United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SPIEGEL DEVELOPMENT, INC.	§	
	§	
v.	§	CASE NO. 4:14-CV-761
	§	Judge Mazzant
U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR-IN-N.A., AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR BEAR STERNS COMMERCIAL MORTGAGE SECURITIES IN., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2001-TOP2, and CWCAPITAL ASSET MANAGEMENT LLC	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are Plaintiff's Motion for Summary Judgment (Dkt. #42) and Defendants' Motion for Summary Judgment (Dkt. #43). After reviewing the relevant pleadings, the Court finds that the Plaintiff's Motion for Summary Judgment be granted in part and denied in part and Defendants' Motion for Summary Judgment should be denied.

BACKGROUND

David Spiegel ("Mr. Spiegel") is the President of Spiegel Development Inc. ("SDI" or "Plaintiff"), and he is the Managing Member of DS Vista Creek LLC ("Vista Creek" or the "Borrower") (Dkt. #42 at p. 2; #47 at p. 3). In February of 2001, the Borrower became indebted pursuant to a Loan (the "Loan") in the principal amount of $3,400,000 (Dkt. #43 at p. 4). The Promissory Note (the "Note") executed in connection with the Loan was secured by a first priority lien on and security interest in the property known as Vista Creek Shopping Center located at 2240 S. IH-35 E, Lewisville, Texas (the "Property") (Dkts. #43 at p. 4; #42 at p. 3).

Pursuant to a series of assignments, U.S. Bank National Association ("USB") became the holder of the Note and the related Loan Documents (Dkt. #43 at p. 4).[1] The Loan matured on March 1, 2013, and Vista Creek defaulted due to nonpayment (Dkts. # 42 at p. 5; #42 at p. 3).

CWCAM is the Special Servicer of the Loan (Dkts. #42 at p. 3; #43 at p. 4). Defendants maintain that "in connection with the contemplated sale at issue in this litigation, [CWCAM] served as the Lender's agent." (Dkt. #43 at p. 4). Plaintiff argues that, "[f]ollowing default of the Note, [D]efendant CWCAM, acting as servicer on the loan, considered options of foreclosing on the Property, selling a portion of the Property to TxDot, or selling the Note and collateral documents at auction" (Dkt. #42 at p. 3).

Defendants assert that "[t]he Lender obtained the appointment of a receiver for the Property in the Denton County Texas State Court with Mr. Spiegel's consent." (Dkt. #47 at p. 4). Defendants also claim that "[t]he Lender evaluated business strategies to mitigate or recover its losses in the face of Borrower's default, among which were a condemnation buyout of the Property from the Texas Department of Transportation ("TxDot") and a sale of the Promissory Note on Auction.com." (Dkt. #47 at p. 4). According to Defendants, "Mr. Spiegel was apprised of both options." (Dkt. #47 at p. 4).

Defendants also explain that "[o]n November 13, 2013 the final dual-track business strategy for the Loan was adopted by CWCAM." It states in part:

> The Note will be marketed for sale through Auction.com with a subject-to-reserve price of $1,155,000… Simultaneous with the marketing of the Note, CWCAM will pursue the early condemnation buy-out that the Borrower and Receiver are currently negotiating with TXDOT. The Borrower is expecting an offer by 11/30/13. If the offer from TXDOT is in excess of the $1,185,000 CWCAM as-is

[1] USB is Trustee, and is successor-in-interest to Bank of America, N.A., which was Trustee, and was successor by merger to LaSalle Bank National Association, which was Trustee for Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through Certificates, Series 2001-TOP2, by and through CWCapital Asset Management LLC, in its capacity as Special Servicer, (the "Lender") and CWCapital Asset Management LLC, in its individual capacity, ("CWCAM") (collectively, "Defendants"). *See* Dkt. #43 at p. 1.

> value, the assigned Asset Manager will pull the asset from the Auction.com Note sale.

(Dkt. #47 at p. 4 (citing 43-1)). Defendants maintain that they "informed Mr. Spiegel that the sale on Auction.com would be pulled if a satisfactory offer was received from TxDot." (Dkt. #47 at pp. 4-5). On December 12, 2013 Plaintiff won the auction for the Note. (Dkt. #42 at p. 4). The Loan Sale Agreement ("LSA") was entered between Lender and Plaintiff SDI that day with the purchase price of $1,325,000.00 (Dkt. #42 at p. 4). According to Plaintiff, "[o]n December 18, 2013, seller's counsel provided Mr. Spiegel with a fully executed LSA and informed him that the closing would take place in January." (Dkt. #43 at p. 4).

