IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

DIVERSIFIED MORTGAGE INVESTORS, INC., Plaintiff,	)	
v.	)	Civil Action No. 82-0153-A
FIRST CHARTER LAND CORPORATION, Defendant.	)	

MEMORANDUM

This matter came before the court for a bench trial. For reasons stated below, the court orders judgment entered in favor of plaintiff.

Defendant First Charter Land Corporation ("First Charter") developed a large subdivision in Accomack County, Virginia. First Charter received a number of promissory notes payable to it in exchange for lots it sold at the subdivision. First Charter sold some of these notes to Diversified Mortgage Investors, Inc. ("DMI") First Charter endorsed the five notes which are the subject of this case as follows:

> PAY TO THE ORDER OF
> DIVERSIFIED MORTGAGE INVESTORS, A
> MASSACHUSETTS BUSINESS TRUST,
> WITH RECOURSE TO FIRST CHARTER
> LAND CORPORATION
>
> FIRST CHARTER LAND CORPORATION
> BY [signature]
> PRESIDENT

Each note provided that "failure of the [maker] to perform or comply with any of the terms and conditions hereof...[gives] the holder hereof the right to declare the entire unpaid balance of this indebtedness...immediately due and payable...." On December 22, 1981, when all five notes were in default, plaintiff's counsel sent acceleration letters to each of the notemakers at their last addresses on file with DMI's collection agent, Guaranty Bank and Trust Company of Fairfax, Virginia, and with the Treasurer of Accomack County, Virginia. Four of the five acceleration letters reached the notemakers. The fifth letter was returned by the post office.

None of the notemakers complied with the acceleration demand. As a result Diversified filed this suit against First Charter.

The Virginia Uniform Commercial Code, Va. Code § 8.3-414(1), provides:

> Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

Seeking to avoid the grip of section 8.3-414(1), defendant argues that:

(1) the court lacks jurisdiction because the amount-in-controversy requirement is unsatisfied;
(2) the failure of the fifth notemaker to receive actual notice of acceleration precludes judgment against First Charter on that note; and
(3) DMI cannot reduce any obligation on the five notes to a judgment, because it is obligated to accept a tender of substitute notes.

For reasons stated below, the court rejects First Charter's arguments.

JURISDICTION

The court has subject-matter jurisdiction of this case, if at all, under 28 U.S.C. § 1332, which requires that the citizenship of the parties be diverse and that the amount in controversy exceed $10,000. Diversity of citizenship is uncontested here. However, if, as First Charter contends, it is not liable on the fifth note, the highest possible judgment against it is less than $10,000.

For reasons stated below, the court finds that First Charter is liable on all notes. That finding entitles DMI to an award of over $10,000. Thus, the award clearly establishes that DMI's allegation of an amount in controversy of over $10,000 was correct.

Moreover, "[t]he test for determining jurisdiction based upon the amount involved is primarily one of good faith. ...[B]efore dismissal of an action it must appear to a legal certainty that the plaintiff cannot recover the amount claimed. The mere fact that a lower amount is awarded does not establish bad faith." Gauldin v. Virginia Winn-Dixie, Inc., 370 F.2d 167,

170 n.1 (4th Cir. 1966). Whether First Charter was liable on the fifth note was a proposition on which both sides were able to put forward persuasive, reasonable legal arguments in support of their respective positions. Thus, even if the award to DMI had fallen below $10,000, the court still would have held that DMI acted in good faith in alleging damages over $10,000. Jurisdiction of this case under 28 U.S.C. § 1332 is proper.

THE NOTICE ISSUE

Ordinarily the holder of a note must take several steps before he becomes entitled to payment from an endorser. In order, these include (1) notice of acceleration of the note to the notemaker, (2) a demand for payment ("presentment," see Va. Code § 8.3-504) on the notemaker and (3) notice to the endorser that the maker has failed to pay as demanded. However, parties may agree to eliminate certain of these steps by agreeing to waivers of them. See Va. Code § 8.3-511(6). In the notes at issue here, there are valid express waivers of presentment and of notice of dishonor. These waivers clearly remove the second and third steps from the procedure which DMI would have to follow before it could look to First Charter for payment. The subject in dispute is whether the waiver of presentment includes waiver of notice of acceleration. First Charter argues that DMI must have completed the first step before it can look to First Charter, and that the actions DMI took do not constitute completion of the first step.

DMI argues that notice of acceleration is only a species of presentment, and since presentment was waived, it follows that notice of acceleration was waived also. However, there is a difference between waiver of presentment and waiver of notice of acceleration. The proper time for presentment is only after acceleration. See Va. Code § 8.3-503(1)(d). Presentment and waiver of presentment do not enter the picture at all until there has been a valid acceleration.

It is entirely possible to provide in a note for waiver of notice of intention to accelerate. See, e.g., Interstate Life Insurance Company v. Turner, 371 S.W.2d 913 (Tx. 1963); Sylvester v. Watkins, 538 S.W.2d 827 (Tx. 1976); Matter of Sutton Investments, Inc., 266 S.E.2d 686 (N.C. 1980). The parties here did not do so. The court finds that the makers of the fifth note did not waive notice of acceleration.

The court next must determine whether the actions DMI took satisfy the notice-of-acceleration requirement. First Charter relies on a dictum in Florance v. Friedlander, 209 Va. 520, 165 S.E.2d 388 (1966), for its claim that DMI has not satisfied that requirement:

> It is essential for a valid exercise of an option to accelerate the maturity of a note that the noteholder do some positive act to indicate that the option has been exercised. This may be accomplished by notice to the maker, or some overt, unequivocal act calculated to apprise the maker effectively of the fact that the option has been exercised. In the case at bar the note-holder chose the method of written notice. While such notice is not a condition precedent to an effective exercise of the option, if it is the only method resorted to, to be complete and effective it must reach the maker.
> 209 Va. at 523, 165 S.E.2d at 391 (1966). See also Sharpe v. Talley, 215 Va. 615, 621, 212 S.E.2d 273, 276 (1975).

This dictum should not be permitted to obscure the holding in Florance, that when notice of acceleration is mailed and received, it is deemed to become effective only at the time of receipt. That holding is similar to the rule for presentments under the Virginia Uniform Commercial Code, that the time of presentment is determined by the time of receipt of the presentment, when the presentment is mailed. See Va. Code § 8.3-504(2)(a). The Virginia Uniform Commercial Code provisions also illustrate that such a timing rule is not the same as a rule defining when the exercise of reasonable diligence will excuse a party from the successful performance of an otherwise necessary act. For instance, although section 8.3-504(2)(a) defines when presentment is deemed to occur if there has been a presentment by mail, , section 8.3-511 states that a presentment is "entirely excused" if "by reasonable diligence the presentment...cannot be made...." The court will not convert a timing rule into a rule

defining when a duty is to be excused. The court will look to other Virginia law to determine whether a reasonably diligent attempt to give notice of acceleration excuses the lack of actual notice to a notemaker, and if so, what constitutes reasonable diligence in those circumstances.

DMI argues that the notice it gave was sufficient, because Va. Code § 8.3-511 excuses presentment or notice of dishonor if neither can be effected by the exercise of reasonable diligence. However, by its own terms, section 8.3-511 is inapplicable to notices of acceleration. Title 8.3 of the Virginia Code does not contain a provision dealing with notices of acceleration. At most the import of section 8.3-511 is that excuse through the exercise of reasonable diligence should be interpolated into any notice-of-acceleration requirement.

Va. Code § 55-59.1 requires trustees and secured parties to give written notice of a proposed sale under any deed of trust by personal delivery or by certified or registered mail to the present owner of the property, at his last known address as the name and address appear in the secured party's records. Section § 55-59.1 further provides that "[m]ailing of a copy of the advertisement [required by Va. Code § 55-59.2] or a notice containing the same information no less than fourteen days prior to such sale shall be a sufficient compliance with the requirement of notice." A deed of trust note should be subject to a rule no more stringent than that applying to sales in execution of a deed of trust. In the absence of a specific provision in the Virginia Uniform Commercial Code regarding notices of acceleration, the court finds that the compliance standard set forth in Va. Code § 55-59.2 constitutes the best indication of the rule a Virginia court would apply if confronted by the situation here in respect to the fifth note. Under this standard DMI's acts in respect to the fifth note constitute sufficient compliance with the requirement of notice of acceleration. Hence the court rejects First Charter's second argument.

THE CUSTOM ISSUE

In a prior case in this court, Diversified Mortgage Investors, Inc. v. First Charter Land Corporation, Civil Action No. 80-600-A, affirmed, No. 81-1543 (4th Cir., March 19, 1982) (unpublished), this court found:

> Although the defendant [First Charter] has failed to prove that Diversified [DMI] orally agreed to accept substitute notes in like amounts in lieu of cash for all defaults after the reserve account was depleted[,] the evidence clearly establishes that the plaintiff did authorize the bank [Guaranty Bank] as its collection agent to accept substitute notes in like amounts for all past defaults up to and including the default in payments due on the nine notes in issue here.
>
> The authorization was never revoked by the plaintiff[,] and the bank never refused to accept substitute notes from the defendant in like amounts in lieu of cash as full payment for the said nine notes.
>
> The defendant breached the so-called practice and custom of accepting substitute notes in lieu of cash by failing to timely deliver such notes to the bank. (Memorandum Opinion, March 27, 1981)

First Charter now argues that despite this finding, First Charter is not liable as an endorser on the notes at issue in this case, because "[n]otwithstanding the court's earlier ruling that First Charter's breach of this custom and practice entitled DMI to a judgment as to to those notes, the obligation to accept substituted notes was not cancelled for the remainder of the contract. This difference results from the divisibility or severability of the contract at issue." Defendant's Proposed Findings of Fact and Conclusions of Law (unpaginated).

Customs, like traditions, last for a time and disappear when discarded. The court cannot hold that a custom has a life of its own enabling it to spring back into existence once parties by their acts abandon it. This is particularly the case where the party who seeks judicial resuscitation of the custom was the one responsible for its demise. First Charter introduced no evidence that the parties reinstituted a custom similar to the prior custom via a course of conduct subsequent to the abandonment of the prior custom. In fact, the parties have stipulated that DMI will refuse any tender of substitute notes. Also, severability of the contract is a red herring where the matter at issue is the existence of a custom and not the interpretation of a term of the

contract. For these reasons the court rejects the third argument of First Charter.

COMPUTATION ISSUES

Some ancillary considerations remain, however. First, the parties are in dispute over the proper computation of interest on the judgment. Va. Code § 8.01-382 provides:

> Except as otherwise provided in § 8.3-122..., the judgment...may provide for interest on any principal sum awarded..., and fix the period at which the shall commence. [Emphasis added]

Va. Code § 8.3-122 provides that interest on instruments such as those involved in this case runs from the date of accrual of the cause of action, at the rate provided by law for a judgment. See Schwab v. Norris, 217 Va. 582, 231 S.E.2d 821 (1977) (interest on note with a definite time of maturity runs from day after maturity).

Va. Code § 6.1-330.35 further provides:

> Any note evidencing an installment loan at an add-on rate may provide that the entire unpaid balance thereof, at the option of the holder, shall become due and payable upon default in payment of any installment without impairing the negotiability of the note, if otherwise negotiable. Upon such acceleration, the lender shall not be entitled to judgment for unearned interest, but the balance owing shall be computed as if the borrower had made a voluntary prepayment and obtained an interest credit as of the date of acceleration based upon the Rule of 78 as defined in § 6.1-330.32. Such accelerated balance shall bear interest at the rate shown (or which should have been shown if a consumer transaction were involved) as the annual percentage rate under a truth-in-lending disclosure pursuant to federal law.

In the case of the four notes where notice of acceleration was received, interest as provided in the last sentence of section 6.1-330.35 shall run from the day after receipt of the notice. In the case of the fifth note, such interest shall run from fourteen days after the date of mailing the notice of acceleration.

The parties also dispute the computation of the amount of the balances due on the notes, computed under a variant of the "Rule of 78." The parties should recompute the balances according to the Rule of 78 as defined in Va. Code § 6.1-330.32, compute interest due on those balances as provided in Va. Code. §

6.1-330.35, and submit their computations to the court within ten days of the date of receipt of this memorandum.

The parties may file a joint stipulation of the correct figures with the court. If the parties cannot agree, they shall set forth their computations in detail, including explanations of the formulas applied. If the parties submit varying computations, the court will require that the parties file objections to the opposing side's computations at a later time.

The notes also provide for 15% attorney's fees. The parties also shall submit a computation of those fees.

An order reflecting the reasoning and conclusions of this memorandum is attached.

DATE: aug 25, 1982

Richard L. Williams
UNITED STATES DISTRICT JUDGE