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February 12, 2010

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Ms. Shirley Harley Brown
1024 Walnut Street
Wilmington, DE 19801

Re: Stornaway Capital LLC v. Smithers
C.A. No. 18845-VCN
Date Submitted: January 31, 2010

Dear Ms. Brown and Counsel:

This foreclosure action is in this Court because the mortgage in default was not under seal. That ministerial shortcoming is the least of the problems associated with this sad story. The Court has previously concluded that Plaintiff Stornaway Capital LLC ("Stornaway") would be entitled to summary judgment in its efforts to

foreclose upon a mortgage given by Defendant Sandra H. Smithers (“Defendant Smithers”). Implementation of this decision, however, is subject to resolution of the issues addressed in this letter opinion.

* * *

Defendant Smithers was called upon to guarantee a loan granted under the auspices of the Small Business Administration (the “SBA”) to assist a business, Stepperz, Inc., of which she was a part owner. As security for that guaranty, she gave a mortgage on real property on Walnut Street, Wilmington, New Castle County, Delaware, titled in her name (the “Property”). The SBA loan was for the principal amount of \$100,000. Defendant Smithers believed that the limit of her exposure would only be 10% of the principal amount, or \$10,000.¹ That understanding, however, is not reflected in the transactional documents. They are unambiguous in imposing upon Defendant Smithers the full obligation to guarantee the payment of the entire indebtedness.

¹ Based on some correspondence from the lender before the underlying loan transaction closed, it was understandable that Defendant Smithers thought she would be guaranteeing 10% of the loan and that the SBA would be responsible for the balance.

Defendant Smithers has suggested that her undertaking could be viewed as the product of unilateral mistake. One of the elements of unilateral mistake is that the “mistake occurred regardless of the exercise of ordinary care.”² As noted, a reading of the unambiguous Guaranty, Mortgage, and other closing documents would have placed Defendant Smithers on notice of her obligation. A failure to read the documents cannot provide a basis for avoiding the obligations they impose.³ The Guaranty provided that “the undersigned [Defendant Smithers] hereby unconditionally guarantees . . . the principal amount of \$100,000.”⁴ The Mortgage recites that “[t]his instrument is given to secure the payment of a promissory note . . . in the principal amount of \$100,000”⁵ In short, there is no reason not to enforce these documents in accordance with their terms.⁶

² *In re Enstar Corp.*, 604 A.2d 404, 411 (Del. 1992).

³ *See, e.g., West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 3247992, at *4 & n.19 (Del. Ch. Oct. 6, 2009), *aff’d*, 925 A.2d 391 (Del. 2009) (TABLE). The record is clear that Defendant Smithers is an intelligent and educated person, fully capable of understanding the words chosen by the drafters of the various documents.

⁴ Def.’s Answering Br. in Opp’n to Mot. for Summ. J., Ex. 10 (the “Guaranty”).

⁵ *Id.* at Ex. 9 (the “Mortgage”).

⁶ The obligations at issue have passed through the hands of numerous creditors. The secondary market, certainly as a general matter, must be able to take documents such as these for what they are.

Defendant Smithers has made a significant effort to invoke various SBA procedures and protocols to help in her defense. These arguments range from (1) an assertion that Defendant Smithers should not be held responsible to guarantee the debt because she only owned a small portion of Stepperz, Inc.; (2) her not being advised of a subordination agreement that would affect the loan's priority; (3) the reliance of the lender upon the SBA's separate guaranty, without reference to her, for several years; and (4) the sale and assignment of the loan without SBA approval. All of these contentions, unfortunately, cannot avoid the clear terms of the Guaranty and the Mortgage. That the lender chose to pursue remedies with respect to the SBA guaranty does not undercut a subsequent right to pursue rights under a guaranty provided by Defendant Smithers. The priority of the loan in relation to other indebtedness on the Property does not affect the guarantor-mortgagor's duties; her expectations, again, are trumped by the express terms of the various documents that she signed. There is no reason to conclude—and Defendant Smithers has not offered any—that the SBA's restrictions on loan assignment were intended for the benefit of

anyone other than the SBA; in other words, the subsequent assignment of Defendant Smithers' obligations did not affect or impair any of her rights or duties.

In short, there is no reason why judgment should not be entered against Defendant Smithers and the foreclosure allowed to proceed as contemplated in the Guaranty and the Mortgage.

* * *

A motion has been filed to substitute New Falls Corporation ("New Falls") as Plaintiff for Stornawaye. The loan obligation, accompanied by the Guaranty and Mortgage, was transferred by Stornawaye to New Falls. There is no challenge to the technical sufficiency of the documents purporting to transfer those rights. Defendant Smithers argues that Stornawaye's continuation of this litigation after assigning the loan (or the failure of New Falls to step into the shoes of Stornawaye promptly) should preclude allowing the substitution. The simple answer to all of this is that no cognizable prejudice resulted to Defendant Smithers; she has the same unhappy debt obligation regardless of the identity of her creditor. The substitution of a proper party plaintiff may be committed to the Court's discretion under Court of Chancery

Rule 25(c), and there is no reason why the holder of the Mortgage and beneficiary of the Guaranty should not be allowed to pursue the rights and remedies conferred by those documents after the transfer of interest. Accordingly, the motion to substitute New Falls Corporation for Stornawaye Capital LLC as the party plaintiff in this action is granted.⁷

* * *

Finally, Shirley H. Brown has moved to intervene in this action. She and Defendant Smithers are sisters. Defendant Smithers acquired the Property from their mother, Rachel Harley, in 1991, several years before the underlying transaction at issue here. Ms. Brown claims that her mother was either not competent to convey the property to Defendant Smithers at that time or that she was somehow, in the Court's words, hoodwinked into conveying her property to Defendant Smithers.⁸

⁷ Defendant Smithers invokes Court of Chancery Rule 17 which, in general terms, deals with proper parties and real parties in interest. "Rule 17(a) applies where there has been a transfer of interest prior to commencement of suit, whereas Rule 25(a) applies where there has been a transfer of interest during the pendency of an action." *Schock Bros., Inc. v. Raskin*, 1991 WL 166076, at *1 (Del. Super. July 24, 1991). See also *Street Search Partners, L.P. v. Ricor Int'l, L.L.C.*, 2006 WL 1313259, at *3 (Del. Super. May 12, 2006). The assignment by Stornawaye to New Falls occurred during the pendency of this action. Thus, the Court is properly guided by Rule 25.

⁸ An alternative explanation might be that Defendant Smithers was given title to hold the Property for the benefit of their mother, as a matter of convenience.

A motion to intervene is governed by Court of Chancery Rule 24. In this instance, in the words of Court of Chancery Rule 24(a), Ms. Brown “claims an interest relating to the property . . . which is the subject of the action and [Ms. Brown] is so situated that the disposition of the action may as a practical matter impair or impede [her] ability to protect that interest, unless [her] interest is adequately represented by existing parties.” In essence, Ms. Brown argues that Defendant Smithers should never have been able to mortgage the Property because it was not fairly hers and should still have been their mother’s. Putting aside some questions as to whether Ms. Brown is authorized to represent her mother’s interest in this proceeding, it is clear that if the foreclosure goes forward the interest that Ms. Brown seeks to assert will be lost. Moreover, because Defendant Smithers is the one who acquired title to the Property—allegedly under questionable circumstances—she is not one to adequately represent the interests of either Ms. Brown (or her mother, Ms. Harley as well as those claiming through Ms. Harley). For that reason, Ms. Brown’s motion to intervene will be granted.

That leaves the question of what to do with the claim in intervention. One can certainly argue that Ms. Brown waited too long after title was conveyed to Defendant Smithers to come forward. One can also argue that the interim investor (and the subsequent holders of the Guaranty and Mortgage) was entitled to rely, under the circumstances, upon the land records of New Castle County, which evidence that Defendant Smithers is in fact the Property's owner. Although these factors constitute major obstacles for Ms. Brown to overcome, it does not appear from the record that she has had a full and fair opportunity to contest such arguments, even though they were raised by Plaintiff's counsel during the course of argument on the motion to intervene.

* * *

Thus, for the foregoing reasons, New Falls Corporation will be substituted as the party plaintiff; all defenses of Defendant Smithers to the foreclosure action are rejected and, subject to disposition of Ms. Brown's claims in intervention, New Falls is entitled to judgment allowing foreclosure.⁹

⁹ The amount of the indebtedness will be as provided in Ms. Miller's affidavit supporting an earlier version of an implementing order.

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K