

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 2013-CP-38-01427

RECEIVED

JUL 29 2015

~~ORDER GRANTING SUMMARY~~

~~JUDGMENT TO PLAINTIFF~~

Winnifred B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

SC Court of Appeals

FILED FOR RECORD
WINNIFRED B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 FEB 25 PM 2:23

Date of Hearing: December 4, 2014
Presiding Judge: Hon. James B. Jackson
Plaintiff's Counsel: Bryan D. Caskey
Defendant's Counsel: Andrew S. Radeker
Court Reporter: Phyllis Norton

This matter is before the Court by way of Plaintiff's motion for summary judgment, which was filed and served on or about March 10, 2014. On or about December 1, 2014, in opposition to summary judgment, Defendant served an affidavit of Kiritkumar H. Mehta. After reviewing the pleadings of record, the affidavit presented by Defendant, the memorandum of law presented by Plaintiff, and hearing argument of counsel, the Court grants Plaintiff's motion for summary judgment as follows.

FACTS

On February 21, 2007, Krishna of Orangeburg, Inc. made, executed, and delivered a promissory note in the original principal amount of \$725,000.00 to Newtek Small Business Finance, Inc. (hereinafter "Newtek"). These funds were used for the purchase of commercial real estate and a hotel in Orangeburg County. To secure the promissory note, Krishna of Orangeburg, Inc. made, executed, and delivered a purchase money mortgage to Newtek secured by the commercial real estate. As additional security, Defendant (hereinafter "Mehta"), in his individual capacity, made, executed,

and delivered an Unconditional Guarantee, to guarantee full and faithful performance of the terms of the promissory note.

On February 26, 2013, Newtek commenced a foreclosure action against Krishna of Orangeburg, Inc., in which Newtek sought to foreclose its interest in the real estate. Prior to the judgment of foreclosure, Krishna of Orangeburg, Inc. sold the real estate to a third party for the contract price of \$437,000.00. Newtek gave prior approval to this sale and specifically agreed to satisfy its mortgage encumbering the property.

Following the sale, Newtek received the sales proceeds, and credited them towards payment of the amount due under the promissory note. Subsequently, the foreclosure action was dismissed, and Newtek delivered a Satisfaction of Mortgage, which specifically included language regarding Newtek's reservation of rights to seek full payment under the promissory note.

Following Mehta's failure to honor his guarantee, on December 3, 2014, Newtek filed the above-captioned action to enforce the guarantee for the amount remaining under the promissory note. On February 11, 2014, Mehta filed and served his answer.

On March 10, 2014, Newtek moved for summary judgment, seeking a judgment against Mehta for the outstanding balance owed under the guaranty. On December 1, 2014, in opposition to summary judgment Defendant served an affidavit from Mehta.

The essence of Mehta's affidavit that during the negotiation of the terms and provisions of the short sale, Newtek, through a representative, orally promised Mehta that "there would be no more debt owed". Mehta's asserts that this alleged oral promise now presents a material issue of fact which would preclude summary judgment. The Court disagrees and finds it appropriate to grant summary judgment to Plaintiff as a matter of law.

LAW/ANALYSIS

A trial court may grant a party's motion for summary judgment if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Epstein v. Costal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.* Therefore, for purposes of considering Plaintiff's motion for summary judgment, this Court accepts all statements in Mehta's affidavit to be true. However, even assuming all statements in Mehta's affidavit to be true, the Court finds that the affidavit does not create a material issue of fact precluding summary judgment.

Specifically, the Court finds that the parol evidence rule prohibits the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. *See Estate of Holden v. Holden*, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App.2001).

In the instant case, Mehta's affidavit specifically seeks to contradict the written contract for sale and the associated satisfaction of mortgage regarding the issue of whether Newtek would accept the sales proceeds in full satisfaction of all funds owed.

In this instance, the parties negotiated specific terms of their contract and reduced those terms to writing. The Court finds that one of the specific terms negotiated was whether the remaining balance would be owed following the sale of the property. The written words of the final contract and the accompanying documents show that there was no agreement for Newtek to accept the sale proceeds in full satisfaction of the debt in question, and therefore cannot be contradicted by any alleged prior or simultaneous oral representations. Therefore, the Court finds that summary judgment

must be granted to Plaintiff as a matter of law, and Plaintiff is hereby awarded a deficiency judgment against Defendant.

