

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 LNV Corporation,)
)
) Plaintiff,)
)
 vs.)
)
) Affordable Hospitality Group-Anderson,)
) LLC; Diversified Capital Investment)
) Group, LLC; Jay Berlye; Anderson County,)
) South Carolina; and the State of South)
) Carolina,)
)
) Defendants.)

IN THE COURT OF COMMON PLEAS)
 TENTH JUDICIAL CIRCUIT)
)
 Civil Action No. 2011-CP-04-2728)

ORDER GRANTING MOTION TO DISMISS COUNTERCLAIMS

This matter came before this Court on February 29, 2012, on Plaintiff, LNV Corporation's ("LNV") motion to dismiss the counterclaims asserted by Affordable Hospitality Group-Anderson, LLC, Diversified Capital Investment Group, LLC, and Jay Berlye (collectively, "Defendants"). Present at the hearing on behalf of LNV were Attorneys B. Rush Smith and Dowse ("Brad") Rustin of Nelson Mullins Riley & Scarborough, LLP. Present on behalf of Defendants were Attorneys Steven E. Buckingham of Gallivan White & Boyd, P.A. and Ron M. Childress. Following the hearing, this Court allowed the parties to submit supplemental briefing and issued a Form 4 Order dated June 7, 2012.

In reaching its decision on this matter, the Court reviewed and considered the following information: (a) LNV's Complaint (with exhibits attached thereto), (b) Defendants' Amended Answer and Counterclaim (with exhibits attached thereto), (c) LNV's amended motion to dismiss the amended counterclaims, (d) LNV's memorandum in support of its motion to dismiss, (e) Defendants' memorandum in opposition to the

motion to dismiss (with exhibits attached thereto), (f) LNV's reply memorandum in support of its motion to dismiss, (g) Defendants' supplemental brief, and (h) LNV's supplemental brief. Having reviewed these submissions and having heard the arguments presented by counsel during the hearing on this motion, the Court **GRANTS** the motion to dismiss Defendants' counterclaims.

Based on the applicable law, materials filed by the parties, and considering the parties' arguments at the hearing, this Court finds as follows:

STATEMENT OF THE CASE / FACTS CONTAINED IN COUNTERCLAIMS

This matter was initially filed as a foreclosure action by LNV against Defendants. The real property that is the subject of this action (the "Subject Property") is a Microtel hotel located in Anderson County, South Carolina. As of the date of filing the Complaint, LNV alleged that it was owed \$4,125,598.66 on the loan covering the Subject Property. Defendants admit that they did not make the payments due under the promissory note, mortgage, and guarantees given to LNV. (*See, e.g.*, Amended Answer and Counterclaim, dated November 28, 2011 (hereinafter "Answer,"), ¶¶ 34 and 116 (admitting Defendants' failure to make payments under Note and Mortgage as demanded) and ¶ 91 (Berlye's refusal to pay guaranty)).

In response to the Complaint, the Defendants filed a series of counterclaims (later amended through an Amended Answer with Counterclaims). Defendants asserted the following claims: (a) breach of contract, (b) breach of the duty of good faith and fair dealing, (c) breach of contract with fraudulent intent, (d) violation of the South Carolina Unfair Trade Practices Act, and (e) tortious interference. In pertinent part, all of the counterclaims revolve around Defendants' assertion that LNV was obligated replace the

construction financing loan (the loan being foreclosed upon) with a permanent loan backed by a United States Small Business Administration ("SBA") 504 guarantee. (See Answer, ¶ 227 ("Plaintiff...was required to grant the permanent loan and assist the Defendants in obtaining the SBA 504 Interim Loan")). The basis of Defendants' claims are an unsigned November 6, 2007, "Loan Commitment" Letter issued by Haven Trust Bank (the original lender that was later placed in receivership by the Federal Deposit Insurance Corporation). (See Commitment Letter, Exhibit A to Defendants' Counterclaims).¹

LNV filed its motion to dismiss Defendants' counterclaims pursuant to Rule 12(b), SCRCF. The crux of LNV's motion is that Defendants released the claims that they now seek to litigate when they entered into a series of loan modifications with LNV and its predecessors.² These modifications with LNV, dated June 1, 2009, and November 10, 2009, were attached as Exhibits B and C to Defendants' Counterclaims. Defendants admit that they signed agreements containing substantially the following language:

AS A MATERIAL INDUCEMENT TO LENDER [LNV] TO ENTER INTO THIS AGREEMENT, BORROWER AND GUARANTORS ... HEREBY FULLY, FINALLY AND COMPLETELY RELEASE AND FOREVER DISCHARGE ORIGINAL LENDER [HAVEN TRUST BANK], THE FEDERAL DEPOSIT INSURANCE CORPORATION ... [AND] LENDER [LNV] OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS,

¹ "A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading." Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (citing Rule 10(c), SCRCF). Considering such matters does not convert a motion to dismiss into a motion for summary judgment. *Id.*

² Though not addressed by this Order, the parties presented a prior loan modification that had been executed with the Federal Deposit Insurance Corporation that similarly contained reaffirmation and release language.

DEMANDS, DAMAGES, EXPENSES ... DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR THE MORTGAGE OR ANY OTHER LOAN DOCUMENT WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER, ET AL., OR ANY THEREOF, ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT.

(Exhibits B and C to Defendants' Answer, ¶ 3). The Loan Modification Agreements also contained the Defendants' reaffirmation of their obligations and the Lender's right to enforce the Note and Mortgage:

Borrower hereby affirms, confirms, ratifies, renews and extends the debts, duties, obligations, liabilities, rights, titles, security interests, liens, powers and privileges created or arising by virtue of the Loan Documents, as amended hereby, until all of the indebtedness and obligations relating to the Loan have been paid or performed in full.

(Loan Modification Agreements, ¶ 6). The guarantors of the debt (Diversified Capital and Berlye) expressly disclaimed any offsets or claims against LNV in the Loan Modification Agreement:

Guarantor has executed this Agreement to evidence his consent. . . and to acknowledge, reaffirm and restate the continuing effect of the Guaranty and the obligations contained therein. Guarantor hereby represents that it has no offset or claims against Lender arising under, related to or connected with the Loans or any of the Loan Documents or otherwise.

(Id. at ¶ 7). Based on the foregoing language, LNV assert in its motion that this language released the claims asserted by Defendants in their counterclaims.

Defendants describe LNV's alleged obligations and breaches as follows:

- a. The Loan Commitment allegedly obligated Haven Trust (and its successors) to make a construction loan, followed by a permanent loan and an SBA loan. (Answer, ¶¶ 214-216).
- b. Defendants allege that as of May 2009, under the Loan Commitment, LNV was required to grant the permanent loan and assist Defendants in obtaining SBA financing pursuant to the Loan Commitment. (Id. ¶ 225) (“In May 2009, Defendants completed performance under the Construction Loan Agreement...[LNV] would have been required to grant the permanent loan and assist Defendants in obtaining the SBA 504 Interim Loan...”).
- c. Defendants allege they repeatedly sought to learn Plaintiff's intentions, repeatedly sought compliance with the Loan Commitment, and/or to negotiate a modification of the Loan Commitment to no avail, and that LNV breached its duty under the Loan Commitment by failing to provide permanent first mortgage financing and by failing to assist Defendants in obtaining SBA financing or even to participate in that process (Id. ¶¶ 243-244).³

ORDER

³ Defendants' counterclaims for breach of the covenant of good faith and fair dealing, breach of contract with fraudulent intent, violation of the South Carolina Unfair Trade Practices Act, and tortious interference with prospective contractual relations, all incorporate and rely on the same basic facts and contentions.

“In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the [pleading].” Cole Vision Corp. v. Hobbs, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). If the claimants fail "to state facts sufficient to constitute a cause of action" in their pleading, the circuit court should dismiss the claims. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003).

Contractual releases are generally recognized by courts of the State of South Carolina. Contractual releases are governed by general principles of contract construction. “A release is a contract and contract principles of law should be used to determine what the parties intended.” Ecclesiastes Production Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Where a “[r]elease unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent.” Bowers v. Dept. of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004).

Neither party disputes that they executed the loan modification agreements dated June 1 and November 10, 2009 (the “Releases”). Neither party disputes the contents of the Releases. The issue before the Court, therefore, is whether the releases apply to the claims asserted by the Defendants in this action. Based on the foregoing, this Court makes the following conclusions of law:

1. The note and mortgage are contractual obligations of the Defendants that are entitled to be enforced against Defendants by the holder of the note and mortgage, LNV. U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199 (Ct. App. 2009).

2. In the Releases, Defendants released LNV “from any and all claims, controversies, disputes, liabilities, obligations, demands, damages, expenses, . . . debts, liens, actions and causes of action of any and every nature whatsoever.” The claims so released included, but were not limited to, any “claim,” “defense,” “counterclaim” or “set-off” that Defendants “have or may claim to have against” LNV “arising out of, connected with or relating to any and all acts, omissions or events occurring prior to [November 10, 2009].”
3. Based on the Defendants’ allegations in the Amended Answer and Counterclaim, Defendants’ claims arose prior to November 10, 2009, when Defendants executed, for the third time, a release of, among other things, “claims,” “demands,” and “causes of action of any nature whatsoever.” By way of example only, Defendants allege that LNV was obligated to provide permanent financing and assist with obtaining the SBA loan from the time it acquired the note from Haven Trust Bank (Answer, ¶ 227), that Defendants “began immediately to negotiate with Plaintiff the future performance” of their duties (*id.*, ¶ 229)—including, as of June 2009, a proposal of “various avenues to qualify Plaintiff for SBA purposes” to facilitate the SBA financing (*id.*, ¶ 239)—all to no avail. Then, in November 2009, when LNV could have sought enforcement of its rights under the Note, Mortgage, and Guaranty, Defendants secured a loan modification that extended the term of the note and, “as a material inducement” for this modification, Defendants granted the broad release of all claims and causes of action, including, but not limited to, defenses and counterclaims arising prior to the time of execution of the modification agreement.

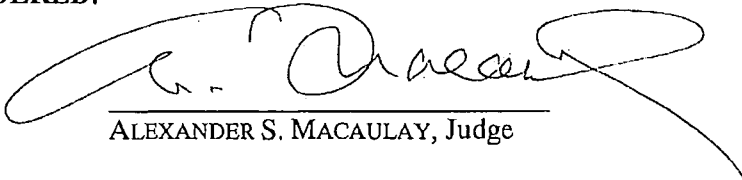
4. The claims asserted in this case by Defendants fall within the definition of released claims in the Releases.
5. When Defendants released all claims, causes of action, and defenses to the debt in the June 2009 and November 2009 Loan Modifications, Defendants did not reserve the claims they now seek to prosecute. Instead, Defendants released *all* claims, demands, and causes of action, and they reaffirmed their respective obligations under the Note and Guaranty.
6. The law does not allow a party, supposedly with a claim for breach of a loan contract, to: (a) sit on its rights and enter into a loan modification agreement with another party, who, in turn, forbears its right to seek contractual remedies, (b) execute, as part of the loan modification agreement, a broad release of all claims and causes of action in favor of the other party, and then (c) later sue the other party for breach of contract on claims that predated the release.
7. Defendants' assertion that they did not intend to release these claims is contradicted by the agreements that they signed. The terms of the release are judged by their plain language. Ecclesiastes Production Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007) (“[I]f the language [of a release] is perfectly plain and capable of legal construction, it alone determines the document's force and effect. [The p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” (Internal citations omitted)).
8. Based on the pleadings and attachments thereto, the arguments of the parties at the hearing and in their briefs—all of which this Court has considered—this Court finds

that Defendants have released the counterclaims asserted in this action, and these counterclaims should be and are hereby **DISMISSED** with prejudice.

9. As this holding disposes of the counterclaims, this Court elects not to reach the additional grounds raised by LNV in its motion to dismiss.

THEREFORE, IT IS ORDERED, that Defendants' counterclaims are dismissed, with prejudice. Plaintiff having prevailed on its motion to dismiss the counterclaims of the Defendants, Plaintiff may proceed with the foreclosure process and may seek, by motion, to have this matter referred to the master-in-equity for further proceedings.

AND IT IS SO ORDERED.



ALEXANDER S. MACAULAY, Judge

November 14, 2012

Walhalla, South Carolina

