SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

FIRSTBANK PUERTO RICO, **Plaintiff,** **vs.** **EDMOND WEBSTER a/k/a EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER a/k/a CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC,** **Defendants.**	**CASE NO. ST-12-CV-239**

MEMORANDUM OPINION

Pending before the Court is Plaintiff FirstBank Puerto Rico's "Response to Order Dated March 6, 2013 and Renewed Motion for Summary Judgment." For the following reasons, Plaintiff's motion will be granted in part.

FACTUAL AND PROCEDURAL HISTORY

In a March 6, 2013, Memorandum Opinion, this Court found that Defendants were in default on a series of construction loans from Plaintiff and granted partial summary judgment in favor Plaintiff in the amount of $1,540,712.80, which represented the unpaid principal sum under the loan agreements.[1] The Court had also determined that the construction loan had not been converted to a permanent loan, and as a result, all accrued interest was due and payable in full on July 21, 2010, pursuant to Section 3B of the Second Amendment to the Construction Loan Agreement. The Court also ordered Plaintiff to submit an amortization schedule detailing the interest and other charges that

[1] The original principal amount under the Second Amendment to the Construction Loan Agreement was $1,541,000.00. See Exhibit 28 to Plaintiff's original motion for summary judgment.

have accrued as result of Defendants' default. In addition, the Court denied Plaintiff's motion for summary judgment pertaining to a series of residential loans Plaintiff had made to Defendants.

ANALYSIS

I) Motion for Reconsideration and Renewed Motion for Summary Judgment concerning the Residential Loans

Given that Plaintiff's submission is partially entitled a "Response to Order Dated March 6, 2013" and that Plaintiff requests that the Court "vacate" that Order, the Court will treat the submission as a motion for reconsideration. Motions for reconsideration are governed by LRCi 7.3, which provides that:

> such motion shall be filed within fourteen (14) days after the entry of the order or decision unless the time is extended by the Court ... A motion to reconsider shall be based on:
> 1. intervening change in controlling law;
> 2. availability of new evidence, or;
> 3. the need to correct clear error or prevent manifest injustice.

Plaintiff's submission does not comply with LRCi 7.3 as it does not assert that the March 6, 2013, Order should be reconsidered based on either an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice. Accordingly, Plaintiff's motion for reconsideration will be denied.

Plaintiff's submission is also partially entitled a "Renewed Motion for Summary Judgment." Pursuant to LRCi 56.1, a motion for summary judgment must be "accompanied by a brief [and] a separate statement of the material facts about which the movant contends there is no genuine issue [and] each paragraph shall be serially numbered and shall be supported by specific citation to the record." Although the format of Plaintiff's submission consists of paragraphs that are serially numbered, the paragraphs mix factual representations with legal arguments and are not supported by specific citations to the record. Accordingly, Plaintiff has failed to comply with LRCi 56.1 and its renewed motion for summary judgment will be denied without prejudice.[2]

II) Late charges on the Construction Loans

Plaintiff has submitted amortization schedules indicating that $244,407.54 in late charges have accrued since August 11, 2010, due to Defendants' failure to timely make payments under the terms of the construction loan agreements.

Generally, late payment charges may be collected as liquidated damages as long as there is provision for them in the mortgage documents.[3] A late charge is generally justified if it "compensat[es] a creditor for the consequences of a borrower's late payment—in particular, the additional administrative expenses incurred in servicing a delinquent account."[4] On the other hand, it is "difficult to envision why the administrative expenses of addressing a loan account delinquency increase because the account is due not only for a delinquent installment, but also for a prior late charge."[5]

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[2] If Plaintiff files another motion for summary judgment in compliance with LRCi 56.1, it also must submit an amortization schedule that provides a detailed accounting of the amount to which Plaintiff is entitled under the residential loan agreements and gives credit for the payments Defendants have made.

[3] *Crest Sav. & Loan Ass'n v. Mason*, 243 N.J. Super. 646, 648-51 (N.J. Super. Ct. Ch. Div. 1990).

[4] *In re Graboyes*, 371 B.R. 113, 123 (Bankr. E.D. Pa. 2007) (citing *Validity of Construction of Provision Imposing "Late Charge" or Similar Exaction for Delay in making Periodic Payment on Note, Mortgage, or Instalment Sale Contract*, 63 A.L.R.3d 50, 1975 WL 37118 (1975)).

[5] *Id.*

Late charges that are compounded may constitute an impermissible penalty for nonpayment, as opposed to permissibly sought liquidated, compensatory damages.

The Court notes that Plaintiff issued a notice of default to Defendants pertaining to the 2010 construction loan on August 17, 2011.[6] The notice established that "all amounts under the Note were to be paid in full on July 21, 2010" as the loan had "not been converted to a permanent loan for various reasons including ... incomplete construction, failure to obtain a certificate of occupancy, and a default on the interest due."[7] The notice gave Defendants one month to cure their default and pay a sum of $1,564,215.18, representing the principal amount, accrued interest, late charges, and fees.[8] In the event Defendants failed to cure their default, the notice stated that Plaintiff could declare all sums immediately due without further notice.[9] Plaintiff has presented no evidence demonstrating whether the debt was actually accelerated prior to May 11, 2012, when Plaintiff filed its Complaint and declared the debt to be accelerated.[10]

The Third Circuit has rejected the imposition of late charges for failure to make monthly payments after the acceleration of a note in the absence of a contract provision that expressly permits the assessment of such charges.[11] The Third Circuit has also

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[6] Plaintiff's Exhibit 30.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] See Complaint at paragraph 32. Prior to the filing of the Complaint, Plaintiff had only provided notice that it could exercise its option to accelerate. As the Supreme Court of Nebraska has determined: "[w]here the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by him evidencing his election to take advantage of the accelerating provision, and that until such action has been taken, the provision has no operation. The exercise of the option should be made in a manner clear and unequivocal, so as to leave no doubt as to the mortgagee's intention." *United Ben. Life Ins. Co. v. Holman*, 130 N.W.2d 593, 595 (Neb. 1964).
[11] *Security Mutual Life Ins. Co. v. Contemporary Real Estate Associates*, 979 F.2d 329, 330–31 (3d Cir. 1992). See also *In re Tavern Motor Inn, Inc.*, 69 B.R. 138 (Bkrtcy. D.Vt. 1987) (late charges cannot be

determined that the prejudgment interest that the lender is entitled to collect after the debt has been accelerated "certainly constitutes full compensation for any lost use of the funds during that period. Furthermore, the expense of collecting is fully covered within the note provision imposing attorneys' fees and costs of collection on defendants."[12]

Here, none of the construction loan documents expressly provide for late charges to be assessed after the debt is accelerated. Section 2.6 of the Construction Loan Agreement states that "any installment payment due and payable on the loan that is not received by [Plaintiff] within ten (10) days after the installment payment is due shall be assessed a late charge of five percent (5%) of the payment."[13] Similarly, Section 3B of the Second Amendment to the Construction Loan Agreement discusses late charges in the context where monthly installment payments are being made.[14] Section 3C of that agreement also establishes the interest rate in the event of a default, but makes no mention of late charges in that circumstance.

Based on the construction loan agreements, Plaintiff is not entitled to additional late charges after the debt was accelerated. In addition, the agreement does not grant Plaintiff the power to assess late charges after July 21, 2010, when all amounts under the Note were to be paid in full. After July 21, 2010, Defendants were in default, and there is no provision in the construction loan agreements that contemplates that monthly installment payments could still be made, and late charges could be assessed, in the event

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imposed for failure to make monthly payments after lender accelerates principal debt); *Crest Sav. & Loan Ass'n, supra*; *Lenio Reis v. Decker*, 516 N.Y.S.2d 851 (N.Y. Del. County Ct. 1987).

[12] *Sec. Mut. Life Ins. Co. of New York*, 979 F.2d at 331.

[13] Plaintiff's Exhibit 11.

[14] Plaintiff's Exhibit 30.

of a default. Moreover, nowhere in Section 2.6 of the Construction Loan Agreement[15] or elsewhere in the loan agreements is it permissible for Plaintiff to assess Defendants with late charges for prior unpaid late charges as the amortization schedules appear to do.

Considering that the amortization schedules indicate that late charges have accrued from August 11, 2010, to March 11, 2013, the Court finds that Plaintiff is not entitled to any of the late charges it seeks.

III Interest on the Construction Loans

In addition, Plaintiff asserts that interest on the construction loans has accrued in the amount of $320,767.10 from June 2010 to thru February 2013.

Section 3C of the Second Amendment to the Construction Loan Agreement establishes that "interest from the date of the [agreement's execution on January 21, 2010] … until the 21st day of July 2010 (the "Interest Only Period") shall accrue at one percent (1.00 %) above the prime rate as it varies, with a floor rate of 8.50%."[16] In the event of default, "interest shall be payable on the principal sum outstanding at a rate per annum equal to five and one quarter percent (5.25%) above the prime rate as it varies, with a floor rate of twelve percent (12.00%)." [17]

Plaintiff seeks an interest rate of 8.5% per annum on the principal loan. As the interest rate Plaintiff seeks is the floor rate of the Interest Only Period and is below the

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[15] *In re Graboyes*, 371 B.R. 113, 121 (Bankr. E.D. Pa. 2007), the court was faced with interpreting a contract provision similar to Section 2.6 of the Construction Loan Agreement and found that the provision provided "little detail concerning the proper method for calculating late charges." The Court also determined that the language of the provision did not "provide for late charge calculation to include prior unpaid late charges."
[16] Plaintiff's Exhibit 30.
[17] *Id.*

floor rate of the default interest rate, the Court finds that 8.5% is an appropriate interest rate under the terms of the loan agreements.

Based on Plaintiff's calculations, 8.5% per annum of the principal amount is equivalent to $363.78 per diem interest, and Plaintiff submits amortization schedules that calculate the monthly accrual balance at the $363.78 per diem rate. However, the amortization schedules also indicate that the outstanding principal amount of the loan is $1,540,712.80. As a result, the Court finds that the yearly interest amount that accrues on $1,540,712.80 at an 8.5% interest rate is $130,960.59 or $358.80 per diem.[18]

In addition, the amortization schedules indicate that interest has accrued since June 2010, in which case the total amount of interest that has accrued from June 1, 2010, thru August 9, 2013, is $417,997.77.[19] The amortization schedules also establish that Defendants have made interest payments of $11,000.00 on December 17, 2010; $5,000.00 on November 27, 2010; $5,000.00 on October 20, 2010; $6,521.00 on September 28, 2010; $5,955.00 on August 4, 2010; $10,643.40 on July 1, 2010; and $10,591.40 on June 1, 2010; for a total sum of $54,710.80 of interest paid. Consequently, the total amount of interest Defendants owe to Plaintiff thru August 9, 2013, is $363,286.97.

[18] The $358.80 per diem figure is arrived at by dividing the per annum interest amount by 365 days in a year.

[19] $130,960.59 has accrued yearly from the beginning of June 2010 to the end of May 2013, and $25,116.00 has accrued from the beginning of June 2013 thru August 9, 2013, the date of this Opinion.

An Order consistent with this Opinion shall follow.

Dated: August 9, 2013

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ___/___/___

by: ____________________
Lori Boynes-Tyson
Court Clerk Supervisor 8/9/13