However, the Court finds that a damages hearing shall be held so as to ascertain the amount of the judgment owed to Plaintiff. Specifically, the Court is concerned about the apparent fact that the real property was subsequently re-sold for a higher amount by the third-party purchaser after the sale in question. The Court finds that Defendant's motion to amend his pleadings is summarily denied.

ORDER OF THE COURT

Based upon the foregoing, the Court finds that Plaintiff is hereby granted summary judgment as to a deficiency judgment against Defendant as a matter of law, for an amount to be determined at a damages hearing, and Defendant's motion to amend his pleadings is denied.

AND IT IS SO ORDERED.

o/ JBj

James B. Jackson
Presiding Judge, First Judicial Circuit
In the Court of Common Pleas

Orangeburg, SC
February 18, 2015

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Newtek Small Business Finance, Inc.,

C/A No.: 2013-CP-38-01427

Plaintiff,

vs.

ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER

Kiritkumar H. Mehta,

Defendant.

Date of Hearing: May 27, 2015
Presiding Judge: James B. Jackson
Plaintiff's Counsel: Bryan D. Caskey
Defendant's Counsel: Andrew S. Radeker

This matter is before the Court by way of the Defendant's Motion to Reconsider, which was timely filed and served on or about March 16, 2015 in response to this Court's Order Granting Summary Judgment to Plaintiff, which was previously entered on February 25, 2015. On or about April 10, 2015 the Defendant filed and served a Return to Defendant's Motion to Reconsider.

After reviewing the pleadings of record, considering the written memoranda of law presented from counsel, hearing oral argument of counsel, and accounting for all relevant factors, the Court denies the Defendant's Motion to Reconsider for the following reasons:

LAW/ANALYSIS

The essence of the Defendant's opposition to summary judgment is provided via an affidavit which alleges that during the negotiation of the terms and provisions of the short sale, the Plaintiff, through a representative, orally promised the Defendant that "there would be no more debt owed". The Defendant asserts that this alleged oral promise now presents a material issue of fact which would preclude summary judgment. The Court disagrees and finds it appropriate to grant summary judgment to Plaintiff as a matter of law.

ATTEST: TRUE COPY
W. James B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC
2015 MAY 11 A 8:33
FILED
WILLIAM J. JACKSON
CLERK OF COURT
ORANGEBURG COUNTY, SC

A trial court may grant a party's motion for summary judgment if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Epstein v. Coastal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.* Therefore, for purposes of considering Plaintiff's motion for summary judgment, this Court accepts all statements in the Defendant's affidavit to be true. However, even assuming all statements in the affidavit to be true, the Court finds that the affidavit does not create a material issue of fact precluding summary judgment.

First, the Court notes that the debt was created by a promissory note made by the Defendant's company, which was secured by both a mortgage and by a guarantee signed by the Defendant, personally. The short sale of the real estate secured by the mortgage was conducted to reduce the amount of the debt owed to the Plaintiff. The Court finds that even if there has been a verbal agreement as alleged, it would not be sufficient to satisfy the deficiency.

The amount due by the Defendant is the result of a personal guarantee of a promissory note. The documents which governed the short sale make no mention of any intent to satisfy the full amount of the debt. It was therefore clear to all parties that the short sale would produce insufficient funds to satisfy the debt owed to the Plaintiff. Accordingly, because of the written promissory note, written guarantee, and written short sale documents, the parol evidence rule prohibits any evidence of a conflicting verbal promise to waive the remaining deficiency.

In addition, the Court finds that an earlier, but unexecuted draft of the short sale documents included a provision to explicitly have the Plaintiff waive the deficiency amount, but that provision was deleted from the final short sale documents that were signed by the Plaintiff. The Court finds this to be clear evidence that it was never the intent of the Plaintiff to satisfy the deficiency upon receipt

of the short sale proceeds, as this specific term was proposed to, and then subsequently rejected by, the Plaintiff.

The Court further notes that it is common practice to require that all deficiencies waived be done so in writing. Based upon the foregoing, the Court will not reconsider its original order granting summary judgment to Plaintiff, as the Court believes summary judgment is appropriate.

AND IT IS SO ORDERED.

5/ CBJ
James B. Jackson
Presiding Judge, First Judicial Circuit
In the Court of Common Pleas

Orangeburg, South Carolina
July 13, 2015