STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY
BRANCH 3

HILLIARD LIMITED PARTNERSHIP,

Plaintiff,

v.

EVERGREEN DEVELOPMENT, LLC and
RONALD VAN DEN HEUVEL

Defendants:

Case No. 08-CV-2265

Code No(s). 30301

DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Court should deny Plaintiff's Motion for Summary Judgment. There exists a material question of fact relating to other Defendants' and Plaintiff had an ancillary agreement relating to whether the July 20, 2007 promissory note ("Note") would not be enforced until the Eco Fibre, Inc. asset sale. Because there does exist a material question of fact, Summary Judgment is not warranted.

ANALYSIS

A promissory note is typically only a subset of a larger agreement. For example, in a bank loan, the promissory note typically only memorializes the payment terms but there is a larger loan agreement which controls the totality of the parties' agreement. While Plaintiffs have correctly asserted the applicably of the statute of frauds and the parole evidence rule pertaining to the Note, neither the parole evidence rule nor the statute of frauds are applicable to the ancillary agreement between Defendants' and Plaintiff relative to the non-enforceability of the note prior to the Eco Fibre, Inc. closing.

In addition, the Note still remains between the original Makers and original Payee. The Note has not been transferred to a person without knowledge of the original deal between the Parties. The Note remains between the original parties. Thus, Plaintiff takes the Note with all defenses of the Maker ("Defendants'") intact. Notably, the Defendants' are free to assert as defense in payment of the Note such organic contractual defenses such as benefit of bargain or lack of consideration. Thus, the denial to the Defendants' of the benefit of the bargain they struck with Plaintiff, which was not to enforce the Note, until the Eco Fibre, Inc. closing, would deny the Defendants' the benefit of their bargain. Moreover, it would deny the Defendants' a material portion of their consideration for entering into the Note.

In deposition testimony of the Defendant, Ron Van Den Heuvel, set forth that the Plaintiff in its own brief, Defendant Van Den Heuvel has stated that it was his belief that he and the Plaintiff had struck a bargain that the Note would not be enforced until the Eco Fibre, Inc. closing. Plaintiffs have asserted an affidavit where the principal of the Plaintiff said he struck no such bargain. This "he said, he said" is a prime example of a material issue of fact which makes summary judgment non-warranted. However, there is circumstantial evidence which supports Defendant Van Den Heuvel's claim. Why would Eco Fiber, Inc., for essentially no consideration whatsoever, give the Plaintiffs a mortgage. Eco Fiber, Inc. owed nothing to the Plaintiff. Eco Fiber, Inc. had and still has pending a potential deal to sell its assets. Neither EcoFibre, Inc. nor any other business would give a mortgage for virtually no consideration to a party it had no obligation to if that party could enforce the mortgage prior to closing of such pending deal almost certainly, then, killing such deal.

CONCLUSION

Because there is a material question of fact whether the Plaintiff and Defendants' had an agreement relative to the enforcement of the Note to not occur prior to the EcoFibre closing, there exists a material question of fact and Defendant Ronald Van Den Heuvel, respectfully requests that Judge Bischel denies the Plaintiff's motion for Summary Judgment.

Dated this 3rd day of April, 2009.

RONALD H. VAN DEN HEUVEL