

Bayview Servicing, LLC.,

Plaintiff

v.

DECISION AND ORDER

Carl and Lynn Gross,

Defendant and Third-party Plaintiffs,

v.

Wilmington Finance, et als.,

Third-party Defendants

On August 29, 2007, the Court conducted a hearing on the pending motions in this action.¹ Attorney James Audiffred represented the Plaintiff. Attorneys William Devoe and Chet Randall represented the Defendants and Third-party Plaintiffs Gross (the Grosses). Attorney Kurt Olafsen represented Third-party Defendants Wilmington Finance, Inc., and AIG Federal Savings Bank. Attorney Deborah Meier Carr represented Third-party Defendants Sally Tornquist and Tornquist Appraisals, Inc. Attorney Christopher Largay represented Third-party Defendants D.F.C. of Maine, Inc. and Terry Robinson.

Although the Court entertained argument on several motions, because the Court's ruling on at least two of the motions could possibly render other motions moot, the Court will first address the motions that are potentially dispositive.

Third-party Defendants' Motion to Dismiss²

Through their motion, the Third-party Defendants contend that the theories of recovery advanced by the Grosses are not proper grounds for a third-party complaint. In other words, they

¹The motions considered by the Court were the motions listed on the July 31, 2007, Notice of Hearing.

² Initially, Third-party Defendants Wilmington Finance and AIG Federal Savings Bank filed a motion to dismiss alleging that the Grosses had failed to comply with M.R. Civ. P. 14. Thereafter, the remaining Third-party Defendants joined in the motion. Because the motions generate the same issue for all of the third-party defendants, the Court will address the motions as one motion.

argue that the third-party complaint is not within the scope of M.R. Civ. P. 14, which governs the filing of third-party actions.

M.R. Civ. P. 14 provides in pertinent part that a “third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff”. M.R. Civ. P. 14(a). When interpreting the counterpart Federal Rule of Civil Procedure, courts have concluded that the rule does not create a cause of action. *See, e.g., McMillan v. Equifax Credit Information Serv., Inc.*, 153 F. Supp. 2d 129, 131 (D. Conn. 2001). Instead, to proceed on a third-party complaint, a party must assert a theory by which the third-party plaintiff’s liability to the plaintiff can be shifted to another party (i.e., the third-party defendant). In other words, a third-party action is only available for derivative claims. 3 J. Moore, *Moore’s Federal Practice*, § 14.03 at 13-14 (3d ed. 2006). Most often, the derivative claims consist of claims for contractual indemnification or claims of contribution.

Here, in their amended third-party complaint, the Grosses’ assert various theories of recovery, including negligence, fraud, misrepresentation and breach of contract. None of the claims can be considered a derivative claim. Rather, the Grosses’ claims are independent claims against the various third-party defendants. That is, the Grosses assert claims that could be prosecuted regardless of whether they are liable on Plaintiff’s complaint for foreclosure.

In response to the motions, the Grosses contend that regardless of the merits of the Third-party Plaintiffs’ technical arguments, the Court should deny the motions because the Grosses can simply file separate claims against the third-party defendants and request the consolidation of all of the claims. The Grosses thus argue that judicial economy militates in favor of the denial of the motions. The Court recognizes that if the Court dismisses the third-party complaints without prejudice³, the Grosses can nevertheless proceed on their claims. The Court also acknowledges that in the event the Grosses commenced separate actions, their request for consolidation of this action with their claims against the Third-party Defendants might have some merit.

The Court is mindful of the desire to maximize judicial resources and avoid duplication of effort. If the Court were to deny Third-party Plaintiffs’ motions to dismiss on the basis of judicial economy in this case, however, the Court would ignore the clear requirements of M.R. Civ. P. 14. In many cases, a party, citing judicial economy, can argue that the Court can and should ignore the mandates of various rules of procedure. To do so would render the rules of procedure meaningless in many instances. In this case in particular, where the Grosses’ claims clearly are not the derivative

³ Third-party Defendants have not argued for, and the Court is not aware of any basis for, a dismissal with prejudice.

claims contemplated by M.R. Civ. P. 14, the Court believes that it must apply the rule regardless of the perceived efficiencies of litigation. Accordingly, the Court will grant the Third-party Plaintiffs' motions to dismiss.

Plaintiff's Motion for Summary Judgment

Plaintiff seeks summary judgment on its complaint for foreclosure commenced pursuant to 14 M.R.S. § 6321 (2006). M.R. Civ. P. 56(c), which governs summary judgment, provides in pertinent part that "[j]udgment shall be rendered ... if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact ... and that any party is entitled to a judgment as a matter of law." When reviewing the record, the Court must view the facts in the light most favorable to the non-moving party. *See Penn v. FMC Corp.*, 2006 ME ¶ 6, 901 A.2d 814, 815.

Plaintiff contends that no issue of material fact exists regarding the Grosses failure make payments on a promissory note secured by a mortgage on the Grosses' real property located on Vinalhaven, Maine. Plaintiff, which holds the mortgage, thus argues that it is entitled to judgment as a matter of law on its complaint.

The record established that in December 2004, the Grosses signed a promissory note by which they borrowed \$400,000 from Wilmington Finance, which is part of AIG Federal Savings Bank.⁴ As part of the consideration for the loan, the Grosses executed a mortgage deed by which they granted the lender a lien on the Grosses' property on Vinalhaven. According to Plaintiff, in January 2005, Wilmington Finance assigned the note and mortgage to Plaintiff.⁵

Under the terms of the promissory note, the Grosses were required to make monthly payments on the indebtedness. The Grosses failed to make the January 2006 payment, and have not made any of the subsequent monthly payments. The Grosses are not, therefore, current on the payments on the loan secured by the mortgage.

In response to Plaintiff's complaint and in their opposition to Plaintiff's Motion for Summary Judgment, the Grosses raise several defenses related to the origination and management of the loan. In essence, the Grosses argue that they are not in default, or alternatively that the Court should not enforce the default provisions of the note and mortgage, because Plaintiff, or Plaintiff's assignor, breached the parties' agreement.

⁴ Wilmington Finance and AIG Federal Savings Bank are third-party defendants in this action.

⁵ The Grosses contend that they did not receive notice of the assignment until March 2006, at which time they were advised that the assignment was effective on March 1, 2006.

More specifically, the Grosses assert that the Plaintiff's assignor, and its agents, appraised the property at an inflated value in order to induce the Grosses to borrow the money and grant a mortgage on the property. In addition, the Grosses aver that Plaintiff's assignor collected escrow funds for the payment of real estate taxes, and that the taxes were not paid, which caused the Town of Vinalhaven to file a tax lien on the property.

The Grosses' allegations are supported by the affidavit of Defendant Lynn Gross. Plaintiff and the Third-party Defendants refute most of the Grosses' contentions. There are, thus, many facts in dispute. The question is whether the disputed facts are material to Plaintiff's legal claim.

Plaintiff correctly notes that the record establishes that the Grosses have not made all of the payments required under the terms of the promissory note. On this record, however, the Court cannot grant summary judgment despite the Grosses' failure to make all of the payments. If the Grosses establish at trial, as they have alleged by affidavit, that Plaintiff's assignor, or its agents, improperly inflated the value of the property to induce the Grosses to execute the promissory note and mortgage⁶, or the Grosses establish that Plaintiff has breached a material term of the parties' agreement⁷, the Grosses could have been justified in not making the payments. For instance, if the Grosses can convince a fact finder that Plaintiff's assignor and/or its agents fraudulently induced the Grosses to enter into the agreement, Plaintiff might not prevail on its foreclosure action. In short, because the parties dispute the facts and circumstances surrounding the execution and performance of the agreement, Plaintiff is not entitled to judgment as a matter of law.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Motions to Dismiss filed by Third-party Defendants for the Grosses' failure to comply with M.R. Civ. P. 14 are granted. The Third-party Defendants are dismissed without prejudice.
2. The Third-party Defendants' remaining motions to dismiss are moot and are thus dismissed without prejudice.
3. Plaintiff's Motion for Summary Judgment is denied.

⁶ Plaintiff's ability to enforce the obligation is subject to the Grosses' defenses against Plaintiff's predecessor, even if Plaintiff is considered a holder in due course. 11 M.R.S. § 3-1305 (2007).

⁷ In the event of the breach of a material term of a contract, the non-breaching party might be relieved of the party's obligation to perform under the terms of the agreement. *See generally, Down East Energy Corp. v. RMR, Inc., 1997 ME 148, ¶ 10, 697 A.2d 417, 421.*

4. The Motion of Wilmington Finance, Inc., and AIG Savings Bank for Leave to File Third-party Complaint is moot.

5. The Motion for Order to Apply M.R. Civ. P. 16B(b)(7) filed by Third-party Defendants Sally Tournquist and Tournquist Appraisals, Inc., is moot.

6. The Third-party Defendants' Motion to Sever Counts II, IV and XIV, para. 152, filed by Defendants Sally Tournquist and Tournquist Appraisals, Inc., is moot.

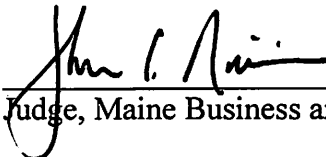
7. The Grosses' Motion to Amend Answer, Affirmative Defenses and Counterclaims is granted.

Given the dismissal of the claims against the Third-party Defendants, the Court further orders:

The parties shall file any request to amend the pleadings and/or join parties to this action on or before October 15, 2007, after which date the Court shall enter a scheduling order to govern future proceedings.

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

Dated: 10/11/07



Judge, Maine Business and Consumer Court