

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

ROYAL BANK AMERICA, : JULY TERM, 2011
Plaintiff, : NO. 02019
v. : COMMERCE PROGRAM
CITIZENS BANK OF PENNSYLVANIA, : Control No. 11075308
Defendant. :

ORDER

AND NOW, this 1st day of August, 2011, upon consideration of plaintiff's Motion for Preliminary Injunction,¹ the response in opposition, all other matters of record, and after hearing oral argument,² and in accord with the contemporaneous Opinion, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

Royal Bank America Vs C-ORDOP




ALBERT W. SHEPPARD, JR., J.

DOCKETED
AUG - 1 - 2011
B. VENTURO

¹ The court notes that the matter was handled in accord with Petition practice.

² The court acknowledges that the borrowers (O'Neill entities) are indispensable parties and to cure this defect, counsel for those borrowers were provided an opportunity to be heard at the argument.

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OPINION

Albert W. Sheppard, Jr., J. August 1, 2011

Defendant Citizens Bank of Pennsylvania (“Citizens”) made a large commercial loan (the “Loan”) to several non-parties controlled by J. Brian O’Neill (the “Borrowers”) to finance the development of certain real estate in Chester County (the “Collateral”). Plaintiff Royal Bank America (“Royal”) purchased a 5.848% participation share in the Loan. Citizens holds a 77.7586% participation interest in the loan. The remaining 16.39% interest is held by non-party NatPenn Bank.

The Borrowers defaulted under the Loan, and Citizens, with Royal’s agreement, commenced foreclosure proceedings. The Borrowers filed litigation against Citizens claiming, among other things, that Citizens caused the default by failing to loan them more money. The amount currently due under the Loan is approximately \$67 million.

Citizens and the Borrowers have agreed to the terms of a potential settlement of the various claims between them (the “Settlement”). The Settlement contemplates the sale of the Loan to an affiliate of Borrowers for approximately \$40 million. If Borrowers are unable to pay

the \$40 million within the time provided in the Settlement, they will give Citizens a deed in lieu of foreclosure for the Collateral.

Royal objects to the Settlement because it (and Citizens and NatPenn Bank) will not receive the entire outstanding Loan amount; instead, they will receive approximately 60% of the amounts due to them. Royal filed this action and a Motion for Preliminary Injunction in an attempt to prevent Citizens from finalizing the Settlement with the Borrowers. For the reasons that follow, Royal's request for an injunction will be denied.

**I. Royal Has No Likelihood of Success
On The Merits Of Its Claims Against Citizens.**

In this action, Royal asserts claims for anticipatory breach of contract, conversion and declaratory judgment. As the basis for its claims, Royal argues that the consummation of the Settlement would be a breach of Royal's written contract with Citizens (the "Participation Agreement.") The Participation Agreement provides that, during the "Administration of the Loan," Citizens shall not: release the Collateral; release the Borrowers from liability; waive any claim against the Borrowers; waive any default; or reduce, waive or forgive any outstanding principal or interest without Royal's consent. Since the Settlement proposes to do all these things, Royal claims its consent to the Settlement is required under the terms of Participation Agreement.

While Royal is correct that Citizens may not do such things during the general "Administration of the Loan," the Participation Agreement contains different, specific provisions governing "Borrower Default and Subsequent Action."³ Once the Borrowers are declared in default, as they were here, Citizens has to prepare a Default Proposal detailing how it

³ *Id.*, Article 7.

proposes to handle the default.⁴ In this case, the Default Proposal is the Settlement. Citizens has to furnish the Default Proposal to Royal, who then has seven days to object to it, in the form of “Default Proposal Advice.”⁵ Royal set forth its objections to the Settlement in writing to Citizens, so it complied with this provision.

Once Royal objects to the Settlement, the parties have twenty business days to work “in good faith to reach an agreement . . . upon the course of action to be taken.”⁶ If they are unable to come to an agreement, Citizens “shall have the right but not the obligation to proceed in the manner described in [its] Default Proposal.”⁷ In other words, Citizens may proceed with the Settlement over Royal’s objection. Since the Participation Agreement allows Citizens to finalize the Settlement without Royal’s consent, Citizens is not in anticipatory breach of that Agreement and will not be improperly converting Royal’s interest by proceeding with the Settlement. This means that Royal has **no** grounds for its claims in this action. Since Royal is highly unlikely to succeed on the claims it raised in this action, it is not entitled to the injunction it seeks.⁸

II. Royal Will Not Suffer Irreparable Harm If the Injunction Is Not Granted.

Even if Royal had grounds for claiming that the Settlement violates the terms of the Participation Agreement, Royal is not entitled to an injunction. Royal objects to the Settlement because it does not require Borrowers to pay the entire amount due on the Loan. Instead, the

⁴ *Id.* at ¶ 7.1(a).

⁵ *Id.* at ¶ 7.1(b).

⁶ *Id.* at ¶ 7.1(d).

⁷ *Id.*

⁸ Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc., 828 A.2d 995, 1001 (Pa. 2003) (“the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits.”)

participating lenders will get back approximately 60% of what is owed to them. The remaining unpaid 40% would be Royal's damages for breach of contract and conversion, assuming Royal could prove that those additional amounts were collectible through sale of the Collateral or otherwise. Since Royal could be made whole with an award of these money damages, it has no claim for irreparable harm and no right to enjoin Citizens from entering into the Settlement.⁹

III. The Court Believes It Has Remedied Royal's Failure to Join An Indispensable Party In This Litigation.

The Borrowers are not parties to this litigation, although it appears to the court that their right to resolve their Loan default and settle their differences with Citizens will be affected if the injunction sought by Royal were to be granted.

The absence of an indispensable party goes absolutely to the court's jurisdiction. If an indispensable party is not joined, a court is without jurisdiction to decide the matter. The absence of an indispensable party renders any order or decree of the court null and void. The issue of the failure to join an indispensable party cannot be waived.¹⁰

[A] party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. The basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her. In undertaking this inquiry, the nature of the claim and the relief sought must be considered. . . . [I]n an action for declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action.¹¹

⁹ Summit, 828 A.2d at 1001 (“a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.”)

¹⁰ Hart v. O'Malley, 647 A.2d 542, 549 (Pa. Super. 1994).

¹¹ City of Philadelphia v. Commonwealth, 838 A.2d 566, 581-2 (Pa. 2003).

Where, as here, a plaintiff seeks to enjoin a defendant's performance of a contract with the non-party, that non-party is a necessary and indispensable party to that litigation.¹² Admittedly, the Borrowers would not be indispensable if Royal was simply suing Citizens for damages for breach of the Participation Agreement.

To remedy this defect, the court provided counsel for the Borrowers the opportunity to take part in oral argument. Plaintiffs acquiesced in this process. Thus, the defect was cured.

CONCLUSION

For these reasons, Royal's Motion for Preliminary Injunction is denied.

BY THE COURT:



ALBERT W. SHEPPARD, JR., J.

¹² See Hart, 647 A.2d at 549 (“Preliminary injunction enjoining Planning Commission from approving [non-parties’] application to expand their mobile home park impaired [non-parties’] property rights [and made them] indispensable parties to the equity action.”); Wilksburg v. Horner, 490 A.2d 964, 964-965 (Pa. Commw. 1985) (non-party, “who intervened upon appeal but was not a party before the trial court, [was] an indispensable party to the taxpayer's equity suit to enjoin the borough from performing its contract with [non-party]”).