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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FIRST CITIZENS BANK, Plaintiff and Respondent, v. DAVID FRANK et al., Defendants and Appellants.	B237283 (Los Angeles County Super. Ct. No. BC426784)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Robins, Kaplan, Miller & Ciresi, Christopher S. Reeder, H. Mark Madnick, Andrew L. Howard for Defendants and Appellants.

Horgan, Rosen, Beckham & Coren, Mel Aranoff for Plaintiff and Respondent.

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David Frank, Kaveh Golshan, and Behzad Soofer appeal from the judgment entered against them and in favor of respondent First Citizens Bank, after respondent's motion for summary judgment was granted. We affirm.

Facts

In February 2007, respondent's predecessor in interest, First Regional Bank, loaned $7.28 million to an entity called Hancock Regency Partners, LLC. (Hereinafter, "the Loan.") The Loan was secured by a deed of trust encumbering real property which was improved with nine apartment buildings. Hancock Partners planned to demolish the buildings and build a new condo development.

Golshan was the Managing Partner of Hancock Partners. Frank and Soofer were, apparently, also members of Hancock Partners. Golshan, Frank, and Soofer (hereinafter, "the Guarantors") guaranteed the Loan.

The Loan was a bridge loan. It enabled Hancock Partners to buy the property, but did not provide funds for construction. At summary judgment, the Guarantors proffered evidence that when the loan was made, First Regional believed that it was likely that it would provide the construction loan, too.

The Loan's initial maturity date was February 1, 2009. In 2008, after expending sums to evict tenants and obtain permissions from the City of Los Angeles, Hancock Partners decided that the condominium project was not feasible. It sought to convert the buildings back to apartments, and sought an 18 to 24 month extension of the Loan.

From the outset, Hancock Partners seems to have worked with two First Regional Vice Presidents, Ralph Downing and Paul Comilang. In February 2009, Downing and Comilang submitted an application to First Regional's Senior Loan Committee, seeking a six month extension of the Loan. That extension was granted, but that was the only extension granted.

After August 2009, Hancock Partners failed to make payments due on the Loan.

In January 2010, the FDIC became the receiver for First Regional. First Citizens Bank soon bought the Loan, along with other assets.

In April 2010, First Citizens sold the property at a non-judicial foreclosure sale. The sale price was lower than the amount due on the Loan, and First Citizens filed this suit to recover the deficiency from the Guarantors.

The trial court granted respondent's motion for summary judgment and entered judgment in respondent's favor in the amount of $3,710,665.18.

Standard of Review

"A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . . .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

"We review summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden,* we consider whether the opposition raised triable issues of fact. We review these matters de novo." (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 939-940.) In so doing, we liberally construe the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

Discussion

1. Promissory Estoppel

The Guarantors first argue that respondent was estopped from declaring the Loan in default, and thus has no claims against them. This estoppel claim is based on the Guarantors' contention that First Regional promised Hancock Partners that the Loan would be extended, and that Hancock Partners detrimentally relied on the promise by continuing to improve the property.

In support of this theory, the Guarantors proffered evidence[1] that, for instance, in late 2008, Comilang and Downing told Golshan that the Loan would be extended for 18 to 24 months from the original maturity date, and that on December 13, 2008, Downing sent Golshan a "term sheet" for the extension; evidence that First Regional took various other steps in furtherance of its consideration of the request for an extension, such as ordering an appraisal; and evidence that in July 2009, after the Loan matured, First Regional continued to work on a loan extension, gathering information from Hancock Partners and ordering information from Chicago Title.

Even given that evidence, we agree with respondent and the trial court that there is no triable issue of fact on promissory estoppel, as a matter of law. (*Greene v. Wilson* (1962) 208 Cal.App.2d 852, 857.)

This is because it was undisputed that First Regional informed Hancock Partners that loans and loan extensions could only be approved by the Senior Loan Committee. The December 13, 2008, "term sheet" from Downing begins "I have prepared the following proposal to extend your existing bridge loan," but then states "All . . . extensions are subject to First Regional Bank's Senior Loan Committee in their sole discretion," and "This information letter is given as a courtesy and should not be construed to be a commitment in and of itself. All terms and conditions are subject to the

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[1] We include evidence to which objections were sustained, and thus need not consider the Guarantors' contention that the trial court's rulings on the objections were wrong.

sole approval of the First Regional Bank Senior Loan Committee."[2] (In their brief, the Guarantors refer to this as an unsigned letter. It was signed by Downing. There were signature lines for the Guarantors, and those are blank.)

First Regional made a similar statement in an August 27, 2009 letter to Hancock Partners and its members (the Guarantors) stating "Prior to any loan extension, a loan recommendation must be prepared and submitted to the Bank's Senior Loan Committee which will either approve, decline or amend the loan recommendation."

The elements of promissory estoppel include a clear and unambiguous promise, and "reasonable and forseeable" reliance. (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.) Here, any promise made by Downing or Comilang was rendered ambiguous by the written statement that they did not have authority to make such a promise. For the same reason, reliance was not reasonable.

"Estoppel cannot be established from such preliminary discussions and negotiations," (*National Dollar Stores v. Wagnon* (1950) 97 Cal.App.2d 915, 919) and "hopeful expectations cannot be equated with the necessary justifiable reliance." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 54.)

2. Breach of the covenant of good faith and fair dealing

The Guarantors argue that the court erred in granting summary judgment because there are triable issues of fact on whether both First Regional and First Citizen violated the covenant of good faith and fair dealing in the loan guarantees. They further contend that if there were breaches, their own nonperformance is excused.

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's

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[2] The Guarantors assert that the loan committee always followed Downing's recommendation, but in deposition testimony submitted by the Guarantors, Downing testified that "The loan committee – so I usually have good success, but until it's approved they have the right to change it, decline it, do whatever they want to . . . . So I don't know what I'm going to get until I get there."

right to receive the *benefits of the agreement actually made*. [Citation.]" (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349.) "It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Id*. at pp. 349-350.) It is "a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.)

We see no triable issue of material fact on breach of the covenant in the guarantee agreements.

a. First Regional's failure to disclose its decision to stop making loans and its financial problems

The Guarantors proffered evidence that the FDIC started to investigate First Regional in 2005; that by 2008, the FDIC was monitoring First Regional on a daily basis, and that no one at First Regional told them of those facts or the fact that in May 2008 First Regional decided to stop making loans. They contend that the failure to disclose those facts amounted to a breach of the covenant, suggesting, at least, that First Regional's refusal to extend the loan was the result of regulatory problems. The Guarantors then argue that there is a triable issue on whether, if they had known of First Regional's problems, they would have entered into the lending relationship to begin with or spent time and money on the development.

We are, however, cited to no facts which would support either contention. Further, in deposition testimony proffered by the Guarantors, Downing testified that First Regional decided to stop making loans because the bank's board recognized that the market was in a decline; that after the decision was made, First Regional would still make loans if the directors believed that a loan was in the bank's best interest, and that in May of 2008, First Regional was concerned about Hancock Partners' ability to make payments on the Loan.

The covenant of good faith and fair dealing in the guarantee certainly did not compel First Regional to tell the Guarantors that First Regional would make loans only if they were in the bank's best interest, or that the real estate market was in decline. Those are obvious facts. We note in this respect that in December of 2008, when Golshan notified his partners that First Regional would be granting an extension of the Loan, he also said "[w]e will not be able to obtain financing with another lender at this time due to the economy, market, and banking situation."

Legally, the Guarantors rely on *Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, which holds that ". . . the creditor owes a duty to the surety to disclose facts known by the creditor if the creditor has reason to believe that those facts materially increase the risk beyond that which the surety intended to assume and that those facts are unknown to the surety." (*Id*. at p. 84.)

As respondent points out, however, the case concerns the duty to inform the surety of facts concerning *the debtor*. We do not know that *Sumitomo Bank, supra,* could establish a breach of contract here, but the Guarantors' argument would fail even if it did.

The Guarantors' claim is essentially that First Regional breached the guarantee because it did not agree to enter into a new, extended agreement with Hancock Partners. The covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement" (*Guz v. Bechtel, supra*, 24 Cal.4th at pp. 349-350), and we are cited to nothing in the guarantee, or indeed in the Loan agreement, which obligated First Republic to grant an extension of the Loan maturity date.

b. The August 2009 appraisal

In connection with its consideration of Hancock Partners' request for an extension of the Loan, First Regional ordered an appraisal. The appraisal concluded that the property was worth $7.56 million, and, as a result, First Regional requested a payment of

$1.232 million, in order to maintain a loan to value ratio of eighty percent -- apparently, a requirement of the Loan.

The Guarantors proffered evidence that the appraisal was a limited appraisal, and not the kind of appraisal First Regional would normally obtain in connection with an evaluation of a loan; that a February 2009 appraisal valued the property at $9.5 million; that Hancock Partners could not make the payment requested, and that the failure to make that payment resulted in the denial of the Loan extension.

In this evidence, the Guarantors find a breach of the covenant of good faith and fair dealing in the guarantees, arguing that the August 2009 appraisal was deliberately and erroneously low, and that First Regional frustrated their reasonable expectation that it would use the proper procedures in considering their request for a loan extension.

The argument fails for the reason recounted above: the covenant of good faith and fair dealing in the Loan guarantee did not extend to First Regional's conduct with respect to Hancock Partners' request for a loan extension. In the absence of a contractual duty to extend the Loan, the fact that First Regional did not do so, for any reason, does not constitute a breach of the guarantee.

c. The foreclosure sale

The Guarantors proffered evidence that prior to the foreclosure sale, a First Citizens Vice President told a prospective bidder, Sean Leoni of Alexis Ariella, LLC, that First Citizens' maximum credit bid would be $5 million. Alexis Ariella later bought the property at the trustee's sale for $5,001,000. Leoni told Golshan that he had been willing to make a much higher bid.

The Guarantors contend that this conduct violated the covenant of good faith and fair dealing in the guarantees, violated Civil Code section 2924h, subdivision (g),[3] and creates a triable issue of fact on whether or not there was actually a deficiency.

We agree with respondent and the trial court that the contentions are waived.

The guarantee includes the provision that "Guarantor waives all rights and defenses that Guarantor may have because Borrower's obligation is secured by real property. This means among other things: . . . . [i]f Lender forecloses on any real property collateral pledged by Borrowers: (1) the amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. . . . This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because Borrower's obligation is secured by real property."

The Guarantors contend that the waiver does not apply because "the scope of the waiver never anticipated" these facts.[4] They cite the established principle that waiver is the intentional relinquishment of a known right. The argument is not persuasive.

The Guarantors agreed that they would not claim that they were excused from payment because the collateral was worth more than the sale price. They now seek to assert precisely that defense. It is not outside the scope of the waiver, but is included in it. The rule that waiver is an intentional relinquishment of a known right does not assist them. The right being waived is clearly spelled out in the guarantee.

The Guarantors also argue that the waiver is void, because it is against public policy.

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[3] That statute provides, in pertinent part, that "It shall be unlawful for any person, acting alone or in concert with others, . . . (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. . . ."

[4] To the extent that this is a contention that parol evidence could vary the terms of the agreement, we say only that there is no citation to any such evidence.

We see no violation of public policy. Under Civil Code section 2856, "(a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following: [¶] . . . [¶] (3) Any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate for years." Concerning this section, the Legislature stated, "It is the intent of the Legislature that the types of waivers described in Section 2856 of the Civil Code do not violate the public policy of this state." (Assem. Bill No. 2585, Stats. 1996, ch. 1013, § 3.)

The Guarantors are obviously sophisticated investors who embarked on a significant real estate development project. To that end, they guaranteed repayment of a commercial loan, in an agreement which included waiver of the many protections which the law provides to borrowers and guarantors. We do not think public policy requires that they be absolved from that agreement, particularly in light of a strong expression of legislative intent.

Finally, the Guarantors argue that a foreclosure sale will be set aside where there is gross disparity between the sale price and actual value, and where there are irregularities in the sale. (*System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 153.) In support of their "gross disparity" theory, they assert that the fair market value of the property at the time of the foreclosure was $7.9 million. They do not cite to anything in the record to that effect, but respondent agrees that in April 2008, the Guarantors obtained an appraisal which valued the property at that number. Even if this contention were not waived, gross disparity cannot be found in the mere difference between those numbers.

Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.