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For Publication

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**THE HONG KONG AND SHANGHAI
BANKING CORP. LTD.,**

Plaintiff,

v.
**ABY & ALICE INTERNATIONAL INC.,
ABY K.O. LEUNG and ALICE YUK MUI
CHEUNG,**

Defendants.

CIVIL ACTION NO. 03-0017

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came on for hearing on May 28, 2003 on plaintiff's motion for summary judgment. Counsel for both sides were present and were heard. After carefully considering the pleadings and the arguments made during the hearing, the Court is prepared to rule.

Summary judgment under Commonwealth Rule of Civil Procedure 56(c) should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c). Hong Kong and Shanghai Banking Corp. Ltd. (HSBC), as the moving party, "bears the initial and the ultimate burden of establishing its entitlement to summary judgment." *Santos v. Santos*, 4 N.M.I. 206, 210. (1994) (quotations omitted). Once the moving party meets its initial burden, the non-moving party must introduce facts, in the form of affidavits or other evidence, to show that a genuine issue of material fact does exist. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). In making its determination, the Court must "review the evidence and inferences in a light most favorable to the non-moving party." *Id.* The Court will begin with an outlay of

1 the facts of the case.

2 **FINDINGS OF FACT¹**

- 3 1. On July 17, 2000, HSBC entered into and executed a credit agreement with Aby K.O. Leung and
4 Alice Yuk Mui Cheung as individuals and as the principal officers of Aby & Alice International Inc.
5 The credit agreement and related documents were written in English. Both individual defendants
6 are citizens of Hong Kong and speak only “basic English.” Their first languages are Mandarin and
7 Cantonese. They are husband and wife.
- 8 2. The purpose of the credit agreement was to provide financing for the construction of a commercial
9 building in Garapan, Saipan. The amount borrowed was \$300,000.
- 10 3. The documents executed on July 17, 2000 included:
- 11 a. Two leasehold mortgages in favor of HSBC, one concerning residential property
12 with a home on Capitol Hill (at which the individual defendants reside) and the
13 other concerning a commercial property in Garapan.
 - 14 b. An optional time or demand grid note.
 - 15 c. An assignment of rents for the commercial property in favor of HSBC.
 - 16 d. Subordination agreements.
 - 17 e. A negative pledge agreement.
 - 18 f. A security agreement.
 - 19 g. A pledge and assignment agreement.
- 20 4. The following properties are subject to the mortgages described above:
- 21 a. H39-1-1, as more particularly described on Drawing/Cadastral Plat No. 2003/84
22 the original of which was recorded October 18, 1983 as Document No. 83-0062
23 at Commonwealth Recorder’s Saipan.
 - 24 b. Lot 002 D 11, as more particularly described on Drawing/Cadastral Plat No 002
25 D 00 the original of which was record Sept. 30, 1970 as Document No. 513 at

26 _____
27 ¹ These finding are issued solely for the purpose of deciding the motion for summary judgment. In so doing,
28 the Court considered all properly submitted facts to be true and construed them in the manner most favorable to the non-
moving party - the defendants in this case.

