UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| THE UNION LABOR LIFE INSURANCE COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>J. BRIAN O'NEILL,<br><br>Defendant. | C.A. No. 15–152 WES |

**MEMORANDUM AND ORDER**

WILLIAM E. SMITH, Chief Judge.

Plaintiff Union Labor Life Insurance Company ("ULLICO") agreed to buy debt owed by companies controlled by Defendant J. Brian O'Neill. These companies used the debt to finance a condominium development. The companies eventually defaulted on the debt, spurring ULLICO to file suit and secure a summary-judgment ruling in its favor on liability. See Union Labor Life Ins. v. O'Neill, C.A. No. 15–152–ML, 2017 WL 24740, at *4 (D.R.I. Jan. 3, 2017). The parties are here again on summary judgment, this time for damages. (ECF Nos. 55, 60.)

I. Background

A. Chronology

ULLICO entered an Amended Loan Agreement ("Loan Agreement") with Carnegie Tower Development Company, Inc., and Carnegie Holdings, LLC, ("Carnegie Companies") on March 20, 2012. (Pl.'s

Statement of Undisputed Facts ("PSUF") Ex. 1, at 1, ECF No. 56–1.) The Loan Agreement refinanced debt used by the O'Neill-controlled Carnegie Companies to develop condominiums in Portsmouth, Rhode Island (collectively, with its various adjuncts as described in the Loan Agreement, "Property"). (See id. at 5–6.) The same day the parties entered the Loan Agreement, O'Neill agreed to an Amended and Restated Guaranty Agreement ("Guaranty"). (PSUF Ex. 2, at 1, ECF No. 56–2.) The Guaranty had O'Neill personally stand behind certain promises made by the Carnegie Companies in the Loan Agreement. (See id. at 1–5, 10.)

On April 10, 2014, after the Carnegie Companies defaulted on the Loan Agreement, they, along with O'Neill and another of his companies, entered a Forbearance Agreement. (PSUF Ex. 3, at 1–2, ECF No. 56–3.) The Forbearance Agreement, in essence, bought O'Neill time to fix the default — either by selling the Property or finding another lender — before ULLICO exercised its rights under the Loan Agreement. (See id. at 4.) One cost to O'Neill and the Carnegie Companies of this extra time was a requirement to place a deed in lieu of foreclosure to the distressed Property in escrow. (See PSUF Ex. 6, at 1–2, ECF No. 56–6; PSUF Ex. 3, at 15–16.)

Also required was payment of outstanding real-estate taxes on the Property by April 30, 2014. (PSUF Ex. 3, at 7.) So when O'Neill and the Carnegie Companies failed to meet this requirement, (PSUF

Ex. 5, at 5, ECF No. 56–5.), ULLICO was within its rights under the Forbearance Agreement to immediately take title to the Property by recording the deed in lieu of foreclosure, (PSUF Ex. 3, at 15). ULLICO held off, however, while O'Neill attempted to sell the condominiums — a result sought by all sides. (PSUF ¶¶ 103–113, ECF No. 56; Downs Decl. Ex. R, at 1, ECF No. 56–4.) Ultimately, O'Neill failed to close a deal before ULLICO decided it had cut him enough slack. And on January 14, 2015, ULLICO recorded the deed in lieu of foreclosure, taking title to the Property. (PSUF ¶ 118.)

B. Pertinent Provisions

When O'Neill signed the Guaranty, he "absolutely and unconditionally guarant[e]e[d] the full and prompt payment and performance . . . of any and all Obligations." (PSUF Ex. 2, at 3.) "Obligations," the Guaranty says, include "all Operating Expenses[] as defined in the Loan Agreement." (Id.) And "Operating Expenses" is defined in the Loan Agreement as follows:

> all costs and expenses incurred in the ownership, use, operation, maintenance, repair, sale, and marketing of the Units and the Sales Amenities, including without limitation, real estate taxes and assessments, condominium fees and assessments, insurance, payments to contractors and service providers, utilities and services, landscaping, cost of rental of model furniture, and payments to marketing and other consultants.

(PSUF Ex. 1, at 13.)

The Guaranty also makes O'Neill responsible for

> the lien-free completion of all work now or hereafter undertaken by or on behalf of Borrower or Guarantor with respect to the Improvements (whether in the nature of maintenance, repairs, capital improvements or otherwise) and the full payment of any and all amounts due to any Contractor, materialman, laborer, or any employee who is engaged or hereafter may be engaged to perform such work including, without limitation, any construction work in connection with fit-up of any Unit and other construction work performed in preparation for sale of, or repair of, any Unit.

(PSUF Ex. 2, at 5.)

By "Improvements," the Guaranty means "all [condominium] Units owned by Borrower . . . and [] the common areas of the Condominium . . . ." (Id.)

These and other obligations came due "immediately and automatically" when O'Neill defaulted on the Forbearance Agreement. (PSUF Ex. 3, at 13.)

II. Discussion

The question for the Court is what these obligations were.[1] In particular, what if any obligation O'Neill had to repair condominium-unit balconies. Before addressing that question, though, the Court notes that O'Neill all but concedes ULLICO's damage calculations not having to do with the balconies. (See PSUF

[1] Answering this question, the Court applies the familiar summary-judgment standard, granting either party's motion only if "there is no genuine issue as to any material fact and the undisputed facts show that the moving party is entitled to judgment as a matter of law." Borges v. Serrano-Isern, 605 F.3d 1, 4 (1st Cir. 2010); see also Bienkowski v. Northeastern Univ., 285 F.3d 138, 140 (1st Cir. 2002) (noting that the summary-judgment standard is the same regardless of whether one or more parties move).

¶¶ 48–102.) O'Neill marshals no evidence contradicting these calculations, arguing only that they should be reduced to the amounts owed before ULLICO breached the covenant of good faith and fair dealing, sometime between April 30, 2014 — when O'Neill defaulted on the Forbearance Agreement — and January 14, 2015 — when ULLICO took title to the Property. (See Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. ("Def.'s Mot.") 15–17, ECF No. 60); cf. Serrano-Cruz v. DFI P.R., Inc., 109 F.3d 23, 25 (1st Cir. 1997) ("To oppose the [summary-judgment] motion successfully, the nonmoving party . . . must establish a trial-worthy issue by presenting enough competent evidence to enable a finding favorable to the nonmoving party.") But as explained below, this argument fails, and therefore, the Court enters summary judgment in ULLICO's favor for the amounts set out in the margin.[2]

A. Balcony Repairs

Now about those balconies. ULLICO maintains that they have been defective since their installation, and that O'Neill owes $1,677,000 to fix the them. (Pl.'s Mot. 15.) ULLICO locates

[2] $1,123,339.62 (real estate taxes) + $13,441.58 (Water-District property taxes) + $906,845.37 (condominium fees and utility charges) + $57,486 (title-insurance fees and premiums) + $2,500 (environmental-site assessment) + $50,000 (mechanic's-lien costs) + $6,000 (working-capital expenditures) + $23,415.39 (costs associated with water damage to Units 602 and 1202) + $2,294.55 (cost to empty, clean, and fill swimming pools as result of glass) + $48,922.50 (closing costs) + $98,084.68 (pre-filing attorneys' fees and costs) + $365,936.76 (post-filing attorneys' fees and costs) = $2,698,266.45. (Pl.'s Mot. for Summ. J. on Damages ("Pl.'s Mot.") 14-15, ECF No. 55; see PSUF ¶¶ 48-102.)

O'Neill's obligation to pay this amount in two places. (Id. at 19–20.) The first is section 1(a) of the Guaranty, where it states that O'Neill is responsible for "all Operating Expenses [] as defined in the Loan Agreement." (PSUF Ex. 2, at 3.) ULLICO argues that the amount necessary to redo the balconies was such an expense, that is, a "cost[] and expense[] incurred in the ownership, use, operation, maintenance, repair, sale, and marketing of the Units." (PSUF Ex. 1, at 13.)

The problem with this argument is that even if the Court accepts ULLICO's definition of incur — "to become liable for or subject to," (Pl.'s Mot. 19 (quoting Quarles Petroleum Co. v. United States, 213 Ct. Cl. 15, 22 (1977)), — it is unclear what caused O'Neill to become liable for or subjected O'Neill to the cost of the balcony repairs. The language in Section 1(a) of the Guaranty resists ULLICO's attempt to read it as both creating an expense and obligating O'Neill pay it. When read in context, "costs and expenses incurred" refers to those whose source of obligation is something other than Section 1(a). See In re Newport Plaza Assocs., L.P., 985 F.2d 640, 646 (1st Cir. 1993) ("[A] court is duty bound to construe contractual terms in the context of the contract as a whole." (applying Rhode Island law)).

The context that recommends this reading is Section 1(a)'s non-exclusive list of covered expenses: "real estate taxes and assessments, condominium fees and assessments, insurance, payments

to contractors and service providers, utilities and services, landscaping, cost of rental of model furniture, and payments to marketing and other consultants." (PSUF Ex. 1, at 13.) These examples suggest what the parties had in mind as "costs and expenses incurred" for purposes of Section 1(a). See Shulton, Inc. v. Apex, Inc., 235 A.2d 88, 91 (R.I. 1967) (applying the "rule of [contract] construction that general words used in connection with and following an enumeration of particulars will, in the absence of a contrary intent, be confined to things ejusdem generis, that is, of the same general nature or use as those specifically enumerated"). Notice they are not — like the cost of repairing the balconies — hypothetical expenses O'Neill might have been subjected to if he had decided to hire work done.

No: the examples are all expenses whose origin of obligation is either the state or contracts O'Neill had already solicited and entered. Included are the kinds of expenses — landscaping, furniture, advertising — that O'Neill might have incurred in order to successfully market the properties. Repairs he might have had taken care of, and for which he might have then been billed, are expenses he might have incurred, but not ones he, in fact, did. These were inchoate, not incurred, expenses, which are not covered by section 1(a). Moreover, that O'Neill may have known about problems with the balconies and intended to do something about them is no matter. (See PSUF ¶¶ 95–100) (noting that management

company reported problems with balconies to O'Neill).) He never placed the $1,677,000 work order ULLICO's argument requires. (See id. ¶ 100.)

The second purported locus of O'Neill's obligation to pay for balcony repairs is Guaranty Section 1(d), which requires from him "the lien-free completion of all work now or hereafter undertaken by or on behalf of Borrower or Guarantor with respect to the Improvements (whether in the nature of maintenance, repairs, capital improvements or otherwise)." (PSUF Ex. 2, at 5.) Two points here: One, work on the balconies has not been nor – because he retained no interest in the condominiums – will ever be "undertaken by or on behalf" of O'Neill or his concerns. So this Section does nothing to indemnify ULICCO for planned balcony remediation.

And two, Section 1(d) hints at how the parties might have drafted a provision that did what ULLICO contends Sections 1(a) and (d) do. Something like, "the lien-free completion of all work now or hereafter undertaken by, on behalf, or due to the neglect of Borrower or Guarantor," might have done the trick. That sophisticated parties did not include this or similar language in their agreements likely attests to O'Neill's hesitancy – even when over a barrel – to assume expenses incurred at ULLICO's fiat. See Gorman v. Gorman, 883 A.2d 732, 738 n.9 (R.I. 2005) (describing the "venerable maxim of contract interpretation expressio unius est exclusio alterius[:] . . . If the parties in their contract

have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed" (quoting 5 Corbin on Contracts § 24.28 (rev. ed. 1998))).[3]

Regardless why certain provisions were or were not included, the fact is that this was not a property sale attended by warranties implied by law. Cf., e.g., Nichols v. R.R. Beaufort & Assocs., 727 A.2d 174, 180 (R.I. 1999) (discussing implied warranties of habitability and workmanlike quality). What happened here instead was a lender seizing the collateral that secured a loan in default — the borrower's obligations arising only from the parties' agreements, the Court powerless to create others.

B. Implied Covenant

The last task for the Court is to dispense with O'Neill's argument that ULLICO breached the covenant of good faith and fair dealing. The contention here is that ULLICO acted unreasonably when it waited eight months after O'Neill defaulted on the Forbearance Agreement to record the deed in lieu of foreclosure. (Def.'s Mot. 15–16.) O'Neill cannot be serious: the undisputed fact is that he requested ULLICO postpone taking ownership of the Property so that he could chase buyers. (See Downs Decl. Ex. R, at 1.) Indeed, two days before ULLICO recorded the deed, one of

[3] O'Neill prevailing on the balcony issue as a matter of law, the Court DENIES as moot ULLICO's Motion to Strike (ECF No. 65) John Rowell's testimony regarding that issue.

O'Neill's representatives emailed ULLICO asking for "an additional week" to close a prospective deal. (Id.) If anything, ULLICO was more than fair in allowing O'Neill to pursue what he described as "the common goal of selling the asset at maximum price." (Def.'s Statement of Undisputed Facts Ex. F, at 2, ECF No. 60–4); see Fleet Nat'l Bank v. Liuzzo, 766 F. Supp. 61, 67 (D.R.I. 1991) (explaining that the covenant of good faith and fair dealing was adopted by the Rhode Island Supreme Court "so that contractual objectives may be achieved"). And in any case, no provision of the Forbearance Agreement required ULLICO to take the Property before it did. (PSUF ¶¶ 119–120); see Miller v. Wells Fargo Bank, 160 A.3d 975, 981 (R.I. 2017) ("The implied covenant cannot create rights and duties not otherwise provided for in the existing contractual relationship." (alteration and quotation marks omitted)).

III. Conclusion

The upshot of the parties' cross-motions (ECF Nos. 55, 60) is that O'Neill owes ULLICO $2,698,266.45, plus the reasonable "costs, fees, and expenses," if any, incurred since briefing summary judgment, (PSUF Ex. 3, at 20).

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: July 24, 2018