

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

DELAWARE TRUST COMPANY : CIVIL ACTION
 :
 v. :
 :
 AMRIT LAL and RAGENDER ARYA :
 :
 v. :
 :
 JOSEPH A. PICCIRILLI : NO. 96-4784

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J.

November 30, 1998

Presently before the Court are Plaintiff Delaware Trust Company and Third Party Defendant Joseph Piccirilli's Motion for Summary Judgment (Docket No. 50), Defendants Amrit Lal and Ragender Arya's Response (Docket No. 55), and Plaintiff's Reply Brief (Docket No. 58). For the reasons stated below, the Plaintiff and Third Party Defendant's Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. On March 21, 1988, Plaintiff Delaware Trust Company ("Bank") and Defendant Amrit Lal entered into a loan agreement for a principal amount of \$829,000.00 ("Loan 1"). As security for Loan 1, Lal gave the Bank a promissory note for the principal amount of the loan, \$829,000.00. As further security for

Loan 1, Lal executed and delivered a mortgage in favor of the Bank on certain properties in Pennsylvania ("Mortgage 1") and an assignment of rents and leases. Although Mortgage 1 was to include Scarlett Manor Apartments, Mortgage 1 failed to list this property. A later modification added this property to Mortgage 1.

On November 10, 1989, the Bank and Lal entered into a second loan for the principal amount of \$400,000.00 ("Loan 2"). As security for Loan 2, Lal executed and delivered to the Bank a promissory note for the principal amount of \$400,000.00. As further security for Loan 2, Lal executed and delivered a mortgage in certain properties in Pennsylvania ("Mortgage 2"). Finally, as even further security for Loan 2, Lal executed and delivered to the Bank a mortgage in a property in Pennsylvania that Lal jointly owned with Defendant Ragender Arya.

Subsequently, Lal and the Bank entered numerous loan modification agreements which, among other things, extended the maturity date of Loan 1 and Loan 2. Lal and the Bank entered into eight loan modification agreements, which-- when taken together-- extended the maturity date of Loan 1 from March 21, 1993 to September 21, 1996. Lal and the Bank also entered into three loan modification agreements, which-- when taken together-- extended the maturity date of Loan 2 from November 10, 1994 to September 10, 1996.

On February 17, 1993, the Borough of Kennett Square filed

a complaint against Lal in the Court of Common Pleas of Chester County. The Borough sought to compel Lal to comply with Borough ordinances at Scarlett Manor Apartments, one of the properties serving as collateral for the loans. The court appointed an agent to manage the apartments and correct the ordinance violations.

In a letter dated March 17, 1995, the Bank proposed the terms of a restructure of the loans. On March 31, 1995, Lal and the Bank entered into an extension agreement of both loans to allow Lal to sell Scarlett Manor Apartments. This agreement extended the maturity date of the loans for six months to September 30, 1995. On April 14, 1995, the Bank sent Lal a letter restating the Bank's desire to refinance the loans and confirming the Bank's approval of a six month extension on the loan maturity date to allow Lal to sell Scarlett Manor Apartments. The letter went on to state that if Lal did not sell the Scarlett Manor Apartments by June 30, 1995, the Bank would "proceed with the original plan to refinance the loans" outlined in the March 17, 1995 letter. In September 1995, upon maturity of the loans, Lal and the Bank entered into a last extension. This agreement extended the maturity of the loans for one year. No mention of the March 17, 1995 letter offering to restructure the loans were made by either party in this last extension agreement.

In February of 1996, Lal failed to make monthly payments of principal and interest under Loan 1 and Loan 2. Pursuant to the

promissory notes, the Bank demanded full and immediate payment of all amounts owed under the loans. Lal failed to pay those amounts as well. Currently, the principal balances are \$73,356.39 for Loan 1 and \$221,823.13 for Loan 2. Moreover, significant amounts of interest accrued under the loans. The promissory notes also provide that Lal is liable for the Bank's costs of collections and attorneys' fees in the event of a default.

In 1997, after several years of management of Scarlett Manor Apartments by the court appointed agent, Lal asked the Bank for release of their lien on Scarlett Manor Apartments in order to sell the property. The Bank agreed. In December 1997, Lal sold the Scarlett Manor Apartments and the Bank applied the sale proceeds to the loans.

On July 3, 1996, prior to the release and sale of Scarlett Manor Apartments, the Bank filed a complaint against Lal alleging breach of contract for defaulting on the loans. On August 21, 1996, the Bank filed another complaint against Lal seeking foreclosure and sale of the properties mortgaged for Loan 2. The complaint named Arya as a defendant because he is a joint owner on a property that Lal mortgaged to the Bank as security for the loans. The Court consolidated these actions. On August 30, 1996, Lal filed an answer. On June 16, 1997, Lal filed an amended answer. This amended answer had counterclaims against the Bank and Third Party Defendant Joseph A. Piccirilli, Vice President of the

Bank. These counterclaims are: (1) breach of contract - Counts I and II; (2) fraud - Count III; (3) RICO violations - Count IV; and

breach of the duty of good faith and fair dealing - Count V. Plaintiff and Third Party Defendant now move for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if 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." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's

evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

Plaintiff argues that summary judgment is proper with respect to two issues. First, Plaintiff asserts that summary judgment should be granted on all counterclaims in favor of the Bank and Mr. Piccirilli. Second, Plaintiff contends that there is no genuine issue of material fact as to Defendant's default and subsequent liability for all amounts due under Loan 1 and Loan 2. Because the counterclaims have an impact on whether the Defendant defaulted on these loans, the Court addresses Defendant's counterclaims first.

A. Counterclaims

1. Breach of Contract (Counts I and II)

In Counts I and II of the amended answer, Defendant asserts a breach of contract claim against the Bank and Mr. Piccirilli. The basis of this claim is that the Defendant and the Bank entered into a loan restructure agreement in between the numerous loan modification agreements. Defendant states that the form of this restructure agreement was either written, as evidenced by the March 17, 1995 letter from the Bank and in the possession of

the Bank, or oral. Dr. Lal also contends that the Bank has possession of this alleged restructuring agreement, but will not produce it. In either case, written or oral, Defendant contends that this restructure agreement changed the several terms of the loans. The alleged agreement changed (1) the loan maturity date to March 31, 2000, (2) the interest rate, and (3) the monthly payments. Thus, Defendant argues that the Bank and Mr. Piccirilli are in breach of this alleged loan restructuring agreement because they did not adhere to its terms in collecting on the loans.

Plaintiff argues that summary judgment is proper on this breach of contract claim for three reasons under Delaware and Pennsylvania law.¹ First, Plaintiff argues that any alleged restructuring agreement violates the parol evidence rule. Second, Plaintiff argues that any alleged restructuring agreement violates the statute of frauds. Third and finally, Plaintiff argues that Defendant signed and executed a loan modification agreement which released the Bank from any breach of contract claims. Because the Court finds merit in the parol evidence argument, it does not address Plaintiff's other arguments.

"The parol evidence rule is a matter of substantive law."
Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 662 (3d Cir.

¹ In this case, Loan 1 does not provide a choice of law provision. Loan 2 provides that "all terms, obligations and provisions are governed by and construed in accordance with the laws of the State of Delaware." This Court finds, however, that under either law, the Plaintiff's motion for summary judgment should be granted. The Court will cite to both Delaware and Pennsylvania law were appropriate.

1990); see also Fr. Winkler KG v. Stoller, 839 F.2d 1002, 1005 (3d Cir. 1988) ("Despite its title, the rule is one of substantive contract law, and not one of evidence."). The leading Pennsylvania case on the parol evidence rule is Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924). There, the Supreme Court of Pennsylvania wrote:

Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract, . . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence. The writing must be the entire contract between the parties if parol evidence is to be excluded, and to determine whether it is or not the writing will be looked at, and if it appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.

Id. at 792 (internal quotations and citations omitted). Pennsylvania courts still rely upon Gianni's definitive statement of the parol evidence rule. See In re Estate of Hall, 535 A.2d 47, 55 n.5 (Pa. 1987); Fountain Hill Millwork Bldg. Supply Co. v. Belzel, 587 A.2d 757, 760 (Pa. Super. Ct. 1991).

The parol evidence rule is not applicable if the parties did not intend a written contract to set forth their full

agreement. See Gianni, 126 A. at 792; see also American Bank & Trust Co. v. Lied, 409 A.2d 377, 381 (Pa. 1979) (noting that, under the parol evidence rule, evidence is forbidden if offered "for the purpose of varying or contradicting the terms of a contract which both parties intended to represent the definite and complete statement of their agreement"); Fountain Hill, 587 A.2d at 761 ("It is clear that the parol evidence rule has no application to a writing that does not state fully the agreement among the parties."). This is true whether or not a contract contains an integration clause. See Greenberg v. Tomlin, 816 F. Supp. 1039, 1053 (E.D. Pa. 1993).

In Gianni, the Pennsylvania Supreme Court also set forth the analysis the court must undertake to determine whether a written agreement is the final and complete expression of the parties' agreement. See Gianni, 126 A. at 792. The Gianni court stated:

When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject-matter, and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing.

Id. Moreover, whether a writing is an integrated agreement is a question of law for the court to decide. See Mellon Bank Corp. v.

First Union Real Estate Equity & Mortgage Inv., 951 F.2d 1399, 1405 (3d Cir. 1991).

The Court concludes that any alleged written or oral loan restructuring agreement is barred by the parol evidence rule. As a threshold matter, the Court concludes that the original loan agreements, as well as the numerous loan modification agreements, represent a fully integrated agreement. These agreements leave nothing to uncertainty. See Gianni, 126 A. at 792. Therefore, under the parol evidence rule, evidence in this case is forbidden if it is offered "for the purpose of varying or contradicting the terms of [the] contract which both parties intended to represent the definite and complete statement of their agreement." American Bank, 409 A.2d at 381.

In this case, Defendant attempts to offer terms in the loan restructuring agreement that would vary and contradict terms in the loan modification agreements. The alleged loan restructuring agreement changed the monthly payments, extended the maturity date five years, and altered the interest rate. These terms fly in the face of the terms as they existed on the date of the alleged restructuring agreement. Moreover, the parties entered into this alleged restructuring agreement prior to the last loan modification. These facts fall squarely within the parol evidence rule and bars Defendant's breach of contract claims whether oral or written.

In his response, Defendant does not argue that the alleged contract falls outside the parol evidence rule. Rather, Lal contends that this case falls within two exceptions to the parol evidence rule. First, Defendant argues that an oral agreement is not barred by the parol evidence rule if it concerns a separate subject matter and is supported by separate consideration than the written agreement. The Court finds that this exception does not apply because any alleged loan restructuring does not concern a separate subject matter than the original written loan agreement. While Defendant argues that the collateral subject matter was the restructuring of the loans rather than the loans themselves, this Court finds little merit in this argument. Indeed, all of these written agreements concern one subject matter, that is, the loans.

Second, Defendant argues that the parol evidence rule should not apply because the Bank fraudulently induced him to sign these loan modification agreements with promises to execute the loan restructuring agreement. However, Defendant does not offer a shred of evidence to support this allegation. "If bald allegations of fraud alone were sufficient to avoid the parol evidence rule, the rule would go up in a puff of smoke." Health Management Publications, Inc. v. Warner-Lambert Co., No. CIV.A.98-1557, 1998 WL 784243, at *5 n.10 (E.D. Pa. Nov. 10, 1998).

Furthermore, the "fraud exception" to the parol evidence rule

has been narrowed considerably by the Pennsylvania courts in recent years. See Dayhoff, Inc. V. H.J. Heinz Co., 86 F.3d 1287, 1298-1301 (3d Cir.) (discussing the transformation of Pennsylvania law), cert. denied, 117 S. Ct. 583 (1996). Under Pennsylvania law as it now stands, parol evidence is only admissible to show "fraud in the execution" of a contract, but not "fraud in the inducement." See Dayhoff, 86 F.3d at 1300. Fraud in the execution exists only when a party deceives another into believing he or she is signing something which is not what it purports to be. See id. Here, Lal does not now claim that he did not know that he was signing a loan agreement. Fraud in the inducement, on the other hand, involves allegations of oral representations on which the other party relied in entering into the agreement. See id. This is the type of fraud Lal alleges, that the Bank induced him to sign the loan modification with promises to restructure the loan, which does not suffice to avoid the parol evidence rule. See id. Therefore, the Court finds that summary judgment is warranted on Defendant's breach of contract counterclaims.

2. Fraud

In his amended answer, Defendant asserts a claim of fraud against the Bank and Mr. Piccirilli. The elements of fraud are as follows: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the

recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result. See Scaife Co. v. Rockwell-Standard Corp., 285 A.2d 451, 454 (Pa. 1971). "Fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991). Under Pennsylvania law, a plaintiff must prove fraud by clear and convincing evidence. See Beardshall v. Minuteman Press Int'l, Inc., 664 F.2d 23, 26 (3d Cir. 1981).

It is well settled that fraud is proved when it is shown that the false representation was made knowingly, or in conscious ignorance of the truth, or recklessly without caring whether it be true or false. See Warren Balderston Co. v. Integrity Trust Co., 170 A. 282 (Pa. 1934). A misrepresentation is material when it is of such a character that if it had not been made, the transaction would not have been entered into. See Greenwood v. Kadoich, 357 A.2d 604, 607 (Pa. Super. Ct. 1976). One deceived need not prove that fraudulent misrepresentation was the sole inducement to the investment of money, a material inducement is sufficient. See id.

The Court finds that summary judgment should be granted on Defendant's counterclaim of fraud because there is no evidence of several of the elements necessary to state a claim of fraud.

Defendant states that the misrepresentation is outlined in the March 17, 1995 letter. Defendant further states that this restructuring never occurred. This is simply insufficient evidence of fraud. While the Bank offered this restructuring option to Lal, the Bank's failure to restructure alone is not fraud. Indeed, the March 17, 1995 letter outlines the proposal "[i]f and when" the restructuring occurs. Moreover, Lal testified in his deposition only that the Bank "should make their intentions clear." Lal Dep. at 203. Defendant offered no evidence that the Bank made this representation never intending to carry it out. Therefore, the Court finds that this counterclaim must fail.

3. RICO

Defendant brought a counterclaim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994). RICO affords civil damages for "any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Defendant asserts claims under Sections 1962(a), (b), and (c).

a. 18 U.S.C. § 1962(a)

Section 1962(a) of the RICO provides, in relevant part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the

proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise

18 U.S.C. § 1962(a). To sustain a Section 1962(a) claim, a plaintiff must show that it was injured specifically by the investment in or use by the RICO enterprise of racketeering derived "income." See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991). Income generally means money or at least something readily measurable in terms of dollar market value. See id.; see also Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989) (stating that Section 1962(a) claimant must show investment of "money" received from pattern of racketeering). Therefore, a plaintiff must show that he or she suffered injury "caused by the use or investment of income in the enterprise, rather than by the predicate acts or pattern." Rose v. Bartle, 871 F.2d 331, 357 (3d Cir. 1989).

Plaintiffs contend that Lal made no allegation that could support a claim under Section 1962(a). They point out that there is no evidence that the Bank or Piccirilli invested any proceeds from the alleged racketeering activity in an enterprise or that such an investment injured Lal. See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188-89 (3d Cir. 1993). In support of its Section 1962(a) claim, Defendant contends only that he suffered injury in the form of the Bank's receipt of Lal's loan payments. Defendant proffered no facts that would support a connection

between this collection of loan payments, allegedly the result of predicate racketeering, and an injury "caused by the use or investment of" this income. Rose, 871 F.2d at 357. Thus, the Plaintiff's motion for summary judgment is granted on Defendant's Section 1962(a) counterclaim.

b. 18 U.S.C. § 1962(b)

Section 1962(b) of the RICO makes it unlawful "for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b). To state a claim under Section 1962(b), a plaintiff must show "a specific nexus between control of a named enterprise and the alleged racketeering activity." Kehr Packages, 926 F.2d at 1411. As with Section 1962(a), a plaintiff must show that it has been injured by the control of the RICO enterprise in addition to showing injury from the predicate acts themselves. See Lightning Lube, 4 F.3d at 1191.

In this case, the Court finds that summary judgment is proper on Defendant's Section 1362(b) counterclaim. The Bank did not acquire an interest itself through the alleged racketeering act. Even if Defendant argued that the Bank used the income gained from its alleged racketeering activity to maintain themselves and this maintenance allowed the Bank to injure Lal, this argument has

been repeatedly rejected by the courts. See id. at 1188, 1191. Moreover, Mr. Piccirilli is a loan officer and also did not gain control of any interest in the Bank. For this reason, summary judgment is granted on Lal's counterclaims under Section 1962(b).

c. 18 U.S.C. § 1962(c)

(1) Enterprise

Section 1962(c) makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). An enterprise may be comprised of individuals or corporations and may take the form of a legal entity or an association in fact. See 18 U.S.C. § 1961(4). It is well established that the defendant and the enterprise cannot be one and the same entity, because an entity cannot associate with itself. See Kehr, 926 F.2d at 1411; Banks v. Wolf, 918 F.2d 418, 421 (3d Cir. 1990); B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628 (3d Cir. 1984).

Lal alleged the Bank as the only enterprise. See Def.'s Am. Ans. at ¶¶ 30, 33. Therefore, the Bank cannot also be a Defendant. For this reason, the Court grants summary judgment in the Bank's favor with respect to the Section 1362(c) counterclaim.