1 Land Registry, Saipan

- 2 5. The individual defendants did not fully understand the legal consequences of giving two separate
3 mortgages to secure the line of credit. Specifically, Defendants did not understand that default on
4 the credit agreement could cause them to lose the mortgaged properties.
- 5 6. Contained in the various substantive provisions of the above noted legal documents are items that
6 allow HSBC to conduct engineering inspections of the commercial property and to make
7 commercial appraisal reports; to impose certain financial conditions on the Aby & Alice
8 International Inc. while it is doing business at the commercial property; to demand security deposits
9 from any tenants who move into the commercial property; to purchase insurance and then
10 automatically debit the defendants' account or, add the insurance costs to the loan amount payable;
11 and, to require payment on demand of any amount necessary to compensate HSBC for a lost
12 return on investment as a result of a change of law or regulation.
- 13 7. The legal documents also provided for acceleration of the total amount due should defendants fail
14 to maintain a monthly payment schedule and revoked defendants' right to a jury trial should a
15 dispute arise and the parties resort to a court of law for resolution.
- 16 8. On June 11, 2001, HSBC extended to the option to renew the line of credit to complete the
17 construction of the commercial building in Garapan. Defendants exercised this option.
- 18 9. Due to a downturn in the economy, defendants were unable to maintain the payment schedule
19 required by the credit agreement. Defendants and HSBC tried repeatedly to reach an agreement
20 that would allow defendants to avoid foreclosure.
- 21 10. On Jan. 8, 2003, the bank filed the instant foreclosure action.
- 22 11. As of Jan. 7, 2003, the outstanding balance on the loan was \$290,875.13. This represents unpaid
23 principle of \$279,493.58, accrued interest of \$11,023.19 and late charges of \$358.36.

24 **CONCLUSIONS OF LAW**

25 In supporting its motion for summary judgment, plaintiff contends there are no disputed material
26 facts. Specifically, plaintiff contends that defendants do not dispute the amount owed, do not dispute that
27 they are currently in default, and do not dispute that the credit line in question was secured by the
28

1 mortgages to be foreclosed in the action. Plaintiff appears to be correct. Though defendants did deny
2 allegations of the amount of debt and their default in their answer, they do not reallege these denials in
3 defending the instant motion. In addition, plaintiff has provided this Court with ample documentary
4 evidence to support its claims as to the amount of debt, the state of default, and the validity of the
5 mortgages, while defendants have presented no contrary evidence whatsoever.² This does not end the
6 question, however, because evidence of the existence of a meritorious defense is enough to defeat
7 summary judgment even where there are no other material facts in dispute. *EBC Amro Asset Mgmt. Ltd.*
8 *v. Kaiser*, 681 N.Y.S.2d 539, 540 (N.Y App. Div. 1998). In their brief, defendants list a number of
9 possible defenses. They note, for example, that foreclosure is an action in equity and therefore all equitable
10 defenses, including waiver, estoppel, bad faith, fraud, oppressive or unconscionable conduct should be
11 allowed. *Nassau Trust Co. v. Montrose Concrete Prod. Corp.*, 436 N.E.2d 1265, 1269 (N.Y 1982).
12 In addition, they argue that the standard defenses to contract formation should apply because the mortgages
13 are a form of contract. The Court agrees that equitable and contract formation defenses, if supported by
14 evidence, can prevent summary judgment in a foreclosure action. However, defendants have not properly
15 raised any such defenses.

16 **I. Defendants’ Defense of Oppressive or Unconscionable Conduct is Not Supported By the**
17 **Evidence**

18 The defendants raise a number of defenses in passing, but provide allegations or evidence to
19 support only two: one alleging oppressive or unconscionable conduct (a defense in equity) and other
20 alleging defects in the formation of the contract. As to the former, defendants allege that it was oppressive
21 or unconscionable for plaintiff to “[establish] lines of credit with individuals not fluent in the English language
22 which require . . . a mortgage on their principal place of residence and then renewing that line of credit
23 under economic realities [plaintiff] knew or should have known would prevent the [defendants] from ever
24 being able to repay” Defs.’ Mem. in Opp’n to Mot. for Summ. J. at 5. Defendants suggest that the
25 Court would be acting “carelessly” if it were to dispose of such allegations on summary judgment.

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27 ² As described in detail below, defendants do challenge their indebtedness in the sense that they assert certain
28 defenses to formation and enforcement of the contract expressed in the loan documents. However, they have not
disputed the authenticity of the documentary evidence submitted by plaintiff.

