IT IS ORDERED as set forth below:

Date: January 22, 2014

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
POINTE PARKWAY LLC,	CASE NO. 13-55084-BEM
Debtor.	CHAPTER 11
FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR ROCKBRIDGE COMMERCIAL BANK AND CRE VENTURES 2011-1, LLC,	
Movants,	
v. POINTE PARKWAY LLC,	Contested Matter
Respondent.	

O R D E R

This Chapter 11 case came before the Court on November 7, 2013, for a hearing to consider approval of the Debtor's Disclosure Statement (the "Disclosure Statement") [Doc. No. 67] and the Objection To Disclosure Statement For Debtor's Chapter 11 Plan and Chapter 11

Plan Proposed by Pointe Parkway, LLC (the "Objection") filed by CRE Ventures 2011-1, LLC ("CRE"). [Doc. No. 88]

Background Facts[1]

Prior to filing bankruptcy, Debtor obtained a loan from Rockbridge Commercial Bank (the "Bank") for the acquisition and improvement of an office building complex. The loan was memorialized in the following documents: (i) Construction Loan Agreement dated June 9, 2008, by and between Pointe Parkway LLC ("Debtor"), Howard B. Workman, and the Bank, ("the Loan Agreement") [Doc. No. 89, Pg. 4] (ii) Promissory Note dated June 9, 2008, made Debtor in favor of the Bank, (the "Note") [Doc. No. 89, Pg. 11] (iii) Deed to Secure Debt in favor of the Bank and recorded at Deed Book 48921, Page 0578 (the "Deed") [Doc. No. 5, Ex. A], and, (iv) Assignment of Rents and Leases dated June 9, 2008, in favor of the Bank [Doc. No. 5, Ex. A]. Prior to fully funding the loan, the Bank failed and the FDIC was appointed receiver of the Bank (the "FDIC-R"). FDIC-R repudiated the Loan Agreement and consequently a portion of the loan was and remains unfunded. FDIC-R assigned the Bank's interest in the loan to CRE. CRE sued Debtor and a guarantor in the Superior Court of Fulton County for breach of the Note and a guaranty. Debtor and the guarantor filed an answer and counterclaim against CRE. The FDIC-R intervened in the state court litigation and removed the case to the District Court for the Northern District of Georgia. Thereafter Debtor filed this chapter 11 case.

FDIC-R and CRE filed a joint motion for relief from the automatic stay seeking entry of an order modifying the stay to allow FDIC-R and CRE to continue prosecution of an amended motion to dismiss Debtor's counterclaim asserting setoff or recoupment in the District Court suit. [Doc. No. 51] This Court held that the Debtor's counterclaim was subject to the jurisdictional bar

[1] The parties did not present evidence at the Hearing, however, it appears that the facts relevant to resolution of CRE's objection are not in dispute.

of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") because the Debtor failed to exhaust the administrative claims process contained in FIRREA such that this Court did not have subject matter jurisdiction to consider the counterclaim. Thus, an order granting the joint motion was entered September 9, 2013. [Doc. No. 65] Thereafter, the District Court dismissed Debtor's counterclaim and three of its defenses[2], leaving only Debtor's defense that CRE has failed to state a claim against the Debtor. It is undisputed that Debtor did not timely exhaust the administrative claims procedure.

The Proposed Plan

Debtor's proposed plan or reorganization (the "Plan") provides for treatment of three classes of claims, unsecured claims, the "claim held by CRE related to the Pointe Parkway Property" and insider unsecured claims. [Doc. No. 66] With respect to CRE's claim, the Plan provides for rescission of the Loan Agreement, the Note and the Deed in response to the FDIC-R's "anticipatory repudiation" of the Loan Agreement. The Plan provides for payment to CRE of an amount equal to the fair market value of the Debtor's real property amortized over thirty years payable in monthly installments for ten years with interest at the rate of 3.75%. The Plan further provides for cancelation of the Deed and execution of a new security deed to secure a claim in an amount equal to the fair market value of the real property.

The Parties' Contentions

Debtor argues that the Loan Agreement and the Note (the "Documents") constitute one integrated contract such that when FDIC-R repudiated the Loan Agreement it also repudiated the

[2] According to the District Court's November 27, 2013 Order, Debtor raised three affirmative defenses: (i) seeking credit given for damages suffered by Debtor; (ii) bad faith repudiation; and (iii) the relief sought is barred in whole or in part because the contract has been repudiated. [Doc. No. 100] The District Court found that only Debtor's first affirmative defense, the failure to state a claim, survived Debtor's failure to exhaust the administrative claims process. It does not appear that the District Court addressed the specific issue raised by the Disclosure Statement and Plan consequently this Court will now adjudicate the issues raised in the Objection.

Note. Thus, according to Debtor the Note is unenforceable and it has no obligation to perform under the Note. Debtor relies on two cases, *Hackel v. FDIC,* 858 F. Supp. 289 (D. Mass. 1994) and W*RH Mortgage, Inc. and FDIC as Receiver v. S.A.S. Assoc., et al.,* 214 F.3d 528 (4th Cir. 2000), in support of this argument and the Plan. CRE points out that these cases are distinguishable because the express terms of the notes in each of *Hackel* and *S.A.S* conditioned the maker's payment of the note on the leasee's performance under an associated lease. Here, the Note is not so conditioned and, although it is clear that the documents contemplate related transactions, that is, the purchase of real estate and renovation of the same, it is less clear that the Documents constitute one integrated agreement which was repudiated by FDIC's repudiation of the Loan Agreement.

CRE argues further that, because Debtor failed to exhaust the administrative claims process, Debtor's argument that the Note is unenforceable is barred because Debtor has no further rights or remedies related to the repudiation. CRE concludes that because the Plan is premised on this argument it is not confirmable and the Disclosure Statement should not be approved. *See, In re Atlanta West VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga 1988); *In re Beyond.com Corp.,* 289 B.R. 138 (Bankr. N.D. Cal. 2003).

At the Hearing, the Court determined that it was necessary to rule on the issue of whether the treatment of CRE's claim as set forth in the Plan is prohibited by FIRREA before proceeding further with consideration of the Disclosure Statement or plan confirmation. The Court requested, and the parties submitted, briefs on November 21 and 27, 2013. [Doc. Nos. 99, 100]

Analysis

In order to determine whether Debtor's proposed treatment of CRE's claim is legally permissible, the Court considers first the Debtor's argument that the Note was repudiated and

then considers whether the proposed treatment of rescission is permissible under FIRREA. Initially, the Court must determine if Debtor's assertion of repudiation is a defense that is not subject to the administrative claims process and if it is not, whether the Documents are integrated such that repudiation of the Loan Agreement was a repudiation of the Note as well.

In *Am First Fed., Inc. v. Lake Forest Park, Inc.,* 198 F.3d 1259 (11th Cir. 1999) the Eleventh Circuit relied upon the definition of defense and claim in concluding that courts must look past the labels applied by the parties and determine whether "a response to plaintiff's claim . . . attacks the plaintiff's legal right to bring an action . . . or is, in actuality, a claim requiring exhaustion as a prerequisite to jurisdiction." *Am First.* at 1264 (citing *National Union Fire Ins. Co. v. RTC,* 28 F.3d 376 (3rd Cir. 1994). Debtor asserts that the legal effect of FDIC-R's repudiation was repudiation of the Note such that CRE does not have a claim under the Note because the Note is unenforceable. This argument directly attacks CRE's legal right to bring an action to recover under the Note and thus is not subject to the exhaustion requirements of FIRREA or subject to the jurisdictional bar. That being the case, the Court will now consider whether the Documents constitute one agreement as argued by Debtor.

Debtor would have this Court conclude that because the Documents were executed contemporaneously, contain cross references and state that the Note is governed by the Loan Agreement, the Note was repudiated when the Loan Agreement was disavowed. It is true that "in cases of contemporaneous agreements between the same parties with relation to the same subject matter, each writing may be used to ascertain the true intention of the parties and may authorize a determination that, when construed together, they constitute, as a whole, but one contract." *Brogdon v. Pro Futures Bridge Capital Fund, L.P.,* 260 Ga. .App. 521, 523 (2003). But it is also true that even when interpreting multiple documents as one contract, the contract

must be read "to give the greatest effect possible to all provisions rather than to leave a part of the contract unreasonable or of no effect." *Quintanilla v. Rathur*, 227 Ga. App. 788, 790 (1997) (citing *Roland Well Drilling v. Murawski*, 193 Ga.App. 38, 40 (1989)). This is so because "[o]ne of the most fundamental rules of construction is that a court should, if possible, construe a contract so as not to render any of its provisions meaningless" *Id.*

The Loan Agreement states that repayment of the amounts loaned are controlled by the Note and the Note states that the Debtor's obligations thereunder are "absolute and unconditional" and that any reference to the Loan Agreement or any provision of the same "shall [not] in any manner affect or impair the absolute and unconditional obligation of Maker to pay. . . ." [3] Construing the Documents as one agreement that was repudiated would render these provisions meaningless. Such a construction would also undermine the lender's rights under the Note which would result, as was the case in *Pro Futures*, in an anomalous result because the Loan Agreement would not have existed but for the Note.

Further, the unconditional promise to pay contained in the Note is in stark contrast to the conditional nature of the promises made in *SAS* and *Hackel* where the documents were clear that if payments were not made under the associated lease then the debtor was not obligated to pay the note or loan. *See also Miraj And Sons, Inc.*, 192 B.R. 297, 311 (Bankr. D. Mass. 1996) (unconditional payment obligation in note enforced notwithstanding repudiation of financing agreements); *Multibank 2009-1 CML-ADC Venture, LLC v. Yoshizawa*, 2011 U.S. Dist. LEXIS

[3] The relevant Note provision states in full, as follows: "this Note shall in all respects be governed by the terms and conditions of the Loan Agreement, as the same may be hereafter amended or supplemented in writing, including, but not limited to , the conditions precedent to advances hereunder, the times at which Holder is obligated to make advances hereunder and the maximum principal balance which may be outstanding at any time hereunder; provided, however, that neither the foregoing reference to said Loan Agreement, as the same may be amended or supplemented, nor any provisions thereof, shall in any manner affect or impair the absolute and unconditional obligation of Maker to pay the outstanding principal balance hereof and unpaid accrued interest hereon as the same shall become due and payable."