On December 30, 2013, the receiver received an offer from TxDot in the amount of $3,093,328.00 for a portion of the Property (Dkts. #42 at p. 4; #47 at p. 5).[2] According to Plaintiff, "[o]n January 15, 2014, a representative of the Seller notified Mr. Spiegel that the 'Initial Closing Date under the [LSA] for the Vista Creek Shopping Center loan is being extended to February 21, 2014 (the 'Extended Closing Date').'" (Dkt. #42 at p. 5). Then, on January 27, 2014, CWCAM informed Mr. Spiegel that the Lender would not be moving forward with the sale to SDI because it had accepted the TxDot offer (Dkts. #42 at p. 5; #47 at p. 5).

According to Defendants, "[o]n November 5, 2014, after SDI engaged in negotiations with TxDot, the Receiver, CWCAM, and USB agreed to accept $3,918,938 from TxDot for a portion of the Property." (Dkt. #42 at p. 6). Defendants also maintain that

> [d]uring the pendency of this case, Vista Creek, SDI, USB, the receiver, CWCAM and an escrow agent entered into a Disbursement and Escrow Agreement that required the TxDot proceeds to be deposited into escrow, and that from those proceeds (a) the receivership expenses would be paid; (b) USB would be paid $1,325,000 representing the purchase price under the LSA; and (c) the prevailing party in this lawsuit would receive the net balance, subject only to the performance of the terms of sale in the LSA.

[2]According to Defendants, "[a]t the time of the TxDot offer the Loan had a balance of $2,884,277.57." (Dkt. #47 at p. 5)

(Dkt. #42 at p. 6). Plaintiff asserts a claim for breach of contract.[3]

On October 5, 2015, Plaintiff filed its Motion for Summary Judgment (Dkt. #42). On November 2, 2015, Defendants filed their response (Dkt. #47). On November 16, 205 Plaintiff files its reply (Dkt. #48). On November 23, 2015, Defendants file their sur-reply (Dkt. #51).[4]

On October 6, 2015, Defendants filed their Motion for Summary Judgment (Dkt. #43). On November 2, 2015, Plaintiff files its response (Dkt. #46). On November 16, 2015, Defendants filed their reply (Dkt. #49).

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits "[show] that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The trial court must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment. *Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The substantive law identifies which facts are material. *Anderson*, 477 U.S. at 248.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* at 247. If the

[3] Plaintiff also requested that the Court decree that "SDI is the owner and holder of the $3,400,000 Promissory Note and that [Vista Creek] is the current debtor of the Promissory Note and that all portions of the Note and collateral documents are valid and in full force and effect." (Dkt. #15 at ¶ 40). However, as discussed in footnote eight, Plaintiff appears to have dropped its request for specific performance.

[4] On November 25, 2015, Plaintiff filed its sur-sur-reply (Dkt. #52). However, Plaintiff did not ask for leave of the Court. Therefore, the Court will not consider the sur-sur-reply because "[a]bsent leave of court, no further submissions on the motion are allowed." Local Rule CV-7(f).

movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Where the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000). Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248-49). The nonmovant must adduce affirmative evidence. *Anderson*, 477 U.S. at 257. No "mere denial of material facts nor . . . unsworn allegations [nor] arguments and assertions in briefs or legal memoranda" will suffice to carry this burden. *Moayedi v. Compaq Computer Corp.*, 98 F. App'x 335, 338 (5th Cir. 2004). Rather, the Court requires "significant probative evidence" from the nonmovant in order to dismiss a request for summary judgment supported appropriately by the movant. *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001). The Court must consider all of the evidence, but must refrain from making any credibility determinations or weighing the evidence. *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

ANALYSIS

The disputes at issue in this case are limited to contractual interpretation. "Under Maryland law, the interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law." *Gresham v. Lumbermen's Mut. Cas. Co.*, 404 F.3d 253, 260 (4th Cir. 2005).[5] "Summary judgment is appropriate when the contract in question is

[5] The parties agree that in construing the LSA, the Court should apply Maryland Law (Dkts. #42 at p. 7 (citing 42-21 at § 11.11 ("This Agreement shall be construed, and the rights and obligations of the Seller and the Buyer hereunder

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