STATE OF VERMONT

SUPERIOR COURT
Caledonia Unit

CIVIL DIVISION
Docket No. 236-9-11 Cacv

DEUTSCHE BANK NAT'L TRUST CO.,
Plaintiff

v.

ERIC BELKNAP &
POULIN LUMBER, INC. &
MORTG. ELEC. REG. SYS.,
Defendants

OPINION AND ORDER RE: DEFENDANT'S MOTION TO ENFORCE SETTLEMENT

The Defendant, Eric Belknap, moves to enforce a settlement allegedly reached with the Plaintiff, Deutsche Bank National Trust Company, in mediation. After hearing and upon reviewing the submitted materials, the court concludes that it has insufficient information to enforce the mediation at this time. As such, the Defendant's motion is denied, but may be addressed by further motion or in summary judgment.

Procedural History

This is a foreclosure case coming before the Caledonia Superior Court on the complaint of the Plaintiff, filed on September 21, 2011 and alleging that the Defendant was in default of his mortgage obligation. As is relevant to the pending motion, the Defendant made a renewed motion for mediation on July 31, 2013, after obtaining counsel. On August 30, 2013, Superior Court Judge Mary Miles Teachout granted the motion.

At this point, the court's understanding is that the parties proceeded to mediation with Mediator Aileen Lachs. On December 12, 2013, the court received a mediation status report indicating that a meeting took place on November 13, 2013, where the Plaintiff requested and the Defendant provided additional financial information. On December 9, 2013, the court received a mediation status report indicating that further mediation was scheduled for January 14, 2014. On January 13, 2014, the court received a foreclosure mediation report indicating that the parties had reached a full settlement of a HAMP loan modification with a trial payment period, attaching a mediation table prepared by the Plaintiff's counsel. The court's understanding from the mediation report is that this was the result of e-mail and phone communication between the parties and the mediator, and that no face-to-face mediation took place after November 13, 2013.

On February 18, 2014, the Plaintiff filed a proposed order regarding the foreclosure mediation, indicating that the parties had settled the dispute. On February 25, 2014, Superior Court Judge Robert R. Bent entered an order approving the mediation report.

On July 2, 2014, the Defendant moved to enforce the settlement and sought sanctions, alleging that the loan modification received after the Defendant completed the trial payments was not what was agreed to in mediation. On July 24, 2014, the Plaintiff opposed, alleging that the mediation table attached to the January 13 mediation report contained a typographical error. The Plaintiff also sought sanctions. On August 6, 2014, the Defendant replied.

On October 9, 2014, a hearing on the Defendant's motion was held in the Caledonia Superior Court, Judge Harold E. Eaton, Jr. presiding. The Plaintiff was represented by Attorney Grant C. Rees. The Defendant was represented by Attorney Maryellen Griffin, appearing in limited scope.

Discussion

For the purposes of resolving this motion, the court considers the "putative settlement agreement" to be Plaintiff's alleged offer of a 480-month loan modification with an unpaid principal balance of $212,993.07. There would not be a significant balloon payment at the end of 480 months. This is the agreement reflected on the first page of the foreclosure mediation report which was submitted to the court by Mediator Aileen Lachs, which was approved by Judge Bent, and which the Defendant is moving to enforce.

The "second" loan modification agreement is only incidentally before the court. This is, in relevant part, a formal loan modification agreement which modifies the Defendant's mortgage to be paid over 266 months, at the end of which is a balloon payment of $127,841.03. This is the agreement reflected in the document the Plaintiff or their servicer sent to the Defendant after the completion of the trial payments.

The questions before the court are whether the parties came to the putative settlement agreement in mediation and whether this agreement is enforceable. To summarize the parties' positions in broad strokes, the Defendant is alleging that the parties agreed to the putative settlement agreement in mediation, and argues that it is fully enforceable, while the Plaintiff is claiming that the putative settlement agreement was the result of counsel's mistake and is not enforceable.

Agreement in mediation

Settlement agreements are contracts, and their existence and enforceability are determined based on contract principles. See, e.g., *Catamount Slate Prods., Inc. v. Sheldon*, 2003 VT 112, 176 Vt. 158. In determining whether the parties came to an agreement in mediation, the court looks to whether there was an offer and an acceptance between the parties. Restatement (Second) of Contracts, § 17. An offer is "the manifestation of willingness to enter into a bargain," while acceptance is "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts, §§ 24, 50.

As an initial matter, the court notes that there is prima facie evidence of an offer and an acceptance during the mediation process. Without yet looking at the effect of any mistakes made by counsel, or what the Plaintiff allegedly intended to offer, from the evidence submitted, particularly the e-mail communication between the parties, it seems that there was an offer and an acceptance, and that both parties intended to be bound. Indeed, it is the Plaintiff, not the

Defendant, who drafted the mediation table and who submitted a proposed order approving the foreclosure mediation report.

Plaintiff's claim that there was no "meeting of the minds" therefore cannot be sustained. As the Vermont Supreme Court held in *Sisters and Brothers Investment Group v. Vermont National Bank*, the no-meeting-of-the-minds argument is largely unhelpful when the parties both assent to the same writing. *Sisters & Bros. Inv. Grp. v. Vermont Nat'l Bank*, 172 Vt. 539, 543 (2001). Here, the writing in question is the Plaintiff's, and the Defendant readily accepted it. See *Chester v. Weingarten*, No. 2012-313, 2013 WL 9055957, at *3 (Vt. Oct. 11, 2013) (unpublished mem.) ("Nevertheless, a contract is not necessarily unenforceable for lack of a 'meeting of the minds' simply because the parties to the contract had differing interpretations of what a particular contract provision meant, even if the disputed provision is later deemed ambiguous and subject to court review to resolve that ambiguity.").

Additionally, the Plaintiff has not clearly informed the court what their offer was supposed to be on the day the offer was made, if not what was presented in the mediation table. Plaintiff's objection makes reference to four amortization tables attached as exhibits, but the date of these documents is July 2014. From the chain of communication provided by the Plaintiff, the only documents provided to the Defendant were the trial payment plan, indicating three payments that had to be made before loan modification would be given, and the aforementioned mediation table. Accordingly, the court can only conclude, based on the evidence presently before it, that the Plaintiff's offer in mediation is entirely encapsulated in the mediation table.

Enforceability

Even though there is prima facie evidence of an agreement, the Plaintiff has also pleaded issues with the putative agreement that may prevent enforcement. In construing and interpreting contracts, the court looks first at the plain meaning of the contract. *Coop. Ins. Cos. v. Woodward*, 2012 VT 22, ¶ 9, 191 Vt. 348. If the plain meaning is not evident, the court turns to general principles of contract interpretation, and may reform or rescind the contract if necessary.

Conflicting terms

The Plaintiff claims that the putative agreement contains conflicting material terms, as the mediation table clearly states on its first page that the loan modification is for 480 months, while the payment schedule on the second page only lists payments through 266 months. Thus, the Plaintiff contends either that no contract was made or that it is unenforceable.

The court concludes that the terms are potentially ambiguous, because they call into question the duration of the loan modification. However, this is not the only possible interpretation, nor is it fatal to the contract. Indeed, it is possible to construe the second page as simply missing interest rates with respect to fourth or fifth steps, rather than creating an internal inconsistency regarding the duration of the modification.

To the extent the court could conclude that there is an ambiguity, there is insufficient evidence to determine which term controls. An error as to the first page (that 480 months should be 266 months), or as to the second page (that there is a missing step) is equally plausible. According to the Plaintiff, it is the former; however, generally speaking, contract ambiguities are

construed against the drafter, and this table was drafted by the Plaintiff. Restatement (Second) of Contracts, § 206.