90240 (general rule that repudiation terminates counter party's obligation to perform inapplicable where partial disbursement of loan made).[4] Consequently, notwithstanding the seeming inequity of the FDIC's disaffirming the Loan Agreement and leaving Debtor with a project that, according to Debtor, cannot generate sufficient revenue to service its obligations, the Court concludes that repudiation of the Loan Agreement did not act to repudiate the Note.

Even if this were not the case, because the Court concludes that the treatment of CRE's claim proposed in the Plan runs afoul of FIRREA, the Plan cannot be confirmed. Debtor argues that the proposed treatment of CRE's claim is merely a component of its repudiation argument, that is, the implementation of its repudiation defense as provided by Georgia law. CRE, on the other hand, argues that the proposed Plan treatment amounts to a claim against an asset of the failed institution, that is, the Note, which is barred because Debtor failed to pursue the same through FIRREA's administrative claims process. CRE argues further that FIRREA expressly limits Debtor's remedies for repudiation to a damage claim asserted through the FIRREA claims process.

In order to determine if Debtor's proposed remedy is a claim as contemplated by §1821(d)(3) and is subject to the claims process, the Court looks to the definition of claim contained in the Bankruptcy Code. *See, National Union Fire Ins. Co., v City Savings, FSB,* 28

[4] Further, the Georgia Court of Appeals has held that the failure of consideration necessary to excuse performance must be a total failure of consideration not a partial failure. *See Complete Trucklease, Inc. . Auto Rental & Leasing, Inc.,* 160 Ga. App. 568 (1981)(failure to provide all maintenance required under truck rental and maintenance agreement partial failure of consideration because trucks were provided and used by complaining party); *Beaulieu Group, LLC v. S&S Mills, Inc.,* 292 Ga. App. 455 (2008)(withholding of over $200,000 worth of material because $3,000 invoice unpaid not justified because failure to pay one invoice was not total failure of consideration); *Radio Perry, Inc. v. Cox Communications, Inc.,* 746 S.E.2d 670 (noting that rescission "is appropriate when the breach is so substantial and fundamental as to defeat the object of the contract"). These cases are analogous to the situation here where the majority of the funding available under the Loan Agreement was advanced prior to the FDIC's repudiation. By the Loan Agreement's terms 75% of the funding was to be paid contemporaneously with entry into the document and purchase of the property.

F.3d 376 (3rd Cir. 1994) (noting that FIRREA does not define claim or creditor and using the definition of claim from the Code). Claim is defined in §101(5) of the Code to include, "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured." 11 U.S.C. §101(5).

Rescission is an equitable remedy which is generally an alternative to damages. *See eg: Cutcliffe v. Chesnut,* 122 Ga. App. 195 (1970); *Western Contracting Corp. v. State Hwy Dep't,* 125 Ga. App. 376 (1972); *Martin v. Rollins, Inc.* 138 Ga. App 649 (1976); *Radio Perry, Inc. v. Cox Communications,* 746 S.E. 2d 670 (Ga. App. 2013). In appropriate cases, a non-breaching party can elect damages or rescission. *Cutcliffe v. Chesnut,* 122 G. App. 195 (1970).[5] An equitable remedy will give rise to a right to payment and therefore be a claim under the Code if payment of monetary damages is an alternative to the equitable remedy. *See Blair 11D Condo, LLC v. Rabin*, 361 BR 282, 285 (Bankr. S.D. Fla. 2007) (citing cases). Thus, the Debtor's proposed treatment of CRE's claim constitutes a claim.

FIRREA provides at §1821(d)(6) for review of the denial of a claim and for a bar "if any claimant fails to request administrative review…. or file suit on such claim . . . before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed . . . as of the end of such period, such disallowance shall be final, and the claimant shall have **no further rights or remedies with respect to such claim.** " 12 U.S.C. §1821(d)(6)(B) (emphasis added). Debtor's proposed remedy is a claim and thus is subject to the administrative claims procedure. *See Am First,* 198 F.3d 1259 (11th Cir. 1999) (administrative claims process applied

[5] Further, it is not at all clear that Debtor would be entitled to rescind given the substantial advance made by the Bank. *See,* Footnote 4.

to claim asserted by a debtor of the failed institution). It is undisputed that Debtor did not exhaust the claims process and thus, Debtor's rescission claim is barred.

Because the Debtor's obligation to pay under the Note was an unconditional and independent obligation that was not repudiated when the Loan Agreement was repudiated, and because its proposed treatment of CRE's claim is in the nature of a claim, the Debtor's proposed treatment of CRE is barred by FIRREA. Thus, the Plan as proposed is not confirmable. In this situation the Court must sustain the Objection and deny confirmation of the Plan. Accordingly, it is now hereby

ORDERED, that the Objection is SUSTAINED. It is further

ORDERED that confirmation of the Plan of Reorganization dated September 10, 2013 is DENIED.

END OF ORDER

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