

STATE OF MAINE
SAGadahoc, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-RE-08-34

FAUNA G. STONE, TRUSTEE
OF RAISIN MEMORIAL TRUST

Plaintiff

v.

ORDER ON DEFENDANT'S MOTION
FOR APPROVAL OF ATTACHMENT
AND TRUSTEE PROCESS

SHARON CASEY,

Defendant

Before the court is Plaintiff Raisin Memorial Trust's ("Plaintiff") Motion for Attachment and Attachment on Trustee Process.

FACTUAL BACKGROUND

The following assertions are made in the affidavit of Fauna G. Stone in support of Plaintiff's motion: On September 20, 2004, Defendant purchased property, located at 182 Otter Cliff Road, Bar Harbor, Maine ("Property") and gave Plaintiff a Promissory Note in the original principal amount of \$225,000.00 (the "Note"). The Note was secured by a Mortgage Deed on the Property ("Mortgage"). Under the terms of the Note and Mortgage, Defendant is responsible for collection costs and attorney fees.

On or about August 15, 2005, Defendant was issued a notice of default and acceleration on the Note. "[T]he amount due as of October 30, 2008 is the sum of \$462,919.89, which includes interest, late fees and attorney fees incurred."¹ Stone Aff. at ¶ 11. Ms. Stone's affidavit further states that "[t]he value of all liability insurance, bond,

¹ In support of this statement, Plaintiff attached a copy of the Note and the Mortgage together with an amortization schedule. It did not include an attorney's fee affidavit.

or other security and any property attached by other writ of attachment or trustee process known to [her] is \$250,000.00 consisting of the mortgage on the subject property.” *Id.* at ¶ 12.

DISCUSSION

Plaintiff seeks an attachment in the amount of \$212,919.89, representing late fees, interest and attorney’s fees allegedly due Plaintiff under the terms of the Note and Mortgage. Plaintiff asserts that sum is the difference between the total amount allegedly due on the Note (\$462,919.89) and the sum of \$250,000, which is purportedly the value of the Property which is encumbered by the mortgage security.

Defendant counters that an attachment would be duplicative in this case because the Property is already subject to a mortgage. According to Defendant “[f]oreclosure is the remedy available to a foreclosing lender,” not attachment. Def.’s Opp. at 2. Defendant further argues that Plaintiff’s efforts to obtain an attachment of property already secured by a mortgage constitutes a waiver of Plaintiff’s rights under the mortgage. *Id.* (citing *Libby v. Cushman*, 29 Me. 429 (1849), and *Whitney v. Farrar*, 51 Me. 418 (1864)). As a consequence, Defendant asks that the affirmative defense of waiver be added to the list of triable issues in this case. *Id.* at 3. Plaintiff replies that it does not seek to attach the mortgaged Property. Rather, because the value of the Property is allegedly inadequate to secure so much of the indebtedness that exceeds \$250,000, Plaintiff seeks to attach other property not subject to a security interest. Accordingly, Plaintiff contends that waiver does not apply and an attachment may be granted. Although Defendant raises interesting questions about mortgage-waiver and the

availability of an attachment to secure property in a foreclosure action, the court does not reach that issue.

Under Maine Rules of Civil Procedure 4A and 4B, attachment and trustee process are available to satisfy any judgment if Plaintiff can establish that it is “more likely than not that [it] will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment [and any other security] available to satisfy the judgment.” M.R. Civ. P. 4A(c); 4B(c); *Trans Coastal Corp. v. Curtis*, 622 A.2d 1186, 1188 (Me. 1993) (moving party must establish by preponderance of the evidence that it will recover judgment in an amount equal to or greater than the amount of the attachment sought).

It is Plaintiff’s burden to demonstrate the likelihood of its success not only on the merits but also as to the amount of any judgment. This case was previously appealed to the Law Court following entry of summary judgment in favor of Plaintiff. *See Raisin Memorial Trust v. Casey*, 2008 ME 63, 945 A.2d 1211. The Law Court sustained the trial court’s earlier finding that Defendant defaulted on the Note and thus breached the conditions of the Mortgage, but remanded the case for a determination of the amount of the judgment, including, “what, if any, late fees and escalated interest rates may be imposed. . . .” *Raisin Memorial Trust*, 2008 ME 63, ¶ 22, 945 A.2d at 1216.

In its opinion, the Law Court considered Plaintiff’s entitlement to the late fees and interest it now seeks to secure by an attachment. *Id.* at ¶¶ 14-18, 945 A.2d at 1215-16. Citing well-established law, the court explained that, “[i]f a late charge amounts to liquidated damages, we will affirm it; if it is an excessive or usurious penalty, we will not uphold the provision.” *Id.* at ¶ 15 (citing RESTATEMENT (SECOND) OF CONTRACTS §

356(1) (1981); and *Dwinel v. Brown*, 54 Me. 468, 469 (1867)). Although the court recognized that “the enforceability of a provision for liquidated damages” is a question of law, it also explained that the threshold determination of whether such a provision constitutes a liquidated damages provision or is, instead, an unenforceable penalty provision is a question of fact. *Id.* at ¶¶ 16 & 17. After reviewing the summary judgment record in this case, the Law Court concluded that “whether the late charges were liquidated damages or so excessive as to be unenforceable is open to debate. There needs, therefore, to be a hearing and further fact-finding as to this question.” *Id.* at ¶ 18. According to the court, it could not “say that [the late charges] are enforceable as a matter of law.” *Id.* Thus, Plaintiff bears the burden of presenting facts sufficient to demonstrate that those fees and interest are in fact reasonable and enforceable. It has not done so on this record.

Plaintiff now asserts that the value of its mortgage security is \$250,000, which is more than the principle balance owed under the Note.² However, Plaintiff has failed to sufficiently establish by the motion exhibits and affidavit testimony whether or to what extent it will recover the late fees, interest and attorney’s fees it seeks over and above the value of its alleged mortgage security of \$250,000.

In light of the Law Court’s holding and the lack of a sufficient evidence that Plaintiff will recover a judgment in an amount over and above its mortgage security, this court concludes that an attachment is not appropriate in this case and, as previously

² The motion record does not disclose the current principal balance owed under the Note. The original principal amount of the Note was \$225,000 and mortgage payments made by Plaintiff since September 20, 2004 have reduced the principle balance. An amortization schedule was submitted with the motion documents. However, it reflects periodic principal balances based upon timely payments. There is no evidence regarding the timeliness of the payments that were made.

noted, does not reach the question of whether a motion for such an attachment constitutes a waiver of Plaintiff's rights under the mortgage.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

Plaintiff's Motion for Approval of Attachment and Trustee Process is DENIED.

Date: January 9, 2009



Justice, Superior Court

ocket entry: 1/29/09