STATE OF VERMONT
WINDSOR COUNTY, SS

KeyBank National Association, Plaintiff v. Sports Odyssey, Inc., Steven R. Rolka, and Joseph L. Rolka, Defendants	SUPERIOR COURT Docket No. 249-4-09 Wrcv

OPINION AND ORDER RE: SUMMARY JUDGMENT

This collections action is before the court on Plaintiff KeyBank's motion for summary judgment. It is represented by John Kennelly, Esq. Defendants Sports Odyssey, Inc., Steven Rolka, and Joseph Rolka oppose summary judgment, and they are represented by Lisa Chalidze, Esq. For the reasons below, the motion is DENIED.

FACTS

The following facts are undisputed. On June 2, 2004, Defendant Sports Odyssey executed a $300,000 variable rate promissory note in favor of Plaintiff KeyBank. The note is payable on demand and requires Sports Odyssey to make regular monthly payments on all accrued interest. The note provides for a late charge of 5% or $25, whichever is greater, for payments more than ten days late. Furthermore, upon default, the interest rate is increased to 3.5% above the prime rate. The note entitles KeyBank to recover its collection costs and attorney's fees in the event of Sports Odyssey's default.

The note is personally guarantied by Defendants Steven and Joseph Rolka. The note is also secured by collateral evidenced by a commercial security agreement granting KeyBank a senior security interest in all Sports Odyssey's inventory, equipment, and accounts.

The note evidences a revolving line of credit. According to the note, "Borrower understands that Lender is authorized to make an annual . . . credit review based upon Borrower's current financial condition in determining whether to continue the line of credit. Nevertheless, Lender may, at any time, with or without cause, refuse to advance funds or extend credit under the line of credit." (Pl.'s Ex. A at 2.)

On March 4, 2009, KeyBank's Vice President Carol White sent Defendants a letter, which in relevant part states:

> By way of introduction, I am a vice president in KeyBank's Asset Recovery Group, and I have been assigned primary responsibility for your

company['s] relationship with KeyBank. . . . This action was taken as a direct result of Guarantor's failure to provide certain financial information as requested. Further, the business line of credit expired on May 31, 2008 and will not be renewed.

As such, KeyBank has elected not to continue our banking relationship with the Borrower and hereby requests that Borrower immediately submit a proposal for the full repayment of the outstanding note for our consideration. Please be advised that the referenced note was granted on a demand basis and that KeyBank could demand the immediate and full repayment of the Note at any time. While KeyBank chooses not to exercise its right to demand the Note at this time, we reserve our right to do so at any time.

It is imperative for you to immediately provide KeyBank with your proposal to repay this debt.

In closing, KeyBank has not waived, and hereby specifically reserves, all of its rights and remedies with regard to the referenced Notes and the related loan documents, including the guarantees [sic].

(Letter from White to Rolka at 1, Mar. 4, 2009.)

On March 17, 2009, KeyBank formally demanded payment in full on the note within ten days. Neither Sports Odyssey nor its guarantors paid the note in full. This suit followed, and subsequently Defendants made some payments on the note. As of March 5, 2010, Sports Odyssey owed $230,673.80 on the note with interest accruing at a rate of $41.61 per day.

Defendants counter that the note was modified by virtue of the parties' conduct. According to Defendants, there was an unwritten understanding between the parties that the note would be renewed every year, i.e., KeyBank would not demand payment under the note, as long as Defendants remained credit worthy. Defendants assert that they have remained credit worthy, but KeyBank demanded on the note anyway in violation of the modified agreement between the parties. Defendants allege that they submitted their financial information to one of KeyBank's agents, but this paperwork was not processed by the bank as it had been in the past.

KeyBank disputes that the note was modified. It points to an addendum to the note which states in all capital letters:

By signing this document each party represents and agrees that: (A) the written loan agreement represents the final agreement between the parties, (B) there are no unwritten oral agreements between the parties, and (C) *the written loan agreement may not be contradicted by evidence of any* prior, contemporaneous, or *subsequent oral agreements or understandings of the parties*.

(Pl.'s Ex. F (emphasis added).) This document was signed by Defendants.

STANDARD OF REVIEW

KeyBank moves for summary judgment on the complaint. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment "has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Price v. Leland*, 149 Vt. 518, 521 (1988). However, "[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element' essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

DISCUSSION

KeyBank seeks summary judgment on its complaint. It claims that (1) Sports Odyssey defaulted on its note; (2) KeyBank is entitled to Sports Odyssey's collateral; and (3) the Rolkas defaulted on their guaranties. KeyBank does not seek summary judgment on Defendants' affirmative defenses or counterclaims, which include claims of breach of contract, negligence, and misrepresentation.

"A promissory note is a written contract for the payment of money, and, as such, contract law applies." *Antonino v. Johnson*, 966 A.2d 261, 264 (Conn. App. Ct. 2009). "If the terms of the contract are plain and unambiguous, 'they will be given effect and enforced in accordance with their language.'" *O'Brien Bros.' P'ship v. Plociennik*, 2007 VT 105, ¶ 9, 182 Vt. 409 (quoting *KPC Corp. v. Book Press, Inc.*, 161 Vt. 145, 150 (1993)). To establish a *prima facie* case of default on a promissory note, plaintiff must provide proof of the valid note and of defendant's failure, despite proper demand, to make payment. See *MM Ariz. Holdings LLC v. Bonanno*, 658 F. Supp. 2d 589, 592 (S.D.N.Y. 2009).

In this case, it is undisputed that KeyBank has provided proof of Sport Odyssey's valid note. Furthermore, KeyBank demanded payment under the note on March 17, 2009. However, Sports Odyssey has failed to pay the note in full. Therefore, KeyBank has made a *prima facie* case of default on its promissory note.

Defendants argue that KeyBank was not entitled to demand payment under the note because "[o]ver the course of the lending relationship, Plaintiff and Defendant(s) modified the written contracts between them by virtue of their conduct, specifically . . . (b) [KeyBank allowed] annual renewals of the line of credit as long as Defendant(s) met Plaintiff's

underwriting standards based on applications from the . . . Sales Officer of Plaintiff . . . ." (Sports Odyssey's Resp. to Pl.'s Interrogs. # 70, at 14.) According to Defendants, as a result of this alleged modification, "Plaintiff was not at liberty to call the note if the borrower met applicable underwriting and other standards when it came time for renewal." (Defs.' Mem. Opp'n Summ. J. at 6.) Defendants allegedly submitted their financial paperwork to KeyBank's sales officer, but he did not fill out the renewal application as he had in the past.

KeyBank argues that the note was not modified, nor could it be by virtue of the integration clause in the note. "[T]he written loan agreement may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the parties." (Pl.'s Ex. F.) However, "it is well settled that a simple contract not within the Statute [of Frauds], though written, may be modified by a parol agreement." *Hambleton v. U. Aja Granite Co.*, 96 Vt. 199, 205 (1922). This is so despite an integration clause prohibiting future oral modifications. See *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 573 n.10 (6th Cir. 2003); *Lone Mountain Prod. Co. v. Natural Gas Pipeline Co. of Am.*, 984 F.2d 1551, 1557 (10th Cir. 1992); *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972); *Madren v. Bradford*, 661 S.E.2d 390, 394 (S.C. Ct. App. 2008). Therefore, the parties were free to modify the promissory note despite their initial agreement not to modify it.

> Contract modification is an affirmative defense. Whether a contract is modified depends on the parties' intentions and is a question of fact. The burden of proving modification rests on the party asserting the modification. . . . In determining whether the parties had a meeting of the minds concerning a modification of a contract, the focus is on what the parties did and said, not their subjective states of mind.

Arthur J. Gallagher & Co. v. Dieterich, 270 S.W.3d 695, 701-02 (Tex. App. 2008) (citations omitted).

In this case, KeyBank has established its *prima facie* case of default. However, a disputed issue of fact remains concerning Defendants' affirmative defense of modification. Although the burden of proving modification ultimately lies with Defendants, KeyBank has the burden of showing no modification in its summary judgment motion, and its motion does not adequately address the factual issues surrounding Defendants' affirmative defenses and counterclaims. Because Defendants are entitled to the benefit of the doubt, and they have submitted their answers to interrogatories as proof of modification, the court cannot grant summary judgment at this time. Since KeyBank's claim for collateral and its claims under the guaranties are dependent on the note, summary judgment is DENIED on all of KeyBank's claims until Defendants' affirmative defenses and counterclaims are adjudicated.

ORDER

For the reasons given above, KeyBank's motion for summary judgment is DENIED.

Dated at Woodstock, Vermont this 15 day of June, 2010.

Harold E. Eaton, Jr.
Superior Court Judge

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FILED

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WINDSOR COUNTY CLERK