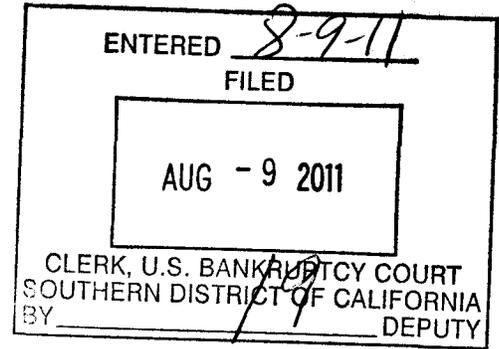


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 10-11408-MM13
)
OSCAR PICO) CHAPTER: 13
VERENICE HUERTA)
Debtors,) MEMORANDUM DECISION REGARDING
) CLAIM AND CONFIRMATION
) OBJECTIONS
)
) DATE: July 22, 2011
) TIME: 10:00 a.m.
) CRTRM: 1
)
) JUDGE: Margaret M. Mann

The Court issues this Memorandum Decision as its ruling following the evidentiary hearing on (1) the Debtors' objection to the claim of IBM Lender Processing Services, Inc. ("IBM")¹ secured by Debtor Oscar Pico's² Tristan River property located in Chula Vista, California, and (2) IBM's objection

¹ The parties have stipulated that the hearing would apply to Claim 11 in the Official Claims Register ("IBM Claim"), even though the Debtors' Objection was technically filed to Claim 10-1, which relates to another of the Debtors' secured loans encumbering property located on Circulo Brindisi, Chula Vista, CA. The Debtors' error may have been caused by IBM's predecessor Chase Bank, USA, N.A. ("Chase") filing an Assignment of Claim 10-1, even though it intended to assign the Tristan River loan, Claim 11 in the Official Claims Register. These technical problems were resolved by the stipulation of the parties on the record at the evidentiary hearing to treat the Objections as pertaining to Claim 11.

² Debtor Oscar Pico owns the Tristan River property as his separate property. His co-debtor wife is not liable on the secured loan claim asserted by IBM.

1 to the confirmation of the Debtors' Chapter 13 Plan ("Plan") for failure to pay pre-petition arrears
2 ("Confirmation Objection" and collectively "Objections").

3 Both Objections pose the question of whether Pico must cure \$53,888.91 in pre-petition
4 arrearages on the Tristan River secured loan to confirm the Plan. Pico claims that he entered into a
5 Loan Modification Agreement ("LMA") with IBM's predecessor, JP Morgan Chase, N.A. ("Chase"), a
6 few days after the Debtors filed bankruptcy. Under the LMA, the arrearages were added to the
7 principal balance of the secured loan, and are not due and payable until the extended maturity date of
8 July 1, 2019, a date after the Plan will be completed. IBM claims that the LMA is not enforceable
9 because Chase never signed it and also notified Pico that he was not qualified for a loan modification
10 in a letter sent three months after Pico signed the LMA. If the LMA is not enforceable, the arrearages
11 must be cured under the Plan as a condition to its confirmation. The Plan is not feasible based on the
12 Debtors' current net income if the arrearages must be cured under the Plan.

13 The Court has considered all of the testimony and other admitted evidence at the hearing on the
14 Objections.³ It concludes the burden of proof on both matters rests on IBM. *Lundell v. Anchor*
15 *Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir. 2000). For the reasons set forth
16 in this Memorandum Decision, the Court finds IBM did not sustain its burden of proof on the
17 Objections. Accordingly, the Objection to Claim is sustained, the Objection to Confirmation is denied,
18 and the non-suit motion made by IBM is overruled.

19 **I. ANALYSIS OF FACTS AND LAW**

20 **A. Factual Summary**

21 The sequence of events relating to the Objections is as follows:

22 **6/29/10** – The Debtors file their Chapter 13 bankruptcy case. For the previous six months, Pico
23 negotiates with Chase in Spanish, his native language, and makes payments pursuant to the trial loan
24 modification in process with Chase.

26 ³ Pico and Kathy Jolly, on behalf of IBM, each testified at the hearing. While the Court does not question the
27 veracity of either witness, it gives more weight to Pico's testimony as Ms. Jolly did not have personal knowledge
28 of the facts underlying her testimony. Each also submitted declarations and attached exhibits which were also
admitted into evidence.

1 **7/01/10** – Pico signs, notarizes, and returns the executed LMA to Chase. The LMA is by its
2 terms part of the Federal Home Affordable Mortgage Program ("HAMP"), under which modification
3 agreements are not entered into unless the borrowers qualify and then successfully complete the trial
4 modification process. [http://www.makinghomeaffordable.gov/learn-more/trial-](http://www.makinghomeaffordable.gov/learn-more/trial-period/Pages/default.aspx)
5 [period/Pages/default.aspx](http://www.makinghomeaffordable.gov/learn-more/trial-period/Pages/default.aspx); visited 7/25/11. The LMA does not anticipate Pico providing further proof
6 of eligibility, but only that Pico must provide further implementation documents upon request. LMA,
7 pp. 4-5, at ¶¶ 2(H), 2(I). Under the LMA, the total arrearages at issue here are added to the balance of
8 the loan, late charges are waived, and the maturity date of the loan is extended.

9 **7/10 to 10/10** - After Pico signs the LMA, he makes three months of reduced payments in the
10 amounts specified in the LMA. Both Chase and IBM accept these reduced payments as payment in
11 full for this period.

12 **10/1/10** – Chase transfers the servicing of the Tristan River secured loan to IBM.

13 **10/10** – After his loan is transferred to IBM, Pico engages in discussions in Spanish with IBM
14 and is advised that he must increase his payments due to increased property taxes. Higher payments
15 may be charged under the LMA than those specified due to property tax or other escrow changes.
16 LMA, p. 3, at ¶ 1(C). Pico increases his payments as advised, and remains current to date.

17 **10/11/10** – IBM sends a welcome letter to Pico, stating: "Please be assured that the transfer of
18 servicing of your mortgage loan does not affect any other terms or conditions of your mortgage loan
19 agreement other than terms directly related to the servicing of your mortgage loan." IBM thus binds
20 itself to the substantive terms of the LMA.

21 **10/25/10** – More than three months after the LMA is signed by Pico, and three weeks after the
22 transfer of servicing to IBM, Chase writes to Pico to inform him that he does not qualify for a loan
23 modification. According to the Disqualification Letter:

24
25 You have been deemed ineligible for the [Making Home Affordable]
26 program for the following reason(s): We are unable to offer you a Home
27 Affordable Modification because you did not provide us with the
28 documents we requested. A notice which listed the specific documents
we needed and the time frame required to provide them was sent to you
more than (30) days ago.

1 Pico does not recall receiving the Disqualification Letter or being asked to provide any
2 additional documents after the LMA was signed. The Disqualification Letter does not identify what
3 documents were not provided, and no other evidence was proffered by IBM to explain what documents
4 had been requested.

5 10/25/10 – Chase assigns Claim 11 to IBM.

6 10/26/10 – Chase assigns the Tristan River Deed of Trust to IBM.

7 2/21/11 - IBM objects to confirmation of the Plan, asserting that Pico must cure the arrearages.

8 **B. Legal Analysis**

9 Whether the LMA is enforceable despite not being signed by Chase raises an issue of the
10 contracting parties' intent. *First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1065 (9th
11 Cir. 2011) (language of initial agreement supported intent to form a binding contract, even though the
12 parties were later unable to enter into a formal agreement as anticipated); *Rennick v. O.P.T.I.O.N.*
13 *Care*, 77 F.3d 309, 316 (9th Cir. 1996) (finding the parties had no intent to be bound by a term sheet
14 which stated it was not binding), *cert. denied*, 519 U.S. 865 (1996); *Angell v. Rowlands*, 85 Cal. App.
15 3d 536, 542 (1978) (a partially executed contract will be valid unless the evidence reflects that the
16 contract was not intended to be complete until all parties had signed).

17 Based upon its review of the terms of the LMA and admissible parol and documentary
18 evidence, and considering the credibility of the witnesses, the Court finds that Pico and Chase intended
19 that the LMA be binding once Pico signed, notarized and returned it to Chase. The LMA expressly
20 obligated Chase to provide its signature once it received Pico's signature. There was no evidence
21 Chase was excused from this obligation by Pico's failure to execute implementation documents, since
22 none were ever requested from him.

23 **1. The LMA Bound Chase to Modify the Loan**

24 Chase expressed its intent to be bound to the LMA at the beginning of the document:

25 "I understand that after I sign and return two copies of this Agreement to the Lender, the
26 Lender *will* send me a signed copy of this agreement . . . The Loan Documents *will*
27 *automatically become modified* on AUGUST 01, 2010 (the "Modification Effective
28 Date") and all unpaid late charges that remain unpaid will be waived."

1 (Emphasis added). By using these terms of commitment as an expression of its intent, Chase could no
2 longer back out of the LMA after Pico fully complied with his end of the bargain: to promptly sign and
3 return the necessary copies. *First Nat'l Mortg.*, 631 F.3d at 1065 (contract terms prescribing how the
4 agreement would become binding manifest the parties' intent).

5 **2. The LMA Must be Interpreted Holistically to Resolve Ambiguities**

6 The "purpose of the law of contracts is to protect the reasonable expectations of the parties."
7 *Ben-Zvi v. Edmar Co.*, 40 Cal. App. 4th 468, 475 (1995). On a plain reading of the LMA, Pico
8 reasonably expected Chase would sign as promised once he signed and returned the LMA. Chase
9 could not reasonably expect that once it promised to sign, it could treat that promise as meaningless.
10 Yet, this appears to be IBM's position, by ignoring Chase's promise to sign earlier in the document, and
11 relying solely upon LMA ¶ 2(L), which states that the LMA is not effective without Chase's signature.

12 The Court must attempt to interpret these apparently contradictory sections of the LMA in a
13 holistic and logical manner. *Bradner v. Vasquez*, 102 Cal. App. 2d 338, 343 (1951); *see also Citizens*
14 *for Goleta Valley v. HT Santa Barbara*, 117 Cal. App. 4th 1073, 1077 (2004); *Harris v. Klure*, 205
15 Cal. App. 2d 574, 578 (1962). This can be achieved only if the Court interprets LMA ¶ 2(L) as
16 applying only if Pico either failed to sign the LMA when he received it from Chase, or failed to
17 comply with his implementation obligations. *See e.g.* LMA, pp. 4-5, at ¶¶ 2(H), 2(I) and 2(K). Chase's
18 separate obligation to sign the LMA is rescued from being meaningless only by this construction.
19 *Blackburn v. Home Life Ins. Co.*, 19 Cal. 2d 226, 230 (1941) (insurance policy rider construed to give
20 meaning to all of its terms).

21 The Court cannot adopt IBM's interpretation that Chase was free not to sign the LMA despite
22 promising to do so, without creating an illogical ambiguity. *Fischer v. First Internat. Bank*, 109 Cal.
23 App. 4th 1433, 1446 (2003) (ambiguous dragnet clause would not cross-collateralize two loans if this
24 were not within the reasonable expectations of the borrower). Contract ambiguities are construed
25 against the drafting party. *Victoria v. Superior Court*, 40 Cal. 3d 734, 739 (1985) (holding that
26 "ambiguities in standard form contracts are to be construed against the drafter", citing *Baker v. Sadick*,
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1 162 Cal. App. 3d 618, 625 (1984)). IBM as the successor to Chase, cannot use Chase's drafting
2 ambiguity to escape its obligation to honor the LMA.

3 **3. IBM Failed to Prove that Pico Failed Any Condition of the LMA**

4 IBM also asserts that the Disqualification Letter sent by Chase on October 25, 2010, which
5 Pico testified he never received, indicates that Chase was not bound by the LMA. Even if the
6 Disqualification Letter was received by Pico, it purported by its terms to be a withdrawal of an offer to
7 modify the loan. It was too late to withdraw the offer after Pico had already accepted it, and a binding
8 contract was already formed. *Kruse v. Bank of America*, 202 Cal. App. 3d 38, 59 (Cal. App. 1st Dist.
9 1988) (binding contract requires offer and acceptance.)

10 The Disqualification Letter cites Pico's failure to provide certain listed documents regarding the
11 modification criteria as its reason for withdrawing its loan modification offer. Since Chase had already
12 qualified Pico during the trial loan modification process, this reason is nonsensical. The HAMP
13 guidelines referenced in the Disqualification Letter anticipate the qualification process is completed
14 *before*, not after, the modification documents are sent to the borrower. Pico also testified that he
15 completed a trial period and made payments for six months before Chase sent him the LMA to sign.
16 *See First Nat'l Mortg.*, 631 F.3d at 1066, 1068-69 (after affirming the formation of a valid contract,
17 later efforts to repudiate the contract were a breach of contract).

18 IBM never contended, much less proffered evidence to prove, that the Disqualification Letter
19 was sent after Pico failed to comply with a request by Chase for the implementation documents that
20 hypothetically could have been requested from Pico under the LMA, pp. 4-5, at ¶¶ 2(H), 2 (I) and
21 2(K). IBM has the burden of defending its proof of claim by proving that Pico failed to satisfy this
22 potential condition subsequent to the LMA. *Lundell*, 223 F.3d at 1039. That burden has not been met.

23 **4. Pico's Increased Payments Support the Effectiveness of the LMA**

24 Ms. Jolly testified that Pico began paying higher monthly payments of \$3,570, more than the
25 precise amounts provided in the LMA, after the loan was transferred to IBM on October 1, 2010. IBM
26 contends these higher payments contradict Pico's testimony that he understood his loan was modified
27 by the LMA.
28

1 Pico testified he increased his payments because he was instructed to do so by IBM to cover
2 additional property taxes and other expenses under the loan. This testimony was consistent with the
3 LMA, raised the specter of higher payments being due on the loan despite the modification to pay for
4 taxes and escrow items, which could "change periodically over the term of [the] loan". LMA, p. 4, at ¶
5 2(B). Ms. Jolly testified she did not know whether IBM had advised Pico to increase his payments for
6 this reason; nor did IBM provide any other evidence to explain why it increased the payment. IBM
7 bears the burden on its claim, and it produced no evidence to contradict this testimony from Pico.

8 In fact, the evidence presented by IBM regarding Pico's payment history leads the Court to
9 conclude the opposite: that Chase and Pico did intend the LMA to be binding. Ms. Jolly testified that
10 Pico provided three payments to Chase in accordance with the LMA. IBM's accounting to the Court
11 reflects that both Chase and IBM accepted these payments as payment in full because no defaults were
12 asserted during this period. IBM's accounting does not include any late charges which were waived
13 under the LMA. *See Wells Fargo Home Mortg., Inc. v. Spaulding*, 2007 ME 116, at *p22 (2007)
14 (mortgage payments accepted by lender constituted proof of a loan modification).

15 **C. Neither the Statute of Frauds nor the Parol Evidence Rule Bars Enforcement of**
16 **the LMA**

17 At the evidentiary hearing, IBM raised the defense that the LMA, even if otherwise a binding
18 contract, is unenforceable under the statute of frauds because it is not signed by Chase. As a motion
19 for non-suit at the conclusion of Pico's case, it renewed this defense. As an additional ground for non-
20 suit, IBM asserted that Pico's testimony should be excluded as parol evidence offered to contradict the
21 LMA. The Court concludes that neither the parol evidence rule, nor the statute of frauds, is applicable
22 here.

23 **1. Statute of Frauds**

24 The statute of frauds applies to mortgage modifications. *See* Cal. Civ. Code, §§ 1624(a)(3),
25 1698 and 2922; *Secrest v. Security Nat. Mortg. Loan Trust 2002-2*, 167 Cal. App. 4th 544, 552-553
26 (2008). The statute of frauds is nevertheless subject to exceptions where its evidentiary function has
27 been satisfied, such as where the unsigned contract has been fully performed by the party seeking to
28

1 enforce it. *Id.* at 556. Where a contract is unilateral, or originally bilateral and fully performed by one
2 party, the remaining promise is taken out of the statute of frauds, and the party who performed may
3 enforce it against the other. *Dougherty v. California Kettleman, etc.*, 9 Cal. 2d 58, 81 (1937).
4 Here Pico fully performed the LMA, which only required of him to sign and return the LMA, and then
5 provide implementation documents upon request. As in *Dougherty, id.*, this full performance is
6 sufficient to take the LMA out of the statute of frauds.

7 If Pico had not fully performed, or his performance had been limited to making payments on
8 the LMA, the LMA might not be enforceable due to an insufficient change in position to estop IBM
9 from asserting the statute of frauds. *Secrest*, 167 Cal. App. 4th at 555. Not only did Pico fully
10 perform, he also changed his position in other respects. By signing the LMA, Pico agreed that any
11 unpaid balance would be rolled into the principal, and that he would pay interest on the unpaid interest
12 added to the principal. This additional change in position both estopped Chase and IBM from
13 asserting the statute of frauds, and provided additional consideration to render the LMA enforceable.

