IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DENNIS JOSLIN COMPANY LLC, a Tennessee limited liability company,	)	
Plaintiff,	)	
v.	)	C.A. No. 00-1034 GMS
EVANS & BIFFERATO, a Delaware corporation, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On December 11, 2000, the plaintiff, Dennis Joslin Company, LLC ("DJC"), filed suit against the defendants, Evans & Bifferato, P.A. (the "Firm") and Marie C. Bifferato ("Bifferato"), a principal of the Firm.[1] In its complaint, DJC seeks to enforce two promissory notes and personal guaranties entered into by the defendants.

Presently before the court is DJC's motion for summary judgment. For the reasons that follow, the court will grant the motion.

II. STANDARD OF REVIEW

The court may grant summary judgment "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 judgment as a matter of law." Fed. R. Civ. P. 56(c);

[1]Donald E. Evans is also a principle of the Firm. He was not named as a defendant, however, because he filed for protection under the United States Bankruptcy Code prior to the commencement of the suit. Bifferato filed for bankruptcy on September 10, 2001.

see also Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 392 (3d Cir. 1998). Thus, the court may grant summary judgment only if the moving party shows that there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id*. (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id*. In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id*.; *see also Assaf v. Fields*, 178 F.3d 170, 173-174 (3d Cir. 1999).

With these standards in mind, the court will describe the facts that led to the motion presently before the court.

III. BACKGROUND

On March 31, 1997, the defendants executed a $25,000 Promissory Note and Security Agreement (the "4704 Loan") in favor of the Delaware Trust Company ("DTC"). The original term of the 4704 Loan expired on June 30, 1997, with interest accruing at the bank's national commercial rate, plus 1.50%. Thereafter, on August 29, 1997, the Firm, Bifferato, and Donald Evans ("Evans") entered into an Amendment to Promissory Note which extended the maturity date of the 4704 Loan. As a condition to advancing the Firm money, Evans and Bifferato were required to personally guarantee the Firm's obligations. They complied by entering into separate Surety Agreements dated August 29, 1997.

In addition to the 4704 Loan, the Firm had incurred earlier obligations with the same lender. On June 28, 1995, the Firm executed a $75,000 Promissory Note and Security Agreement (the "4705 Loan") in favor of the DTC. The 4705 Loan was payable on demand, with interest accruing at the bank's national

commercial rate, plus 1.00%. As with the 4704 Loan, Evans and Bifferato were required to personally guarantee the loan. They complied by entering into separate Surety Agreements dated June 28, 1995. On December 30, 1996, the Firm entered into an Amendment to Promissory Note which increased the principle amount of the 4705 Loan to $100,000.

On August 25, 1999, DJC acquired the 4704 and 4705 Loans. On November 3, 1999, the Firm and DJC entered into a "Loan Agreement and Settlement" for each of the Loans (the "Restated Agreements"). The Restated Agreements ratified the 4704 Loan and the 4705 Loan and restructured them in part. They did not modify the terms and conditions of any previous agreements except with respect to restructuring payments. Specifically, the Restated Agreements provided that interest would accrue on the outstanding balance due as of November 3, 1999 at the annual rate of 9.25% on the 4704 Loan and 8.75% on the 4705 Loan. The defendants were further required to make a $1,200 monthly interest payment which represented interest on both the 4704 Loan and the 4705 Loan.

Although DJC restructured the loans to allow the defendants some flexibility in repaying their obligations, the defendants nonetheless defaulted on their loans. As of August 17, 2001, the unpaid principle balance on the 4704 Loan was $24,382.58, with interest accruing at the rate of 9.25%. As of August 17, 2001, the unpaid principle balance on the 4705 Loan was $90,191.62 with interest accruing at the rate of 8.75%.

In accordance with the express provisions of the 4704 and 4705 Loans, DJC also seeks reasonable attorney's fees and costs incurred in enforcing the Loans. DJC maintains that such fees and costs have already been incurred in excess of $20,000.00.

IV. DISCUSSION

In their answer to the complaint, the defendants admit that the Firm executed a $25,000 promissory note in favor of the DTC on March 31, 1997. They also admit that the Firm executed a $75,000 promissory note in favor of the DTC on June 28, 1995. Finally, they agree that the amount of the 4705 Loan was increased to $100,000 pursuant to an Amendment to the promissory note.

A. The August 29, 1997 Amendment to the Promissory Note

The Firm and Bifferato deny that they entered into the August 29, 1997 Amendment to the Promissory Note relating the 4704 Loan. However, a review of this document reveals that Bifferato affixed her signature at the end of the document under the word "Borrower." In addition, the name "Evans & Bifferato, P.A." also appeared under the word "Borrower." Under the Firm's name, Bifferato signed in her capacity as Secretary of the Firm, and Evans affixed his signature as President of the Firm. The defendants have not specifically claimed that these signatures are not authentic, nor have they provided any explanation for why their signatures otherwise appear. Therefore, the court concludes that the no reasonable factfinder could determine that the defendants did not enter into this agreement.

B. The Surety Agreements

DJC's complaint next alleges that Evans and Bifferato also entered into separate Surety Agreements dated August 29, 1997, relating to Loan 4704. The defendants deny this. However, the August 29, 1997 Surety Agreement clearly shows their signatures affixed at the end of the Agreement under the word "Surety."

Bifferato does not deny entering into the June 28, 1995 Surety Agreement relating to the 4705 Loan.

C. Restated Agreements

The Firm denies that it entered into the two Restated Agreements dated November 3, 1999.[2] Bifferato admits that the Firm entered into these Agreements, but denies that she personally entered into them.

The Restated Agreement pertaining to the 4704 Loan contains the word "Borrower(s)" on the last page, which is followed by the name "Evans & Bifferato, P.A." Under the word "Borrower(s)," Evans affixed his signature as President of the Firm, and Bifferato affixed her signature in her capacity as Secretary of the Firm. At Paragraph 4, the Restated Agreement acknowledges and reaffirms that "[t]his promissory note and amendment to promissory note has individual surety agreements executed by Donald E. Evans and Marie C. Bifferato dated August 29, 1997." The defendants do not contend that their signatures are forged, nor do they provide an explanation for their signatures in the absence of a forgery. Accordingly, the court finds that the Firm and Bifferato in her personal capacity entered into this agreement.

The Restated Agreement pertaining to the 4705 Loan contains the word "Borrower(s)" on the last page which is followed by the name "Evans & Bifferato, P.A." Under the word "Borrower(s)," Evans affixed his signature as President of the Firm. The Restated Agreement acknowledges and reaffirms that "[t]his promissory note and amendment to promissory note has individual surety agreements executed by

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[2]The Firm argues the Restated Agreements were never finalized because DJC did not sign them, thus relieving the Firm of any contractual liability under its loans. This argument must clearly fail. The Firm signed the Restated Agreements as the borrower. *See* DEL. C. § 3-401 (stating that a person is liable on an instrument when that person, or his representative, signs the instrument.) Moreover, even were the court to find that the Restated Agreements were not finalized, the contractual relationship between the parties would simply revert back to the original 4704 and 4705 Loan documents, the essential terms of which are explicitly unchanged by the Restated Agreements.

Donald E. Evans and Marie C. Bifferato dated June 28, 1995." Again, the defendants do not dispute the authenticity of the signatures. As above, the court finds that the Firm and Bifferato entered into this agreement.

In spite of these clear facts, the defendants argue that they entered into an oral "understanding" with DJC that the lender would accept payments from the Firm whenever the Firm could make them, and in whatever amounts possible.[3] The Firm cites no documents or other evidence to support this claim. Indeed, both the Restated Agreements and the earlier Security Agreements contained "no oral modification" clauses. Moreover, even had DJC on occasion accepted a late payment, or failed to bring legal action against the Firm, that does not suffice as an "oral understanding." The Loans clearly state that "[n]either any delay or failure by Bank, in exercising any of its options, power or rights herein, nor any partial or single exercise thereof shall constitute a waiver of the right to exercise the same or any other right at any other time . . . ." Finally, even were the court to agree that the parties had intended an oral agreement, the vague terms as set forth by the defendants would preclude such a finding. *See First Fed. Savings Bank v. CPM Energy Systems Corp.*, 1993 WL 138986, at *7 (Del. Super. April 22, 1993) (noting that the alleged oral agreement lacked the terms of repayment and whether the loan was to be secured.)

Finally, in an attempt to salvage this case, the defendants urge the court to find that DJC breached the covenant of good faith and fair dealing when it initiated a lawsuit, rather than acting in good faith by discussing the matter with the Firm. The loan documents clearly state that all '[l]iabilities' as defined therein

[3]The Firm does not dispute that, beginning in August 2000, its monthly payments were late. *See Defendant's Answering Brief* at 3 (stating that, "[f]rom time to time, due to delays in receiving funds from billings and contingent case settlements, the Firm's monthly payments were delayed.")

(including principle, interest and costs of collection) become due and payable upon default." Thus, the court will decline the defendants' invitation because a lender cannot violate the implied covenant of good faith and fair dealing by following the express terms of the parties' contract. *See First Fed. Savings Bank*, 1993 WL 138986, at *3.

V. CONCLUSION

It is abundantly clear from the record before the court that the defendants entered into a series of contractual relationships with DJC, and its predecessors. The court will not place its imprimatur on the apparent efforts of the defendants to avoid the responsibilities associated with these relationships.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. DJC's motion for summary judgment (D.I. 32) is GRANTED.
2. The court will award reasonable attorney's fees to counsel for DJC.
3. Counsel for DJC will submit to the court, within thirty (30) days of the date of this order, a request for the specific amount of attorney's fees sought, with the relevant supporting documentation attached.
4. Judgement BE AND IS HEREBY ENTERED in favor of DJC.

Date: February 20, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE