

CAUSE NO. 2023-02005

FROST BANK,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
JOSHUA P. DAVIS, P.C. AND	§	
JOSHUA P. DAVIS,	§	
	§	
Defendants.	§	129 th JUDICIAL DISTRICT

FROST BANK MOTION FOR SUMMARY JUDGMENT

Frost Bank (the “Bank”), Plaintiff/Counter-Defendant, moves for summary judgment on the Bank’s claims against Joshua P. Davis P.C. (“JPD P.C.”), and Joshua P. Davis (“Davis”), Defendants/Counter-Plaintiffs, as follows:

SUMMARY OF THE CASE

The Bank seeks to recover \$152,911.17 principal plus accrued interest from JPD P.C. and Davis pursuant to the terms of a Promissory Note (“Note”) and the Joshua P. Davis Commercial Guaranty (“Davis Guaranty”). Additionally, The Bank seeks recovery of its reasonable and necessary attorneys’ fees from JPD P.C. and Davis.

FACTUAL BACKGROUND

On or about January 25, 2022, the Bank, as lender, entered into the Note with JPD P.C., as borrower, in the original principal sum of \$180,000.00. The Note was a renewal and extension of a promissory note entered into between the Bank, as lender, and JPD P.C., as borrower, dated October 20, 2021, in the original principal amount of \$200,000.00. In connection with the Note, Davis entered into the Davis Guaranty whereby Davis absolutely and unconditionally guaranteed and promised to pay the Bank the indebtedness of JPD P.C. The Note and Davis Guaranty are

attached to the Declaration of Mark Davis which is attached hereto as Exhibit 1.

Pursuant to the Note, JPD P.C. was to pay the loan in one payment of all outstanding principal plus all accrued unpaid interest on January 25, 2023. In addition, JPD P.C. was to pay eleven (11) consecutive interest payments, beginning February 25, 2022, with interest calculated on the unpaid principal balances using an interest rate as described in the Note. Further JPD P.C. was to pay four (4) quarterly consecutive principal payments of \$20,000.00 each, beginning February 25, 2022, during which interest continued to accrue on the unpaid principal balances using an interest rate as described in the Note.

At all times material hereto, the Bank has been the owner and holder of the Note.

The Note has not been paid as agreed and therefore the Note is in default.

Because of JPD P.C. and Davis failure to pay the Note, the Bank hired The Kruckemeyer Law Firm to assist it in the collection of the amounts owed. The Bank has agreed to pay The Kruckemeyer Law Firm a reasonable fee for its services.

By letter dated October 18, 2022 (the "Notice Letter"), the Bank provided JPD P.C. and Davis notice of their default, made a demand for payment of amounts then owed and provided notice of the Bank's intention to accelerate the indebtedness. The Notice Letter gave JPD P.C. and Davis until 5:00 p.m., Houston time, on Friday, October 28, 2022, to make the payment demanded. The Notice Letter is attached to the Declaration of Robert J. Kruckemeyer which is attached hereto as Exhibit 2.

By letter dated November 2, 2022 (the "Demand Letter"), the Bank provided notice to JPD P.C. and Davis that the Bank had accelerated the indebtedness and made demand upon JPD P.C. and Davis to honor the terms of the Note and the Davis Guaranty. The Demand Letter advised JPD P.C. and Davis that the Bank had set-off the amount of \$5,956.64 from Account

Number 502388189 and advised JPD P.C. and Davis how the Bank had applied the setoff to the indebtedness. The Demand Letter gave JPD P.C. and Davis until 3:00 p.m. on November 11, 2022, to pay the principal balance and outstanding interest due on the Note. The Demand Letter is attached to the Declaration of Robert J. Kruckemeyer which is attached hereto as Exhibit 2. The principal balance and outstanding interest on the Note was not paid as demanded, and has not been paid as of November 2, 2023.

The Note provided that upon default, the interest rate on the Note increased to 18% per annum.

The Bank filed its original petition on January 11, 2023. As of November 2, 2023, JPD P.C. owed the Bank \$152,911.17 principal and \$27,524.01 interest. Interest continues to accrue at the rate of \$76.45 per day.

JPD P.C. defaulted on its obligation to make payments to the Bank under the terms of the Note. Despite demand, JPD P.C. refused to honor its obligations pursuant to the terms of the Note and Davis has refused to honor his obligations pursuant to the terms of the Davis Guaranty.

On October 18, 2023, the Bank deposed Davis both as President of JPD P.C. and individually. Davis testified as follows:

Davis Admitted to Signing the Promissory Note

Davis, Joshua, (Page 16:3 to 16:7)

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3 (BY MR. M. KRUCKEMEYER) You have been handed a

4 document marked as Exhibit 3; is that correct?

5 A. Yes.

6 Q. And at the top it reads "Promissory Note"?

7 A. Yes.

Davis, Joshua, (Pages 16:21 to 17:4)

16

21 Q. All right.

22 If we flip to the last page of the
23 document, Page 3, we see a signature block about the
24 middle of the page. It says Joshua P. Davis, P.C., and
25 it's signed "Joshua P. Davis, President of Joshua P.

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1 Davis, P.C."; correct?

2 A. Yes, I see that.

3 Q. And you signed this document, sir?

4 A. I did.

Davis Admitted to Signing the Commercial Guaranty

Davis, Joshua, (Page 33:4 to 33:9)

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4 Q. (BY MR. M. KRUCKEMEYER) You have just been
5 handed a document marked as Exhibit 7; is that correct?

6 A. Yes.

7 Q. And this document is entitled "Commercial
8 Guaranty"?

9 A. I see that.

Davis, Joshua, (Pages 33:22 to 34:6)

22 Q. Okay.

23 And if we flip to Page 5 of this document,
24 we see a signature block at the top?

25 A. Yes.

1 Q. And it says "Guarantor"?

2 A. Correct.

3 Q. And under that, it says "Joshua P. Davis"?

4 A. Correct.

5 Q. And it's signed by yourself?

6 A. True.

A. Summary Judgment Evidence

The summary judgment evidence consists of the Declaration of Mark Davis, a Senior Vice President at the Bank, which is attached hereto as Exhibit 1, the Declaration of Robert J. Kruckemeyer, attorney at law, which is attached hereto as Exhibit 2 and the deposition testimony of Davis, the transcript of which is attached to the Declaration of Robert J. Kruckemeyer. The summary judgment evidence attached to this Motion proves the following:

- 1) That on or about January 25, 2022, the Bank, as lender, entered into the Note with JPD P.C., as borrower.
- 2) Davis signed the Note as President of JPD P.C.
- 3) Davis signed the Davis Guaranty.
- 4) That the Bank is the owner and the holder of the Note.
- 5) JPD P.C. did not pay the Note as agreed.

- 6) Davis did not pay JPD P.C.'s indebtedness to the Bank as agreed pursuant to the Davis Guaranty.
- 7) That the Note has not been paid as agreed and therefore the Note is in default.
- 8) That by letter dated October 18, 2022, the Bank provided notice to JPD P.C. and Davis of the Bank's intention to accelerate the indebtedness if payments were not made as demanded.
- 9) That by letter dated November 2, 2022, the Bank provided notice to JPD P.C. and Davis that the payments had not been made as demanded and that the Bank had accelerated the indebtedness and had setoff the amount of \$5,956.64 from Account Number 502388189 and advised JPD P.C. and Davis how the Bank had applied the setoff to the indebtedness.
- 10) That by letter dated November 2, 2022, the Bank demanded that JPD P.C. and Davis make payments as there in demanded on or before 3:00 P.M. on Friday, November 11, 2022.
- 11) That despite demand, JPD P.C. has refused to honor its obligations pursuant to the terms of the Note and that Davis has refused to honor his obligations pursuant to the terms of the Davis Guaranty.
- 12) That as of November 2, 2023, JPD P.C. owes the Bank \$152,911.17 principal and \$27,524.01 interest with interest continuing to accrue at the rate of \$76.45 per day.
- 13) That because of JPD P.C.'s and Davis' failure to pay the Note, the Bank has been required to hire The Kruckemeyer Law Firm to assist it in collecting the indebtedness owed to the Bank.
- 14) That, demand having been made, the Bank is entitled to recover its reasonable and necessary attorneys' fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001 *et seq.*
- 15) That the Bank is entitled to recover its attorneys' fees under the provisions of the Note.
- 16) That the Bank has incurred reasonable and necessary attorneys' fees in the amount of \$24,000.00.

ARGUMENT AND AUTHORITIES

A. Standard for Granting Summary Judgment

The Bank seeks affirmative relief against JPD P.C. and Davis. For the Bank to obtain

summary judgment on its claims for affirmative relief, the Bank must show that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law. In deciding whether there is a disputed material fact issue, evidence favorable to the non-movant will be taken as true. Further, every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Property Management Company, Inc.*, 690 S.W. 2d 546 (Tex. 1985). The Bank has brought causes of action against JPD P.C. and Davis for breach of contract and attorneys' fees.

B. The Bank's claims against Defendants

1. Breach of Contract

To recover on its cause of action for breach of contract against JPD P.C. and Davis the Bank must prove:

- (1) The note in question;
- (2) The party sued signed the note;
- (3) The plaintiff is the owner or holder of the note; and
- (4) A certain balance is due and owing on the note.

Dorsett v. Hispanic Housing and Educ. Corp., 389 S.W.3d 609, 613 (Tex. App. – Houston [14th Dist.] 2012, no pet). citing *Geiselman v. Cramer Fin. Group, Inc.*, 965 S.W. 2d 532, 536 (Tex. App. – Houston [14th Dist.] 1997, no writ).

The Bank has submitted summary judgment evidence conclusively establishing each of these elements. Accordingly, the Bank is entitled to judgment as a matter of law on its breach of contract claim.

2. Attorneys' Fees

The Bank is entitled to recover its attorneys' fees because it has proved its entitlement to

recovery on its breach of contract claim. Tex. Civ. Prac. & Rem. Code § 38.001 *et seq.* By letter dated November 2, 2022, demand was made upon JPD P.C. and Davis to pay the amounts due and owing to the Bank. The Declaration of Mr. Kruckemeyer establishes the following:

- 1) Because of JPD P.C.'s and Davis' breach of contract, the Bank has been required to hire Robert J. Kruckemeyer to assist it in collecting the indebtedness owed to the Bank by JPD P.C. and Davis;
- 2) Demand having been made, the Bank is entitled to recover its reasonable and necessary attorneys' fees herein pursuant to Tex. Civ. Prac. & Rem. Code §38.001 *et seq.*; and
- 3) The Bank has incurred reasonable and necessary attorneys' fees in the amount of \$24,000.00 through summary judgment, it will incur additional attorneys fees of \$25,000.00 should the Defendants appeal the judgment to the Court of Appeals and the appeal is unsuccessful, and that the Bank will incur further attorneys fees of \$25,000.00 should the Defendants appeal the Court of Appeals opinion to the Texas Supreme Court and that appeal is unsuccessful.

Additionally, the Note provides for Attorneys' Fees and expenses to be paid by the Borrower in the event the Bank hires an attorney to help collect on the Note.

The Bank has proved all elements of its cause of action against Defendants for attorneys' fees and is entitled to judgment as a matter of law.

3. Interest

The Note allows the Bank to charge interest at the rate of 18% per annum on all amounts owed post default. The Note reads, in part, as follows:

INTEREST AFTER DEFAULT. Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased to 18.000% per annum based on a year of 360 days. However, in no event will the interest rate exceed the maximum rate limitations under applicable law.

Additionally, Section 304.002 of the Texas Finance Code entitled, Judgment Interest Rate: Interest Rate or Time Price Differential in Contract, reads as follows:

A money judgment of a court of this state on a contract that provides for interest or time price differential earns post-judgment interest at a rate equal to the lesser of:

- (1) the rate specified in the contract, which may be a variable rate; or
- (2) 18 percent a year.

Accordingly, the Bank is entitled to pre and post-judgment interest at the rate of 18% per annum.

CONCLUSION

The Bank requests that the court enter summary judgment in its behalf on the Bank's causes of action for breach of contract and attorneys' fees and that the Bank have and recover judgment against JPD P.C. and Davis, jointly and severally, as follows:

1. The outstanding amount of principal due under the terms of the Note which is \$152,911.17 principal plus outstanding interest in the amount of \$27,524.01 through November 2, 2023.
2. Prejudgment interest on the Note at the rate of 18% from November 2, 2023, until the date of judgment;
4. Post judgment interest at the rate of 18% per annum;
5. Cost of suit;
6. Attorneys' fees in the amount of \$24,000.00 with an additional amount of \$25,000.00 should the case be appealed to the court of appeals and that appeal is unsuccessful and an additional amount of \$25,000.00 should the case be appealed to the Texas Supreme Court and that appeal is unsuccessful; and
7. Such other and further relief to which the Bank may be justly entitled.

Respectfully submitted,

/S/ Robert J. Kruckemeyer _____
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ATTORNEY FOR PLAINTIFF,
FROST BANK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Frost Bank Motion for Summary Judgment*** has been sent to all counsel of record by electronic service on this the 14th day of December, 2023.

/S/ Robert J. Kruckemeyer
Robert J. Kruckemeyer

Unofficial Copy Office of Marilyn Burgess District Clerk

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