14 Any new bargained for consideration, however small, will bind the party against whom the
15 contract is to be enforced. *House v. Lala*, 214 Cal. App. 2d 238, 243 (1963); *Ansanelli v. JPMorgan*
16 *Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 32350 at *10-11(N.D. Ca. 2011) (borrower's additional
17 financial disclosures and lender's eligibility for incentive payments for modifying loans provided
18 sufficient consideration for oral trial modification agreement); *Kattar v. Demoulas*, 433 Mass. 1, 13
19 fn.6 (2000) (consideration for loan modifications can be found where debtors agree to higher interest
20 rates, waive or release certain pre-existing legal rights, or provide additional financial information);
21 *Vissuet v. Indymac Mort. Servs.*, 2010 U.S. Dist. LEXIS 26241 *12 (S.D. Ca. 2010) (borrower's
22 completion and submission of loan modification application provided adequate consideration for
23 lender's oral promise to postpone foreclosure sale). Pico completed the trial loan modification process
24 and waived certain rights, which together with the payments he had made, bound Chase and IBM to
25 the LMA.

26 To evaluate whether a party is estopped, courts also look at the conduct of the party who is
27 asserting the statute of frauds. *Dougherty*, 9 Cal. 2d at 81 (inducement to perform created an estoppel
28

1 by the statute of frauds); *Monarco v. Lo Greco*, 35 Cal. 2d 621, 623-626 (1950); *Norcross v. Winters*,
2 209 Cal. App. 2d 207, 216 (1962). Chase expressly promised to sign the LMA and modify the loan,
3 accepted the reduced payments in full, and waived the late charges. IBM advised that the payments
4 were raised to account for property taxes, waived the late charges, and then waited eight months after
5 the Plan was proposed to object to it. This conduct induced Pico to believe his loan had been
6 modified. Even if new consideration did not exist—and this Court finds based upon the evidence that
7 it does— IBM is estopped from asserting the statute of frauds.

8 **2. The Parol Evidence Rule Does Not Prevent the LMA's Enforcement**

9 "[If] the language of a deed is plain, certain and unambiguous, neither parol evidence nor
10 surrounding facts and circumstances will be considered to add to, detract from, or vary its terms or to
11 determine the estate conveyed." *Laux v. Freed*, 53 Cal. 2d 512, 523 (1960); *see also Goble v. Dotson*,
12 203 Cal. App. 2d 272, 280 (1962). Nevertheless, where parol evidence is entirely consistent with and
13 in no way changes or contradicts the written contract, it should be admitted. *Id.* The parol evidence to
14 which IBM objects is Pico's testimony explaining the higher payments he made once the servicing of
15 the loan was assigned to IBM. This evidence was admitted, not to contradict the LMA, but to evaluate
16 IBM's statute of frauds defense and whether Pico had fully performed. Since this evidence was not
17 admitted "to add to, detract from, or vary" the terms of the LMA, it was properly admitted. *Laux*, 53
18 Cal. 2d at 523; *Goble*, 203 Cal. App. 2d at 280.

19 IBM also objected to the parol evidence of the trial modification payments made by Pico.
20 However, parol evidence is also admissible to interpret an ambiguous agreement. *Union Bldg.*
21 *Materials Corp. v. Haas & Haynie Corp.*, 577 F. 2d 568, 572 (9th Cir. 1978); *see also Fischer*, 109
22 Cal. App. 4th at 1446 (allowing parol evidence to resolve ambiguity regarding parties' intent to be
23 bound). Pico's testimony that he received the LMA after he completed the trial modification process
24 was properly admitted for the purpose of resolving the ambiguities inherent in Chase's agreement to
25 sign the LMA, with its later claim that it was free to renege thereafter. LMA ¶ 2(L). *Union Bldg.*, 577
26 F. 2d at 572.

1 **II. CONCLUSION**

2 This Memorandum Decision will serve as the Court's findings of fact and conclusions of law
3 pursuant to Federal Rule of Bankruptcy Procedure 7052. The Confirmation Objection is overruled and
4 the Claim Objection is sustained. The Debtors are to submit an order on the Objections consistent with
5 this Memorandum Decision.

6 IT IS SO ORDERED.

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8 Dated: August 9, 2011

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10 MARGARET M. MANN, JUDGE
11 United States Bankruptcy Court
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