

Case No. 78-3646

Dept. No. 5

FILED

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

83 DEC 29 10:10

JUDICIAL DISTRICT
C. Swartz
CLERK

MARINE MIDLAND REALTY
CREDIT CORPORATION

Plaintiff,

vs.

FINDINGS OF FACT
CONCLUSIONS OF LAW
JUDGMENT AND DECREE

JAMES F. TEMPLE, PHYLLIS
TEMPLE, JEROME APELBY and
FRANK W. COSTANZO

Defendants.

The above entitled matter came on regularly for trial on the merits before the Court, sitting without a jury, on December 13-15, 1982. Representatives of both parties and their respective attorneys of record were present. Prior to trial, plaintiff Marine Midland Realty Credit Corporation ("Marine") entered into a settlement agreement with defendants James F. Temple, Phyllis Temple and Jerome Apelby. Oral and documentary evidence were adduced at trial. At the request of the Court, briefs and points and authorities were filed by the parties. After having heard and carefully considered the testimony of the witnesses and having reviewed the documentary evidence, the Court finds the following facts and states the following conclusions of law:

FINDINGS OF FACT

1. On October 29, 1973, Dominion Mortgage and Realty Trust ("Dominion") entered into a loan commitment with Temple Village, Inc. ("Temple Village") requiring Dominion to loan Temple Village an amount not to exceed 2.1 million dollars for the development of a condominium project located in Washoe County, Nevada.

2. The project was to consist of two phases. Phase I was to consist of 40 units with a maximum loan of 1.2 million

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1 dollars. Phase II was to consist of 42 units and its funding was
2 contingent upon the sale of 80% of Phase I units.

3 3. The money loaned to Temple Village was evidenced by
4 a Construction Loan Agreement ("Loan Agreement"), a Promissory
5 Note and Deed of Trust covering both Phase I and Phase II land.

6 4. Each of the documents contained a provision that
7 the instruments would be governed by the laws of the State of New
8 York.

9 5. Dominion is a Massachusetts business trust with its
10 principal place of business in New York.

11 6. Temple Village is a closely held New York
12 corporation.

13 7. The money loaned to Temple Village under the Loan
14 Agreement was originally guaranteed by James Temple, Phyllis
15 Temple and Jerome Apelby.

16 8. The money loaned was disbursed in New York from New
17 York bank accounts.

18 9. Marine is a New York corporation.

19 10. New York is the state with the most significant
20 contacts with the transactions at issue.

21 11. Dominion subsequently assigned all of its interests
22 under the Promissory Note and Deed of Trust to Marine.

23 12. In September of 1974, defendant Frank W. Costanzo
24 (Costanzo) entered into an agreement with James Temple for the
25 purchase of 50% of the stock in Temple Village.

26 13. On January 15, 1975, Costanzo executed a Guaranty
27 Agreement ("Guaranty Agreement"; Exhibit V) in which he personally
28 guaranteed the payment of the obligations of Temple Village.

29 14. At the time the Guaranty Agreement was executed by
30 Costanzo, the balance due Marine was 1.2 million dollars plus
31 interest.
32

1 15. Like the other documents involved in this transac-
2 tion, the Guaranty Agreement provided that it was to be governed
3 and construed according to the laws of the State of New York.

4 16. Payment upon the Guaranty Agreement was to be made
5 in New York.

6 17. The Eighth Judicial District Court entered a
7 declaratory judgment (Exhibit M) which provides that the documents
8 involved in this transaction are to be governed and construed
9 according to the laws of the State of New York.

10 18. Costanzo, a certified public accountant and
11 experienced businessman, made a knowing and intelligent decision
12 to execute the Guaranty Agreement.

13 19. The Loan Agreement was amended on January 30, 1975
14 and July 30, 1975. All guarantors, including Costanzo, consented
15 to these amendments.