(2) Predicate Acts

Furthermore, with respect to the Bank and Mr. Piccirilli, this Court finds that summary judgment is appropriate on the Section 1362(c) counterclaim because Lal presented no evidence of the predicate acts. With respect to the predicate acts, Defendant's RICO counterclaim alleges violations of the federal

mail statutes. A violation of the mail fraud statutes requires proof of: (1) a scheme or artifice to defraud; (2) use of the mails or interstate wires in furtherance of the scheme; and (3) participation by the defendant in the scheme or artifice. See United States v. Burks, 867 F.2d 795, 797 (3d Cir. 1989).

This Court finds that summary judgment is proper because the Defendant presented no evidence of violations of the federal mail statutes. The Bank and Mr. Piccirilli states that: "Lal could not even clearly articulate how the Bank committed mail and wire fraud." In response, "Dr. Lal contends that the fraudulent scheme or pattern spanned a period of more than two years from the execution of the first mortgage modification agreement to the present with the bank making fraudulent misrepresentations in financing, and refinancing all done in an effort to gain and control the property holdings of Defendant in addition to charging excessive interest rates in excess of the agreed upon amounts." Beside this general statement, Lal does not identify any evidence in the record before the Court of predicate acts committed by the Bank or Mr. Piccirilli. Because the Plaintiff failed to produce sufficient evidence and cannot rely on vague statements, this Court grants summary judgment on Defendant's Section 1362(c) counterclaim. See Trap Rock Indus., 982 F.2d at 890 (stating that a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements).

4. Breach of Duty of Good Faith and Fair Dealing

Defendant also brought a counterclaim alleging that the Bank and Mr. Piccirilli breached their duty of good faith and fair dealing. Essentially, Defendant alleges three breaches: (1) the Bank's failure to record the Scarlett Manor Apartments in their mortgage with Dr. Lal until 1993; (2) the Bank failure to exercise its right to assign rent proceeds once Dr. Lal indicated that he could no longer make payments on the loans; and (3) the Bank's failure to honor the alleged restructure agreement.

Under Pennsylvania and Delaware law,² a contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract. See Liazis v. Kosta, Inc., 618 A.2d 450, 454 (Pa. Super. Ct. 1992); see also Restatement (Second) of Contracts § 205 (1981). The duty of good faith has been defined as "honesty in fact in the conduct or transaction concerned." Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992). The obligation to act in good faith in the performance of

² This Court recognizes that it is unclear whether a claim for breach of the duty of good faith and fair dealing applies to the creditor/debtor relationship under Pennsylvania law. Indeed, the cases in this circuit have unanimously held that a lender does not breach an implied contractual duty of good faith by adhering to the terms of its contract with a borrower. See Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 319-20 (E.D. Pa. 1992), aff'd mem., 981 F.2d 1248 (3d Cir. 1992); Bohm v. Commerce Union Bank of Tenn., 794 F. Supp. 158, 163 (W.D. Pa. 1992). Under Delaware law, however, the duty of good faith and fair dealing attaches to all contracts. See Pierce v. International Ins. Co. of Ill., 671 A.2d 1361, 1366 (De. 1996) ("So that the reasonable expectations of parties to a contract will not be defeated, we have held that a duty of good faith and fair dealing attaches to every contract, and this duty cannot be disclaimed."). Nevertheless, under the merits of Defendant's counterclaim, this Court finds that the summary judgment is proper under either law.

contractual duties varies somewhat with the context and is impossible to define completely. See id. It is possible to recognize certain strains of bad faith which include: evasion of the spirit of the bargain; lack of diligence and slacking off; willful rendering of imperfect performance; abuse of a power to specify terms; and interference with or failure to cooperate in the other party's performance. See id. (citing Restatement (Second) of Contracts § 205 cmt. d (1981)). Absent a contract, however, there is no breach of the duty of good faith and fair dealing. See id.

a. Failure to Record Scarlett Manor Apartments in Mortgage

Defendant argues that the Bank breached its duty of good faith and fair dealing when it failed to list Scarlett Manor Apartments on a mortgage held as security for the loans. The Bank did not list Scarlett Manor Apartments in the mortgage. When the Bank added Scarlett Manor in a modification document, the Bank failed to record this document until February 10, 1995. Dr. Lal states that these actions caused him harm when a court appointed agent of the property refused to pay the mortgage from the rent proceeds because the court instructed the agent to only pay the mortgage of perfected security liens.

Plaintiff argues that: (1) these facts are unsupported by the record and (2) even if they are supported by the record, Lal suffered no harm. This Court agrees with both arguments. The court ordered the agent not to reimburse Lal for mortgage payments

until the apartments were brought up to the ordinances, not because the property was not a perfected security interest. Furthermore, even if Lal had to pay the mortgage "out of his own pocket" rather than from rent proceeds through the court appointed agent, this Court finds that Dr. Lal suffered no injury. In either case, Lal was responsible for the mortgage on the property. Thus, summary judgment is proper because Lal suffered no harm.

b. Failure to Exercise Right to Assign Rent Proceeds

Defendant also argues that the Bank breached its duty of good faith and fair dealing when it failed to exercise its right to assign the rent proceeds from the Scarlett Manor Apartments. Under a court order, the court appointed agent had authority to collect rents from the Scarlett Manor Apartments until the property complied with the ordinances. Lal contends that, once Lal defaulted, the Bank should have exercised its rights under the loans and collect the rents at the Scarlett Manor Apartments.

This claim is without merit. The loan agreements gave the Bank "discretion" and "at its option" the Bank could collect rents from Scarlett Manor Apartments if Lal was in default. The Bank properly declined to exercise this option in order to avoid the litigation between Lal and the Borough of Kennett Square. Defendant offered no evidence, nor made any arguments, that this decision was made in bad faith or lacked "honesty in fact in the

conduct or transaction concerned." Somers, 613 A.2d at 1213. Therefore, summary judgment is proper under this argument as well.

c. Failure to Honor Restructuring Agreement

Defendant argues that the Bank breach its duty of good faith and fair dealing when it failed to honor the alleged loan restructuring agreement. Plaintiff responds that there is no such contract, and therefore, there can be no corresponding implied duty of good faith and fair dealing. This Court agrees.

Under Delaware or Pennsylvania law, a contract is necessary to assert a breach of a duty of good faith and fair dealing. See Gilbert v. The El Paso Co., 490 A.2d 1050, 1055 (Del. Ch. 1984), aff'd, 575 A.2d 1131 (Del. 1990); see also Creeizer v. Mid-State Bank, 560 A.2d 151, 153-54 (Pa. Super. Ct. 1989). This Court already held that any alleged loan restructuring agreement is barred by the parol evidence rule. Furthermore, even if there was an alleged restructuring agreement, this claim simply repeats his claim that the Bank was liable for breach of contract in Counts I and II of his amended answer. See Dorn v. Stanhope Steel, Inc., 534 A.2d 798, 808 (Pa. Super. Ct. 1987) (noting that there can be no implied covenant of good faith and fair dealing as to any matter specifically covered by the written contract between the parties). Therefore, summary judgment is proper on Defendant's breach of good faith and fair dealing counterclaim.

B. Default and Liability Under Loan 1 and Loan 2

Finally, having granted summary judgment on all of Defendant's counterclaims, the Court finds that summary judgment is proper for the Plaintiff and against the Defendant on the default of the loans. Plaintiff submitted the loan agreements and an affidavit that Dr. Lal has been in default of these loans since February of 1996. Under the terms of the loans, all amounts became immediately payable to the Bank. Indeed, the Defendant does not really dispute the facts surrounding his default. Therefore, the Court grants the Plaintiff's summary judgment motion and enters judgment in favor of the Plaintiff and against the Defendant in the amount owed under Loan 1 and Loan 2.

Under the loan agreements, the Plaintiff is also entitled to costs and attorneys' fees in bringing this action. The Plaintiff has twenty days from the date of this Order to submit evidence of their costs and reasonable attorneys' fees. The Court will modify the judgment if necessary.

An appropriate Order follows.

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FINAL JUDGMENT

AND NOW, this 30th day of November, 1998, upon consideration of the Plaintiff and Third Party Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED that the Motion is **GRANTED**.

IT IS FURTHER ORDERED that:

(1) Defendant's counterclaims, Counts I, II, III, IV, and V are **DISMISSED**;

(2) Judgment is **ENTERED** in favor of the Plaintiff and against the Defendant Lal in the amount of \$295,179.52 plus interest from February 1996; and

(3) Plaintiff has twenty (20) days from the date of this Order to petition this Court for costs and attorneys' fees incurred.

BY THE COURT:

HERBERT J. HUTTON, J.