

STATE OF MAINE  
CUMBERLAND, ss.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. RE-11-51  
TDW-CUM-9/9/2011

KIMCO CAPITAL CORP.,

Plaintiff

v.

ORDER

500 WESTBROOK LLC, et al

Defendants.

Before the court is plaintiff Kimco Capital Corporation's motion for summary judgment on count I of its complaint, which seeks foreclosure of its mortgage on certain property owned by defendant 500 Westbrook LLC in Westbrook, Maine.<sup>1</sup>

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. E.g., Johnson v. McNeil, 2002 ME 99 ¶ 8, 800 A.2d 702, 704. The facts must be considered in the light most favorable to the non-moving party. Id. Thus, for purposes of summary judgment, any factual disputes must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a

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<sup>1</sup> Count II of plaintiff's complaint seeks a deficiency judgment against defendant Maria Snyder. Ms. Snyder has not opposed plaintiff's motion for summary judgment on count I but she has reserved all her rights to contest any effort to collect a deficiency judgment from her. This order does not address count II and does not intimate any view on issues that may be raised by Kimco or Ms. Snyder under count II.

matter of law, summary judgment should be granted. Rodrigue v. Rodrigue, 1997 ME 99 ¶ 8, 694 A.2d 924, 926.

In this case it is not disputed that 500 Westbrook LLC signed a note evidencing its indebtedness to Kimco, that the note is secured by a mortgage on the property in question, and that 500 Westbrook is in default on the note, having failed to make any payments since April 2009. 500 Westbrook also does not dispute that it owes \$ 1,250,000 representing the principal amount of the note.<sup>2</sup> In addition, 500 Westbrook has not offered any evidence that would generate a factual dispute for trial as to whether Kimco is entitled to foreclose upon the mortgaged property.

500 Westbrook does, however, contest Kimco's entitlement to \$ 642,488 in interest as of February 1, 2011 and continued interest accruing at the rate of 15 % per year. That interest is sought by Kimco under the default rate of interest specified in paragraph 6 of the note. 500 Westbrook's contention is that this constitutes a liquidated damages provision and, based on the affidavit of Jason Snyder, 500 Westbrook argues that there are disputed issues of fact as to whether Kimco's damages in the event of default are difficult to estimate accurately and whether the default interest rate is a reasonable forecast of the amount necessary to compensate Kimco for 500 Westbrook's default. See Raisin Memorial Trust v. Casey, 2008 ME 63 ¶ 18, 945 A.2d 1211, 1215.

The threshold issue is whether the default rate of interest agreed to by the parties should be treated as a liquidated damages provision. This can be determined by the court based on the provisions of the note as an issue of law. Specifically, section 6 of the

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<sup>2</sup> 500 Westbrook has denied ¶ 4 of Kimco's Statement of Material Facts (SMF) but that denial is not supported by any record citation and is therefore admitted for purposes of summary judgment. M.R.Civ.P. 56(h)(4). In addition, it is evident from 500 Westbrook's statement of additional material facts that 500 Westbrook's opposition to Kimco's motion for partial summary judgment relates solely to the amount of interest sought by Kimco.

note provides in pertinent part that upon the occurrence of an event of default, unpaid amounts shall bear interest at 15% per annum and further provides:

The Borrower hereby acknowledges that (a) such Default Rate is a material inducement to the Payee to make the Loan available to the Maker, (b) the Payee would not have made the Loan available to the Maker in the absence of an agreement of the Maker to pay such Default Rate, (c) such Default Rate represents compensation for increased risk to the Payee that the Loan will not be repaid and (d) such Default Rate is not a penalty and represents a reasonable estimate of (1) the cost of the Payee in allocating resources (both personal and financial) to the on-going review, monitoring, administration and collection of the Loan and (2) compensation to the Maker for losses that are difficult to ascertain.

Where 500 Westbrook has specifically agreed to the default rate of interest and has specifically agreed that the default rate of interest represents “compensation for increased risk to the Payee that the Loan will not be repaid,” the court concludes that the default rate of interest does not represent a liquidated damages provision that is subject to the criteria set forth in the Raisin Memorial Trust case. In the alternative, because the references in section 6 to the costs incurred by Kimco upon a default and losses that are difficult to ascertain suggest that section 6 is partly intended to serve the purposes of a liquidated damages provision, the court concludes that 500 Westbrook has waived its right to contest liquidated damages in the language quoted above.<sup>3</sup>

In this connection, 500 Westbrook has not offered any evidence that would suggest that either the note as a whole or the default interest rate provision constituted a contract of adhesion imposed upon an unrepresented, unsophisticated, or vulnerable party. To the contrary, the terms of the note indicate that the note resulted from a transaction in which 500 Westbrook was represented by a New York law firm. See Note

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<sup>3</sup> As a result, the court does not have to consider whether the opinions in Jason Snyder’s affidavit are sufficient to raise issues of fact under Raisin Memorial Trust.

§ 33 (notices to be sent to 500 Westbrook LLC with a copy to Cohen Tauber Spievack & Wagner LLP).

The court also concludes that Kimco has demonstrated that there is no dispute that the liens claimed by the parties in interest named in the complaint have expired or have been discharged.

The entry shall be:

Plaintiff's motion for summary judgment on Count I of its complaint against defendant 500 Westbrook LLC is granted. See accompanying judgment of foreclosure and sale. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: August 9, 2011

  
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Thomas D. Warren  
Justice, Superior Court