

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ADVANTA MORTGAGE CONDUIT	:	
SERVICES, INC.,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-1883
MG INVESTMENTS, INC. t/a PREMIER	:	
MORTGAGE COMPANY,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

June 23, 2000

Presently before the Court is the Plaintiff's Motion for Summary Judgment. For the reasons given below, the Motion is Granted.

I. BACKGROUND

Plaintiff Advanta Mortgage Conduit Services, Inc. ("Advanta"), a corporation in the business of originating, servicing and purchasing residential mortgage loans, initiated this action on April 14, 1999. Defendant MG Investments, Inc. t/a Premier Mortgage Company ("Premier") is a corporation that originates mortgage loans secured by residential real property and offers loans for sale in the secondary market. The Complaint alleges that Premier breached certain aspects of a contract with Advanta, including the duty to make truthful representations and warranties.

In July of 1995, Advanta and Premier entered into an agreement for the sale of a pool of residential mortgage loans. The parties also entered into a Master Loan Purchase Agreement (“Agreement”), the terms of which are incorporated by reference into the Master Commitment for Conduit Participants. Premier warranted in the Agreement that:

1. it would insure the delivery of all certified documentation required by the Buyer with respect to each Mortgage Loan; and
2. there was no valid and enforceable offset, defense or counterclaim to any Note or Mortgage, including the obligation to pay the unpaid principal and interest on each Note; and
3. it had committed no fraud in connection with the origination of the Mortgage Loans; and
4. that each Mortgage Loan, at the time it was made, complied in all material respects with all applicable federal and state laws; and
5. that each Note was a valid and binding obligation of the maker and was enforceable in accordance with its terms; and
6. that the fair market value of each property was at least as appraised as of the date of the Agreement.

In case of breach, Premier promised that it would :

1. use all reasonable efforts to cure any breach; and
2. repurchase any loan that was not cured by the end of a “Cure Period”; and
3. not be able to cure any breach involving fraud (¶ 5(b)(vii); and
4. upon written notice from Advanta, immediately repurchase a Mortgage Loan at the Repurchase price, in the event that a Mortgagor should fail to make either the first or the second Monthly payment within ninety (90) days of the respective due date.

Advanta seeks recovery for six loans purchased by Advanta from Premier that either violated the Representations and Warranties or were otherwise subject to repurchase under

the Agreement. The loans to Calvin Jenkins (“Jenkins”), Mark Heineman (“Heineman”) and Sally Hurtte (“Hurtte”) all involved first Monthly Payment defaults that required repurchase by Premier. Anthony Allmond’s (“Allmond”) loan was secured by a false tax return and signature. The appraisal of Almond’s property also appeared to contain inflated values. The loan to Martha Adcock (“Adcock”) involved a second payment default. Finally, Mark and Pamela England (“England”) received a loan with improper documentation and disclosures. Advanta has foreclosed on all but the England loan. Advanta seeks damages calculated as the repurchase price offset by returns from the foreclosure sale.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir.1992). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). When considering a motion for summary judgment, a court must view all evidence in favor of the non-moving party. See Bixler v. Central Pa. Teamsters Health and Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993).

A movant “bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence

of a genuine issue of material fact”. Celotex, 477 U.S. at 323. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). For the dispute over the material fact to be genuine, “the evidence must be such that a reasonable jury could return a verdict in favor of the non-moving party.” Id. To successfully challenge a motion for summary judgment, the non-moving party must offer specific facts contradicting the movant’s assertion that no genuine issue is in dispute. Kline v. First West Government Securities, 24 F.3d 480, 485 (3d Cir. 1994).

III. DISCUSSION

To establish a *prima facie* case for breach of contract, Advanta must show 1) that Premier made certain representations and warranties to Advanta regarding the mortgage loans; 2) that Premier breached the representations and warranties; 3) that Advanta has sustained damages resulting from those breaches and 4) the amount of damages Advanta has sustained.

A. Damages

Advanta presents evidence of the warranties made, resulting breaches, and damages. Premier only contests Advanta’s claim for damages because it argues that Advanta did not adequately mitigate damages. Both parties agree that California law is applicable, under which, the party seeking relief has a duty to mitigate damages. See Altel Information Services, Inc. v. FDIC, 970 F.Supp. 775 (S.D. Ca. 1997). This duty to mitigate damages rests on the party claiming damages, but the burden of proving failure to mitigate falls on the breaching party. See e.g. Koppers Co., Inc. v. Aetna Cas. & Sur. Co., 98 F.3d 440, 448 (3d Cir. 1996) (Mitigation is an affirmative defense, so the burden of proving a failure to mitigate is on the defendant);

Fleming v. County of Kane, State of Illinois, 898 F.2d 553, 560 (7th Cir.1990) (“A more fundamental problem with the district court's holding is that mitigation of damages is generally an affirmative defense for which the defendant bears the burden of proof”). Premier has not advanced any evidence that could show by a preponderance that Advanta has failed to mitigate damages. On the other hand, Advanta has provided a declaration that it has foreclosed on five of the six disputed loans.¹ Therefore, summary judgment will be granted with respect to the Heineman, Hurtte, Jenkins and Adcock Loans.

B. The Allmond Loan

Premier argues that summary judgment would be inappropriate with regard to the Allmond Loan because it is not governed by the terms of the Agreement. Premier's 30(b)(6) deponent, Joseph Fioretti (“Fioretti”), testified that Advanta underwrote the Allmond loan. He also said that it was sold not within the terms of the Agreement. But Fioretti stated the loan had been owned by Premier and sold in a pool of other loans that are indisputably subject to the Agreement's terms. Although he claimed that Advanta approved the loan, this was within Advanta's rights under the Agreement. Premier has not presented adequate evidence to contradict Advanta's claim that the Allmond Loan fell under the same Agreement as the other loans.

1. Damages, after calculating foreclosure proceeds, are as follows;

Adcock Loan:	\$49,393 proceeds, \$24,896 damages
Allmond Loan:	\$111,760 proceeds, \$183,132 damages
Jenkins Loan:	\$29,816 proceeds, \$30,961 damages
Hurtte Loan:	\$12,918 proceeds, \$36,380 damages
Heineman Loan:	\$7,940 proceeds, \$28,790 damages
England Loan:	\$88,286 damages.

The England Loan has not been foreclosed. Advanta calculates total damages at \$392,446.72.

C. The England Loan:

Advanta states Premier has an obligation to repurchase the England Loan because of two breaches of the Agreement's warranties and representations. The first breach is that the Englands' signatures are forged on the Balloon Rider Disclosure. The second breach is that Premier's disclosures to the Englands are not in compliance with the applicable state law². In the West Virginia Action, Premier has stipulated that the Englands did not actually sign the Balloon Rider Disclosure. Advanta argues that this stipulation violates the representation that "no fraud was committed, nor was any material misrepresentation made". Premier does not contest that such an action violates the representation. According to the Agreement, Premier would not be able to cure any breach involving fraud. If the breach can not be cured, then Premier has an obligation to repurchase the loan. Premier contends that the forgery (and the lack of disclosure) did not cause the default by Pamela and Mark England. This assertion may be true, but Advanta's demand that Premier repurchase the England Loan is not based on default, as are its demand with respect to four of the other disputed loans. Advanta's demand is based on breaches of warranties and representations. Premier has produced no evidence that it did not, in fact, breach such warranties. Premier also contends that it can not be responsible for any non-compliant disclosures because Advanta itself approved the forms used by Premier. But this merely repeats the argument made with respect to the Allmond Loan that Advanta's approval of documents somehow takes the Loan outside of the Agreement's terms. The Court rejects this

2. The Englands have commenced litigation against the Defendant in this case through an action in the Southern District of West Virginia (the "West Virginia Action"). That breach of contract action is also based on the breaches asserted by Advanta in the present case.

argument now as it did with regard to the Allmond Loan.³ Summary Judgment can, therefore, be entered in favor of Advanta with respect to the England Loan.

IV. CONCLUSION

Advanta has demonstrated its prima facie case for breach of contract with respect to six loans. Premier has not raised sufficient issues of material fact to dispute these claims.

Therefore, summary judgment will be entered in Advanta's favor on all loans.

An appropriate order follows.

3. The Court might agree that a failure to use the specific disclosure language required by West Virginia for balloon loans would not necessarily be a failure to comply in all *material respects* with applicable state law, as required in the Agreement. However, since Premier has stipulated that the Balloon Rider Disclosure was not signed by the Englands, it would appear that the Disclosure was never made at all. This would have to be considered a material departure from compliance.

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ORDER

AND NOW, this 23rd day of June, 2000, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 20) and the Defendant's Response thereto (Docket No. 22); it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**. It is **FURTHER ORDERED** that judgment is to be entered in favor of Plaintiff Advanta Mortgage Conduit Services, Inc. and against Defendant MG Investments, Inc. in the amount of \$392,446.72. In addition, upon entry of this Order, title and ownership of the loan to Mark and Pamela England (loan no. 3146230) shall revert to defendant MG Investments, Inc., to whom Plaintiff Advanta is directed to return the original loan documents.

This case shall be marked **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.