

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

SOVEREIGN BANK,	:	NOVEMBER TERM, 2009
	:	
Plaintiff,	:	NO. 04667
	:	
v.	:	COMMERCE PROGRAM
	:	
XL-75, INC. and MARK JACKSON,	:	Control No. 10111901
	:	
Defendants.	:	

OPINION

In 2002, plaintiff Sovereign Bank (“Sovereign”) made a mortgage loan to defendant XL-75, Inc.’s (“XL-75”) predecessor in interest and obtained a personal guaranty of the loan from defendant Mark Jackson (“Jackson”). The mortgage loan Note contained an Indemnification Provision as follows:

[XL-75] hereby indemnifies and agrees to defend and hold harmless [Sovereign] from and against any and all losses, damages, or liabilities and from any suits, claims or demands, including reasonable attorneys’ fees incurred in defending such claim, suffered by [Sovereign] and caused by, arising out of, or in any way connected with the Loan Documents or the transactions contemplated therein (unless determined by a final judgment of a court of competent jurisdiction to have been caused by the gross negligence or willful misconduct of [Sovereign]) including, without limitation: [six types of disputes not applicable in this case].

In 2005, XL-75 paid off the loan and sued Sovereign for damages for breach of the loan contract, breach of fiduciary duty, breach of the implied covenant of good faith, and tortious interference with contract. Sovereign counterclaimed against XL-75 for breach of contract for non-payment of a prepayment penalty. Sovereign also joined Jackson as an additional defendant.

During the course of the underlying action, the parties entered into a Stipulation dismissing Sovereign’s claims as follows:

Sovereign's claims for all sums due and owing under the Loan Agreement . . . including, without limitation, the unpaid prepayment penalty in the principal sum of \$34,940.49, asserted against XL-75 in Sovereign's counterclaim, and against Jackson in Sovereign's Joinder Complaint, are hereby withdrawn, with prejudice, each party to bear their own fees, costs and expenses.

After trial, the court entered judgment in favor of Sovereign on XL-75's claims.

Sovereign subsequently filed this action asserting a claim against XL-75 and Jackson for \$226,264.95 in attorneys' fees Sovereign incurred defending XL-75's claims in the underlying action. Both parties have moved for summary judgment on Sovereign's claim for fees.

XL-75 and Jackson argue Sovereign's attorney's fees claim is barred by the terms of the parties' Stipulation in the underlying action. In the Stipulation, Sovereign agreed to withdraw with prejudice its "claims for all sums due and owing under the Loan Agreement." Sovereign's claim for attorneys' fees incurred in the underlying action was not yet due and owing when the Stipulation was signed because Sovereign had not yet prevailed in the underlying action.¹

Therefore, the Stipulation does not cover Sovereign's prospective claim for attorneys' fees.

The Stipulation further provides, upon withdrawal of Sovereign's counterclaims, "each party [is] to bear their own fees, costs and expenses." This phrase applies to the fees, costs and expenses incurred with respect to Sovereign's withdrawn counterclaim only. It does not apply to any fees, costs, or expenses that Sovereign incurred in defending against XL-75's claims in the underlying action. Therefore, Sovereign may pursue its claim for such attorneys' fees in this action.

Defendants also argue the Indemnification Provision in the Note does not cover the fees incurred by Sovereign in the underlying action because XL-75, rather than a third party, was the

¹ Under the Indemnification Provision, Sovereign can collect its attorneys' fees "unless determined by a final judgment of a court of competent jurisdiction to have been caused by the gross negligence or willful misconduct of [Sovereign]." By finding in favor of Sovereign on XL-75's claims in the underlying action, the court necessarily determined Sovereign was not grossly negligent or guilty of willful misconduct.

plaintiff suing Sovereign. The Indemnification Provision describes several types of disputes it covers, all of which are instances in which third parties assert claims against Sovereign. However, these are only examples, which are “include[ed], without limitation” in the broader language of the Indemnification Provision. The Provision encompasses more than these types of claims. It also includes “reasonable attorneys’ fees incurred in defending [any] claim, suffered by [Sovereign] and caused by, arising out of, or in any way connected with the Loan Documents or the transactions contemplated therein.”

XL-75’s suit against Sovereign for breach of the Loan Documents is clearly a claim arising out of the Loan Documents and the transactions contemplated therein. Therefore, Sovereign may recover from XL-75 Sovereign’s attorneys’ fees incurred in defending against XL-75’s claims in the underlying action. Since Jackson personally guaranteed XL-75’s predecessor’s obligations under the Note and other Loan Documents, Jackson is also personally liable for Sovereign’ attorney’s fees.

For all the foregoing reasons, XL-75’s and Jackson’s Motion for Summary Judgment is denied, and Sovereign’s Motion for Summary Judgment is granted.

BY THE COURT:

ARNOLD L. NEW, J.