

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**PASCAL J. VESCIO and
VATSALA VESCIO,
Confirmed Chapter 11 Debtors.**

**Chapter 11 Case
96-10153**

**PASCAL J. VESCIO and
VATSALA VESCIO,
Plaintiffs,
v.
NCS 1, L.L.C.,
Defendant.**

**Adversary Proceeding
02-1005**

MEMORANDUM OF DECISION
ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
PLAINTIFF-DEBTORS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Introduction

In conjunction with its Motion to Amend Proof of Claim, Defendant NCS 1, L.L.C. filed a Motion for Partial Summary Judgment (doc. #53), seeking judgment that three loans it holds are secured. Plaintiff-Debtors filed an objection to Defendant's Motion and cross-moved for the entry of partial summary judgment declaring the three loans to be unsecured (hereinafter, "Vescios' Cross-Motion") (doc. #73). For clarity, the three loans being discussed will be identified as follows: the Jeep Loan (which is account # 51-3805017 and is addressed in count I of the complaint); the \$350,000 Loan (which is account # 51-3804853 and is addressed in count II of the complaint); and the \$950,000 Loan (which is account # 51-3804838 and is addressed in count III of the complaint).

For the reasons stated below, the Defendant's Motion to for Partial Summary Judgment is granted with certain limitations and the Vescios' Cross-Motion is denied.

II. Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 157 and 1334.

III. Discussion

A. The Summary Judgment Standard

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C); FED. R. BANKR. P. 7056. A genuine issue exists only when the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant’s favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1002). In making its determination, the court’s sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

B. The Jeep Loan

Debtor Pasquale Vescio owned a 1990 Jeep that he pledged to the Defendant as collateral for a \$21,812 loan. In its proof of claim, NCS 1, L.L.C. (hereinafter, “NCS”)¹ claimed this loan was secured. Attached to the proof of claim was the certificate of title for the automobile, a promissory note evidencing the loan and a corresponding security agreement. The certificate of title indicates Mr. Vescio is the owner of the vehicle and that there is a lien on the vehicle. Both the promissory note and security agreement were executed

¹ NCS is the successor-in-interest to the claims of AMRESKO New England II, Inc., the entity that originally filed the proof of claim. Subsequent to the filing of the instant motion for partial summary judgment, the indebtedness was assigned to Landstar Investment II, Inc. For convenience, the Court shall refer to the subject proof of claim as NCS’s and intends to refer to the current holder of the notes when referring to “the Defendant.”

by Mr. Vescio and witnessed. These documents certainly establish a *prima facie* case for a finding that the Jeep Loan is secured. See 23 V.S.A. § 2042; see also, e.g., In re Farnham, 57 B.R. 241, 247-48 (holding that a lienholder who has complied with 23 V.S.A. § 2042 and who has not contributed to the erroneous omission of the lien on the certificate of title enjoys a perfected security interest in the titled vehicle). Moreover, the Court finds the Vescios have not provided any evidence that would disturb such a finding. Therefore, finding no material fact in dispute as to the secured status of the Jeep Loan and that the Defendant is entitled to judgment as a matter of law, the Court grants the Defendant’s motion for summary judgment on the validity of its secured status as to the Jeep Loan.

The extent of the security interest is a distinct question. The Vescios bifurcated the Jeep Loan in their amended plan, treating \$5,000 of the loan as secured and the balance as unsecured². NCS did not object to this treatment. The Vescios assert that the amount NCS claims to be due on the Jeep Loan is erroneous because NCS has not properly applied payments they have made under the amended plan. The questions of how much is due and whether payments made have been properly applied turn on the resolution of material facts in dispute. However, the Defendant’s motion for partial summary judgment does not seek a determination on either of these issues. The Vescios may pursue these two issues before the trier of facts at the trial in this adversary proceeding.

C. The \$350,000 Loan

In the Vescios’ Cross-Motion, they state that the \$350,000 Mortgage Note “might be secured if the Court were to allow NCS to amend its proof of claim to add the omitted \$350,000 Mortgage Deed . . .” Vescios’ Objection and Cross-Motion at p.5 (doc. #73). Indeed, on April 7, 2003, the Court did grant NCS’s Motion to Amend Proof of Claim (doc. #99), allowing, *inter alia*, NCS to attach the omitted \$350,000 Mortgage Deed to its proof of claim.³ After reviewing the amended proof of claim in support of the claim

² Section 506(a) of the Bankruptcy Code specifically provides that a claim is secured only to the extent of the value of the collateral.

³The Vescios have not appealed this Order.

under the \$350,000 note, the Court finds the \$350,000 promissory note is secured by a \$350,000 mortgage deed. See generally, Jones v. Guaranty and Indemnity Co., 101 U.S. 622 (1879) (where a note secured by a mortgage is renewed or otherwise changed, the lien of the mortgage continues until the debt is paid.). The Court further finds there is no material fact in dispute regarding the secured nature of the \$350,000 loan. Therefore, granting the Defendant summary judgment on this issue is appropriate.

In their Opposition, the Vescios also allege that NCS failed to apply all payments made by the Vescios to the \$350,000 loan and consequently the amount NCS claims to be due on this obligation is in error. This is a material factual dispute. However, the Defendant's motion for partial summary judgment does not seek a determination on either of these issues. Therefore, the Vescios may pursue the propriety of NCS's application of payments against this debt, and the amount now due under this note, before the trier of facts at the trial in this adversary proceeding

D. The \$950,000 Loan

As required by the Local Rules, NCS filed a Statement of Uncontested Facts (doc. #55) in support of its Motion for Partial Summary Judgment, see Vt. LBR 7056-1(a)(1). The Court will accept as true the facts presented in NCS's Statement of Uncontested Facts.⁴ Based upon these facts, the Court finds there is a \$950,000 promissory note, dated April 4, 1994, that is secured by a \$780,000 mortgage deed dated July 19, 1993 (hereinafter, the "\$780,000 Mortgage").⁵

The Court reaches this conclusion after considering both the validity of the security and the extent of the security. First, the Court has been presented with a mortgage that recites that it secures a \$780,000

⁴ The Vescios never filed any opposition to this Statement of Uncontested Facts. Cf., Vt. LBR 7056-1(a)(2) ("Opposition to a motion for summary judgment, if any, must be filed no more than 21 days after the motion is served. *A separate, short, and concise statement of disputed material facts **must** accompany the opposition brief.*") (emphasis added).

⁵ There are two mortgages between the parties dated July 19, 1993 (a commercial mortgage securing a \$350,000 promissory note and a mortgage securing the payment of a promissory note dated July 19, 1993 in the principal amount of \$780,000). The Court is satisfied that the commercial mortgage secured the \$350,000 promissory note. See supra Part C.

promissory note. In their supplemental papers, the Vescios contend there is no such promissory note, and in its Supplemental Memorandum of Law in Support of Motion for Partial Summary Judgment (doc. #89), NCS acknowledges this. NCS explains that initially there was a \$605,000 promissory note that was executed on July 19, 1993 in conjunction with the \$780,000 Mortgage; and, thereafter, on January 19, 1994, the Vescios renewed the \$605,000 promissory note and executed a new promissory note in the amount of \$780,000. See \$605,000 Promissory Note (#3230001162) (July 19, 1993), attached as Ex. 1 to NCS’s Supplemental Memorandum (doc. #89); “Renewal” Promissory Note (#3230001162) (Jan. 19, 1994), attached as Exhibit 2 to NCS’s Supplemental Memorandum (doc. #89). Finally, on April 4, 1994, the Vescios executed another new promissory note, documenting yet another renewal of the same promissory note, this time with an advance of new money and reflecting a total indebtedness of \$950,000. See “Renewal w/New Money” Promissory Note (#3230001162) (Apr. 4, 1994), attached as Exhibit 3 to NCS’s Supplemental Memorandum (doc. #89). All three promissory note documents signed by the Vescios indicate they were or are secured by the \$780,000 Mortgage. See, e.g., Nutting v. Bradford National Bank (In re Nutting), 44 B.R. 233, 236 (D. Vt. 1984) (instructing that “where the debtor executes renewal notes with the intent that the original security continue, the original security becomes an incident to the renewal note.”).

Second, having examined the language of the \$780,000 Mortgage, the Court finds NCS’s loan is secured to a maximum extent of \$780,000. The Court bases this finding on the plain language of the \$780,000 Mortgage Deed, which states, *inter alia*:

d. For better security of the indebtedness hereby secured, upon the request of the mortgagee, its successors or assigns, he shall execute and deliver a supplemental mortgage or mortgages covering any additions, improvements, or betterments made to the property hereinabove described and all property acquired by it after the date hereof (all in form satisfactory to mortgagee). . . .

This language, in combination with the absence of any “future advance” clause,⁶ convinces the Court that the

⁶ In its Supplemental Memorandum of Law, NCS acknowledges that, unlike the commercial mortgage securing the \$350,000 promissory note, the \$780,000 Mortgage does not contain a future advance clause.

parties contracted to have additional mortgages executed if additional collateral was deemed necessary. See id (“a prerequisite to secured status under an accrual clause is a showing by the lender that such intent existed at formation of the subsequent loan agreement.”). Therefore, finding no material factual dispute regarding the secured status of the \$950,000 loan and that the Defendant is entitled to judgment on this issue as a matter of law, the Court grants NCS’s Motion for Partial Summary Judgment on this note to the extent of \$780,000.

The Vescios challenge whether NCS has properly applied all payments made on the \$950,000 promissory note and dispute the balance NCS claims to be due on this promissory note. Since this turns on material facts that are in dispute, the accuracy of NCS’ application of the Vescios’ loan payments on this note and the balance due on this loan shall be determined by the trier of fact at the trial in this adversary proceeding.

E. The Vescios’ Cross-Motion for Partial Summary Judgment

The Vescios did not file the required Statement of Undisputed Facts in support of their Cross-Motion for Partial Summary Judgment. See Vt. LBR 7056-1(a)(1) (“A separate, short, and concise statement of undisputed material facts **must** accompany every motion for summary judgment. *Failure to submit this statement constitutes grounds for denial of the motion.*”) (emphasis added). Therefore, the Court does not have before it any undisputed facts upon which to grant the Vescios’ Cross-Motion for Summary Judgment as to the secured nature of the three enumerated loans. Accordingly, the Court denies the Vescios’ Motion for Partial Summary Judgment as to the secured status of the Jeep Loan, the \$350,000 Loan and the \$950,000 Loan both because of the procedural deficiency of the Cross-Motion and for the reasons set forth above.

IV. Conclusion

Finding no material facts in dispute and determining that the Defendant is entitled to judgment as a matter of law, the Court grants NCS’s Motion for Partial Summary Judgment on the three enumerated loans, and finds that the loans were secured, subject to the following limitations: (1) the Jeep Loan was secured, as of the confirmation of the amended plan, to the extent of \$5,000; (2) the \$350,000 Loan, when made, was secured to the extent of \$350,000; and (3) the \$950,000 loan, when made, was secured to the extent of

\$780,000.

The Defendant has not sought, and the Court is not granting, summary judgment on the questions of whether the Defendant applied the Vescios' payments properly or what amount is currently due on each loan. The Vescios may pursue those issues before the trier of fact at the trial in this adversary proceeding.

Conversely, finding the Vescios failed to create an evidentiary record upon which summary judgment could be granted, the Vescios' Motion for Partial Summary Judgment is denied.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

April 21, 2003
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge