failing to specify the rate; and alleging a promise to extend "a new term loan in excess of $1,200,000 secured by a second mortgage on real estate . . . subject to the results of [an] appraisal" but failing to specify the precise amount of the loan or any terms for repayment).

principal debtor fails to pay. A creditor may not refuse a tender of payment by the principal debtor and then force the guarantor to make good on his [or her] guaranty.") (citation omitted). Because Title 11 does not apply, Defendants' obligations under the respective Guaranties have not been discharged.

B. Count II

In Count II of their Counterclaims, Defendants allege that Plaintiff "impaired the collateral securing its loans by improper activities and interference in violation of" 11 M.R.S. § 1605(6). (Morse Counterclaim at 23-24; Hawkins Counterclaim at 29.) Defendants specifically seek a declaration (a) that there was a violation of 11 M.R.S. § 1605(6); and (b) that the Defendants are discharged from their obligations under the Guaranty. According to Defendants, Plaintiff's "improper activities" include, among other things, its failure to abide by its alleged oral promise to grant additional financing, its settlement of two lawsuits set aside to it by the Bankruptcy Court, and its interference with the sale Morse Brothers' assets in bankruptcy by disparaging Defendants to the high bidder.

As explained above, because the written agreements between the parties are not negotiable instruments, Title 11, Art. 3-A does not apply to the Guaranties. Defendants are not, therefore, entitled to raise "impairment of collateral" under § 1605 as a defense or as an affirmative claim. Moreover, even if the Court determined that the Guaranties constitute negotiable instruments, § 1605 expressly provides that it does not apply if "the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral." 11 M.R.S. § 1605(9)(b). In this case, the Guaranties executed by Defendants contain such a waiver. Accordingly, event if Title 11 applies, Defendants cannot, as a matter of law, prevail on Count II of their Counterclaims.

C. Count III

In Count III, Defendants seek money damages for the alleged breach of the oral contract at issue in Count I. Because the Court has concluded that Defendants have failed to make a prima facie showing that any such oral contract existed, the Court similarly concludes that Defendants may not recover for the alleged breach.

D. Count IV

Although Defendants have captioned Count IV as a breach of contract claim, in their opposition to Plaintiff's motion, they describe Count IV as the "flip-side of Banknorth's claim in Count I of its Complaint . . .. Count IV is a suit for wrongful claim of default for the specific purpose of pursuing the Defendants on the guarantees on the basis of false pretenses." (Defs.' Opp. at 29-30). Defendants basically assert that because Morse Brothers was not in default on September 20, 2005, Plaintiff impermissibly filed this action seeking to collect from them as Guarantors. The claim is, therefore, actually one for the wrongful use of civil proceedings.

"The tort of wrongful use of civil proceedings exists where (1) one initiates, continues, or procures civil proceedings without probable cause, (2) with a primary purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based, and (3) the proceedings have terminated in favor of the person against whom they are brought." *Pepperell Trust Co. v. Mountain Heir Fin. Corp.*, 1998 ME 46, ¶ 15, 708 A.2d 651, 656 (quoting 10 RESTATEMENT (SECOND) OF TORTS § 674). In *Pepperell Trust*, The Law Court emphasized the need for a successful conclusion to the alleged wrongful proceeding before a party can pursue a claim when it wrote, "[f]avorable termination of the offending proceeding is an essential element of the [wrongful use of civil proceedings] claim." 708 A.2d at 656.

Whether Plaintiff was justified in declaring a default of its agreement with Morse Brothers is a central issue in this matter. With that issue unresolved, Defendants cannot possibly establish the "favorable termination" of the proceeding about which they complain (i.e., the initiation of this action based on the declared default). As such, Defendants' claim set forth in Count IV of their Counterclaims is not ripe.[5]

E. Count V

Defendants maintain that in Count V they allege that "Banknorth's call of the LOC (line of credit) on September 20, 2005 was fundamentally fraudulent and dishonest and constituted a breach of the Bank's duties to act in good faith and honesty in the transaction." (Defs.' Opp. at 34). In

[5] In the event that Defendants believe that the Court has mischaracterized their claim, and wish to pursue a breach of contract claim (Defendants allege a "breach of the guarantee contract" ¶ 110), Defendants have failed to identify any specific term of the Guaranty that Defendants allegedly violated. If Defendants maintain that Plaintiff breached an implicit obligation of the Guaranty, Defendants have not cited any authority for the imposition of such an obligation.

support of its motion as to Count V, Plaintiff argues that its good-faith belief when it declared the default and called the loan on September 20, 2005, is not in dispute and, therefore, Plaintiff did not act fraudulently or in bad faith. (Pl.'s Mot. at 24; and Pl.'s Reply at 18).

As will be discussed more fully below, because Defendants have failed to dispute adequately Plaintiff's claim that it believed the loan to be in default on September 20, 2005, and because "[t]he assertion of a legal right, . . . [even if erroneous] is by itself insufficient as a matter of law to support a finding of interference by fraud," the Court concludes that summary judgment in favor of Plaintiff on Count V is appropriate. *Rutland v. Mullen*, 2002 ME 98, ¶ 15, 798 A.2d 1104, 1111.

F. Count VI

According to Defendants, in Count VI of their Counterclaims they allege "that [Mr.] Wedge's [an officer of Plaintiff] actions on September 20-21, 2005 wrongfully interfered with the pecuniary interest of Hawkins and Morse as the owners of Morse Brothers because Wedge knew that there was no ground to claim a default in the LOC . . . but he claimed that default in order to retaliate directly against the owners" of Morse Brothers. (Defs.' Opp. at 35). Defendants thus allege a claim for tortious interference with a prospective economic advantage.

Tortious interference with a prospective economic advantage requires a plaintiff to prove: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages. *Rutland*, 2002 ME 98, ¶ 13, 798 A.2d at 1110 (citing *James v. MacDonald*, 1998 ME 148, ¶ 7, 712 A.2d 1054, 1057). Here, if Defendants seek to establish Plaintiff's liability through fraud, Defendants must prove that Plaintiff:

> (1) made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or refrain from acting in reliance on it, and (5) the other person justifiably relie[d] on the representation as true and acted upon it to the damage of the plaintiff.

*Id.* (citations omitted).

In support of its motion for summary judgment, Plaintiff argues, among other things, that Count VI fails because Plaintiff's declaration of default was valid or, at the very least, was not

fraudulent or malicious. (Pl.'s Mot. at 24-25; and Pl.'s Reply at 18). As such, Plaintiff contends that even if its actions interfered with an economic advantage of Defendants, there was no fraud or intimidation as required under *Rutland.* (*Id.* at 10-11 & 24-25).

Defendants argue that Plaintiff's Notice of Default was fraudulent because Mr. Wedge knew that the loan was not in default. However, Defendants do not cite any record evidence to support that allegation. Instead, at most, Defendants assert that Mr. Wedge called the loan based on an erroneous assumption that the loan was in default. (*See* Defs.' S.A.M.F. ¶ 43 & Pl.'s S.M.F. ¶ 145; Defs.' O.S.M.F. ¶ 145(D)). As noted above, Maine's Law Court has previously held that "[t]he assertion of a legal right, . . . is by itself insufficient as a matter of law to support a finding of interference by fraud." *Rutland*, 2002 ME 98, ¶ 15, 798 A.2d at 1111. Even if Plaintiff's call of the loan could be the basis of a fraud claim, Defendants neither claim nor attempt to demonstrate that they relied on the notice of default (the allegedly tortious act) to their detriment.

To the extent that Defendants seek to prove tortious interference based on intimidation, Defendants must show unlawful coercion or extortion. *Id.* ¶ 16, 798 A.2d at 1111. As the Law Court explained in *Rutland*, "a person who claims to have, or threatens to lawfully protect, a property right that the person believes exists cannot be said to have intended to deceive or to have unlawfully coerced or extorted another simply because that right is later proven invalid." *Id.* In this case, Plaintiff has asserted that it called the loan based on a belief that the loan was in default. Defendants have failed to controvert, on the record, Plaintiff's claim that when Plaintiff called the loan, it was asserting what it believed to be its legitimate right under the loan documents. Rather, Defendants have simply argued that Plaintiff's call of the loan was erroneous because maintenance of the Key Account, the alleged basis of the default, was not prohibited. The erroneous assertion of a legal right, without any evidence of fraud or intimidation, cannot sustain a claim for tortious interference.

G. Count VII

In Count VII, Defendants assert a claim for defamation citing a statement allegedly made by Mr. Wedge. Plaintiff seeks summary judgment on the defamation claim because Mr. Wedge's alleged statement (1) was true and, therefore, not actionable; or alternatively (2) constituted a protected opinion or characterization of actual events and is, therefore, not actionable. (*See* Pl.'s Mot. at 26-27). To the extent that Defendants' defamation claims are based on statements made in

connection with Morse Brothers' bankruptcy petition, Plaintiff also argues that those statements are privileged and not actionable.

According to Defendants' Counterclaims, Plaintiff defamed Defendants when Mr. Wedge began a meeting on September 20, 2005 "by accusing Morse Brothers, Hawkins, and Morse of theft by stealing money from the bank in the form of taking approximately $430,000" from the line of credit and depositing it in the Key Account. (Morse Counterclaim at ¶ 59; Hawkins Counterclaim at ¶ 72 & 90). Defendants also claim that Plaintiff "published the defamatory comments to numerous persons having even the slightest involvement in and connection [to the] bankruptcy of" Morse Brothers. (Morse Counterclaim at ¶ 132; Hawkins Counterclaim at ¶ 160).

Although Defendants allege that Plaintiff defamed both Defendants individually through statements made by Mr. Wedge, the record is devoid of any evidence that Mr. Wedge made disparaging remarks about Defendant Morse. Rather, the record evidence shows that Mr. Wedge made the alleged defamatory statements about Defendant Hawkins exclusively. In other words, Defendants have failed to provide any admissible evidence to establish that Plaintiff made any statements about Defendant Morse that could in any way be considered defamatory.[6] (*See* Defs.' A.S.M.F. ¶ 45[7]; Pl.'s Reply to Defs.' A.S.M.F. ¶ 45; Defs.' O.S.M.F. ¶¶ 136 & 143 & 180-182).

With respect to Defendant Hawkins' defamation claim, Plaintiff directly disputes the alleged statements. There would, therefore, appear to be an issue of fact for trial. (*See* Defs.' A.S.M.F. ¶ 45 and Pl.'s Reply ¶ 45). Plaintiff nevertheless maintains that summary judgment is appropriate because any such statement by Mr. Wedge constitutes an opinion, which is not actionable. "A defamation claim requires a statement -- i.e. an assertion of fact, either explicit or implied, and not merely an opinion, provided the opinion does not imply the existence of undisclosed defamatory facts." *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991) (citations omitted). In this case, Plaintiff argues that even if the "thief" or "stealing" accusation was made, it constituted an opinion or a "characterization of actual events" and is therefore not actionable.

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[6] To the extent that both Defendants contend that Plaintiff defamed them through affidavits submitted during Morse Brothers' bankruptcy proceedings, the Court concludes that any statements made in connection with those proceedings are privileged and, therefore, are not actionable. *See Dineen v. Daughin*, 381 A.2d 663, 664-65 (Me. 1978); and *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991).

[7] Although Defendants assert in their A.S.M.F. ¶ 45 that the "thief" reference was made regarding both Morse and Hawkins, the record citations provided in support of that allegation do not establish that any reference was made to Defendant Morse.

"The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law. . . but if the average . . . [recipient] could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the fact-finder." *Ballard v. Wagner*, 2005 ME 86, ¶ 11, 877 A.2d 1083, 1087 (citations and internal quotation marks omitted). When making a determination as to whether a statement expresses fact or opinion, courts "look to the totality of the circumstances and to whether the statement was intended to state an objective fact or a personal observation." *Id.*

The Law Court has explained that "[t]he crucial difference between statements of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." *Id.* at ¶ 12 (citations omitted). Here, given the nature of the alleged statements and the context in which the statements were purportedly made, the Court believes that an "average recipient" could possibly construe the statements as opinion or fact. Accordingly, an issue remains for a fact finder.

H. Count VIII

In Count VIII of his Counterclaim, Defendant Morse alleges that when Mr. Wold, one of Plaintiff's employees, promised to loan Morse Brothers additional money, he did so with the knowledge of the statement's falsehood, or in reckless disregard of its falsity for the purpose of inducing Mr. Morse to rely on the promise, which Defendant Morse alleges he did to his detriment. (Morse Counterclaim at ¶ 135). While a review of Count VIII reveals some uncertainty as to Defendant Morse's actions in reliance on the alleged promise, the only action pled with sufficient particularity was Mr. Morse's agreement to execute the Sixth Guaranty.[8] *See* M.R. Civ. P. 9(b).

As outlined above,

> [a] defendant is liable for fraud or deceit if he (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to [her] damage. . . .

[8] Although Defendant Morse has suggested that he opted to forego alternative financing based upon Plaintiff's alleged oral promise, Defendant Morse has not provided or cited any record evidence to establish that he had in fact secured and declined alternative financing, or that specific alternative financing was available, but not pursued.

*Francis v. Stinson*, 2000 ME 173, ¶ 38, 760 A.2d 209, 217 (quoting *Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979)).

Because Mr. Wold denies making the statement upon which Defendant Morse allegedly relied, whether Plaintiff, through its employee, made the statement; whether the statement, if made, was false; if false, whether the statement was made intentionally or recklessly in order to induce Defendant Morse to sign the Sixth Guaranty; and whether Defendant Morse relied upon the statement to his detriment are all issues of fact for trial.

I. Count IX

Finally, in Count IX of his Counterclaim, Defendant Morse alleges that Plaintiff had a duty, pursuant to the Maine Commercial Code and under the common law, to act in good faith toward Defendant Morse as Guarantor, which duty Plaintiff breached. According to Count IX, Plaintiff breached that duty when it refused to authorize Plaintiff's property appraiser to do work on behalf of Morse Brothers in connection with its bankruptcy petition. (Morse Counterclaim at ¶¶ 139-147). Defendant Morse more specifically contends that Plaintiff's property appraiser was the only appraiser who could timely appraise Morse Brothers' property and Plaintiff had a duty to authorize its expert to assist Morse Brothers. Plaintiff argues that summary judgment is warranted because no such duty exists under either the Maine Commercial Code or the common law.

In response to Plaintiff's argument, Defendant Morse simply refers the Court to its other arguments in opposition to summary judgment, but cites no authority supporting the existence of the duty he alleges. Moreover, Mr. Morse fails to cite to any record evidence supporting his claim that Plaintiff's appraiser was the only appraiser who could complete the work, or to any evidence of damage that he, as Guarantor, suffered as a proximate result of the alleged breach.

In short, the Court finds no legal basis for the imposition of the duty alleged by Defendant Morse in Count IX of his Counterclaim. Furthermore, even if such a duty exists, Defendant Morse has failed to provide any credible record evidence upon which a fact finder could conclude that Plaintiff breached the duty.

### D. Defendant Hawkins' Motion for Discovery Sanctions

The Court finds no evidence to suggest that Plaintiff committed any discovery violations. Consequently, Defendant Hawkins is not entitled to the relief that he seeks.

Conclusion

Based on the foregoing analysis, the Court concludes and orders as follows:

1. The Court denies Defendant Morse's Motion for Summary Judgment on Count I of Plaintiff's Amended Complaint.

2. The Court grants Plaintiff's Motion for Summary Judgment on Count I of Defendants' Counterclaims.

3. The Court grants Plaintiff's Motion for Summary Judgment on Count II of Defendants' Counterclaims.

4. The Court grants Plaintiff's Motion for Summary Judgment on Count III of Defendants' Counterclaims.

5. The Court dismisses without prejudice Count IV of Defendants' Counterclaims on the ground that the action is not ripe.

6. The Court grants Plaintiff's Motion for Summary Judgment on Count V of Defendants' Counterclaims.

7. The Court grants Plaintiff's Motion for Summary Judgment on Count VI of Defendants' Counterclaims.

8. The Court denies Plaintiff's Motion for Summary Judgment on Count VII of Defendants'

Counterclaims.

9. The Court denies Plaintiff's Motion for Summary Judgment on Count VIII of Defendants' Counterclaims.

10. The Court grants Plaintiff's Motion for Summary Judgment on Count IX of Defendants' Counterclaims.

11. The Court denies Defendant Hawkins' Motion for Discovery Sanctions.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 11/7/08

John C. Nivison
Justice, Maine Business & Consumer Court