

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE HUNTINGTON NATIONAL BANK)	CASE NO: CV 09 703346
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
G.E.R. BUTTERNUT COMMONS, LLC, et al.)	<u>JOURNAL ENTRY</u>
)	
Defendants.)	

John P. O'Donnell, J.:

The plaintiff filed its complaint on September 4, 2009. The complaint alleges a breach of a promissory note by defendant G.E.R. Butternut Commons, LLC. The complaint against the individual defendants Robert L. Lyons, Jr., and Shirley J. Lyons is that they each personally guaranteed the promissory note and are, therefore, liable in damages for Butternut's default.

The proceedings were stayed as to defendant Butternut only on January 27, 2010, when it filed a notice of bankruptcy. On February 9, the individual defendants filed identical separate answers.¹ The case was tried to the court on April 6 and this entry follows.

Testimony at trial was given by Erin L. Moore of Huntington and defendant Robert Lyons. Exhibits admitted are the promissory note (Exhibit 1), the continuing guaranties of Robert L. Lyons, Jr. (Exhibit 2) and Shirley Lyons (Exhibit 3), Butternut's payment history (Exhibit 4), and a July 30, 2008, settlement statement for a loan from Home Savings Bank to Butternut (Exhibit 7).

Robert and Shirley Lyons are husband and wife. They are the only two members of G.E.R. Butternut Commons, LLC. The limited liability company owns a 120-unit apartment

¹ The answers included a "counterclaim" that the defendants were "coerced into signing the prepayment penalty work out agreement." This assertion is taken by the court as an affirmative defense of duress.

building at 15409 Euclid Avenue, East Cleveland. Butternut acquired the building in around August, 2005, with the proceeds of a loan from Sky Bank. The terms of that loan were not offered into evidence at trial, but the loan included a penalty provision in the event it was paid off early.

Sky Bank was later bought by Huntington Bank. Lyons testified that after Huntington acquired Sky's portfolio he was approached by John Lane of Huntington Bank. Lane told Lyons that Huntington was not interested in carrying "this kind of loan" in its portfolio. Because of that, Lyons sought refinancing.

Lyons admitted in his testimony that he was under no obligation to refinance the property to pay off the Huntington loan. Indeed, he testified that Butternut was not in default on any of the terms of the loan.

Lyons testified that discussions with other lenders of a possible refinancing made it clear to him that the prepayment penalty on the Huntington loan would not be covered by a new loan. He communicated this to Huntington more than once. Eventually, Lyons procured a new loan from Home Savings Bank.

Huntington's loans were paid off with the proceeds from the new loan. However, since the payoff did not include the prepayment penalty, Huntington was not willing to release its mortgage. To induce Huntington to agree to release its mortgage, Butternut executed the \$140,000 note in favor of Huntington and the individual defendants both personally guaranteed the note.

The note matured September 15, 2009. Although some payments were made, Butternut has defaulted, triggering the personal guaranties. As of April 5, 2010, the balance on the note was \$137,513.88, including principal and interest. Interest continues to accumulate at the rate of \$19.01 per day.

A promissory note is a contract.² Essential elements of a contract include an offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration.³ Defendant G.E.R. Butternut Commons, LLC, offered to pay Huntington \$140,000.00 plus interest and the individual defendants offered to guarantee that payment. Huntington accepted the offer. Consideration exists in the form of Huntington releasing its mortgage despite defendant Butternut not having paid the prepayment penalty. The transaction was legal.

Lyons claims he and his wife signed the contracts under duress. This claim calls into question the contract elements of capacity and mutual assent. The defense of duress in a contract action encompasses physical and economic compulsion.⁴ The elements of duress that the defendants must prove are: (1) that they were subjected to a wrongful or illegal act, (2) by a party to the contract, (3) which prevented them from exercising their own free will.⁵

The evidence here does not support the defense of duress. Even assuming that Huntington first raised the issue of Butternut paying off its loan early, there is no evidence that Lyons was thereby “deprived of his unfettered will.”⁶ Although Lyons chose to pay off the Huntington loan, he did not have to. When he decided to pay off the loan, it was necessary as a practical matter to resolve Huntington’s claim for a prepayment penalty.

² *Cranberry Fin., LLC v. S & V Partnership*, 2010-Ohio-464, 6th Dist. No. H-09-004, at ¶9.

³ *Fine Line Communications, Inc. v. Schumann & Co.*, 2010-Ohio-1438, Cuyahoga Co. App. No. 93512, at ¶12.

⁴ *Blodgett v. Blodgett* (1990), 49 Ohio St. 3d 243, 245-246.

⁵ *Id.*

⁶ *Id.*

It is worth noting that Butternut received \$270,003.81 in cash proceeds from the Home Savings Bank loan, more than enough to cover the prepayment penalty. That Lyons chose to receive the cash and execute a promissory note to cover the prepayment penalty strongly suggests that he was not coerced into the agreement.

No separate evidence was introduced about the circumstances under which defendant Shirley Lyons signed the guaranty. Because Robert Lyons was not under duress when he agreed to the personal guaranty, the evidence compels the same conclusion for Shirley Lyons.

The court therefore finds in favor of plaintiff The Huntington National Bank and against defendants Robert L. Lyons, Jr., and Shirley L. Lyons. Judgment is hereby entered in favor of the plaintiff and against Robert L. Lyons, Jr., and Shirley L. Lyons, jointly and severally, in the total amount of \$137,513.88, plus interest at the rate of \$19.01 per day beginning April 6, 2010, and court costs.

Pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure, the court finds that there is no just reason for delay.

IT IS SO ORDERED:

Date: _____

Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of April, 2010, to the following:

Shelly R. LaSalvia, Esq.
Ziegler, Metzger & Miller, LLP
925 Euclid Avenue, Suite 2020
Cleveland, OH 44115
Attorney for Plaintiff

Robert L. Lyons
3645 Warrensville Center Road, Suite 230
Shaker Heights, OH 44122
Defendant *Pro Se*

Judge John P. O'Donnell