

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

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| I & S ASSOCIATES TRUST, | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | NO. 99-4956 |
| LaSALLE NATIONAL BANK, et al., | : | |
| Defendants. | : | |

MEMORANDUM AND ORDER

YOHN, J.

April 12, 2000

The plaintiff, I & S Associates Trust (“I & S”), has brought suit against LaSalle National Bank (“LaSalle”) and GMAC Commercial Mortgage Company (“GMAC”)¹ for claims arising out of the plaintiff’s purchase of real property located in Lancaster, Pennsylvania on July 13, 1998. The plaintiff’s complaint asserts a claim against LaSalle for declaratory relief concerning the validity of certain promissory notes, as well as a claim for breach of contract.² See Compl. ¶¶

¹In its complaint, the plaintiff also named North Queen Street Limited Partnership (“North Queen”) as a defendant. See Compl. ¶ 4. On December 14, 1999, the plaintiff voluntarily withdrew its complaint against North Queen. Consequently, this memorandum and order addresses only the claims against LaSalle and GMAC.

²The complaint also included a claim against LaSalle for indemnification. In its response to the defendants’ motion to dismiss, however, the plaintiff expressed a willingness to withdraw this claim. See Plaintiff I & S Associates Trust’s Response to Motion of Defendants LaSalle National Bank and GMAC Commercial Mortgage Corporation to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) as to Both Defendants or, in the Alternative, under 12(b)(2) as to Defendant LaSalle National Bank, (“Pl.’s Resp.”) at 16. Thus, I will dismiss this claim without prejudice.

30-44. The complaint also alleges that GMAC is liable for negligence and breach of warranty. See id. at ¶¶ 45-52.

Currently pending before the court is the motion of defendants LaSalle and GMAC (collectively the “defendants”) to dismiss the plaintiff’s complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). See Motion of Defendants LaSalle National Bank and GMAC Commercial Mortgage Corporation to Dismiss Plaintiff’s Complaint as to These Defendants Pursuant to Fed. R. Civ. P. 12(b)(6) or, in the Alternative, under 12(b)(2) as to Defendant LaSalle National Bank, and Memorandum of Law in Support of Motion (“Def.’s Mot.”). As an alternative argument, LaSalle also requests that the court dismiss the action against it pursuant to Federal Rule of Civil Procedure 12(b)(2). See id. at 11-12.

For the reasons that follow, I will grant in part and deny in part the defendants’ motion to dismiss. I will deny the defendants’ motion to dismiss with respect to all counts, with the exception of the count for breach of warranty brought against GMAC, which I will dismiss without prejudice.

FACTUAL BACKGROUND³

The facts of this case revolve around the sale of a property located at 150 North Queen Street in Lancaster, Pennsylvania (the “property”). See Compl. Ex. A. On August 7, 1997, North Queen and Granite Investment I Corp. (“Granite”), borrowed \$8,250,000 from Boston Capital Mortgage Limited (“Boston Capital”). See Compl. ¶ 9. The repayment of the loan was

³Because this is a motion to dismiss the court will “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)).

secured by a Mortgage and Security Agreement that encumbered the property. See id. Granite and North Queen memorialized their duty to repay their indebtedness to Boston Capital in a promissory note dated August 8, 1997 (“note one”). See Compl. ¶ 10 & Compl. Ex. B. The terms of note one do not require the payment of a penalty or premium for the prepayment of the principal amount due on the note. See Compl. ¶ 17 & Compl. Ex. B.

On September 3, 1997, Granite, North Queen, and Boston Capital executed a second promissory note for \$8,250,000 (“note two”). See Compl. Ex. G. Although note two was signed and executed on September 3, 1997, it was dated to take effect “[a]s of August 8, 1997.” See id. Note two requires that the borrower pay a premium in order to prepay any of the outstanding principal balance of the Note. See Compl. ¶ 24 & Ex. G.

On June 30, 1998, Granite conveyed its interest in the property and assigned its obligations under note one to North Queen. See Compl. ¶ 11. On July 13, 1998, I & S bought the property from North Queen and became the sole owner of the property. See id. ¶ 12. At the time of the sale of the property to I & S, North Queen simultaneously assigned to I & S all of its obligations under the Mortgage and Security Agreement. See id. ¶ 13. Additionally, sometime prior to July 13, 1998, Boston Capital had assigned all of its rights and interests in the loan to LaSalle. See id. ¶ 14. Accordingly, on July 13, 1998, I & S was the purchaser of the property and owed an obligation to repay the loan to LaSalle. See id. ¶¶ 13-14. GMAC was the servicing agent for the lender at all relevant times. See Compl. ¶ 15.

Before I & S and North Queen agreed that I & S would purchase the property from North Queen, I & S requested that GMAC’s counsel provide I & S with a copy of the Assignment

Agreement. See Compl. ¶ 16. GMAC's counsel agreed to do so, and gave a copy of note one to I & S's counsel. See id.

Prior to the closing of the sale of the property to I & S from North Queen on July 13, 1998, the parties entered into an Amendment and Release Agreement (the "release"). See Pl.'s Resp. at 2. The release provided that:

In exchange for the reduction in the purchase price [from \$12,200,000 to \$12,100,000] and the agreement of Trocki and Trust to execute documents prepared by Lender or Lender's counsel and upon the recording of the deed from Seller to Trust any and all claims by Buyer, Trust and Trocki against Seller and Conroy on account of any claims that Buyer, Trust or Trocki may have against Seller or Conroy related to the agreement, the claim of Buyer, Trust and Trocki related to the Guaranty of Recourse Obligations of Borrower, the agreement, and the premises shall be fully released and forever discharged from any and all claims. As used in this context claims shall mean and include any and all actions, causes of action, suits, disputes, controversies, claims, debts, sums of money, offset rates, defenses to payment, agreements, promises, losses, damages and demands of whatsoever nature, known or unknown, whether in contract or in tort at law or in equity, for money damages or recovery of property, or specific performance, or any other redress or recompense which have accrued or may ever accrue may have been had may be not possessed, or may or shall be possessed in the future by or on behalf of any one of Buyer, Trocki, or Trust against Seller or Conroy or any officer, director, or general partner of Seller by reason of, on account of, or arising from or out of, or by virtue of, the transaction contemplated by the Agreement and this agreement.

Buyer, Trocki and Trust acknowledge that, in the event that they discover facts different from or in addition to those that they now know or believe to be true with respect to the claims that they have herein released that this release shall remain effective in all respects and waive the right to make any new, different, or additional claims on account of such different or additional facts once the deed from Seller to Trust has been recorded.

See Motion of Defendant North Queen Street Limited Partnership to Dismiss Counts IV and V of the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) or, in the Alternative, for Summary Judgment ("North Queen Mot."), at Ex. 1; see also Pl.'s Resp. at 2-3.

On March 16, 1999, counsel for I & S wrote to GMAC requesting confirmation that I & S would not be required to pay a prepayment penalty if it prepaid any of the outstanding principal balance on the note. See Compl. ¶ 22. In a letter dated March 24, 1999, GMAC responded that because note two controlled, I & S would be required to pay a prepayment penalty in order to prepay any principal balance on the note. See id. at ¶¶ 23-24.

On October 6, 1999, I & S this action to determine whether note one or note two governs the relationship between the parties. The defendants then filed the present motion to dismiss for failure to state a claim.

STANDARD OF REVIEW

The defendants have filed a motion to dismiss for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12 (b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)). At this stage of the litigation, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In deciding a motion to dismiss, a district court also may consider exhibits attached to the complaint and matters of public record. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, “a court may consider an undisputedly authentic document that a defendant attaches

as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Id.
(citations omitted).

DISCUSSION

In their motion to dismiss, LaSalle and GMAC set forth several arguments for why the court should hold that the plaintiff's complaint fails to state a claim upon which relief can be granted. I will address each of the defendants' arguments in turn.

A. Does the Release Executed Between I & S and North Queen Bar Claims by I & S Against LaSalle and GMAC?

The defendants first argue that the "Release executed at the time of the closing between the Trust and North Queen Street unambiguously bars any claims by the Trust relating to the transaction to buy the Property." Def.'s Mot. at 6. The defendants contend that I & S entered into a general release barring all claims based on the sale of the property against all parties, including parties not specifically named in the release. See id. at 7-8. As support for the proposition that the release bars claims brought against parties not specifically named in the release, the defendants cite Buttermore v. Aliquippa Hosp., 561 A.2d 733, 735 (Pa. 1989); Wolbach v. Fay, 412 A.2d 487, 488 (Pa. 1980); and Hasselrode v. Gnagey, 172 A.2d 764, 765 (Pa. 1961).

In response, the plaintiff argues that the release is not a general release and therefore, does not "release any and all claims I & S may have against any and all parties, even those not named in the Release." See Pl.'s Resp. at 4. The plaintiff contends that the cases cited by the defendants are distinguishable because the language of the releases at issue in those cases released from liability the defendant and any and all other persons. See id. at 6.

In interpreting a release, the court is guided by general principles of contract law. See Bickings v. Bethlehem Lukens Plate, 82 F. Supp. 2d 402, 405 (E.D. Pa. 2000); Harrity v. Medical College of Pennsylvania Hosp., 653 A.2d 5, 10 (Pa. Super. Ct. 1994) (citing Flatley by Flatley v. Penman, 632 A.2d 1342 (Pa. Super. Ct. 1993); Vaughn v. Didizian, 648 A.2d 38 (Pa. Super. Ct. 1994)); Martin v. Donahue, 698 A.2d 614, 616 (Pa. Super. Ct. 1997). “The court must look to the terms of the release, both clear and ambiguous, and examine the document to determine the intent of the parties.” Martin, 698 A.2d at 616 (citing Harrity, 653 A.2d at 10). In so doing, the court is bound to give deference to the written word when it is clear, and will not re-write a contract. See id. Moreover, “the court will adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement.” Harrity, 653 A.2d at 10.

As noted above, the defendants rely on several Pennsylvania cases to support their proposition that the release in this case extends to parties not mentioned in the release. See Def.’s Mot. at 8 (citing Buttermore v. Aliquippa Hosp., 561 A.2d 733, 735 (Pa. 1989); Wolbach v. Fay, 412 A.2d 487, 488 (Pa. 1980); Hasselrode v. Gnagey, 172 A.2d 764, 765 (Pa. 1961)).

The court in Buttermore was asked to interpret the scope of the following disputed release:

[Plaintiffs] hereby remise, release, acquit and forever discharge Frances Moser, et al. His/her successors and assigns, and/or his, her, their, and each of their associates, heirs, executors and administrators and any and all other persons, associations and/or corporations, whether known or unknown, suspected or unsuspected, past, present and future claims, demands, damages, actions, third party actions, causes of action or suits at law or in equity, indemnity of whatever nature, for or because of any matter or thing done, omitted or suffered to be done, on account of or arising from damage to property, bodily injury or death resulting from damage to property, bodily injury or death resulting or to result from [the accident].

Buttemore, 561 A.2d at 734. The court held that the language releasing from liability the specific individual and “any and all other persons . . . whether herein named or not,” meant that the plaintiff released from liability all tortfeasors, even those not specifically named in the release. See id. at 735. Other courts examining similar language have also concluded that a general release bars claims against parties not included explicitly in the language of the release. See Wolbach, 412 A.2d at 488 (concluding that a release that stated that it released from liability “any and all persons or entities, whether named herein or otherwise” was a general release that applied to unnamed parties); Hasselrode, 172 A.2d at 765 (holding that language in a release barring claims against the named party and “any and all other persons” was a general release). Thus, it is true that pursuant to Pennsylvania law, parties not named in a release may benefit from the release. See Flatley, 632 A.2d at 1345. Courts have made clear, however, that for an unnamed party to benefit, “there must be a clear showing that other parties were somehow contemplated.” See id. In other words, for a release to apply to an unnamed party, the party must demonstrate that it was the intent of the parties for all persons, including unnamed parties, to be released from liability.

Keeping these basic principles in mind, I conclude that the release signed by I & S does not bar claims brought against parties not specifically named in the release. Unlike the Buttemore line of cases cited by the defendants, see Def.’s Mot. at 8, the language of the release at issue here did not release “any and all other persons” from liability. The language of the release at issue here addresses only the release of North Queen from liability. The release states explicitly that in exchange for North Queen reducing its purchase price, I & S will agree to release all claims “against [North Queen] or [North Queen’s President] or any officer, director, or

general partner of [North Queen] by reason of, on account of, or arising from or out of, or by virtue of, the transaction” See North Queen Mot. at Ex. 1; Pl.’s Resp. at 3. This case is clearly distinguishable from Buttermore, therefore, because nothing in the language of this release indicates an intent to create a general release of liability against all persons named and unnamed. Accordingly, I hold that LaSalle and GMAC are not released from liability pursuant to the release entered into between I & S and North Queen and I will deny the defendants’ motion to dismiss on this ground.⁴

B. Which Promissory Note Controls the Relationship Between the Parties?

The next issue is which promissory note controls the relationship between the parties. The defendants argue that note two, which required the payment of a prepayment premium, was in effect at the time that LaSalle purchased the loan from Boston Capital and the obligations under the loan were assigned to I & S. See Def.’s Mot. at 9. The defendants contend that note two was in effect when I & S assumed the obligations under the loan from North Queen (because an assignee assumes all of the obligations of the assignor at the time of the assignment), and thus, note two controls the relationship between the parties. See id. at 9-10.

⁴In their motion to dismiss, the defendants also argue that they are third party beneficiaries to the release and therefore, the claims against them are barred as a matter of law. See Def.’s Mot. at 8-9. Under Pennsylvania law, “a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself . . . , unless, the circumstances are so compelling that recognition of the beneficiary’s right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Scarpitti v. Weborg, 609 A.2d 147, 150-51 (Pa. 1992) (citing Spires v. Hanover Fire Ins. Co., 70 A.2d 828 (1950); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983)). For the same reasons that I held that the release at issue here is not a general release, I conclude that the defendants were not the intended third party beneficiaries of the release contract entered into between I & S and North Queen.

In response, the plaintiff argues that note two was merely a modification of note one because it was identical to note one with the exception of the correction of a misprint and the inclusion of the prepayment premium clause. See Pl.’s Resp. at 11. The plaintiff contends that the modification of the note (i.e., the inclusion of the prepayment premium in note two) was not supported by consideration and thus, is invalid. See id. The plaintiff argues, therefore, that it may challenge the invalidity of note two because as the assignee under the note it received all of the rights that North Queen, the assignor, maintained under the note. See id. at 10-12. In other words, I & S argues that it is entitled to raise the defense of lack of consideration because it is a defense that North Queen would have been able to raise to challenge the validity of note two. See id.

The plaintiff is correct in its contention that a contract modification must be supported by consideration to be enforceable. See Barnhart v. Dollar Rent A Car Sys., Inc., 595 F.2d 914, 919 (3d Cir. 1979) (finding that, under Pennsylvania law, “additional consideration or reliance [is required] to support a contractual modification”) (citing Nicolella v. Palmer, 248 A.2d 20 (Pa. 1968)). The plaintiff has alleged that there was no consideration to support the modification of the contract. See Compl. ¶¶ 38-40. Thus, this is an issue that can not be resolved as a matter of law at this time and I will deny the motion to dismiss on this ground.⁵

⁵In its motion to dismiss, LaSalle also argues that the claims against it should be dismissed because the note is held by LaSalle as trustee and the plaintiff “has failed to sue LaSalle in its capacity as such Trustee.” Def.’s Mot. at 12. The only evidence that LaSalle presents to demonstrate that it was acting in its capacity as a trustee is one “Whereas” clause in the Assignment Agreement. See id. (citing to Ex. “E” to plaintiff’s complaint). Based on this evidence, I cannot conclude as a matter of law that LaSalle was acting solely in a trustee capacity. Because LaSalle’s relationship to this transaction is unclear, I will deny the defendants’ motion to dismiss. I note, however, that the plaintiff itself acknowledges that the complaint is inadequate if LaSalle acted solely in a trustee capacity and not in its corporate capacity. If further

C. Does the Plaintiff’s Complaint Fail to State a Claim for Breach of Warranty Against GMAC?

Count five of the plaintiff’s complaint alleges breach of warranty against GMAC. See Compl. ¶¶ 49-52. In its motion to dismiss the plaintiff’s complaint, GMAC contends that the plaintiff cannot state a claim for breach of warranty because GMAC was “not the seller with respect to the sale transaction, or the assignor under the Assignment Agreement.” See Def.’s Mot. at 13.⁶

In its response to the defendant’s motion to dismiss, the plaintiff disclaims its intent to state a claim for breach of warranty and instead maintains that it intended to state a claim for misrepresentation. See Pl.’s Resp. at 14. The plaintiff’s complaint, however, does not state a claim for misrepresentation. The plaintiff has expressed its willingness to amend its complaint to allege a claim for misrepresentation. See id. at 14 n.4. I will therefore dismiss the plaintiff’s warranty claim without prejudice to the plaintiff’s right to amend this count to allege a claim for misrepresentation.

D. Does the Plaintiff’s Complaint Fail to State a Claim for Negligence Against GMAC?

evidence is presented which demonstrates that LaSalle is not named in its proper capacity, I will revisit this issue at that time.

⁶In the defendants’ motion to dismiss, GMAC argues that the plaintiff has not stated a claim for breach of contract against GMAC. See Def.’s Mot. at 14 n.4. The plaintiff’s complaint alleges a claim for breach of contract only against LaSalle, not against GMAC. See Compl. ¶¶ 41-44; Pl.’s Resp. at 13-14. Because there is no claim for breach of contract against GMAC in the complaint, I will not consider the arguments set forth by GMAC for why this claim should be dismissed.

In Count four of the complaint, the plaintiff alleges that GMAC is liable to it for negligence. See Compl. ¶¶ 45-48. To establish a claim of negligence under Pennsylvania law, a plaintiff must prove: (1) a duty; (2) a breach of that duty; (3) a causal connection between the defendant's breach and the resulting injury; and (4) injury to the plaintiff. See Estate of Zimmerman v. Southeastern Pennsylvania Transp. Auth., 168 F.3d 680, 684 (3d Cir. 1999); see also Ferry v. Fisher, 709 A.2d 399, 402 (Pa. Super. Ct. 1998) (holding that plaintiff must show that defendant owed him a duty and that duty was breached in order to recover for negligence).

In its motion to dismiss, GMAC argues that it owed no duty to I & S. See Def.'s Mot. at 13-16. In response, I & S contends that GMAC owed it a duty because GMAC provided I & S with note one to induce it to assume North Queen's obligations under the loan.

A duty “is predicated on the relationship existing between the parties at the relevant time.” See Zanine v. Gallagher, 497 A.2d 1332, 1334 (Pa. Super. Ct. 1985) (quoting Morena v. South Hills Health Sys., 462 A.2d 680, 684 (Pa. 1983)). Thus, even if the parties are strangers, a relationship may be inferred from the general duty imposed on all persons not to place others at a risk of harm through their actions. See id. (citing Gerdes v. Booth & Finn, Ltd., 150 A. 483, 485 (Pa. 1930)). “The scope of this duty, however, is limited to those risks that are reasonably foreseeable by the actor in the circumstances of the case.” See id. (citing Paulsack v. Hoebler, 198 A. 646, 650 (Pa. 1938); Restatement (Second) of Torts § 284(a) (1965)).

In this case, GMAC owed a duty to I & S if, through its actions, it could have reasonably foreseen that it would cause harm to I & S. I & S has alleged in its complaint that GMAC knew that I & S would rely on the promissory note and that the note was of “critical importance” to I & S in finalizing the transaction. See Compl. ¶ 46. Thus, based on these allegations, the plaintiff

has alleged sufficient facts to demonstrate that GMAC owed I & S a duty so that a breach of that duty would support a claim for negligence. Accordingly, I will deny GMAC's motion to dismiss the plaintiff's negligence claim.

CONCLUSION

Based on the foregoing reasons, I will deny the defendants' motion to dismiss with the exception of the count for breach of warranty brought against GMAC. The breach of warranty claim against GMAC will be dismissed and the plaintiff will be granted leave to amend this claim.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
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| I & S ASSOCIATES TRUST, | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | NO. 99-4956 |
| LaSALLE NATIONAL BANK, et al., | : | |
| Defendants. | : | |

ORDER

AND NOW, this 12th day of April, 2000, upon consideration of the defendants' motion to dismiss and the plaintiff's response thereto, IT IS HEREBY ORDERED that:

1. LaSalle's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is DENIED;
2. LaSalle's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) is DENIED;
3. GMAC's motion to dismiss the negligence claim is DENIED;
4. GMAC's motion to dismiss the breach of warranty claim is GRANTED and the claim is DISMISSED WITHOUT PREJUDICE to the plaintiff's right to amend this claim within 30 days of the date of this court's order; and
5. The claim of I & S against LaSalle for indemnification is DISMISSED BY AGREEMENT WITHOUT PREJUDICE.

William H. Yohn, Jr., J.