As such, the court concludes that the conflicting terms in the mediation table are not fatal to enforcement of the contract. At the same time, the court is unwilling to conclusively reform or construe the terms without further briefing.

Mistake

The Plaintiff claims that the putative agreement was a result of counsel's transcription error, and that the putative agreement should not be enforced on the mistaken terms. The Plaintiff also claims that the Defendant shared responsibility in checking the mediation table for errors.

Generally, mistakes of this sort are not grounds for rescission. Here, the contract presents a unilateral mistake by the Plaintiff or their agent. This is not a mutual mistake, as the Defendant in accepting the offer did not have a belief different from what was reflected in the offer. Restatement (Second) of Contracts, § 152. A unilateral mistake only makes a contract voidable if it would render the contract unconscionable or the other party is responsible or had reason to know of the mistake. Restatement (Second) of Contracts, § 153. As yet, there is nothing in this case to indicate that the terms of the putative agreement are substantively unconscionable such that it would justify voiding the contract; it is, at worst, a poor business decision for the Plaintiff, a sophisticated financial services company. Restatement (Second) of Contracts, § 202; see, e.g. *Howard v. Edgell*, 17 Vt. 9, 27 (1842) ("it is well settled that *mere inadequacy,* independant [sic] of and unconnected with other circumstances, is not sufficient, *per se,* to rescind a contract, unless its grossness amount to fraud.").

As to whether the Defendant had reason to know of the error, the procedural history of this case indicates that this is not a reasonable expectation. Clearly, no one involved, including the court, saw the potential inconsistency until at least June of 2014. To the extent the Plaintiff alleges it is the Defendant's fault for cancelling the formal mediation on January 14, 2014, this is simply unsupportable. From the Plaintiff's own submitted exhibits, it is clearly the Plaintiff who first sought to have the mediation session cancelled.

There is further argument to be made that it is the Plaintiff who should bear the risk of mistake. Restatement (Second) of Contracts, § 154. There are few scenarios with more unequal bargaining power than in the foreclosure context. Here, the Plaintiff had exclusive control of the terms it would offer as a loan modification. Were the burden of risk to fall on either party, it would likely be the Plaintiff.

Thus, the putative agreement is not voidable simply because of the Plaintiff's mistake.

Statute of Frauds

The Plaintiff also raises the Statute of Frauds as a defense to enforcement. The Statute of Frauds in Vermont is generally available for obligations that take longer than one year to be performed and for agreements relating to an interest in land. 2 V.S.A. § 181(4), (5). Without deciding whether the Statute of Frauds applies to the putative agreement at hand, the court

concludes that it would not be a defense to enforcement of this agreement, because the Statute of Frauds is satisfied.

The Statute is satisfied because there is a writing here containing the disputed term, signed or ratified by the party to be charged. The mediation table that forms the basis for the agreement is in writing, and was submitted by e-mail by the Plaintiff, the party to be charged, "signed" by their attorney. Vermont has adopted the Uniform Electronic Transactions Act, which recognizes the effectiveness of electronic signatures. 9 V.S.A. § 274. Additionally, the Plaintiff or their agent ratified the agreement by submitting to the court a proposed order accepting the mediation report, physically signed by the Plaintiff's counsel. This would likely satisfy the "memorandum or note thereof" requirement under the Statute of Frauds. 12 V.S.A. § 181.

In any case, the issue in the pending motion is not so much whether the exact terms of the underlying loan modification are binding (for instance, with the formality of the "second" loan modification), but whether the putative general agreement for a 480-month modification is binding. As the Vermont Supreme Court noted in *Catamount*, "parties to a mediated settlement are free to enter into a binding oral contract without memorializing their agreement in a fully executed document, even if they intend to subsequently reduce their agreement to writing." *Catamount*, 2003 VT 112, ¶ 26. The fact that the putative agreement was not memorialized in a formal loan modification document would not prevent the 480-month offer itself from becoming binding.

