IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.,
a West Virginia non-profit corporation,

Plaintiff,

v.

Civil Action No. 21-C-129
Presiding Judge: Joseph Reeder
Resolution Judge: Michael D. Lorensen

COOPER LAND DEVELOPMENT, INC.
an Arkansas corporation, and
JUSTICE HOLDINGS, LLC,

Defendants.

ORDER GRANTING GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING JUSTICE HOLDINGS LLC'S MOTION FOR SUMMARY JUDGMENT THAT JUSTICE HOLDINGS WAS A HOLDER IN DUE COURSE OF THE WORKING CAPITAL REVOLVING NOTE

Pending before the Court are two competing Summary Judgment Motions:

1. *Justice Holdings LLC's Motion For Summary Judgment That Justice Holdings Was A Holder In Due Course Of The Working Capital Revolving Note* ("JH Motion") filed by Defendant, Justice Holdings, LLC ("JH" or "Justice Holdings"); and

2. *Glade Springs Village Property Owners Association, Inc.'s Combined Cross-Motion For Partial Summary Judgment And Response In Opposition To Justice Holdings LLC's Motion For Summary Judgment That Justice Holdings Was A Holder In Due Course Of The Working Capital Revolving Note* "("GSVPOA Motion") filed by Plaintiff, Glade Springs Village Property Owners Association, Inc. ("GSVPOA"),.

Both the GSVPOA Motion and the JH Motion argue that there are no disputed material facts and the Court can determine as a matter of law (i) whether Justice Holdings is a holder in due

course of a Loan Agreement and corresponding Revolving Note, and (ii) whether Justice Holdings was a bona fide purchaser for value of the loan Agreement and Revolving Note. Additionally, the GSVPOA Motion argues that the Court may determine as a matter of law that Justice Holdings took an assignment of the Revolving Note, and that as an assignee, Justice Holdings is subject to all claims and defenses assertable against the assignor.

As set forth below, the Court holds that:

A. The Revolving Note, as amended, is clear and unambiguous on its face to establish that it does not meet the definition of a negotiable instrument. As a result, Justice Holdings cannot occupy the status of a holder in due course of the Loan Agreement and Revolving Note.

B. The doctrine of bona fide purchaser for value is inapplicable as Justice Holdings took an assignment of the Loan Agreement and Revolving Note and therefor took the Loan Agreement and Revolving Note subject to claims and defenses assertable against the assignor.

I. LEGAL STANDARD

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment must be given "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E. 2d 329, 336 (1995); *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E. 2d 546 syl. pt. 2 (1994). The movant has the initial burden to show the absence of a genuine issue of material fact. Once the movant has met that burden, the opponent of summary judgment must present specific evidence that there is a trial-worthy issue, or else suffer a judgment to be entered against him. Syllabus point 2, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d. 171 (1995); *Guthry v. North Western Mutual Life Ins. Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974). Although

courts must construe facts in the light most favorable to the party opposing summary judgment, the non-movant has the burden of setting forth facts demonstrating the existence of a genuine issue for trial. Indeed, the non-movant must satisfy its burden of proof by offering more than a mere scintilla of evidence. It must produce evidence sufficient for a reasonable jury to find in its favor. *See also Painter v. Peavey*, 192 W. Va. 189, 451 S.E.2d 755 (1984).

II. STATEMENT OF FACTS

1. Cooper Land Development, Inc. ("Cooper Land") was the Declarant[1] of Glade Springs Village beginning in 2001 when Glade Springs Village was created and ending in 2010 when Justice Holdings became the Declarant. Complaint, ¶ 7; Cooper Land's Answer ¶ 7, JH' Answer, ¶ 6.

2. On May 30, 2001, Cooper as the Declarant filed the *Declaration of Covenants and Restrictions Glade Springs Village, West Virginia* in the office of the Clerk of the County Commission of Raleigh County, West Virginia (the "Clerk's office") in Deed Book 5004, at page 6485 (the "Declaration").

3. Cooper Land as the declarant, directed GSVPOA to enter into a Loan Agreement, dated May 14, 2001, by and between GSVPOA, and Cooper Land for "capital to fund the initial operational and maintenance expenses" for Glade Springs Village and recited that "up to $2,000,000 is needed to meet these expenses." JH Motion, Exhibit A.[2]

4. A Revolving Note dated May 14, 2001, was executed contemporaneously with the Loan Agreement. GSVPOA Motion, Exhibit A.

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[1] Under UCIOA, "declarant" is defined as "any person or group of persons acting in concert who: (i) As part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of; or (ii) reserves or succeeds to any special declarant right." W. Va. Code § 36B-1-103(12).

[2] At times, the Loan Agreement is referred to as the Working Capital Loan.

5. The parties do not dispute that the Loan Agreement and Revolving Note were created in 2001 and amended numerous times as set forth in Exhibit A to the JH Motion.

6. The parties also do not dispute that the Loan Agreement and Revolving Note, as amended, were assigned from Cooper Land Development, Inc., to Justice Holdings on October 20, 2010.

7. More specifically, Justice Holdings acquired the Loan Agreement and Revolving Note through an *Assignment and Assumption of Working Capital Loan Agreement* between Cooper Land Development, Inc., as assignor, and Justice Holdings, as assignee (the "Assignment"). JH Motion, Exhibit C.

The Revolving Note

8. The Revolving Note, dated May 14, 2021, states that GSVPOA promises to pay "TWO MILLION DOLLARS *or so much thereof as shall be advanced and outstanding* . . . ." GSVPOA Motion, Exhibit 1 (emphasis supplied).

Amendment 1

9. The First Amendment to Loan Agreement, dated August 1, 2003 ("Amendment 1"), increased the maximum amount of the loan limit from $2,000,000 to $2,500,000. *Id.*

10. Amendment 1 also states that "Cooper agreed to loan up to $2,000,000 . . . ." *Id.*

11. Amendment 1 further states that "Cooper is willing to increase the loan limit of the May 14, 2001 Loan Agreement from $2,000,000 to $2,500,000." *Id.*

12. Next, Amendment 1 expressly states that "That certain Loan Agreement dated May 14, 2001 and all of its terms and conditions shall remain in full force and effect . . . ."

13. Importantly, Amendment 1 attached a Revolving Note dated August 1, 2003 (the "2003 Revolving Note"), which expressly states that GSVPOA promises to pay "TWO MILLION

FIVE HUNDRED THOUSAND DOLLARS *or so much thereof as shall be advanced and outstanding . . . .*" JH Motion, Exhibit A (emphasis supplied).

14. Amendment 1 further stated: "The initial Aggregate Principal Outstanding under the new Revolving Note shall be the current Aggregate Principal Outstanding reflected on the back of the Revolving Note dated May 14, 2001." The 2003 Revolving Note contains no such statement and, regardless, resort must be had to extraneous documents to determine the amount due at any given time.

15. The 2003 Revolving Note simultaneously (i) increased the lending limit of the Revolving Note, and (ii) defined the principal sum as ""TWO MILLION FIVE HUNDRED THOUSAND DOLLARS *or so much thereof as shall be advanced and outstanding . . . .*" JH Motion, Exhibit A (emphasis added).

Amendment 2

16. The Second Amendment to Loan Agreement, dated May 1, 2006 ("Amendment 2"), increased the Revolving Note's lending limit a second time, from $2,500,000 to $2,600,000. "CLD is willing to increase the *loan limit* of the August 1, 2003 First Amendment to Loan Agreement from $2,500,000 to $2,600,000. *Id.* (emphasis supplied).

17. As with Amendment 1, Amendment 2 likewise stated: "That certain Loan Agreement dated May 14, 2001, as reaffirmed and amended by the First Amendment to Loan Agreement dated August 1, 2003, and all of its terms and conditions as amended, shall remain in full force and effect . . . ."

18. Importantly, Amendment 2 attached a Revolving Note, dated May 1, 2006 (the "2006 Revolving Note"), which expressly states that GSVPOA promises to pay "TWO MILLION

SIX HUNDRED THOUSAND DOLLARS *or so much thereof as shall be advanced and outstanding* . . . ." JH Motion, Exhibit A (emphasis supplied).

19. Although there is an Exhibit B attached to the 2006 Revolving Note purporting to state the balance as of May 1, 2006, the 2006 Revolving Note simultaneously (i) increased the lending limit of the Revolving Note from $2,500,000 to $2,600,000, and (ii) defined the principal sum as "TWO MILLION SIX HUNDRED THOUSAND DOLLARS *or so much thereof as shall be advanced and outstanding* . . . ." GSVPOA Motion, Exhibit A (emphasis added).

20. Amendments 3-10 merely extended the maturity date of the Revolving Note. JH Motion, Exhibit A; JH Motion, pp. 3-4.

Subsequent Lending

21. In the Motion, Justice Holdings concedes that there was additional lending under the Revolving Note after execution of Amendment 2 and the 2006 Revolving Note: "This $82,174.25 was added as an accrued payroll expense to the balance of the Working Capital Loan Agreement." JH Motion, p. 3.

III. DISCUSSION

A. GSVPOA is Entitled to Summary Judgment as a Matter of Law That the Revolving Note, as Amended, is Not a Negotiable Instrument.

Applicable Statutory Law

Under West Virginia's codification of Article 3 of the Uniform Commercial Code, negotiable instrument is defined as follows:

> (a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order *to pay a fixed amount of money*, with or without interest or other charges described in the promise or order, if it:

> (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) Is payable on demand or at a definite time; and
>
> (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

W. Va. Code §46-3-104(a) (emphasis supplied). Importantly, "instrument" means "negotiable instrument" under Subsection (b). *Id.*[3]

As such, in order for a party to obtain holder in due course status under W. Va. Code §46-3-302, the subject document must be an "instrument" which is defined more specifically as a "negotiable instrument." *Id.*[4]

Applicable Case Law

Case law involving identical circumstances has found that inclusion of the language in a promissory note "or so much thereof as may be advanced" prevents the promissory note from being a "negotiable instrument" because it is not a loan for a fixed sum and the amount actually due at any given time is not ascertainable by review of the face of the promissory note.

In *Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001-1002 (5th Cir. 1992), the Court dealt with a promissory note for "the sum of TWO MILLION AND NO 100 DOLLARS ($2,000,000) or so much thereof as may be advanced...." *Id.* The Court confirmed that, because such language made it impossible to ascertain an exact amount due from the face of

[3]The JH Motion asserts that the Loan Agreement is to be construed under Arkansas law. Arkansas Code §4-3-104(a) and (b) are identical to W. Va. Code §46-3-104(a) and (b).

[4]Arkansas Code §4-3-302 is identical to W. Va. Code §46-3-302.

the note, it was not a negotiable instrument, and the assignee of the note could not be a holder in due course:

> The district court determined that the RTC did not qualify as a holder in due course because it concluded that the Note was not a negotiable instrument. The district court based its decision upon its finding that the note failed to contain an unconditional promise to pay a sum certain. In his memorandum opinion, Judge McBryde stated:
>
> The note in this case does not contain an obligation to pay a "sum certain", but rather "the sum of TWO MILLION AND NO100 DOLLARS ($ 2,000,000) or so much thereof as may be advanced...." 753 F. Supp. at p. 1337 n. 2.
>
> Notwithstanding the RTC's argument that the sum certain requirement should be liberally construed, we agree with the finding of the district court and hold that the Note fails to demand the payment of a sum certain. The language employed by the Note fails to disclose the exact amount to be repaid by the Partners. The amount advanced to the Partners cannot be certainly determined absent an inquiry to other documents. Since the Note does not facially demand payment of a sum certain, the Note is non-negotiable. The RTC, therefore, cannot enjoy the protection provided to a holder in due course. *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975, 980 n. 10 (5th Cir.1992); *Sunbelt Savings, FSB Dallas, Texas v. Montross*, 923 F.2d 353, 356 (5th Cir.), aff'd, *Resolution Trust Corporation v. Montross*, 944 F.2d 227 (1991) (en banc) (per curiam).

Resolution Trust Corp. v. Oaks Apartments Joint Venture, 966 F.2d 995, 1001-1002 (5th Cir. 1992).

The U.S. District Court for the Western District of Texas reached the same conclusion, citing with approval to *Resolution Trust*:

> First, several courts have found that promissory notes are non-negotiable for not meeting the sum-certain requirement when the note includes the phrase "or so much thereof as may be advanced/outstanding" after stating the principal amount due on the note. *See, e.g., Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001 (5th Cir. 1992) (holding note non-negotiable because principal amount due was "the sum of [$2,000,000] or so much thereof as may be advanced"); *Bank of Am., NA. v. Alta Logistics, Inc.*, 05-13-01633-CV, 2015 Tex. App.

> LEXIS 1218, 2015 WL 505373, at *3 (Tex. App.—Dallas Feb. 6, 2015, no pet.) ("the Note states the amount due is $125,000 'or so much as may be outstanding,' and the unpaid principal balance may not be determinable without reference to BOA's internal records. . . ."). This is because the amount of outstanding principal is not readily determinable on the face of the note. *Id.*

Gillmann v. Fisher, 2018 U.S. Dist. LEXIS 227196, *5-6 (W.D. Tex 2018).

Next, the Indiana Court of Appeals collected cases on this issue:

> Other courts have faced the issue or a situation quite similar to it and held that such an agreement is not a negotiable instrument. For example, in *Resolution Trust Corp. v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992), reh. denied, the Fifth Circuit agreed with a district court's opinion that "the note in this case does not contain an obligation to pay a 'sum certain,' but rather 'the sum of TWO MILLION AND NO/100 DOLLARS ($2,000,000) or so much thereof as may be advanced. . . .'" *Id.* at 1001; *see also In re Hipp v. Lawrence Systems et al.*, 71 Bankr. 643 (N.D. Tex. 1987). The Fifth Circuit reasoned that the language employed by the note failed to disclose the exact amount to be repaid. *Resolution,* 966 F.2d at 1001. That is, the amount advanced to the parties could not be determined with certainty absent an inquiry to other documents. Accordingly, the note did not facially demand payment of a sum certain, and hence was not negotiable. Id.; *See also Cadle Co. v. Richardson*, 597 So. 2d 1052 (La. Ct. App. 1992) (holding that a revolving loan account was not an unconditional promise to pay a sum certain); *Goss v. Trinity Savings & Loan*, 813 P.2d 492 (Okla. 1991) (holding that an unconditional guarantee did not contain a promise to pay a sum certain in money because the principal amount was adjustable); *In re 1301 Connecticut Ave. Assoc. v. Resolution Trust Corp.*, 126 Bankr. 823 (D.C. 1991) (holding that a construction loan, containing a condition whereby the principal could increase, was not a negotiable instrument because it was not an unconditional promise to pay a sum certain).

Yin v. Society Nat'l Bank Ind., 665 N.E.2d 58, 62 (Ct. App. In. 1996). Importantly, in the *Connecticut Ave Assoc* case cited above, the loan at issue was not a negotiable instrument because the principal could increase, which is precisely what occurred here by Justice Holdings' own admission that there was additional lending. *Id*; Motion , p. 3.

Here, there is no dispute as to any material fact that:

(i) The Revolving Note, the 2003 Revolving Note and the 2006 Revolving Note all contained a maximum lending amount qualified by the phrase "or so much thereof as shall be advanced." JH Motion, Exhibit A.

(ii) Exhibit B to the 2006 Revolving Note purported to state a balance as of May 1, 2006, but the 2006 Revolving Note simultaneously increased the lending limit from $2,500,000 to $2,600,000, *Id.* and

(iii) Justice Holdings did, in fact, provide additional lending after execution of the 2006 Revolving Note. JH Motion at p. 3.

Under the above-referenced undisputed facts and the foregoing authorities, the Revolving Note (in all iterations) fails as a negotiable instrument for two reasons: First, the phrase "or so much thereof as shall be advanced" (which expressly exists in the Revolving Note, the 2003 Revolving Note, and the 2006 Revolving Note), makes it impossible to ascertain a fixed amount due from review of the face of the respective Revolving Notes. Second, because the 2006 Revolving Note, the last substantive amendment to the Revolving Note, increased the lending limit, there is no dispute that the principal balance could increase, further eliminating any possibility of ascertaining the balance due from the face of the 2006 Revolving Note or its Exhibit B. Because the Revolving Note, as amended, is not a negotiable instrument, Justice Holdings cannot be a holder in due course as a matter of law.

B. Justice Holdings' Bona Fide Purchaser Argument is Inapplicable as Justice Holdings Took an Assignment of the Working Capital Loan Subject to Claims and Defenses Against Cooper Land, the Assignee.

JH Motion asserts: "Should the Court find that Justice Holdings was not a holder in due course, the common law regarding bona fide purchasers dictates that Justice Holdings has no liability to the POA for the performance of its obligations under the Working Capital Loan." JH Motion, p. 6.

The bona fide purchaser doctrine essentially protects a purchaser of *real estate* from title disputes such as unknown or unrecorded interests or conveyances:

> We have also described a bona fide purchaser of land as "'one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.'" *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921) (quoting *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N.W. 228 (1897)). *See also Simpson v. Edmiston*, 23 W.Va. 675, 680 (1884) ("[A] bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it."); Black's Law Dictionary 1249 (7th ed.1999) (defining a bona fide purchaser as "[o]ne who buys something for value without notice of another's claim to the item or of any defects in the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.").

Whiteside v. Whiteside, 222 W. Va. 177, 182-183 (2008) (citing *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005). Additionally,

> A bona fide purchaser of property takes title free and clear of adverse interests, unknown rights, unrecorded equitable claims, outstanding interests, and any and all liens of third parties. An instrument affecting the title to land is invalid as to a bona fide purchaser having no knowledge of the existence of such instrument.

77 Am Jur 2d Vendor and Purchaser § 362 (citations omitted).

Justice Holdings cites to *Goddard v. Hockman*, 874 S.E.2d 773, 782 (W. Va. 2022), in an effort to support the bona fide purchaser argument. However, *Goddard* was a case that involved a trustee's sale of real estate. Specifically, the Court in *Goddard* dealt with a "Declaration of Covenants" that was recorded after a "Deed of Trust." *Id.* The Court held that the trust deed sale under the deed of trust extinguished only covenants and restrictions that were *subsequent* to the recording of the deed of trust: "[T]he trustee's sale of the acreage to Mr. and Mrs. Stephens *extinguished all prior covenants and restrictions that post-dated the execution of the deed of trust*,

and that their successor in interest, the petitioner, took the subject property free and clear of all such covenants and restrictions." *Id.* at 776 (emphasis supplied).

Goddard reinforces the proposition that a bona fide purchaser is really only applicable to protect adverse claims to title: "A bona fide purchaser is a wholly innocent party who, despite having used reasonable diligence, is unable to ascertain any conflicting rights to the subject property and has no actual notice of any such conflicts." *Id.* at 787.

Justice Holdings makes no argument that there are any adverse claims of "ownership" regarding the Working Capital Loan.

The transfer of the Loan Agreement and Revolving Note to Justice Holdings is more properly viewed as an assignment of an account under West Virginia Code §46-9-404:

> § 46-9-404. Rights acquired by assignee; claims and defenses against assignee.
>
> > (a) Assignee's rights subject to terms, claims and defenses; exceptions. — Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), inclusive, of this section, the rights of an assignee are subject to:
> >
> > (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
> >
> > (2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

W. Va. Code § 46-9-404. *See also Blue Ridge Bank, Inc. v. City of Fairmont*, 240 W. Va. 123, 128 (2017) (an assignee takes an assignment subject to the account debtor's defenses and claims against the assignor).

Exhibit C to the JH Motion is the *Assignment and Assumption of Working Capital Loan Agreement* between Cooper Land Development, Inc., as assignor, and Justice Holdings, as assignee (the "Assignment"). JH Motion, Exhibit C. The Assignment expressly identified the May

14, 2001 Loan Agreement and Revolving Note as the "Loan Documents." *Id.* Additionally, the Assignment expressly provides:

> WHEREAS Assignor and James C. Justice Companies, Inc., a West Virginia corporation ("Justice") are parties to that certain Purchase Agreement dated July 20, 2010 (the "Purchase Agreement") whereby Assignor agreed to convey to Justice certain real properties and other assets in return for funds and Justice's assumption of certain liabilities of Assignor.
>
> WHEREAS Justice has assigned all of its rights, duties and obligations under the Purchase Agreement to Assignee, and Assignee has assumed such rights, duties and obligations . . . .

Id at p. 1. Finally, Paragraph 2 of the Assignment states:

> Assignment and Assumption. Assignor does hereby assign and Assignee does hereby assume and agree to perform all of Assignor's obligations including, but not limited to, each and every term, condition and covenant of and under the Loan Documents accruing from and after and relating to the period from and after the Effective date.

Id at p. 2.

As such, the bona fide purchaser doctrine has no application to the assignment of the Loan Agreement and Revolving Note to Justice Holdings, and Justice Holdings took the Loan Agreement and Revolving Note subject to the claims and defenses GSVPOA may assert against the assignor, Cooper Land Development, Inc.

It is accordingly ORDERED that:

1. The GSVPOA Motion is GRANTED and the JH Motion is DENIED;

2. The Court grants summary judgment in favor of GSVPOA and against Justice Holdings by holding that the Revolving Note, as amended, is not a negotiable interest capable of conferring holder in due course status upon Justice Holdings;

3. The Court grants summary judgment in favor of GSVPOA and against Justice Holdings that the bona fide purchaser doctrine has no application to Justice Holdings as a matter of law with respect to the Loan Agreement and the Note; and

4. The Court grants summary judgment in favor of GSVPOA and against Justice Holdings that, under express terms of the Assignment, Justice Holdings took an assignment of the Loan Agreement and Revolving Note subject to any pre-existing claims and defenses GSVPOA held against Cooper Land as the assignor.

Enter: 12/4/23

Honorable Joseph Reeder, Circuit Judge

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