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PNC BANK, NATIONAL ASSOCIATION, Plaintiff, v. BRANCH BANKING AND TRUST COMPANY, Defendant.

Case No. 8:08-cv-611-T-24TGW

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

704 F. Supp. 2d 1229; 2010 U.S. Dist. LEXIS 32937

March 8, 2010, Decided
March 8, 2010, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion granted by, in part, Motion denied by, in part, Costs and fees proceeding at *PNC Bank v. Branch Banking & Trust Co., 2010 U.S. Dist. LEXIS 84158 (M.D. Fla., July 16, 2010)*
Affirmed by *PNC Bank v. Branch Banking & Trust Co., 412 Fed. Appx. 246, 2011 U.S. App. LEXIS 2183 (11th Cir. Fla., Feb. 2, 2011)*

PRIOR HISTORY: *PNC Bank v. Branch Banking & Trust Co., 2010 U.S. Dist. LEXIS 3046 (M.D. Fla., Jan. 14, 2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff bank filed suit against defendant bank alleging (1) breach of contract, (2) a claim that defendant's failure to remit 100% of all of a company's principal repayments constituted gross negligence, bad faith, or willful misconduct , (3) conversion, and (4) breach of trust and fiduciary duty. Defendant filed a motion to dismiss.

OVERVIEW: In the breach of contract claim, plaintiff alleged that defendant breached the participation agreement by (1) failing to remit to plaintiff all of the company's principal repayments, (2) allowing the company to use loan proceeds to pay for golf course expenditures, and (3) waiving late fees without plaintiff's consent. Defendant argued that plaintiff waived its right to assert a breach of contract claim relating to its failure to remit to plaintiff 100% of the company's principal repayments. The court found that plaintiff's acceptance of defendant's August 2, 2007 proposal, as well as plaintiff's failure to object to defendant's partial remittance of principal repayments during the year-and-a half that they funded the loan together prior to the company's default, constituted clear evidence of plaintiff's waiver. Next, the court found that defendant's failure to remit to plaintiff 100% of all of the company's principal repayments was a mistake that amounted to mere negligence. The court reasoned that defendant mistakenly remitted partial principal repayments to plaintiff, and there was no evidence that defendant ever intentionally withheld any of the principal repayments.

OUTCOME: Defendant's motion to dismiss was granted.

CORE TERMS: golf course, repayment, funding, loan proceeds, expenditures, email, remit, funded, loan balance, outstanding balance, bad faith, site, breach of contract, administered, gross negligence, willful misconduct, remitted, remittance, outstanding, collected,

phases, conclusions of law, remitting, screen, claims relating, mis-administration, waived, inspection report, inspector's, totaling

LexisNexis(R) Headnotes

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Contracts Law > Contract Conditions & Provisions > Waivers > General Overview
[HN1] Whether a waiver has occurred is generally a question of fact.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview
[HN2] Under Florida law, waiver is the voluntary and intentional relinquishment or abandonment of a known and existing right or privilege which, except for the waiver, the party would have enjoyed. Waiver can be established through express language or implied by conduct that clearly leads a party to believe that a right has been waived. However, mere delay is insufficient to establish waiver.

Contracts Law > Remedies > Compensatory Damages > General Overview
[HN3] Damages for a breach of contract should put the plaintiff in the same position it would have been in had the defendant not breached the contract.

Torts > Negligence > Actions > General Overview
[HN4] A finding of gross negligence requires a showing of (1) the existence of a composite set of circumstances that, taken together, constitute imminent or clear and present danger amounting to more than normal and usual peril; (2) chargeable knowledge or awareness of the imminent or clear and present danger; and (3) the act or omission complained of must occur in a manner which evinces a conscious disregard of the consequences, as distinguished from a careless disregard (as in simple negligence) or from willful or wanton disregard (as in culpable or criminal negligence).

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN5] Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing, and it assures that neither party acts in a manner that destroys the rights or interests of the other party to an agreement.

Torts > Negligence > Actions > General Overview
[HN6] A finding of willful misconduct requires a showing of (1) intentional performance of an act knowing that the act likely would result in injury or damage; (2) an action taken with reckless disregard of the consequences; or (3) a deliberate failure to discharge a duty necessary to safety.

COUNSEL: [**1] For PNC Bank, National Association, Plaintiff: Andrew J. Muha, Colin E. Wrabley, James J. Restivo, Jr., Nina M. Faber, Paul M. Singer, LEAD ATTORNEYS, PRO HAC VICE, Reed Smith, LLP*, Pittsburgh, PA; Jeffrey Carter Andersen, Jeffrey Wayne Warren, LEAD ATTORNEYS, Bush Ross, PA, Tampa, FL.

For Colonial Bank, N.A., Defendant: Christi Adams, James S. Grodin, LEAD ATTORNEYS, Foley & Lardner, LLP, Orlando, FL.

For Branch Banking and Trust Company, Defendant: Christi Adams, LEAD ATTORNEY, Foley & Lardner, LLP, Orlando, FL.

For Jay M. Cohen, Mediator: Jay M. Cohen, LEAD ATTORNEY, Jay M. Cohen, PA, Winter Park, FL.

JUDGES: SUSAN C. BUCKLEW, United States District Judge.

OPINION BY: SUSAN C. BUCKLEW

OPINION

[*1230] *ORDER*

This matter came before the Court on a non-jury trial that was held February 23-25, 2010. This Court has jurisdiction over this action pursuant to *28 U.S.C. § 1332*. After considering all of the evidence, the deposition designations and cross-designations, the pleadings filed by the parties, the arguments made by counsel, and the legal authorities submitted to the Court, the Court makes

the following findings of fact and conclusions of law. To the extent that any of the findings of fact might constitute conclusions of [**2] law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

I. Findings of Fact [1]

1 Stipulated Facts ("SF") can be found in the parties' Pretrial Statement (Doc. No. 63). References to the trial exhibits are as follows: J-# refers to the parties' joint exhibits, P-# refers to Plaintiff's exhibits, and D-# refers to Defendant's exhibits.

Attached to this Order are three exhibits created by the Court to explain certain calculations within this Order. The information in these exhibits comes from evidence admitted during the trial, including J-55.

Plaintiff PNC Bank ("PNC") is the successor to Mercantile Mortgage Corporation. [*1231] (SF # 1). Defendant Branch Banking & Trust Company is the successor-in-interest to certain assets of Colonial Bank ("Colonial"). (SF # 3). Throughout this Order, the Court will refer to Plaintiff as PNC and Defendant as Colonial.

This lawsuit arises out of a loan participation agreement ("Participation Agreement") entered into in August of 2006 by James Bange [2] of Colonial and John Long [3] of PNC. (SF # 5; SF # 8; J-6). The Participation Agreement related to a $ 36.5 million loan made by Colonial [**3] to Venetian Bay of New Smyrna Beach, LLC ("Venetian Bay") to fund Venetian Bay's construction of the Venetian Bay residential development community. (J-1, J-6). The two main issues in this case relate to Colonial's failure to administer the parties' participation in the loan on a LIFO basis (as required by the Participation Agreement) and the use of the loan proceeds by Venetian Bay to pay for golf course expenditures.

2 James Bange was a senior lender at Colonial at the time. (SF # 8).

3 John Long was the Senior Vice President of Mercantile, PNC's predecessor at the time. (SF # 8).

Administration of the Parties' Participation in the Loan

The underlying loan agreement between Colonial and Venetian Bay is similar to a line of credit, in that the balance of the loan was constantly changing. The loan balance would increase when Venetian Bay drew upon the loan and would decrease when Venetian Bay made periodic principal repayments after it sold its lots to builders.

The Participation Agreement provided that PNC would fund all loan amounts made by Colonial to Venetian Bay in excess of $ 26.5 million, up to a maximum amount of $ 10 million. Specifically, paragraph 6 of the Participation Agreement [**4] provides the following:

> The theory of this Participation Agreement between these parties is that [Colonial] shall fund the first $ 26,500,000.00, and [PNC] shall fund all amounts above $ 26,500,000.00. All principal payments from [Venetian Bay] shall be paid to [PNC] until the outstanding loan balance is paid down to $ 26,500,000.00, and thereafter, all principal payments shall be retained by [Colonial].

(J-6). This manner of funding--where PNC funds 100% of all amounts in excess of $ 26.5 million and is paid 100% of all amounts collected by Colonial as long as PNC has an outstanding loan balance--is referred to as a LIFO loan. [4]

4 LIFO stands for "last in, first out," meaning that the last dollars put in to fund the loan are the first dollars repaid when amounts are collected from the borrower. By comparison, a revolving loan administered on a pro rata basis, or pari passeu basis, would require that each bank advance principal based upon fixed percentages and receive principal reductions in a similar fashion.

Pursuant to Paragraph 14 of the Participation Agreement, Colonial was the "lead" bank, responsible for the collection, management, and administration of the loan. As such, Colonial [**5] directly funded Venetian Bay's draw requests, and then Colonial sought funding from PNC for its participation in the funding. This funding procedure was set forth in Paragraph 6 of the Participation Agreement, which provides that when

Venetian Bay made a draw on the loan, Colonial was required to give PNC a funding request for the amount of PNC's participation (along with notice that all conditions precedent to the funding had been satisfied), and then PNC was required to wire the funds to Colonial within three days. (J-6).

Venetian Bay made principal repayments directly to Colonial. Paragraph 16 [*1232] of the Participation Agreement provides that when Venetian Bay made a principal repayment, Colonial was required to pay PNC 100% of the amounts collected until PNC's outstanding balance was reduced to zero, and Colonial was required to make such remittance within two business days after it received the money from Venetian Bay. (J-6).

Under Paragraphs 7 and 8 of the Participation Agreement, PNC was obligated to fund all amounts over $ 26.5 million loaned to Venetian Bay as long as PNC's outstanding balance did not exceed $ 10 million. (J-6). Specifically, Paragraphs 7 and 8 of the Participation [**6] Agreement provide the following:

> 7. *PURCHASE AND SALE OF PARTICIPATION.* [Colonial] hereby sells to [PNC] and [PNC] hereby purchases from [Colonial] the excess loan amounts of all fundings over and above $ 26,500,000.00 based upon fundings drawn by [Venetian Bay] under the Loan Documents ("the Participation Amounts"). The respective amounts of the Loan to be held by [Colonial] and [PNC], based upon the full advance of the proceeds of the Loan, are:
>
> a. [Colonial's] Share: the first $ 26,500,000.00; and
>
> b. [PNC's] Share: all amounts funded or to be funded in excess of $ 26,500,000.00 (maximum of $ 10,000,000.00).
>
> 8. *PARTICIPATION PROCEDURE.*
>
> a. [PNC] shall purchase the Participation from [Colonial] as provided in Paragraph 7 above.

(J-6).

On August 23, 2006, PNC wired to Colonial its first funding payment under the Participation Agreement in the amount of $ 8,913,920.27. (J-8). The parties determined this amount by taking the outstanding balance of the loan on August 17, 2006 ($ 35,413,920.27) and subtracting the $ 26.5 million portion that Colonial was required to fund, leaving a balance of $ 8,913,920.27 to be funded by PNC. (J-55).

It is undisputed that after PNC's initial funding in August [**7] of 2006, Colonial failed to administer the parties' participation in the loan on a LIFO basis for almost a year. Instead, Michelle Fuller, Colonial's Vice President of Construction Loan Administration, testified that Colonial mistakenly administered the parties' participation in the loan on a pro rata basis. Fuller testified that very few of the loans in her construction administration department were administered on a LIFO basis, and when PNC's loan participation information was manually entered into Colonial's computer system, someone mistakenly designated the parties' participation as pro rata, with PNC's participation being designated as 27.397% of the loan. [5] (D-20). As a result, Colonial sought funding from PNC for 27.397% of the amounts of Venetian Bay's draw requests and Colonial remitted repayments from Venetian Bay to PNC for 27.397% of the amounts that Colonial collected.

> 5 This percentage was calculated by dividing the $ 10 million maximum amount that PNC would fund by the $ 36.5 million maximum amount that could be loaned to Venetian Bay.

This erroneous administration of the parties' participation can be seen by reviewing the loan transactions that occurred. For example, [**8] from August 2006 through September 19, 2006, Colonial collected $ 2,511,008.88 from Venetian Bay. (J-55; J-9). However, despite PNC's outstanding balance of almost $ 9 million, Colonial only remitted 27.397% or $ 687,947.55 to PNC. (J-55; J-9). Likewise, from September 6, 2006 through September 19, 2006, Colonial funded $ 1,778,181.19 in draw [*1233] requests from Venetian Bay, but Colonial only sought funding from PNC for 27.397% of that amount or $ 487,172.93. (J-55; D-1). When it sought funding from PNC or was remitting

payments to PNC for these amounts, Colonial gave PNC documentation showing how the amounts were calculated. (J-9; D-1). This documentation revealed that Colonial was only seeking funding from, and remitting payments to, PNC at 27.397%. [6] (J-9; D-1).

