2006 BNH 015 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Newfound Lake Marina, Inc., and	Bk. No. 04-12192-MWV
Newfound Marine, Inc.,	Bk. No. 04-13727-MWV
Debtors	Jointly Administered
	Chapter 11 Cases

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MEMORANDUM OPINION

The Court has before it the Motion for Summary Judgment filed by Sumac Corporation ("Sumac") and the objections thereto filed by the Debtors, Newfound Lake Marina, Inc., and Newfound Marine, Inc. (jointly referred to as "Newfound"). Sumac, in its motion, seeks summary judgment on its motion for allowance of claim and for determination of secured status. By virtue of the underlying motion, Sumac seeks to have this Court find that it has an allowed claim of $1,915,088.84, all or part of which is secured, depending on the value of the collateral it holds as security. A hearing on the motion was held on March 20, 2006. In preparing for this opinion, the Court has reviewed the parties' memoranda of law, the affidavits attached thereto, and the other exhibits in support thereof.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

On or about December 7, 1994, Resolution Trust Corporation assigned a loan originally from Newfound Lake Marina, Inc., as borrower, to Home Bank, as lender, to Sumac. A principal of Sumac is P. Andrews McLane, a former trustee of Grey Rocks Land Trust, which owns land abutting land owned by Newfound. Prior to Sumac's assumption of the loan, Grey Rocks was involved in litigation with Newfound as an abutter concerning the marina property. It is undisputed that subsequent to the assignment to Sumac, Newfound was continually in default of its obligations under the loan agreements. At all times subsequent to December 7, 1994, Sumac held a mortgage on the land and building owned by Newfound. It is also undisputed that Sumac and Newfound communicated with each other concerning the marina and the loan defaults. Newfound transferred 24.77 acres of land to Sumac by deed dated April 26, 1996, which was recorded February 1997. (See Sumac Exs. K & L.) In June 1997, the parties executed a letter agreement referred to as a forbearance agreement. It is the interpretation of this agreement that is the subject of Sumac's motion for summary judgment.

Pertinent parts of the letter agreement are as follows:

> For well over a year we have discussed restructuring the obligations of the Obligors to Sumac. For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Obligors jointly and severally have agreed to the terms set forth below. This agreement ratifies in writing the terms and agreements the parties hereto agreed to in May, 1996 [sic].
>
> A. Acknowledgment of Debt. Each of the Obligors acknowledge and agree that Sumac has no obligation to make further loans to any of the Obligors. The unpaid balance of the Note is as follows:

Principal (as of 5/30/95)	$1,107,804.64
Interest (as of 5/30/95)	199,269.79
Late Charges (as of 7/27/94)	20,214.14
Costs and Fees (Estimated)	150,000.00
TOTAL	$1,477,288.57

(These figures do not include interest, late charges, costs and fees that have accrued from the dates indicated.)

. . . .

C. Principal Reduction and Payment and Interest Under the Note. The principal amount owing under the Note shall be deemed to be reduced to $700,000 as of the date hereof. The Note shall bear interest at 10% per annum based on a 360 day year. The Obligors shall pay interest on the Note monthly on the first day of each month, provided, however, the Obligors may accrue such monthly interest payments in excess of (i) $2,000 from the date hereof through December 31, 1997 and (ii) $2,500 from January 1, 1998 through June 15, 1998. All interest accrued and not paid shall be added to the principal amount of the Note (the "Accrued Interest"). Provided there has been no occurrence of an Event of Default (as defined in Paragraph K hereof) on or before June 15, 1998, Sumac shall forgive 50% of the Accrued Interest from the principal amount of the Note.

(Forbearance Agt. at 2, 3.) The agreement also provided that it would be governed by the laws of the Commonwealth of Massachusetts.

DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriquez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel

of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the "record in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriquez, 23 F.3d 576, 581 (1st Cir. 1994).

To summarize the positions of the parties, Sumac states that paragraph (C) cites, "[t]he principal amount owing under the Note shall be deemed to be reduced to $700,000." It argues there is nothing ambiguous about this language. Principal means principal and nothing else, thus, the interest, late charges and costs listed in paragraph (A) survive the forbearance agreement. Newfound argues that, despite the language of paragraph (C), the total amount owed under the Note was reduced to $700,000 and this included the interest, costs and fees.

There is little dispute as to the Massachusetts law concerning contract interpretation. First, there is a distinction between the interpretation of any contract provision standing alone as opposed to the contract as a whole. "A contractual provision is ambiguous 'only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.' Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998). Mere disagreement between the parties as to the contract's meaning does not necessarily establish that the contract is ambiguous[.]" Beth Israel Deaconess Med. Ctr., Inc., v. MATEP LLC, 60 Mass. App. Ct. 1118, 2004 WL 369098, at *4 (Mass. App. Ct. 2004).

However, that court further says that the provision in question "does not stand in isolation and that proper interpretation of a contract must take account of the entire contract, construed in a sensible way in light of the transaction the contract envisions and the purposes the contract was designed to accomplish." Id. at *5. Stated another way, "[t]he present rule of construction recognizes that '[c]ontract interpretation is largely an individualized process, with the conclusion in a particular case turning on the

particular language used against the background of other indicia of the parties' intention.' We therefore 'construe the contract with reference to the situation of the parties when they made it and to the objects sought to be accomplished.'" Shea v. Bay State Gas Co., 418 N.E.2d 597, 600 (1981) (quoting United States v. Seckinger, 397 U.S. 203, 213 (1970), and Bryne v. Gloucester, 8 N.E.2d 170, 171 (Mass. 1937)). Thus, it is the Court's role to interpret the contract "with reference to the situation of the parties when they made it and to the objects sought to be accomplished." Id. Based on the record before it, the Court cannot make these findings, which are findings of fact essential to its decision and, thus, material findings of fact. In reviewing the correspondence between the parties, the depositions and affidavits, it appears that the objective of Sumac was to downsize the marina, the essence of which was the transfer of the 24.77 acres of land.

Paragraph 7 of Sumac's motion for allowance of claim states:

> The Agreement also memorialized the terms surrounding Debtors' transfer to Sumac of a portion of Marina's Mortgaged land, approximately 24.77 acres of undeveloped acres (largely wetlands). In return for such transfer Sumac gave Marina credit against principal of $407,804.64 and reduced such principal from $1,107,804.64 to $700,000. The accrued interest, fees and expenses remained outstanding.

(Motion for Allowance of Claim ¶7 p. 3.)

However, the forbearance agreement recites that it is to memorialize the agreements made in May 1996. There is no mention in the forbearance agreement of the land transfer, its value or the consideration given for it. Likewise, from the correspondence included in Sumac's Exhibit G running from 1995 to 1999, there is no mention of the real estate transaction included therein.

Further, downsizing of the marina, including the loss of a boat storage facility, had to impact the marina's ability to service its debt, which goes back to the initial question of the intent of the parties in executing the forbearance agreement.

Newfound, in its response to the original motion and to the motion for summary judgment, raises issues concerning Sumac's alleged interference with the marina operation. With respect to the motion for summary judgment, these issues are outside the question of the interpretation of the forbearance

agreement. The Court further questions whether these issues have ever been properly raised as an objection to Sumac's claim. The Court will find that to the extent Sumac exercised its legitimate rights as an abutter, there can be no claim for damages. For all of the above reasons, the Court denies Sumac's motion for summary judgment.

CONCLUSION

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 11th day of April, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge