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IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANKPACIFIC, LTD., **Plaintiff,** **vs.** **SEVIO T. CHARGUALAF, JR. and THERESA LG. CHARGUALAF,** **Defendants.**	**CIVIL ACTION NO. 10-0220** **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING ACTION**

I. INTRODUCTION

THIS MATTER came before the Court on April 30, 2011 in Courtroom 217A. Janet H. King, Esq., and Joshua Berger Esq., appeared on behalf of BankPacific, Ltd., ("Plaintiff"). Ramon K. Quichocho, Esq., appeared on behalf of Sevio T. Chargualaf, Jr. ("Mr. Chargualaf") and Theresa LG. Chargualaf ("Mrs. Chargualaf") (collectively, "Defendants"). Plaintiff moves the Court to find that there is no genuine issue of material fact in dispute and that they are entitled to summary judgment as a matter of law.

II. FACTUAL BACKGROUND

On February 20, 1996, Defendants executed a seventy-five thousand dollar Promissory Note ("Note"), secured by a Mortgage which was payable to Northern Marianas Housing Corporation ("NMHC"). The Mortgage was subsequently recorded as File No. 96-501. On March 26, 1997,

NMHC assigned all of its rights and interest in the Note and Mortgage to Plaintiff's predecessor corporation, Guam Savings and Loan Association ("GSLA"). (Compl. Ex. B.) As consideration for the assignment, GSLA paid $75,000 to NMHC. (Decl. of Camacho 2 Ex. 1.) Notice of the assignment by NMHC to GSLA was sent to Defendants on March 26, 1997. (Decl. of Camacho 2 Ex. 2.)

By June of 2010, Defendants were delinquent in their mortgage payment in the amount of $2,073.27. (Compl. Ex. D.) On June 21, 2010, a Notice of Default was personally delivered to Juan T. Chargualaf—Mr. Chargualaf's brother—on behalf of Defendants. Additionally, separate copies of the Notice of Default in both English and Chamorro were sent via certified mail with delivery thereof acknowledged by the Defendants on July 1, 2010. On July 30, 2010, following the Defendants' failure to comply with the terms of the Notice of Default, Plaintiff initiated the present action.

III. MOTION FOR SUMMARY JUDGMENT PURSUANT TO NMI R. Civ. P. 56

A. Legal Standard

The Court may grant summary judgment "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 a judgment as a matter of law." NMI R. Civ. P. 56(c). The moving party is faced with the initial burden of establishing the absence of a genuine issue of material fact before summary judgment may be granted. *In re Estate of Roberto*, 2002 MP 23 ¶ 17. The Court will not grant summary judgment unless it is clear that a trial is unnecessary. *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 272 (1995). If the necessity of a trial remains uncertain, the Court will resolve any doubts in favor of the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).[1]

The movant "bears the initial responsibility of informing the [] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant must show the absence of evidence to support the nonmoving party's case. *Id.* at 325. Once the movant has

[1] Because the Commonwealth Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal cases interpreting the counterpart Federal Rules are helpful in interpreting the Commonwealth Rules of Civil Procedure. *Ada v. Sadhwani's Inc.*, 3 NMI 303 (1992).

discharged its burden, the burden of production shifts to the nonmoving party. *Roberto*, 2002 MP 23 ¶ 17 (citing *Adickes*, 398 U.S. at 160). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Moreover, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but must produce "specific facts showing that there is a genuine issue for trial." NMI R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587.

To establish a genuine issue, the nonmoving party must assert sufficient factual indicia for a reasonable trier of fact to sustain a finding in their favor. *Castro*, 4 NMI at 272. "Both the 'quantum and quality of proof' is to be considered, and 'the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 254 (1986). If the nonmoving party's evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Discussion

1. The Plaintiff has established a cause of action.

Defendants' first and second affirmative defenses assert that the Plaintiff has failed to state a cause of action or a claim upon which relief can be granted. (Answer at 3.) In light of the facts presented, the Court disagreed with this contention.

A party is entitled to seek dismissal of a claim where the claimant fails to state a claim upon which "relief" can be granted. NMI R. Civ. P. 12(b)(6). Although this standard is applicable to motions to dismiss pursuant to Rule 12(b)(6), Defendants have proffered this defense in response to Plaintiff's Rule 56 motion. Nevertheless, the sufficiency of the complaint is analyzed by "accept[ing] the allegations in the complaint as true and constru[ing] them in the light most favorable to the plaintiff." *Govendo v. Micronesian Garment Mfg.*, 2 NMI 270, 283 (1991).

Plaintiff clearly alleges that the Defendants procured a secured Promissory Note on February 20, 1996, and that the Defendants subsequently defaulted on that Note. (Compl. Ex. C.) Specifically, Plaintiff alleges that on June 21, 2010, separate copies of the Notice of Default were sent to the Defendants in both English and Chamorro in accordance with 2 CMC § 4534. (Compl. Ex. D.) The present action was initiated on July 30, 2010, more than 30 days after the Notice of Default was issued.

Plaintiff seeks an order for monetary relief to be satisfied by a sale at auction of the mortgaged parcel. (Compl. at 3.) On this evidence, the Court finds that the Plaintiff has set forth sufficient facts to establish a cause of action for judicial foreclosure, along with an appropriate claim for relief. Accordingly, Defendants' first and second affirmative defenses must fail.

2. Plaintiff is a real party in interest.

Next, Defendants argue that the Plaintiff lacks standing as the real party in interest, and that the Plaintiff has failed to join an indispensable party pursuant to Rule 19. "While it is true that a trial court must accept all well-pleaded facts of the non-moving party as true, and must also draw reasonable inferences from allegations, there is no duty to strain to find inferences favorable to the non-moving party." *In re Adoption of Magofna,* 1 NMI 449 (1990). Under Commonwealth law, "[t]he holder of an instrument whether or not he is the owner may . . . enforce payment in his own name." 5 CMC § 3301. Because the Court finds that the assignment between NMHC and Plaintiff is valid, as discussed *infra*, and that Plaintiff is the undisputed holder of the Mortgage, Plaintiff is a real party in interest. Likewise, no reasonable inference can be drawn as to why Plaintiff would not be the real party in interest. Moreover, Defendants have provided no factual basis to support the allegation that Plaintiff has failed to join an indispensable party to this action. In fact, Defendants have not proffered the name of any indispensable party. Accordingly, Defendants' third and fourth affirmative defenses must fail.

3. The Assignment is valid and legally enforceable.

Defendants have presented an interminable number of theories urging the Court to disregard the assignment between NMHC and GSLA. However, Defendants have failed to present any evidence to support their allegations. The arguments presented by the Defendants are predicated solely upon conclusory assertions that the assignment was: (1) a mistake, (2) unconscionable, (3) lacking in consideration, (4) illegal, (5) impermissible, (6) unenforceable, or (7) a potential fraud. (Answer 3:14-5:7.)

Merely raising an issue does not bring a matter into dispute. Without providing some degree of factual support, the conclusory statements made by the Defendants cannot withstand summary judgment. *Riley v. Public Sch. Sys.*, 4 NMI 85, 89 (1994). Moreover the Court observes that many of the defenses raised by the Defendants are couched as factual assertions although they misstate the

material facts in the record. For the reasons set out below, the Court finds that the assignment of the Note and Mortgage by NMHC and GSLA is both valid and enforceable.

a) *The assignment was not a mistake.*

Defendants contend that the assignment of the Note and Mortgage by NMHC was a mistake. With respect to a mortgage, an assignee is subject to any traditional equitable defenses the defendant could raise against the assignor. *See Klehm v. Grecian Chalet, Ltd.*, 518 N.E.2d 187, 190 (Ill. App. Ct. 1987). The Restatement provides that "[w]here a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake." Restatement (Second) of Contracts § 153 (1979). As such, the affirmative defense of mistake may be permissible if either NMHC or Plaintiff raised it with regard to enforcement of the assignment. It is not, however, a permissible defense as raised by Defendants.

Nevertheless, assuming for purposes of argument that the Defendants herein were permitted to proffer such a defense on behalf of NMHC, "the intent of contracting parties is presumed to be encompassed by the plain language of contract terms." *Riley v. Public Sch. Sys.*, 4 NMI 85, 88 (1994) (*citing Fidelino v. Sadhwani*, 3 CR 284, 287 (1988)). Therefore, NMHC's intentions are manifestly encompassed in the Assignment of Promissory Note and Mortgage dated March 26, 1997. (Compl. Ex. B.) Therein, both the Chairman of the Board and the Corporate Director of NMCH separately affixed their signatures as evidence of NMHC's intent to assign its rights; moreover, by virtue of their respective offices, each was aware of the rights and obligations inherent in such a transfer. Consequently, the facts presented suggest that the assignment between NMHC and GSLA was not only intentional, but also that the parties responsible for facilitating the assignment were well aware of their obligations and were not mistaken in their consent.

b) *The assignment was not unconscionable.*

Defendants argue that the assignment between NMHC and GSLA was unconscionable, but they fail to state facts sufficient to substantiate this conclusive argument. Conclusory statements without factual support are insufficient to withstand summary judgment. *Riley v. Public Sch. Sys.*, 4 NMI 85, 89 (1994). In the absence of evidentiary support this argument must fail.

c) *The assignment was predicated upon sufficient consideration.*

Defendants further allege that the assignment between NMHC and GSLA lacked sufficient consideration. In support of this contention, Defendants cite an excerpt from Paragraph I of the Assignment of Note and Mortgage dated March 26, 1997, which indicates that "TEN DOLLARS" was paid in consideration for the Note. (Compl. Ex. B.) What Defendants fail to acknowledge is that the larger excerpt of the same states "in consideration of the sum of TEN DOLLARS ($10.00) and other valuable consideration paid." (*Id.*) A review of the record elucidates that the "other valuable consideration" consisted of GSLA paying NMHC seventy-five thousand dollars for the Note and Mortgage. (Decl. of Camacho 2 ¶ 4; Ex. 1.) Accordingly, the Court finds that adequate consideration was rendered sufficient to sustain the assignment.

d) *The assignment was not illegal.*

Assignment of the Note and Mortgage was not illegal; rather, the undisputed facts show that NMHC and GSLA complied explicitly with the requirements of the Commonwealth's Real Estate Mortgage Law. The relevant statute provides:

> At the time of the assignment, a notice shall be served upon the mortgagor pursuant to the provisions of 2 CMC § 4524. The notice shall be in substantially the following form:
> [Y]our promissory note and mortgage of (date) to (payee-mortgagee) has been assigned to (assignee). All payments shall hereinafter be made to (assignee), at (assignee's address).

2 CMC § 4526(b). Upon examination, the Court is satisfied that the Notice of Assignment sent to Defendants complied with the requirements set forth above. (Decl. of Camacho 2 Ex. 2.) Therefore, this affirmative defense must also fail.

e) *The assignment was permissible because the Defendants explicitly consented to any subsequent transfer of the Note and Mortgage.*

It is undisputed that the Defendants executed a Promissory Note and Mortgage in favor of NMHC on February 20, 1996. (Answer at 1.) Contrary to the Defendants' arguments, however, clauses contained in both the Note and Mortgage contemplated subsequent transfer thereof by the parties. For example, the Note specifically states that "[Defendants] understand that the lender may transfer this note." (Compl. Ex. C ¶ 1.) Similarly, the Mortgage alludes to subsequent transfer in section thirteen which states "any person who takes over lender's rights or obligations under this

Mortgage will have all of Lender's rights and will be obligated to keep all of Lender's agreements made in this mortgage." (Compl. Ex. A ¶ 13.) Even a cursory reading of the Note and Mortgage would have placed the Defendants on notice of NMHC's right to assign both the Note and Mortgage. Moreover, "a term of a contract manifesting an obligor's assent to the future assignment of a right . . . is effective despite any subsequent objection." Restatement (Second) of Contracts § 323(1) (1979). As a result of Defendants' signatures on the Note and Mortgage respectively, they are presumed to have consented to all of the terms contained therein; including those terms which relate to subsequent transferability. The Restatement recognizes that once a party has manifested assent to a contract term evinced in a writing, they are effectively estopped from asserting a defense to enforcement of that clause. *Id*. Accordingly, the Defendants are precluded from asserting impermissibility or lack of consent to the transfer as a defense.

f) *The assignment is enforceable.*

Defendants argue that the assignment should be deemed unenforceable because it represents a unilateral contract. This argument is irrelevant. To be enforceable, all contracts require an (1) offer, (2) acceptance, and (3) consideration. *Isla Fin. Servs. v. Sablan*, 2001 MP 21 ¶ 26. Defendants do not specifically allege that the offer or acceptance are lacking; however, they contend that the assignment was predicated upon insufficient consideration. As discussed *supra*, the Court finds that there was sufficient consideration to sustain the assignment. At most, Defendants suggest that there is no acceptance of the assignment in the present action for want of a signature by GSLA. This argument is a misstatement of the rule of law. Although the Commonwealth Code does not specifically address this issue, in the absence of written law or local customary law, the rules of the common law as expressed in the Restatements of Law applies here. 7 CMC § 3401. With respect to assignments, a unilateral signature functions as a revocable gratuitous assignment. Restatement (Second) of Contracts § 332. Moreover, a gratuitous assignment becomes irrevocable if the assignment is in a signed writing delivered by the assignor to the assignee. *Id.* In the absence of a signature by GSLA, the assignment by NMHC would have functioned as a revocable gratuitous assignment that became irrevocable at the moment it was signed and delivered to GSLA by NMHC. *See e.g. Brooks v. Mitchell*, 163 Md. 1, 15 (Md. 1933). Accordingly, the assignment is valid and enforceable.

g) *The assignment was not fraudulent.*

Defendants contend that the assignment should not stand because it is a potential fraud. Defendants seek to support this assertion by concluding "that only Ten Dollars ($10.00) was purportedly paid by Guam Savings and Loan Association for a Note worth $75,000.00." (Answer at 4.) As discussed *supra*, this conclusion misstates the evidence. GSLA paid seventy-five thousand dollars to NMHC for the Note and Mortgage. The Court finds no evidence of potentially fraudulent activity; therefore, this affirmative defense fails.

Additionally, the Court notes the arguments raised by the Defendants' regarding the alleged breach of the mortgage. (Opp'n 2:6.) Although Defendants have couched this argument as an alternative theory by which to invalidate the mortgage, the Court observes that a finding relative to this issue would not alter the character or the merits of the case. Paragraph seventeen of the Mortgage sets out specific conditions that must be satisfied before the Plaintiff seeks "Immediate Payment in Full." (Mortgage ¶ 17.) However, Defendants have not alleged that Plaintiff is seeking "immediate payment in full," nor have they set out any specific facts to indicate what provisions of the Mortgage Plaintiff failed to satisfy. As indicated above, this Court need not strain to make arguments on behalf of the Defendants, and so, will not make any such arguments or inferences. *Riley*, 4 NMI at 89.

4. Defendants' impossibility defense lacks factual support.

Mr. Chargualaf argues that it was impossible for him to comply with the terms of the contract "due to the CNMI Government's unlawful termination of his employment after he came back from a tour of military duty in Iraq." (Answer 7.) However, "mere market shifts or financial inability do not usually effect discharge of the obligation to perform." *OWBR LLC v. Clear Channel Communications, Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003). Therefore, Mr. Chargualaf's employment status and surrounding circumstances have no bearing on this issue and do not support the defense of impossibility.

5. The Notice of Default failed to comply with Commonwealth law.

The Commonwealth's Real Estate Mortgage Law provides:

> Not less than 30 days prior to the commencement of any action or proceeding seeking foreclosure of a mortgage, written notice of default shall be served as provided in 2 CMC § 4524. The notice shall be

> written in the English language and in either Chamorro ***or*** Carolinian and ***shall*** contain the following:
>
> a) A description of the real property;
> b) The date and amount of the mortgage;
> c) The amount due for principal and interest, separately stated; and
> d) ***A statement that if the amount due is not paid within 30 days from the date of service, the mortgagor shall be in default and proceedings shall be commenced to foreclose the mortgage.***

2 CMC § 4534 (emphasis added).

Plaintiff sent the Notice of Default to the Defendants in both the English and Chamorro language as mandated by Section 4534. At issue is whether the Chamorro version complies with the statutory language requirement of Section 4534(d). (Opp'n. at 7.) Specifically, Defendants assert that the Chamorro version failed to notify them of the consequences if they fail to pay the amount due on the mortgage. (*Id*.) Plaintiff contends that the Chamorro version substantially complies with the statutory requirements for notice and, therefore, the motion for summary judgment should be granted. (Reply at 6.) Though the statute grants the mortgagee discretion to send the notice in either Chamorro or Carolinian, Section 4534 specifically requires certain provisions to be included regardless of the language chosen.

The Court is required to give statutory language its plain meaning. *See e.g. Marianas Eye Inst. v. Moses*, 2011 MP 1 ¶ 12; *Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12. As such, statutes are read "with an aim to effect the plain meaning of their object." *Commonwealth v. Cristomo*, 2005 MP 9 ¶ 39 (quotations omitted). Where statutory "language is clear, we will not construe it contrary to its plain meaning." *King v. Bd. Of Elections*, 2 NMI 298, 403 (1991). In addition, "specific language controls over more general language." *Owens v. Commonwealth Health Ctr.*, 2011 MP 6 ¶ 14. "This ensures that we give effect to the intent of the legislature." *In re Adoption & Change of Name of Y.M.F.V.*, 2011 MP 7 ¶ 9 (citation omitted).

The Court must therefore disregard the Plaintiff's argument that the Notice of Default substantially complied with the statute. Indeed the language of the statute is clear; mandating strict adherence to the terms that shall be included in the notice. Substantial compliance cannot be honored where strict compliance is required.

Section 4534(d) requires the following language in the Notice of Default: (1) that the amount

due must be paid within 30 days, and (2) if the amount due is not paid within 30 days two things would happen - (a) the mortgagor shall be in default and (b) proceedings shall be commenced to foreclose the mortgage. The latter portion of Section (d) is particularly important to Defendants because it notifies them of the consequences should they fail to cure their deficiency.

The issue of whether notice is defective is a question of law, not fact. *Sablan Enters v. New Century, Inc.*, 1997 MP 32 ¶ 37 (citing *Farrell v. Brown*, 729 P.2d 1090, 1095 (Idaho Ct. App. 1986)). Following a meticulous review of the documents provided, the Court determines that the Chamorro version of the Notice of Default fails to notify the Defendants of the consequences of not curing their deficiency. The Plaintiff failed to issue a proper Notice of Default to the Defendants and therefore this action must be **DISMISSED**.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is hereby **DENIED** and the action **DISMISSED**.

IT IS SO ordered this 22nd day of August, 2011.

PERRY B. INOS, Associate Judge