> 6 The documentation for the September 26, 2006 remittance, November 7, 2006 funding request, January 9, 2007 remittance, January 18, 2007 funding request, April 26, 2007 funding request, and April 25, 2007 remittance also revealed that Colonial was only seeking funding from, and remitting payments to, PNC at 27.397%. (D-2; D-4; D-5; J-11; J-15). Likewise, the Participation Certificate for PNC's outstanding balance on November 7, [**9] 2006 reflects that PNC's participation was considered to be 27.397%. (J-14).

In July of 2007, it was discovered that Colonial was not administering the parties' participation in the loan on a LIFO basis. As a result, on August 2, 2007, Jim Hogan from Colonial sent an email to John Long at PNC stating the following:

> . . . I have a slightly different proposal to make to you re: Venetian Bay. At the moment, due to [Colonial's] mis-administration of the loan and nothing that [PNC] did, [Colonial is] approximately [$ 873,000] over-funded on the current loan balance of [$ 36.5 million]. [Colonial has $ 27.373 million] outstanding and [PNC] has a balance of [$ 9.126 million]. Under our LIFO agreement, [Colonial] should have ceased funding at [$ 26.5 million] and [PNC] should have funded up to your limit of [$ 10 million].
>
> [Colonial] now ha[s] in hand funds to make a principal payment against the line of [$ 892,000]. I would like to propose to you that we apply [$ 873,000] of that amount against [Colonial's] principal to get [Colonial] back to our [$ 26.5 million] cap. The remainder, [$ 19,000] would come to [PNC] for principal reduction. Thereafter, until [PNC is] fully repaid, all principal [**10] repayments would come to [PNC]. Does that work for you? I would really like to redress [Colonial's] overlimit situation in this manner if possible.

(J-23). An hour later, John Long responded via email: "Okay to your proposal." (J-23).

As a result of this email communication, on August 3, 2007, Colonial remitted to PNC $ 19,669.69 of the $ 892,843.94 it received from Venetian Bay, which brought Colonial's outstanding loan balance to $ 26.5 million and PNC's outstanding balance to $ 9,107,156.06. (J-23; J-25). Therefore, on that date, the parties' participation balances were exactly what they should have been had their participation been properly administered using LIFO for funding and remittance from the very beginning. (Ex 1.2 to D-27).

Thereafter, when Colonial received the November 2, 2007 and December 6, 2007 principal repayments from Venetian Bay, Colonial remitted 100% of these amounts to PNC. (J-55). However, when Venetian Bay made a draw against the loan on December 12, 2007 for $ 1,079,138.78, Colonial initially sought funding from PNC for 27.397% of that amount, but about a week later, Colonial sought funding from PNC for the remainder. (J-55). Therefore, on December 27, 2007, [**11] Colonial's outstanding loan balance was $ 26.5 million and PNC's outstanding balance was $ 9,142,758.72--exactly the amounts required under proper LIFO administration. (J-55; D-27, Ex. 1.2).

On December 28, 2007, Venetian Bay made a draw against the loan for $ 832,837.42. (J-55). Colonial sought [*1234] funding from PNC for the entire amount, but PNC refused to fund the draw. (J-43). Thereafter, Colonial received two more repayments from Venetian Bay totaling $ 130,000, and Colonial remitted the entire $ 130,000 to PNC. (J-55). As a result, PNC's remaining outstanding principal balance is $ 9,012,758.72. (J-55; SF # 26).

While Colonial concedes that it did not administer the parties' participation in the loan on a LIFO basis during the first year, Colonial argues that PNC waived any claims relating to Colonial's administration when PNC accepted Colonial's email proposal on August 2, 2007 to fix their loan balances. [7] Additionally, Colonial argues, and its expert, James Cross, opined, that PNC did not suffer any damages as a result of Colonial administration of the loan. [8] Cross explained that after

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