Express Authority

A further complication is that this agreement allegedly took place in the context of mediation. As articulated by the Vermont Supreme Court in *Price v. Bowen*, a "settlement is valid only if defendant was found to have granted express authority to settle on those terms." *Price v. Bowen*, 2008 VT 10, ¶ 6, 183 Vt. 572 (mem.) (citing *Smith v. Osmun*, 165 Vt. 545, 546 (1996) (mem.)). It is unclear from the materials submitted by the parties whether the Plaintiff—that is, Deutsche Bank—gave counsel express authority to settle on the terms of the putative agreement.

This does not mean that the Plaintiff is free to void the contract simply because it now recognizes it made a costly mistake. Indeed, the Plaintiff may have given counsel express authority to settle the case on terms counsel felt were appropriate—this would likely be sufficient to bind the Plaintiff. Indeed, the submission of the second loan modification by the Plaintiff suggests that counsel had the authority to bind it. However, the court is disinclined to make a firm ruling without further briefing.

As an aside, the court notes that there has also been no evidence submitted about when the Plaintiff learned of their mistake. In the court's view, if the Plaintiff accepted the Defendant's trial payments fully aware of the offer that counsel at made, contrary to the Plaintiff's assertions, it would not be the Defendant who is bound to the second loan modification, but the Plaintiff who is bound to the first.

The "Second" Loan Modification

The court does not see any basis for enforcing the second loan modification against the Defendant. The second loan modification matches neither the Defendant's interpretation of the mediation table nor the Plaintiff's. The deviations may be minor, if the Plaintiff's interpretation of the putative agreement is accepted, but they are nevertheless deviations, regardless of who benefits.

With respect to the fact that the Defendant made a payment on or before June 24, 2014, the court does not conclude that this is a ratification of the second loan modification. Had the Defendant not paid, he would have been in breach of both what he thought he agreed to and whatever the second proposal was. Shortly after June 24, the Defendant filed a motion to enforce the putative settlement agreement. The Defendant's conduct was reasonable to preserve his claim of enforcement.

The Plaintiff has not directly addressed whether the second loan modification's balloon payment violates HAMP, and the court will not rule on it at this time, as it is inchoate and collateral to the pending motion.

Sanctions

The court will not enter sanctions for either party at this time. The Defendant is certainly entitled to seek enforcement of an agreement he thought the parties reached in mediation, and the Plaintiff's briefing concedes that the error with respect to the mediation table was the Plaintiff's fault. On the other hand, the court concludes that the Plaintiff's explanation regarding the error is credible, though the court cannot yet rule on the legal effect. Accordingly, the court does not conclude that there is sufficient evidence of bad faith on either side to warrant sanctions. The court notes, however, that if the terms of the second loan modification indeed do violate HAMP, there may be cause for sanctions.

Estoppel

The Defendant has also raised issues of promissory estoppel. It would not be appropriate to rule on estoppel at this stage, as the court has not yet made a determination about the enforceability of the putative agreement under contract law.

Conclusion

The court recognizes that a ruling in the Defendant's favor would essentially dispose of this case. Given that there are many outstanding issues regarding the existence and enforceability of the putative agreement, the court is not prepared to enter a de facto judgment. The parties must be given an opportunity to submit further evidence and argument, whether in motions for summary judgment or otherwise. Limited discovery and a full hearing on the merits may be required to resolve this dispute.Any further pleadings should clearly address the issues raised in this order. Although the court has drawn some conclusions about the putative agreement, including with respect to sanctions, these may be open to reconsideration.

The parties are also invited to resume mediation in an effort to settle this issue independently.

Order

The Defendant's motion to enforce settlement is DENIED. The court's order does not preclude the Defendant from revisiting the putative settlement agreement in the future.

Dated this 28 day of October, 2014.

Judge Harold E. Eaton, Jr.
Caledonia Superior Court