1 The Court must disagree with defendants, because most of the conduct alleged would not be
2 oppressive or unconscionable even if proven. Certainly the Court can not conclude that accepting
3 mortgages on residential property as collateral for a loan or transacting business with those not fluent in
4 English should be considered oppressive as a matter of law.³ Furthermore, defendants have produced
5 absolutely no evidence to suggest that plaintiff truly “knew or should have known” that defendants would
6 be unable to repay the credit line extended in June 2001.⁴ Simply put, defendants have produced no
7 evidence to support their charge of oppressive or unconscionable conduct.

8 **II. Defendants’ Defense Against Formation of the Contract is Not Supported By the Law or**
9 **the Evidence**

10 Defendants also challenge the formation of the mortgage contracts, because of the alleged failure
11 of plaintiff to ensure that defendants understood the full legal consequences of the deal. To support this
12 defense, defendants point to a law of the Commonwealth that entitles mortgagors to a Chamorro or
13 Carolinian translation of any mortgage agreement. 2 CMC § 4519. Defendants suggest that this
14 entitlement should be extended to all people whose native language is not English. This interpretation is
15 wholly unsupported by the statute. Furthermore, under the statute, the mortgagee is required to provide
16 a translation only upon request and may require the requester to pay the costs involved. *Id.* There is no
17 evidence that defendants ever requested a translation. The Court holds that the Commonwealth’s mortgage
18 law does not require a mortgagee to provide the mortgagor with a translation of mortgage papers in any
19 languages but English, Chamorro and Carolinian. Furthermore, even if the right to a translation in Mandarin
20 or Cantonese existed, the Court finds no evidence that defendants ever requested such a translation.

21 Of course, defendants could still argue that there was no contract because the language barrier
22 prevented any true meeting of the minds. However, defendants admit in the affidavit of Aby K.O. Leung
23 that they understood that the documents they signed were mortgages and that one of these mortgages was

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25 ³ Defendants’ larger point, however imprecisely expressed, may be that plaintiff should have conducted
26 negotiations in the native language of the defendants and should have provided the legal documents involved in that
27 same language. For the reasons explained in Section II of this opinion, the Court holds that no such requirement exists.

28 ⁴ The Court finds it very unlikely that HSBC or any other bank would deliberately issue a bad loan. There is
simply no profit in it. If HSBC does sell the property in question at a foreclosure sale, it can only recoup what it is owed,
plus fees and costs. Any overage would be returned to defendants. 2 CMC § 4537(g).

1 on the residential property at which the individual defendants resided. Defendants have pointed to nothing
2 in the statutory or common law that would require each party to a contract to insure that the other parties
3 have a complete understanding of the full legal consequences of the provisions of the contract. If
4 defendants truly did not understand the legal import of the agreements they signed, they should have asked.

5 **CONCLUSION**

6 Because defendants have not properly contested the facts supporting plaintiff's action for
7 foreclosure and have raised no valid defenses, plaintiff's motion for summary judgment must be and is
8 GRANTED.

9 Pursuant to 2 CMC § 4537(d), defendants ARE HEREBY ORDERED to pay into the Court the
10 following sums within 90 days of the date of this order:

- 11 A. \$279,493.58, the outstanding principal amount owing as of Jan. 7, 2003.
- 12 B. \$11,023.19 in interest accrued as of Jan. 7, 2003, plus additional interest accruing at a rate
13 of 12% per annum on the principal up to the date of this order.
- 14 C. \$358.36 in late charges accrued as of Jan. 7, 2003.
- 15 D. An amount sufficient to reimburse plaintiff's reasonable attorney fees and costs.
- 16 E. Post-judgment interest accruing at the statutory rate of 9% per annum beginning on the day
17 of this order.

18 Plaintiff IS HEREBY ORDERED to provide the defendants and the Court with the amount
19 requested for attorney fees and costs, with appropriate documentation within 21 days of the date of this
20 order. The Court will hold a hearing on fees and costs if requested by defendants.

21 SO ORDERED this 18th day of June 2003.

22
23 /s/
24 JUAN T. LIZAMA, Associate Judge