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Chapman Sidebar

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The Dangers of Ambiguities in Negotiating Settlement Agreements

A defaulting borrower and its guarantors, owing millions of dollars, claim that a series of emails sent to the lender’s attorney constitutes a legally binding settlement agreement to modify the loan agreement and to settle the matter for pennies on the dollar. This was not the lender’s intent. The lender merely intended to explore terms on which the parties might agree to resolve the default, while the lender investigated the guarantors’ financial condition. If the borrower or guarantors file a lawsuit to enforce the proffered terms, is the lender bound by the terms set forth in the emails?

In *Van Pelt Const. Co., Inc. v. BMO Harris Bank, N.A.*, 2014 IL App (1st) 121661, the trial court said “yes.” Fortunately for the lender, the appellate court saw it differently.

In *Van Pelt*, the lender filed a claim against a borrower and its 10 guarantors seeking recovery of $1.5 million after the borrower defaulted on a loan secured by a mortgage. Throughout the course of a year, counsel for the parties, including the guarantors, exchanged multiple emails in an attempt to settle the matter. These discussions culminated in an email from counsel for the lender stating that she “believed” a counteroffer of $350,000.00 and a deed in lieu would be acceptable to the lender to settle the matter, subject to the lender’s final approval after reviewing updated personal financial statements to be provided by the guarantors. Counsel for the lender later clarified that if the guarantors’ financial statements did not support “the offer” of $350,000.00, then the $350,000.00 settlement amount would be off the table, and that the lender would not approve the settlement “until it reviewed *all* of the [guarantors’] updated personal financial statements.” Guarantors’ counsel asked whether the lender would agree to the $350,000-settlement conditioned on the personal financials not showing an “upward variance.” Guarantors’ counsel then tried to clarify the meaning of “upward variance.”

Soon thereafter, without providing the required financial statements, counsel for the guarantors informed counsel for lender that the $350,000.00-settlement amount was ready to be transferred. New counsel for the lender informed guarantors’ counsel that unless the financials were provided he had instructions to move forward with the foreclosure, and again clarified that “until the time the bank approves [the] offer we do not have a settlement.” The lender then filed a motion for summary judgment and judgment of foreclosure and sale.

Two weeks later, the lender’s counsel informed counsel for the guarantors that the lender had declined “the guarantors’ offer” because “the offer was not aligned with the ability of the [guarantors] to pay.” The lender’s counsel communicated an offer to settle the case for $525,000.00 in addition to a deed in lieu. The borrower and guarantors filed an emergency motion to enforce the purported $350,000-settlement agreement. The guarantors argued that the lender was bound to accept the $350,000.00-settlement amount because there was no “upward variance” in the guarantors’ ability to pay. The lender responded that no settlement agreement had come to fruition, and that even if it had, it was unenforceable under the Illinois Credit Agreements Act (815 ILCS 160/0.01 *et seq.*) (the *“Credit Act”*) because it was not reduced to a signed writing.

Following a lengthy evidentiary hearing, the trial court held that an enforceable settlement agreement had been created. The trial court found that the email exchanges between the parties contained “piecemeal assent” to terms which, when read together, constituted the material conditions by which the parties agreed to be governed. The trial court also opined that the settlement agreement was not a new credit agreement within the definition of the Credit Act, but rather a “mere modification” of an existing agreement, and therefore the signed writing-requirement of the Credit Act did not apply.

On appeal, the trial court’s finding was reversed because the appellate court found the exchange of emails did not reflect a meeting of the minds on relevant terms of an agreement, and the Credit Act barred the alleged settlement in any event.

Section 2 of the Credit Act bars a debtor from maintaining a legal action “on or in any way related to a credit agreement” unless the credit agreement is: (1) in writing; (2) expresses an agreement or commitment to lend money, extend credit or delay or forbear repayment of money; (3) sets forth the relevant terms and conditions; and (4) signed by <u>both</u> the creditor and the debtor. 815 ILCS 160/2. The Credit Act also makes clear that these standards equally apply to the question of whether an alleged agreement by a creditor to

modify or amend an existing credit agreement, or forbear from exercising remedies connected with an existing agreement, is enforceable.

Citing state and federal cases involving the Credit Act, the *Van Pelt* Court observed that the Credit Act was intended to be broadly interpreted. There is no limitation as to the type of action by a debtor that which is barred by the Credit act so long as it is in any way related to a credit agreement, as expressly stated in the statute. The Court found that “the purported agreement, which effectively modified an existing agreement by requiring [the lender] to forbear from exercising its remedies and right to repayment, is clearly the type of agreement encompassed by the act.” The Court observed that nothing in the parties’ original agreement required the lender to accept a lesser sum than was otherwise due, and that by settling, the lender would be forced to forbear from collecting the remaining sum due from the guarantors. Finally, but perhaps more importantly, the Court noted that signatures of the lender and the guarantors were nowhere to be found on the emails which were alleged to have made up the agreement; and, that none of the attorneys for the parties had express authority to enter into the purported settlement agreement.

While the *Van Pelt* decision reinforces the proposition that the Credit Act is to be broadly construed to bar *any* legal action related to *any* credit agreement unless the elements of the Credit Act are met in their entirety, *Van Pelt* also teaches that creditors and their counsel should be cautious as to when and how they put settlement terms into writing, lest those communications later be argued or found to constitute a binding settlement agreement the lender did not intend. Creditors should stay in close communication with their attorneys regarding the content of any settlement discussions with debtors, and consider using their attorneys to exchange offers until a final, signed agreement is intended. As shown by *Van Pelt*, while the appellate court correctly applied the law in reversing the trial court’s holding, ambiguous communications may lead a lender to incur the expense of unnecessary litigation.

For More Information

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