

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
2016-CP-29-01319

INDIAN LAND VENTURES, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 LANCASTER COLLINS ROAD, LLC)
 and FONVILLE & CO.,)
)
 Defendants.)
 _____)

ORDER

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SC Court of Appeals

This matter came on before the undersigned judge on the ~~Order~~ ^{Appeals} for Summary Judgment filed by Plaintiff Indian Land Ventures, LLC (“Indian Land”). Indian Land was represented by Richard B. Fennell and John R. Buric from the law firm James, McElroy & Diehl, P.A. Defendant Fonville & Co. (“Fonville”) was represented by Stephen Cox from the law firm Robinson Bradshaw & Hinson. Defendant Lancaster Collins Road, LLC (“Lancaster”) was represented by Dan Ballou from the law firm Morton & Gettys.

The Court received the deposition transcripts of Charles Fonville, John M. Mulvaney, and Ted Barnes. Indian Land and Fonville each presented briefs. The Court reviewed those materials, as well as the Motion filed by Indian Land, and the pleadings and heard argument of counsel. After so doing the Court finds and concludes that there are no genuine issues of material fact as to Indian Land’s entitlement to the relief prayed for in its complaint. Fonville has also failed to present evidence creating any genuine issue of fact in support of its claims and defenses to Plaintiff’s entitlement to that relief. Plaintiff is therefore entitled to judgment as a matter of law.

FACTUAL BACKGROUND

Indian Land filed this action seeking to foreclose a mortgage on real property located in Lancaster County, South Carolina (the "Property"). The Property consists of approximately 14.8 acres of land located near the intersection of U.S. Highway 521 and Collins Road in the town of Indian Land and is owned by Lancaster. Indian Land holds the first priority mortgage on the Property. Fonville holds a junior mortgage on the Property. Indian Land filed this action to foreclose its mortgage. Fonville has asserted defenses to Indian Land's claims contesting Indian Land's right to foreclose, Fonville lien priority position, and the impact of any foreclosure on it.

The basic facts are undisputed:

- Lancaster purchased the Property in April 2007.
- On April 25, 2007, Fonville made a loan to Lancaster in the principal amount of \$1,400,000.00 (the "Fonville Loan").
- The Fonville Loan is evidenced by a promissory note dated April 25, 2007 (the "Fonville Note").
- The Fonville Note is secured by a Mortgage, Assignment of Rents, Security Agreement and Fixture Filing (the "Fonville Mortgage") which was recorded on April 25, 2007 with the Register of Deeds of Lancaster County, South Carolina in Book No. MORT 1708, Page No. 71.
- The Fonville Mortgage encumbers the Property.
- On or about September 23, 2008, Paragon Commercial Bank ("Paragon") made a loan to Lancaster in the original principal amount of \$3,700,000.00 (the "Paragon Loan").

- The Loan is evidenced by a promissory note dated September 23, 2008 (the “Paragon Note”).
- The Paragon Note is secured by a Commercial Mortgage of Real Property and Security Agreement (the “Paragon Mortgage”) which was recorded on September 26, 2008 with the Register of Deeds of Lancaster County, South Carolina in Book No. MORT 1987, Page No. 277.
- The Paragon Mortgage also encumbers the Property.
- The Fonville Mortgage was subordinated to the Paragon Mortgage through an Acknowledgment and Consent to Subordination by Subordinate Lender (the “Fonville Subordination Agreement”).
- The Fonville Subordination Agreement was recorded on September 26, 2008 with the Register of Deeds of Lancaster County, South Carolina in Book No. MORT 1987, Page No. 301.
- The Paragon Mortgage creates a first priority mortgage lien on the Property.
- The Fonville Subordination Agreement results in Fonville holding a second priority mortgage lien on the Property.
- Lancaster defaulted in payment of the loan secured by the Paragon Mortgage.
- The Paragon Mortgage was assigned to Indian Land by an Assignment of Mortgage recorded on October 14, 2016 with the Register of Deeds of Lancaster County, South Carolina in Book No. MORT 3242, Page No. 255 (the “Assignment”).
- The Assignment did not impact Fonville’s mortgage lien priority.
- Indian Land is the current owner and holder of the Paragon Mortgage and

associated loan documents.

FONVILLE'S CLAIMS

Fonville contests Indian Land's right to foreclose by raising claims related to certain alleged promises made to Fonville's principal, Charlie Fonville ("Mr. Fonville") by a "Member A" in both Indian Land and Lancaster. Mr. Fonville claims that he provided the Fonville loan because "Member A represented that he was investing in Lancaster, that he would be a member of Lancaster, and that Lancaster would follow through with its obligations under the Fonville Mortgage Documents." Mr. Fonville further asserts that he was wronged because he (or his company) understood that its loan had to be repaid before Member A could receive any return on his investment in Lancaster. Lancaster purchased the Property in April 2007, intending to develop it. The planned development did not occur. In the last half of 2016, Lancaster realized that the value of the Property was significantly less than the debt encumbering it. No one disputes this. The members of Lancaster had made significant payments on the Paragon Loan, and came to a point where a decision needed to be made about whether to extend the loan and continue making payments or not.

Member A and some of his family members decided to purchase the Paragon Loan. Indian Land was formed on September 20, 2016 to achieve this purpose. Fonville alleges that Member A was a member and agent of both Indian Land and Lancaster while undertaking these steps. Fonville asserts that "Indian Land's formation and subsequent purchase of the Mortgage (as defined in the Complaint) was an intentional scheme by Member A to receive proceeds from the sale of Lancaster's property to the exclusion of Fonville." Specifically, Fonville alleges that "Indian Land, while under the control and/or influence of Member A, purchased the Loan Documents (as defined in the Complaint) on or about October 11, 2016 - just one day after

Lancaster defaulted on the loan with Paragon Commercial Bank - and recorded the Assignment (as defined in the Complaint) on or about October 13, 2016.” Then, “[o]n or about November 14, 2016, Indian Land, while under the control and/or influence of Member A and with no disclosure to Fonville, filed this action to foreclose the Mortgage (as defined in the Complaint) requesting that this Court declare such Mortgage to be a first Lien on the encumbered Property.” Fonville concludes “[b]ecause the value of the Property exceeds Lancaster’s debt, Member A’s conduct demonstrates that, despite his initial involvement in inducing and executing the Fonville Loan, he attempts to use this foreclosure action to eliminate the Fonville Mortgage and, effectively, to elevate the priority of his mere equity investment.”

The Court’s review of the deposition transcripts reveals that Mr. Fonville makes multiple, contradictory statements about who might have told him anything about the Fonville Loan, what role they had with Lancaster, who Member A actually was, and how that might all tie in to Indian Land. These self-contradictory statements cannot create their own issue of fact. They do not support the claims pled by Fonville, and at times directly contradict them. Regardless, even accepting Mr. Fonville’s claims as true, Defendant’s claims are insufficient as a matter of law to defeat this foreclosure action, or to alter the reality that Indian Land holds the first position mortgage interest on the Property.

ANALYSIS AND CONCLUSIONS

I. Legal Standard

There is no question that but for the attempted defenses raised by Fonville, Indian Land would be entitled to the relief it seeks in what would otherwise be a simple foreclosure action. Fonville has the burden on those defenses, and has not met that burden. Rule 56(C) of the South Carolina Rules of Civil Procedure provides that summary judgment shall be rendered “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.” Rule 56(C), SCRCP. Summary Judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E. 2d 703 (1976).

“Under Rule 56(C), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the non-moving party bears the burden of proof, this initial responsibility may be discharged by ‘showing,’ that is, pointing out to the trial court that there is an absence of evidence to support the nonmoving party’s case. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991) (emphasis added). The moving party need not support its motion with affidavits or other similar materials negating the opponent’s claim.” Baughman, 306 S.C. at 115, 410 S.E. 2d at 545. When seeking to avoid a motion for summary judgment, the non-movant must disclose the facts on which he intends to rely by affidavit or other proof. Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). “A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.” Shupe v. Settle, 3105 S.C. 510, 517, 445 S.E.2d 651, 655 (Ct. App. 1994). Mr. Fonville cannot, as he did in his deposition, simply declare that he thinks Fonville was treated unfairly. There must be some factual basis to support Fonville’s defenses. There simply is not.

II. Indian Land Is Entitled to Foreclose on the Property.

The parties do not dispute that Indian Land is the lawful holder of the Paragon Note and the Paragon Mortgage. As set forth previously, that Mortgage is a first priority lien on the Property. It is likewise not in dispute that Lancaster has defaulted on the Paragon Note, and that the Paragon loan documents entitle Indian Land, as the owner and holder of those loan documents, to foreclose on the Property in the event of default by Lancaster. Because Lancaster raises no defense to foreclosure, and Fonville has failed to provide evidence supporting the counterclaims and defenses by which it seeks to defeat Indian Land's right to foreclose on the Property Indian Land is entitled to a judgment of foreclosure and the sale of the Property.

III. Fonville's Defenses Do Not Apply in This Case.

Fonville's defenses to Indian Land's right to foreclose on the Property are summarized in its equitable subordination counterclaim. Equitable subordination has not been recognized as a valid cause of action under South Carolina law, although it is true that the Supreme Court has vacated dictum from the Court of Appeals stating affirmatively that the doctrine did not apply outside of the bankruptcy context. Advance Int'l Inc. v. N.C. Nat'l Bk of S.C. 320 SC 532, 533 (1996). Instead, equitable subordination is a remedy that generally arises in bankruptcy proceedings. See *e.g.*, Matter of Multiponics, Inc., 622 F.2d 709 (5th Cir. 1980); In re AS! Reactivation, Inc., 934 F.2d 1315 (4th Cir. 1991); In re: Dornier Aviation (N. Am.), Inc., 453 F.3d 225, 231 (4th Cir. 2006); In re French Quarter Grp., LLC, 489 B.R. 400, 402 (Bankr. D.S.C. 2013), and that helps to understand its elements. To warrant the remedy of equitable subordination, courts require that "(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the

claim must not be inconsistent with the provisions of the Bankruptcy Act.” Peoples Federal Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 150, 425 S.E.2d 764, 775 (citing Matter of Multiponics, Inc., 622 F.2d 709, 713 (5th Cir. 1980)). “The linchpin in the decisions applying the doctrine of equitable subordination is the conviction that insider misconduct caused injury to the creditors of a bankrupt corporation.” Id.

IV. Fonville Is Unable to Prove the Elements of an Equitable Subordination Claim.

Even if this Court were to apply the doctrine of equitable subordination in this case, Fonville has not provided evidence to support the necessary elements for this counterclaim to survive. Specifically, Fonville is unable to show that any alleged misconduct of Indian Land “resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.” There is no bankruptcy estate with the usual different constituent interests to analyze and protect here. This is simply a lien priority dispute between two commercial entities regarding a real estate development. This is not changed by Mr. Fonville’s claims about Member A. Mr. Fonville repeatedly admitted in his deposition that he did not speak to Member A about the Fonville Loan before or after Fonville made the loan to Lancaster. Nor has Fonville presented any evidence that Indian Land took any “unfair advantage of it, or Mr. Fonville.” No Member of Lancaster is also a Member of Indian Land, and Fonville cannot show otherwise. Mr. Fonville says numerous times in his deposition that Fonville’s second place lien position never changed, despite the alleged conduct of Member A.

Fonville also has not presented evidence of any damages it suffered as a result of Indian Land’s purchase of the Paragon Mortgage. Fonville voluntarily entered into the Fonville Subordination Agreement which subordinated the Fonville Mortgage to the Paragon Mortgage. Fonville does not allege misconduct regarding the Fonville Subordination Agreement or any

other misconduct that caused the loans status to be changed in any way. In other words, the Fonville Mortgage was a second priority lien before Indian Land purchased the Paragon Mortgage, and remains in that same position today. Accordingly, Fonville can show no change in circumstances due to Indian Land's purchase of the Paragon Mortgage. "There is no inequity or fraud in this instance where the priorities of [the second priority lenders] do not change, and [the second priority lenders] are left no worse off than had [the original first priority lender] foreclosed on the property." Oskin v. Johnson, 400 S.C. 390, 401, 735 S.E.2d 459, 465 (2012).

Ultimately, as in Oskin, this is simply a case of a party properly using legal mechanisms to protect its own financial interests. There is not sufficient evidence to allow a finder of fact to conclude that any inequitable or fraudulent conduct took place here. There is no evidence that Indian Land used Lancaster's funds to benefit anyone to Fonville's detriment. Additionally, Fonville cannot show that it had a right to receive the funds that Indian Land borrowed to purchase the Paragon Mortgage. Finally, Indian Land paid proper consideration for the Paragon Mortgage, and Fonville has not presented any evidence to the contrary. This is not a case where an insider received some form of bargain and failed to disclose it to partners or investors. This was an arm's length purchase transaction that Mr. Fonville admits he could not have undertaken. Mr. Fonville's claims and defenses all depend on him being able to show that Plaintiff engaged in something illegal or inequitable. There is not sufficient evidence here from which a trace of fact could conclude that that was the case.

V. "Member A" Does Not Owe a Fiduciary Duty to Lancaster or Fonville.

Defendant attempts to buttress its defenses by claiming that Member A owed some form of elevated duty to it. Thomas H. Cluderay and Ted S. Barnes are Lancaster's Managers. Member A is not a Member or Manager of Lancaster. The law is clear: "[i]n a manager-

managed company . . . a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member.” S.C. Code Ann. § 33-44-409(h)(1). Lancaster is a manager managed company. Nor has Fonville provided any evidence that Member A owes any fiduciary duty of care directly to Fonville, whether as an alleged “co-investor” or otherwise. Fonville has not produced sufficient evidence to establish a duty owed to it by Member A, or to transfer any such duty owed by Lancaster or anyone else to Member A.

VI. Fonville Can Not Establish the Elements of a Tortious Interference of Contract Claim.

To prove its counterclaim for tortious interference with contract, Fonville must prove: (1) the existence of a valid contract; (2) Indian Land’s knowledge of the contract; (3) Indian Land intentionally procured a breach of the contract; (4) without justification; and (5) which caused Fonville to suffer prejudice. See, Broach v. Carter, 399 S.C. 434, 441, 732 S.E.2d 185, 188 (Ct. App. 2012) (citing Vortex Sports & Entm’t, Inc. v. Ware, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008)). Fonville must show that, but for the interference, its contractual relationship with Lancaster would have continued. BCD, LLC v. BMW Mfg. Co., LLC, No. 6:05-CV-2152-GRA., 2008 WL 304878, at *20 (D.S.C. Jan. 31, 2008), aff’d, 360 F. App’x 428 (4th Cir. 2010) (quoting Jones Eng’g Sales, Inc. v. Faulkner/Baker & Assocs., 1999 U.S. App. LEXIS 26920, 1999 WL 972171 (4th Cir. Oct. 26, 1999)).

Fonville asserts that Indian Land’s conduct “furthered” Lancaster’s breach of the Fonville loan documents. See Counterclaim Para. 59. If this is true, Lancaster was already in breach of contract with Fonville, even before Indian Land was formed. Fonville further asserts that Lancaster was insolvent when Indian Land purchased the Paragon Mortgage. Clearly, Indian Land did not create or “induce” that problem, nor did Indian Land contribute to Lancaster’s financial problems. The evidence shows that those involved with the Property found themselves

in an economic hole and made the perfectly rational decision to stop digging. No one “induced” that. Financial reality dictated it.

Moreover, by purchasing the Paragon Mortgage, Indian Land did nothing to interfere with the Fonville/Lancaster relationship. Lancaster’s contract obligations to Fonville still exist and are not altered by Indian Land’s purchase of the Paragon Mortgage. Fonville is still in a second lien position, Lancaster’s contractual obligations to Fonville are still in place, and Lancaster’s obligations to Fonville have not changed to Fonville’s detriment.

Fonville’s claims are also defeated by his allegations regarding the status of Member A. The fundamental purpose of the tortious interference with contract claim is to “protect the property rights of the parties to a contract against unlawful interference by third parties.” Threlkeld v. Christoph, 280 S.C. 225, 227, 312S.E.2d14, 15 (Ct. App. 1984). “Thus, ‘[t]he actions of a principal’s agent are afforded a qualified privilege from liability for tortious interference with the principal’s contract.’” Dutch Fork Dev. Grp. IL LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012) (quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir.2004)). “The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract.” *Id.* “Conversely, an agent may be liable for tortious interference, just as if the agent were an outside third party, if the allegedly interfering acts were conducted outside the scope of the agent’s authority.” *Id.*

Fonville’s claim that Member A remained an agent and principal actor on behalf of Lancaster, therefore, defeats Fonville’s interference of contract claim. As stated above, “holding an agent liable would be like holding the principal itself liable for the tort of interfering with its

own contract, instead of holding the principal liable for breach of contract.” See, Dutch Fork, *infra*. As such, Fonville cannot show that Member A induced Lancaster to breach its contract with Fonville.

CONCLUSION AND JUDGMENT

For the reasons stated, The Court finds and concludes:

1. There are no genuine issues of material fact as to Plaintiff’s entitlement to move forward with the relief prayed for in its complaint, including a judgment of foreclosure and sale of the Property under the direction of the Court.

2. There are no genuine issues of material fact as to any of the defenses and counterclaims raised by Fonville in this action, and enters judgment in favor of Indian Land as to each defense and counterclaim.

3. There are no genuine issues of fact with respect to lien priority with respect to Indian Land and Fonville. Fonville’s lien is subordinate to that of Indian Land as a matter of law.

4. For all the reasons stated, JUDGMENT is hereby entered consistent with this Order.

This _____ day of November, 2019.

Judge Presiding



Lancaster Common Pleas

Case Caption: Indian Land Ventures, Llc VS Lancaster Collins Road, Llc ,
defendant, et al
Case Number: 2016CP2901319
Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge