STATE OF MICHIGAN

COURT OF APPEALS

FIFTH THIRD BANK, Plaintiff/Counter Defendant-Appellee,	UNPUBLISHED June 14, 2011
v	No. 296731 Oakland Circuit Court LC No. 2009-099403-CK
MARK A. CANVASSER and MARK A CANVASSER REVOCABLE LIVING TRUST, Defendants/Counter Plaintiffs-Appellants.	

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants appeal as of right an order granting summary disposition in favor of plaintiff and holding defendants liable for the loan guarantees they had executed in favor of plaintiff. Defendants do not dispute that the promissory notes they guaranteed have not been paid and that payment is overdue pursuant to the original terms of those notes. Instead, defendants contend that plaintiff agreed to an extension of those terms, lacked capacity to sue, failed to mitigate its damages, and violated its duty of good faith. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing a motion brought under MCR 2.116(C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A grant of summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 552. Statutory interpretation and contract interpretation also present questions of law that we review de novo. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009); *DaimlerChrysler Corp v G Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Defendants argue that the loans are not yet due because plaintiff agreed to an indefinite extension of their terms. We disagree.

Defendants proposed a modification, the details of which are not found in the record, to the loans. In response, plaintiff stated in a letter, "Thank you for your proposal memorialized in

your November 20, 2008 correspondence. Please pay off the loans at your soonest available opportunity." Defendants replied that it "agrees and accepts your offer" to pay off the loans at the "soonest available opportunity." Defendants argue that plaintiff therefore agreed to grant defendants an effectively unlimited time within which to repay their debts. Although this is a clever argument, it is patently incredible. When read in context, plaintiff's letter appears to have been nothing more than a polite rejection of defendants' proposal—which, significantly, defendants made *after* the loans' maturity dates had already passed. We apply the plain language of contracts. *Amtower v William C Roney & Co* (*On Remand*), 232 Mich App 226, 234; 590 NW2d 580 (1998). But nothing in the plain language of plaintiff's letter even hints that it was intended as an effectively complete relinquishment of its right to repayment. Indeed, it appears to be the opposite.

The loans are overdue under the plain language of the promissory notes, and we hold that those notes were not modified by the correspondence between the parties.

Defendants next argue that plaintiff has no capacity to bring the instant suit because it does not have a certificate of authority to conduct business in this state, and therefore, pursuant to the Michigan Business Corporation Act (MBCA), MCL 450.1101 *et seq*., it may not maintain an action in Michigan. We disagree.

Plaintiff is an Ohio banking corporation. Pursuant to MCL 450.2051(1), "[a] foreign corporation transacting business in this state without a certificate of authority shall not maintain an action or proceeding in any court of this state until the corporation has obtained a certificate of authority." However, the MBCA "does not apply to insurance, surety, savings and loan associations, fraternal benefit societies, and banking corporations." MCL 450.1123(2). Under the Banking Code, MCL 487.11101 *et seq*., both state and out-of-state banks are considered "banking corporations." MCL 487.11201(g); MCL 487.11202(q). Defendants tortuously attempt to apply only the independent exclusion found at MCL 487.11104(7) of "banks" from the MBCA, which, they argue, applies only to in-state banks. However, because the MBCA *itself* exempts the broader category of "banking corporations," which would include plaintiff, we need not address defendants' construction. Further, defendants concede that plaintiff constitutes a banking corporation.

The trial court properly found plaintiff exempt from the MBCA requirement for a certificate of authority. Moreover, the Legislature created a special framework of regulation under the banking code for both Michigan and foreign banks. This framework obviates any need for foreign banks to be subject to the MBCA.

Defendants next argue that plaintiff breached its duty to mitigate its damages by refusing to foreclose on its collateral before suing defendants; defendants further argue that the language in the guarantees allowing plaintiff to do so is void as against public policy. We disagree.

We do agree that contractual provisions that violate public policy are void. *Federoff v Ewing*, 386 Mich 474, 481; 192 NW2d 242 (1971); *Badon v General Motors Corp*, 188 Mich App 430, 439; 470 NW2d 436 (1991). And a plaintiff generally may not recover damages that could have been avoided by reasonable effort or expenditure. *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). However, an absolute guaranty of payment does not

require the creditor to exhaust its remedies against the borrower, including foreclosure on its collateral, before suing any guarantors. *Krekel v Thomasma*, 255 Mich 283, 288; 238 NW 255 (1931). Therefore, the guarantees here do not violate public policy. Furthermore, plaintiff suffered damages as soon as the promissory notes were defaulted on; foreclosure is merely one possible remedy, and under the contracts, plaintiff had its choice of remedies. Electing one rather than another does not per se constitute a failure to mitigate.

Defendants finally allege that plaintiff breached a duty of good faith by suing them instead of foreclosing on the collateral. See *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992). Where a contracting party has absolute discretion, that discretion must be exercised in good faith. *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 243; 257 NW2d 668 (1984). However, defendants contracted to allow plaintiff to proceed against them before pursuing any collateral. We do not find it to be an act of bad faith to exercise discretion that was obtained pursuant to a valid contractual agreement.

Affirmed.

/s/ Karen Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause