GILL, ET AL.	*	IN THE
Plaintiffs/ Counter-Defendants	*	CIRCUIT COURT
v.	*	FOR
S AND A SONS, LLC, ET AL.	*	BALTIMORE COUNTY
Defendants/ Counter-Plaintiffs	*	LEAD Case No.: 03-C-14-10910

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MEMORANDUM OPINION AND ORDER

This matter came before the Court upon the Defendants' Motion to Vacate Confessed Judgments, to which there is a Response and Reply filed. The Court held a hearing on this matter on August 27, 2015. For the following reasons, the Motion to Vacate Confessed Judgments is DENIED.

I. Background

This consolidated case involves four cases[1] with nine total defendants (hereafter the "Defendants").[2] The four cases consist of two foreclosure actions and two confessed judgment cases.[3] These cases arise from the default on two loans that were used by the Defendants to purchase properties at 3 Compass Road, Baltimore, MD 21220 (hereafter "3 Compass Road") and 10 Wilshire Road, Baltimore, MD 21221 (hereafter "10 Wilshire Road").

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[1] The four cases are: (1) 03-C-14-010910 (the lead case), (2) 03-C-14-010911, (3) 03-C-14-010922, and (4) 03-C-14-010923.

[2] The nine defendants are: (1) P and R Brothers, LLC, (2) S and A Sons, LLC, (3) Martin Subway, LLC, (4) Star Subway, Inc., (5) Sejal, Inc., (6) Star One Subway, LLC, (7) Martin 1 Subway, LLC, (8) Martin, LLC, and (9) Rajesh A. Patel.

[3] The two foreclosure actions are 03-C-14-010910 and 03-C-14-010911. The two confessed judgment cases are 03-C-14-010922 and 03-C-14-010923.

A. History of the S and A Loan

On October 30, 2006, Defendant S and A Sons, LLC obtained a $400,000.00 loan (hereafter "S and A Loan") from the Plaintiff, First Mariner Bank (hereafter "First Mariner") to purchase 3 Compass Road. Pl. Ex. 1. The S and A Loan was secured by a Purchase Money Deed of Trust. Pl. Ex. 13. Defendants Rajesh A. Patel and Sejal, Inc. also signed a Guaranty Agreement to be guarantors of the loan. Pl. Ex. 5.

The maturity date of the S and A Loan was to be November 1, 2009, with First Mariner having the option to extend it for an additional three years to November 1, 2012. Pl. Ex. 1. First Mariner exercised this option on December 22, 2009. Pl. Ex. 2. On November 15, 2012, First Mariner extended the S and A Loan's maturity date to January 1, 2013. *Id.* at 2. On December 13, 2012, First Mariner extended the maturity date until March 1, 2013. *Id.* at 3. Subsequently, the parties then entered into an "Allonge Agreement" on April 9, 2013, which extended the maturity date to June 1, 2013. Pl. Ex. 3.

Following the Allonge Agreement, the parties entered into a "Modification Agreement" on June 28, 2013. Pl. Ex. 4. Defendant Martin, LLC also signed a Guaranty Agreement for the S and A Loan on the same day. The Modification Agreement extended the maturity date of the S and A Loan to June 5, 2014. *Id.* at 2. The agreement did not include an option to extend the maturity date. *Id.* The agreement did provide that the parties were represented by counsel, and contained a "Release" clause in Section 5.2. *Id.* at 5. The Release clause states that the Defendants released First Mariner from "any and all claims" that the Defendants "had, has or might have hereafter." *Id.* This Release was not present in any of the prior S and A Loan documents.

B. History of the P and R Loan

On August 20, 2009, Defendant P and R Brothers, LLC obtained a $250,000.00 loan (hereafter "P and R Loan") from First Mariner to purchase 10 Wilshire Road. Pl. Ex. 7. The P and R Loan was secured by a Purchase Money Deed of Trust. Pl. Ex. 14. Defendants Rajesh A. Patel, S and A Sons, LLC, Martin Subway, LLC, Star Subway, LLC, and Sejal, Inc. signed to be guarantors of the P and R Loan. Pl. Ex. 11.

The maturity date of the P and R Loan was to be September 5, 2012, with First Mariner having the option to extend it until September 5, 2018. Pl. Ex. 7. First Mariner extended the maturity date of the P and R Loan multiple times with a final due date of March 5, 2013. Pl. Ex. 8. On April 9, 2013, the parties entered into an Allonge Agreement that extended the maturity date until June 5, 2013. Pl. Ex. 9.

Like the S and A Loan, the parties to the P and R agreement entered into a Modification Agreement on June 28, 2013. Pl. Ex. 10. On the same day, defendants Martin, LLC, Star One Subway, LLC, and Martin 1 Subway, LLC signed to be guarantors of the P and R Loan. Pl. Ex. 12. The Modification Agreement extended the maturity date until June 5, 2014 and had the same terms as the Modification Agreement as the S and A Loan. Pl. Ex. 10. Like the S and A Loan, the Release clause made its first appearance in the Modification Agreement.

C. Defaults and Procedural History of the Litigation

After all of the extensions and modifications, both the S and A Loan and the P and R Loan had a maturity date of June 5, 2014. Neither loan was paid in full on that date. Pl. Ex. 15. As a result, both loans were in default. *Id.* On October 8, 2014, First Mariner filed complaints for confessed judgment against the S and A Sons, LLC, P and R Brothers, LLC, and the guarantors

of each loan. On the same day, Substitute Trustees for First Mariner filed foreclosure actions against S and A Sons, LLC and P and R Brothers, LLC to sell the respective properties.

On October 21, 2014, First Mariner obtained a confessed judgment against S and A Son's, LLC and the guarantors of the S and A Loan. On October 30, 2014, First Mariner obtained a confessed judgment against P and R Brothers, LLC and the guarantors of the P and R Loan. On December 29, 2014, the Defendants filed a Motion to Vacate Confessed Judgment in both confessed judgment cases. On December 31, 2014, the Defendants also filed a Motion to Consolidate the four cases, which was granted on March 10, 2015. Finally, on March 30, 2015, P and R Brothers, LLC filed a Counterclaim in the foreclosure case against it.

II. Standard for Motion to Vacate Confessed Judgment

Maryland Rule 2-611(b) provides that a defendant can move to "open, modify, or vacate" a confessed judgment, and such motion "shall state the legal and factual basis for the defense to the claim." "If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive pleading." Md. R. 2-611(e). The defendant has the burden of proof on a motion to open, modify, or vacate a confessed judgment. *NILS, LLC v.* Antezana, 171 Md. App. 717, 726 (2006). The burden is met if persons of ordinary judgment and prudence could fairly draw different inferences from the evidence presented. *Garliss v. Key Federal Sav. Bank*, 97 Md. App. 96, 104 (1993).

What qualifies as a meritorious defense is a question of law for the judge. *NILS, LLC*, 171 Md. App. at 727–28. "The 'meritorious defenses' of which case law speaks go either to the amount due on the note or to the execution of the promissory note itself, including the confessed judgment provisions." *NILS,* LLC, 171 Md. App. at 730. These defenses "do not go to all of the

antecedent transactions and proceedings that may have eventuated in the execution of the promissory note." *Id.* Presenting a valid set-off, or an assertion that the movant is entitled to a credit, may constitute a meritorious defenses. *Garliss*, 97 Md. App. at 104.

III. Discussion

The Defendants asserts two types of defenses. The first type of defense raised are six set-off defenses which are set out in the Defendants' Counterclaim against the foreclosure action. The six counts of the Counterclaim are as follows: (1) Fraudulent Inducement, (2) Negligent Misrepresentation, (3) Violation of Md. Code Ann. Fin. Inst. § 5-807, (4) Breach of Contract, (5) Equitable Enforcement, and (6) Wrongful Foreclosure. First Mariner argues that all of the set-off defenses have been waived pursuant to the Release clause within the loan modification agreements. The second type of defenses asserted are (1) that a default never occurred, and (2) in the event that a default occurred, that the late fees are an illegal penalty. First Mariner contends that the default occurred because the Defendants did not pay the full balance of the note on its maturity date, and that the late fees are allowable under Maryland law.

A. Validity of the "Release"

The first issue in determining the validity of the Defendants' set-off claims is whether they have been waived pursuant to a Release found in §5.2 of the loan modification agreements. The clause reads as follows:

> Debtors release, acquit and forever discharge Lender and Lender's subsidiaries, affiliates, officers, directors, agents, employees, servants, attorneys and representatives from any and all claims, demands, debts, actions, causes of action, suits, contracts, agreements, obligations, accounts, defenses, offsets against the Loan and liabilities of any kind or character whatsoever, known or unknown which any of the Debtors ever had, has or might have hereafter.

Maryland courts follow the objective theory of contracts. *Myers v. Kayhoe*, 391 Md. 188, 198 (2006). Under the objective theory, courts will give effect to the clear terms of the agreement, regardless of the intent of the parties at the time of the contract's formation. *Id.* Whether a contract is ambiguous depends on whether a "reasonable person" would find that language is capable of more than one meaning. *Cochran v. Narkunas*, 398 Md. 1, 16 (2007).

First Mariner argues that this language is an unambiguous waiver of all of the Defendants' claims for set-off. A waiver is an "intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." *Creveling v. Gov't Employees Ins. Co.*, 376 Md. 72, 96 (2003) (citations and quotations omitted). First Mariner contends that this waiver was knowing because §5.3 of the agreements state that the Defendants were represented by counsel.

The Defendants argue that this Release is an invalid exculpatory clause. "An exculpatory clause is a 'contractual provision relieving a party from liability resulting from a negligent or wrongful act." *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714, 724 (2013) (quoting Black's Law Dictionary (9th ed. 2009)). In an exculpatory agreement, "the parties expressly agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent." *Wolf v. Ford*, 335 Md. 525, 531 (1994) (quoting W Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 68, at 482 (5th ed. 1984)).

The Court of Appeals of Maryland has had multiple opportunities to examine exculpatory agreements and their characteristics. In *Wolf v. Ford*, 335 Md. 525 (1994), the court considered an exculpatory provision in a contract between a stockbroker and a client, when the client sued for the negligent mismanagement of her stock account. The relevant part of that contract was: "I

hereby exonerate you from any and all liability for losses which may occur while you are acting on my behalf . . ." *Id.* at 528. This exculpatory clause was upheld because it did not violate any of the public policy exceptions. *Id.* at 535–38.

Likewise in *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714 (2013), the court considered an exculpatory clause that a parent signed in order for his child to play in the Play Center at BJ's Wholesale Club. The key language in that case was "I further agree to indemnify, defend and hold harmless . . . from any claims or causes of action of any kind arising from my child's use of the Play Center." *Id.* at 717. Like in *Wolf*, this exculpatory clause was upheld because it did not violate any of the public policy exceptions. *Id.* at 742.

The exculpatory language in these examples is quite different from the Release clause at issue in this case. In both *Wolf* and *Rosen* the contractual language was forward looking, and only waived liability for possible future harms. That is not the case here. The Release here relieves First Mariner from all claims, offsets, and liabilities, known or unknown, which the Defendants "ever had, has or might have hereafter." The Court, therefore, agrees with First Mariner that the Release operates as a waiver. The Court also finds that this waiver was knowingly made because Section 5.3 of the Modification Agreement states that all parties were represented by, and had the opportunity to discuss the terms of the agreement with, counsel.

The next issue before the Court, then, is to which, if any, of the Defendants' claims does the Release apply. Counts I, II, and III, of the Counter-Complaint all allege various theories that the Defendants were wrongly induced into the loan. The Court finds this is past conduct, and is therefore covered by the Release. Counts IV and V allege breach of the loan modification agreement and seek performance of the same. Count VI of the Counter-Complaint alleges

wrongful foreclosure. The Court finds these causes of action have not been waived because they arose after the signing of the contract.

B. Merits of the Set-Off Defenses

a. *Even if Count I was not waived pursuant to the Release clause, it would be barred by the statute of limitations.*

Even if Count I was not waived pursuant to the Release, it would have been barred by the statute of limitations. In Count I, the Defendants argue that they were fraudulently induced into the loan. To prove fraud, the Defendants must provide evidence that: (1) there was a false representation by First Mariner to the Defendants, (2) that the falsity of the representation as known at the time the representation was made, (3) the misrepresentation was made for the purpose of defrauding the Defendants, (4) that the Defendants reasonably relied on the misrepresentation, and (5) that the Defendants suffered a compensable injury as a result of that reliance. *Rozen v. Greenberg*, 165 Md. App. 665, 674–75 (2005).

The Defendants argue that they were approached by First Mariner in 2009 about the prospect of purchasing the real property at 10 Wilshire Road. First Mariner represented that it was worth $400,000 to $500,000, but the loan amount was finalized for $250,000. The Defendants argue that they were entitled to rely on this representation because they had developed a special relationship with the bank. They argue that there was a special relationship because they had been a customer for a number of years, and had attended a number of social events as a special guest of First Mariner. It is also argued that the misrepresentation was purposeful in order to get a nonperforming asset off of First Mariner's books, and that the Defendants were injured by obtaining a loan that they otherwise would not have obtained.

The statute of limitations for civil actions is three years in Maryland. *See* Md. Code Ann. Cts. & Jud. Proc. §5-101 (2014). For cases of fraud, the cause of action accrues when the

plaintiff discovers, or by the exercise of diligence should have discovered the fraud. Md. Code Ann. Cts. & Jud. Proc. §5-203 (2014). "[A] person is said to be on inquiry notice when a reasonable person would have used due diligence to investigate the fraud or the underlying injury." *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 715 (2003). The sole issue in applying this rule to Count I, is when, if ever, should the Defendants have been put on inquiry notice that 10 Wilshire Road was not worth $400,000 to $500,000.

Defendant Rajesh A. Patel[4] testified at the August 27, 2015 hearing that he began paying the taxes for 10 Wilshire Road beginning in 2011, for the 2010 tax year. He also testified that he knew the tax assessment value of the property when he paid those taxes. Exhibit 19, in the Appendix of Exhibits for the Counterclaim, reveals that the tax assessment value of 10 Wilshire was $292,066 in 2010. This is approximately 26% below $400,000, and approximately 42% below $500,000, the range of value that First Mariner allegedly represented to the Defendants. This significant departure should have put a reasonable person of ordinary diligence on inquiry notice that the value of the property may be have been misrepresented. The Court finds that the Defendants should have been on inquiry notice in 2011 when they knew their 2010 property tax assessment value. Count I would therefore be barred by the statute of limitations even if it had not been waived pursuant to the Release.

b. Counts II and III would also barred by the statute of limitations if they were not waived by the Release.

Counts II and III are similar to Count I. In Count II the Defendants claim that the Plaintiff made negligent misrepresentations about the value of 10 Wilshire Road. In Count III, it is alleged that those same fraudulent misrepresentations are in violation of Md. Code Ann. Fin.

[4] Rajesh A. Patel founded P and R Brothers, LLC for the explicit purpose of purchasing 10 Wilshire Road. While he is also a defendant in his personal capacity, the testimony described below describes his actions as the manager of P and R Brothers, LLC.

Inst. §5-807(2014). Since these claims arise from the same factual scenario as Count I, Counts II and III would also have been barred by the statute of limitations.

c. The Defendants have not provided a substantial basis for Counts IV and V of the Counterclaim.

In Count IV, the Defendants allege that First Mariner breached an agreement to extend the loan for three to five more years after the 2013 Loan Modification Agreement. Count V seeks specific performance to enforce this same promise. The Loan Modification Agreement states that its maturity date is June 5, 2014; a one year term. It does not have an option to extend the maturity date. Section 4.3 of the Loan Modification Agreement states that the writing represents the entire agreement of the parties.

The Defendants' sole evidence of the agreement to extend stems from conversations they had with various agents of First Mariner. None of these conversations were recorded in writing. The conversations also never consisted of definite promises to extend, but rather, only spoke of the possibility of an extension if the Defendants continued to pay on time. Without evidence of a definite promise, the Defendants have not met their burden to establish the existence of an agreement to extend the loan beyond June 5, 2014. The Defendants, therefore, have not met their burden of showing a meritorious set-off defense based on the breach of contract.

d. The Defendants have not provided a substantial basis for Count VI of the Counterclaim.

Count VI of the Counterclaim alleges that the foreclosure action filed against the Property was "wrongful" because there was not a "default that allows sale." This is because First Mariner continued to accept payments on the loan after the end of the one year term. Under the terms of the agreement, the loan was to be paid in full as of June 5, 2014. The loan was not paid in full by that date. The Defendants continued making monthly payments after that date, and the

acceptance of those payments, does not cure the default. The acceptance of the late payments also did not waive any of the remedies of First Mariner under the contract as stated in the multiple demand letters and Section 2.6 of the Loan Modification Agreements. The Defendants have failed to meet their burden of proving a meritorious set-off defense.

C. The Defendants other claims are meritless.

Outside of the Counterclaim, the Defendants argue that a default never occurred on the loan, and even if a default did occur, the late fees constitute an illegal penalty. As in the Counterclaim, the Defendants argue that a default never occurred on the loan because Plaintiffs continually accepted late payments. Essentially, the Defendants argue that First Mariner waived the default under the notes when it accepted the partial payments after the maturity date.

This argument fails because Section 2.6 of the Modification Agreement expressly states:

> [n]o consent, forbearance, indulgence, or other action, inaction, or omission by [First Mariner] under or in respect of the Loan Documents and no delay in the exercise of, or failure to exercise, any right, remedy, or power accruing upon any default or failure of the Debtors in the performance of any obligation under the Loan Documents shall impair any such right, remedy, or power or shall be construed as a waiver thereof . . . .

Pl. Ex. 10. This same language is mirrored in the post-default demand letters, which specifically state:

> acceptance of partial payments by First Mariner under or in connection with the Loan, . . . shall not constitute an election of remedies on the part of First Mariner, nor shall acceptance partial payments constitute a waiver of [] the matured status of the Loans; [] any defaults existing under the Loan Documents; or [] any of First Mariner's rights, remedies or recourse under the Loan Documents.

Pl. Ex. 15. This language expressly counters the Defendants' argument that First Mariner waived the default by accepting late partial payments. The Defendants have not met their burden of proof of a meritorious defense on this ground.

The Defendants' arguments regarding the late fees being illegal penalties similarly fails. Section 14-1315 of the Commercial Law Article states that late fees are not penalties. As allowed under the statute, the late fees in this case are calculated as a percentage of the amount due. §14-1315(a)(4)(ii)(2). The Defendants have offered no evidence that the late fees in the loan documents violate the statute. The Defendants, therefore, have failed to meet their burden of proof.

IV. Final Ruling

WHEREFORE, it is this 6 day of November, 2015, by the Circuit Court of Maryland for Baltimore County,

ORDERED, that Defendants' Motion to Vacate Confessed Judgments is **DENIED.**

Judge Michael J. Finifter