16 20. In July-August of 1977, Marine agreed to a recon-
17 veyance of the Deed of Trust on Phase II property in return for
18 the payment of \$150,000.00, which was applied to the outstanding
19 indebtedness of the loan.

20 21. The collateral was released for its fair market
21 value.

22 22. Costanzo was not prejudiced by the release of the
23 collateral.

24 23. Costanzo took active part in the negotiations
25 leading up to the settling of the price for the land in question
26 and by the execution of a quit claim deed, made possible a
27 transfer of title to James and Phyllis Temple.

28 24. Marine and James and Phyllis Temple did not enter
29 into an agreement for a new loan in the amount of \$117,269.99 in
30 July-August of 1977.

31 25. There was no oral agreement which extinguished any
32 obligation of Temple Village under the Loan Agreement.

1 26. Ken Rawski and Robert Lennartz did not assure
2 Costanzo that he would be released from his obligations under
3 Guaranty Agreement.

4 27. There was no intent by Marine to release Costanzo
5 from his obligations under the Guaranty Agreement.

6 28. As units in Phase II were sold, Marine partially
7 reconveyed its first Deed of Trust in order to facilitate
8 financing by its purchasers.

9 29. Marine took bank notes secured by Second Deeds of
10 Trust. Marine has collected much of the money from these trust
11 deeds and credited the collected amounts against the outstanding
12 balance due on the loan.

13 30. Temple Village is in default under the Loan
14 Agreement, as amended.

15 31. The amount due under the Loan Agreement is
16 \$255,437.69.

17 32. Costanzo's right to the Second Deeds of Trust was
18 contingent upon Marine's being paid in full on the loan.

19 33. The Guaranty Agreement provides for an award of
20 attorney's fee incurred in any suit to enforce the Guaranty
21 Agreement.

22 34. Marine is entitled to judgment in the amount of
23 \$255,473.69 against defendant Costanzo under the guaranty agreement.

24 35. Marine is also entitled to the costs of suit, with
25 interest from November 30, 1982, and reasonable attorneys' fees.

26
27 CONCLUSIONS OF LAW

28 36. Normally, the intent of contracting parties
29 controls as to the choice of law.

30 37. The Guaranty Agreement should be governed and
31 construed according to the laws of the State of New York.

1 38. Under the laws of the State of New York, a guarantor
2 may waive his right to discharge upon a creditors release of
3 collateral.

4 39. Costanzo waived his right to discharge from the
5 obligations under the Guaranty Agreement upon Marine's release of
6 the collateral.

7 40. The waiver contained in the Guaranty Agreement is
8 valid and enforceable.

9 41. A creditor is not obligated to exhaust the
10 collateral securing a debt before seeking to collect from a
11 guarantor.

12 42. The reconveyance of the collateral did not release
13 Costanzo from his obligations under the Guaranty Agreement.

14 43. The one action rule (NRS 40.430) does not apply to
15 defendant Costanzo under the facts of this case.

16 44. Costanzo was not discharged from his obligations
17 under the Guaranty Agreement by a novation.

18 45. Costanzo was not discharged from his obligations
19 under the Guaranty Agreement by assurances from Marine officers.
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JUDGMENT AND DECREE

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

That plaintiff Marine Midland Realty Credit Corporation recover from defendant Frank W. Costanzo the principal sum of \$255,473.69; interest thereon at 12% computed from November 30, 1982; with costs of suit and reasonable attorney's fees in the amount of \$22,353.02

DONE IN OPEN COURT this 29 day of December 1983.

William N. Forman

DISTRICT JUDGE

RECORDED JUDGMENT BOOKET

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By *L. Snow* Deputy

SEAL

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: *Jan. 12, 1984*
JUDGE BAILLY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By *[Signature]* Deputy.

REQUESTED BY

Gene Barbagelata

IN OFFICIAL RECORDS OF DOUGLAS CO. NEVADA

\$10.00 pt
1984 JAN 13 AM 11:20

SUZANNE BEAUDREAU
RECORDER

Betty Herdon
Dep

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