2013 WL 8136814 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Rufus STANCIL and Delores Stancil, Appellants,

v.

FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, Appellee.

No. 12-CV-1382.
January 7, 2013.

On Appeal from the Superior Court of the District of Columbia
Civil Division (Case Number Car6061-11 R (RP)

Brief of Appellant

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***1** ISSUE PRESENTED FOR REVIEW

1. The cause arises from a claim of breach written contract and an Oral Agreement promised to be reduced to writing, to forebear foreclosure action on real property for $70,000.

2. Whether Defendant-Appellee breached the Implied Good Faith and Fair Dealing requirement of the District of Columbia Uniform Commercial Code in its contractual relationship with Plaintiffs-Appellants under the implied terms of the contract.

3. Whether the court properly dismiss the cause of action under Superior Court Rule 12 (b) 6 for alleged failure to state a claim upon which relief could be granted.

4. Whether Appellants' claims prohibited by the statute of frauds and the parole evidence rule. 5 Promissory Estoppel

***2** *STATEMENT OF THE CASE*

This case involves Appellee's foreclosure sale of commercial property owned by Appellants who are **elderly** in age in excess of 77 years at the time of the sale. At the time of the sale and at all times herein, Appellants suffered both mental and physical stabilities. Appellee's representative was completely aware of Appellants' disabilities.

Prior to being held in default and the scheduled foreclosure sale of property, Appellants tendered to Appellee One Hundred Thousand, ($100,000) Fifty Thousand ($50,000) and Twenty Thousand ($20,000) Dollars. In consideration of the amounts, it was mutually agreed between Appellee and Appellants that Appellee would forebear foreclosure sale of the property and would reduce the agreement to writing. Appellee did not reduce the forbearance agreement to writing. Appellee Foreclosed upon the property and sold the property at a foreclosure auction.

FACTUAL AND PROCEDURAL BACKGROUND

The Appeal is from a final order of Honorable Judge John M. Mott, from the District of Columbia Superior Court dismissing Appellants' amended complaint pursuant to Defendant's 12 (b) 6 motion. As stated by the Court Order. JA 59-70: “This action arises out of a dispute over two foreclosure sales and an alleged ***3** oral agreement to stay the foreclosure. On April 9, 2009, defendant First Mount Vernon Industrial Loan Association executed a $500,000 Commercial Deed of Trust, with plaintiffs as beneficiaries for a property consisting of condominium units at 646 Newton Place for “commercial investment purposes.” (“Def. Ex. 1, 2”). See Court Order, (JA 69 pg#1). There were two foreclosure sales of the property, the first on or about July 28, 2011 and January 25, 2012. (*id at #2*). “Further, plaintiffs maintain that sometime before June 16, 2012, they and defendant entered into an oral agreement in which plaintiffs promised to pay defendant $50, 000 in exchange for defendant staying the foreclosure of the property. They assert that defendant promised to put this agreement into writing and failed to do so. Defendant denies such an agreement was ever reached. On June 16, 2012, plaintiff paid defendant $50,000, which plaintiffs purport was response to the agreement. On the other hand, defendant asserts the $50,000 exchange was intended to pay part of the principal still owed on the property.” (*Id* at pg#2).

SUMMARY OF THE ARGUMENT

The court order dismissing all counts in the amended complaint was in error. The complaint factual allegations supported the legal claims and defied the grant of a 12 (b) (6) motion for failure to state a claim upon which relief could be ***4** granted. The court's dismissal of the claims is predicated on the ruling that the oral agreement is prohibited by the statute of fraud and the parole evidence rule and that the terms of the contact is unambiguous.

Appellants argues that the terms of the contract are sufficient to support Appellee's violation and breach of the contract and to the extent that there are express ambiguous clauses and discretionary clause in the contract, Appellants must be given the benefits of the ambiguity and that the Appellee acted in bad faith in exercising the discretionary terms of the contract; (Balloon Deed of Trust Note) JA 55 -58.

ARGUMENT

THE DISMMISAL OF APPELLANTS' CLAIMS PURSUANT TO SUPERIOR COURT CIVIL RULE 12 (B) (6) FOR FAILURE TO STATE A CLAIM UPON WICH RELIEF CAN BE GRANTED WAS ENTERED IN ERROR AS A MATTER OF FACT AND LAW AND MUST BE REVERSED AND THE CASE REMANDED TO THE COURT FOR DISCOVERY AND TRIAL ON THE MERITS

The case is primarily one of contract interpretation: The relevant terms of the contract are:
CONTRACT TERMS (1)

“Commencing on June 1, 2009, and continuing on the 1st day of each and every month thereafter interest-only payments of **$7,500.00,** with the entire remaining unpaid balance of principal and interest, if not sooner paid, being due and payable in full on or before May 1, 2014. The monthly interest Only ***5** payment will be made from an Interest Reserve ($90,000.00) established at closing until depleted. Once the Interest Reserve is depleted it shall be the Borrower's responsibility to make the full payments.” JA at 55.

INTERPRETATION

The above terms are unambiguous. By calculation, the $100,000 reserve would be depleted in exactly one year, June 1, 2010, with the interest and principal payments starting on July 1, 2012.

CONTRACT TERM (2)

" Each installment when so paid to be applied first to the payment of late charges, second to the payment of interest on the amount of the principal remaining unpaid, and the balance thereof to be credited to the principal." JA at 55.

A finding by the court that the payment of $170,000 was a sufficient amount to bring the Contract current and that the $170,000 was misapplied, Appellant was not in default and the foreclosure sale of the property was inappropriate.

CONTRACT TERM (3)

"And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event, the unpaid balance of the aforesaid principal sum and accrued interest shall at the option of the holder hereof at once become and be due and payable." JA at 55.

The operative word is Option, which provide Appellee with discretionary ***6** authority to demand full payment or to exercise the option to accept partial payments and not accelerate the principal of the Contract.

CONTRACT TERM (4)

" Borrower shall be responsible for all cost of collections, including without limitation, court cost, attorney fees of at least 20% of the outstanding indebtedness under the Note and all other cost of collection to the extent not prohibited by applicable law." JA at 55, pg#2.

The cost of collection set a condition prerequisite. If the Appellee exercises the discretionary option to activate the contract acceleration clause, only then will the attorney fees become due. Even with that being the case, the amount of attorney fees is not set, only the limitation to the extent of 20% of the outstanding indebtedness is assessable to Appellee. The activation of the acceleration clause must, by contract terms, precede the collection process. Only then will the Appellee would have elected the option.

The $170,000 was paid by Appellant to Appellees agent, Dale Duncan on or about June 17, 2011. Shortly thereafter, on or about June 24, 2011, Appellee activated the acceleration clause and foreclosed on the property and sold the same at a foreclosure auction and refused to provide Appellants a payoff amount as required by law. By the terms of the contract, the attorney fees had not become owed because they had not been earned and absolutely no activity for ***7** earning the fees had occurred.

CONTRACT TERM (5)

"Additionally, in the event of default and at the sole discretion of the Lender, if said note is modified, extended or default cured, there shall be an administrative/ reinstatement fee equal to two and one-half (2.5%) of the principal balance and all outstanding interest and penalties."

Here again, Appellee reserves a discretion clause (Option) to either modify the contract with acceptance of an amount less that the full outstanding principal, interest and penalties, or to modify the contract with acceptance of an amount less that the total

amount then due. By accepting the $70,000 before activating the acceleration clause and the initiation of foreclosure procedures, by operation of the terms of the contract, Appellee exercised the option of modification. By operation of law, Appellee was required to put in writing any modification of the contract after or before accepting the $70,000 from Appellants.

Standard of Review.
(1) "When addressing a Rule 12 (b) (6) motion to dismiss, the facts must be viewed in a light most favorable to the non-moving party. Jordan Keys & Jessamy, LLP v. St. Paul Fir & Marine Ind. Co., 870 A. 2d 58, 62 (D.C. 2005)."

(2) All factual allegations in the complaint must be accepted by the court as true.

***8** (3) A motion pursuant to Rule 12 (b) (6) "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of a defense." *Edwards v. City of Goldsboro,* 178 F. 3d. 231, 243 (4th Cir. 1999).

DEFENSE OF COUNT TWO OF THE AMENDED COMPLAINT

FRAUDULENT MISREPRESENTATION AS TO ATTORNEY'S FEES

See Court Order of Dismissal at pg#6-Complaint, pg#9-10, Count#2

Facts: Appellants paid Defendant $170,000 in consideration for the promise of forbearance of foreclosure. Appellee represented that in exchange for the $170,000, it would not foreclosure on the property and reduce the agreement to writing. Appellants relied on the promise to their detriment in that the property was foreclosed upon and sold. The agreement of forbearance constituted a contract between the parties. The foreclosure sale of the property constituted a breach of the contract. Appellee's representation for the acceptances use of the $70,000 was misrepresented because it was not used for forbearance foreclosure purposes.

Pleading requirement: Contrary to the court order, the Amended Complaint met the pleading requirements for the claim of fraudulent misrepresentation. The complaint properly alleged the element of reliance, malice and specific intent to deceive and detriment suffered by Appellants and a prayer for damages. Under the terms of the contract default status, Appellants was only obligated to pay the ***9** attorney fees in consideration for foreclosure forbearance. Otherwise, nonpayment of the fees would result in foreclosure on the property.

In re Estate of Mc Kenney No.05-PR-1271 953 A2d 336 (D.C. 2008). For pleading purposes to defeat a 12 (b) (6) motion, the required elements are (1) a false representation (2) made in reference to a material fact; (3) made with knowledge of its falsity; (4) made with the intent to deceive; and (5) action was taken in reliance upon the representation. Id at 341-42. The lower court emphasized the element of reliance in a fraudulent misrepresentation cause of action but found no reason to question whether Appellants reasonably relied upon the Appellee's representation. Such, however, is an issue of fact not one of law.
"The recipient of a fraudulent misrepresentation can recover monetary damages in tort only if he establishes all of the elements of common law fraudulent misrepresentation." See Estate of Mc Kenney at 341 citing Restatement (Second) of Torts Sec. 525, at 55 (1977).Court order at pg#6.

The lower court emphasizes the existing contract between the parties:
("Balloon Deed of Trust Note") and expressed that:

(" an actionable breach ,detrimental reliance and misrepresentation could exist only at the initial execution of the contract between the parties.")

Such conclusion is contrary to the expressed and implied terms of the contract.

***10** All action involving the contract are subsequent to the initial contract consummation. Under the existing terms of the contract, a default by Appellants grants the Appellee the authority to use the option to activate the discretionary modification terms of the contract for consideration. Those terms are:Additional, **in the event of default and at the sole discretion of the lender.")** Id at #3. Appellan's obligation to pay the attorney fees and related expenses upon default was subject to Appellee's discretion to accept the same or, alternatively, foreclose on the property and seek recovery of any deficiencies, including cost, attorney fees and recoverable related fees. When Appellee accepted the $170,000 from Appellants, Appellee exercised the discretionary clause of the contract. Such exercise of discretion ipso facto modified the contract with mandatory required writing of the same. By law, Appellee was obligated to exercise the discretionary terms in good faith and fairness. Implied in the good faith exercise of the discretionary terms of the contract is the requirement of full disclosure for the purpose of acceptance of the $170,000 and forbearance of foreclosure. Modification of the contract required a written document that constituted new contractual terms. Because the modification of the contract was within the (" sole discretion of the Lender") only the lender could provide the written modification terms. The lender ***11** failure to provide the modification terms for consideration of acceptance of the $170,000 amounted to a breach of contract. However, the failure to modify the contract in writing does not confer upon the Appellee a statute of fraud defense because the modification was activated as a matter of original contractual agreement and the terms therein.

CONTRACT MANIPULATION

Appellee manipulated the terms of the contract by using the terms to induce Appellants in making payment in the aggregate of $170,000 for forbearance of foreclosure and thereafter used the terms of the contract to claim entitlement to the $170,000 under the contract terms and foreclosed upon the property. Appellee acted in bad faith.

APPELLANTS' CONTRACT RIGHTS: Appellants had a right to not pay the attorney fees and other cost and to allow the property to proceed to foreclosure sale. In exercising the rights, Appellants could have benefited substantially. For example, if the foreclosure sale of the property netted an amount of Two Hundred Thousand ($200,000) Dollars in excess of the amount owed to Appellee, there would have been no deficiency owed by Appellants and they would have saved $170,000. Appellant may have been entitled to payment of any surplus amount.

*12 ACTION INDEPENDENT OF THE CONTRACT CONTRACT MANIPULATION

The lower court cites Choharis v. State Farm Fire & Gas. Co., 961 A. 2d 1080, 1089, for the proposition that action independent from the contract is required to sustain tort and decided, (" the court will treat thus claim as a contractual misrepresentation claim." Court Order JA 59, foot note#5, pg#6. Logically, if the Appellee accepted Appellants' $70,000 and did not honor the agreement upon which the consideration was tendered, Appellee acted outside of the contract (simply used and manipulated the terms of the contract) and Appellee's acceptance of the consideration is fraudulent and illegally obtained. The contractual terms were manipulated and used to commit fraud upon Appellants with an anticipated defense within the Statute of Frauds.

King v. Indus. Bank of Washington, 474 A 2d 151, 155 (D.C. 1984). The lower court cited King for the proposition ("one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not"). Id 155. The proposition is well stated but for the opposite proposition. ***13** Involved parole evidence is not sought to contradict the terms of an existing contract. Appellant affirms the content of the original contract between the parties and contend that the contract contained a latent mutuality of obligation upon the parties that was triggered by Appellee's acceptance of the $170,000 in consideration for forbearance of foreclosure. The mutual obligation required Appellee, according to the express terms of the contract, to modify the contract to reflect the modification and to present the same to Appellant in writing and not to foreclose on the property. The terms of the contract are unambiguous and no contradiction is sought. The modification element required the presentment of a new- Modified Contract consistent with the exercise of the terms of the existing contract as to default status and foreclosure

proceedings. In King, the Appellant failed at all stages, including the pleadings stage, to allege the element of Reliance, not so in the instant case. See King Id at 155. Forrest v. Verizon Communications, Inc. 805 A. 2d 1007, 1010 (D.C. 2002) was cited by the court for the same position as King.

THE COURT'S CONCLUSION AS TO COUNT TWO

" Defendant charged plaintiff according to this provision. Plaintiffs do not contend they were induced to sign the contract with the understanding that they would not ever be charged attorney's fees. Indeed, they cannot claim this ***14** because there is an attorney's fee provision of the and they are bound by the contract that they agreed to.")

APPELLANTS' CONCLUSION AS TO COUNT TWO

The court's reasoning and contract interpretation support an opposite conclusion.

III. Fraudulent misrepresentation of attorney's fees: JA 64.

The court conclusion that Appellee charged Appellants the $100,000 according to this the 20% provisions of the contract is incorrect. The court did not consider the condition prerequisite as to the payment of the attorney fees.

As to the attorney fees, the contract, as previously stated, set conditions prerequisite for the payment of the attorney fees. Appellee waived the attorney fee option by accepting payment prior to activating the acceleration clause of the contract.

Contract interpretation: The terms of the agreement provided that the total sum owed by Appellants for the property must be paid to avoid foreclosure sale of the property or repossession of the same. However, the Appellee retains the option to proceed with enforcement of the terms.

Further contract terms

The record is void of the Appellee's decision to exercise the collection option and ***15** foreclosure proceedings prior to its acceptance of the $170,000. Therefore, the obligation for payment of any sum *as to attorney fees had not been assessed or sought by Appellee before acceptance of the $170,000.*

Contract Interpretation associated with the facts:

Fact: The $90,000 reserve sufficed for one year. Therefore, the reserve was exhausted on June 1, 2010.The record is void of any default action in year 2010. Assuming that Appellants were in default as to payments during the period of 2010 and June 2011. During this period, there is no indication that the Appellee activated the acceleration clause of the contract or declared default, as was the Appellee's option. On or about June 16, 2011, Appellant tendered the $170,000 to Appellee. On or about June 28, 2011, eleven days after payment of the $170,000, (considering the 30 day prior notice), on June 28, 2011, Appellee commenced foreclosure action on the property.

Based on the terms of the contract, the payment of attorney fees, cost and other related charges to Appellants should have commenced after the initiation of foreclosure proceedings to remove the propriety from default/ foreclosure status. Initiation of the foreclosure proceedings would have constituted Appellee's ***16** exercise of the option. At that point, to prevent foreclosure, Appellants, at the option of the Appellee to accept any payment(s) would have been required to pay the total sum due to take the property out of foreclosure status. On the other hand, where there being no foreclosure action before June 16, 2011, yet a deficiency in payments, there had to be threats to Appellant of foreclosure action. With the threats of foreclosure action,

Appellants were induced to take preventive action. The parties agreement for forbearance of foreclosure in consideration of the $170,000 was the preventive measures.

The only logical reasons for the acceptances and tendering of the $170,00 was for forbearance of foreclosure proceedings.

Prayer for relief: Appellant move for remand of count two for discovery and disposition on the merits.

COUNT THREE OF THE AMENDED COMPLAINT

("Fraudulent Misrepresentation of Material Facts as to The Payment and acceptance of the $50,000 ") JA at 68

The count is dismissed as a matter of law. The fact predicate of the complaint was not addressed. Whether the $50,000 payment was received by Appellee as payment for the principal, as contended by Appellee, and to the contrary by ***17** Appellant, is a matter of material disputed fact for the jury, not the court. The oral agreement does not vary, add to, or subtract from the terms of the written contract as contended by the lower court in citing *Segal Wholesale, Inc. United Drugs Service*, 933 A. 2d 780, 783 (D.C. 2007). JA 69. cited by the court for the proposition that ("Evidence outside of the contract, therefore, "is inadmissible to vary or contradict the terms of a valid, and plain and unambiguous, written contract.") Order, JA 69 at pg#

The court further states:" Plaintiffs do not offer any argument based on the language of the contract to explain these events. Foot Note #8 "In the part of their claim titled, "malicious breach of contract" plaintiffs argue that the $50,000 exchange was the modification fee provided for under the modification clause of the contract. The contract stipulates that "an administrative fee equal to two and one-half percent (2.5%) of the principal balance and all outstanding interest and penalties" may be imposed for modifying the deed. However, the 2.5% of the principal $100,000, provided in this clause would equal $2,500 rather than $50,000."

RULE OF LAW

"No extrinsic evidence may be introduced for a completely integrated agreement, but evidence consistent with the terms of a partially integrated ***18** agreement is permissible. "D.C. Official Code, 2001 Ed. § 28:2-202. See Segal at 785. Appellee's acceptance of the $50,000 is consistent with the terms of the contract.

As much is admitted by the court's foot note #8. However, $50,000 consideration for a foreclosure or default forbearance agreement does not come within the parol evidence rule because the same, as in the instant case, was not made contemporaneously with the original agreement, it does not alter the terms of the original agreement nor does it contradict the existing terms. Rather,

the execution of the forbearance agreement was an exercise of the Appellee's option reserved exclusively to Appellee under the terms of the contract. Any modification of the contract is required to be reduce to writing. A writing only the Appellee can produce with concomitant contractual obligations to do so.
Segal at 785" In order to determine whether the parole evidence rule applies in a given case, we look to whether the written agreement was intended to be a complete statement of the terms of the agreement or rather was intended to be something less. In ascertaining the parties' intent, we consider "the written contract, the conduct and language of the parties and the surrounding circumstances." Id. (citing Standley v. Egbert, 267 A.2d 365, 367 (D.C.1970)). Furthermore, where a "document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent." Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916, 927 (D.C.1992) (quoting 1010 Potomac Assocs. v. Grocery Mfrs. of Am. Inc., 485 A.2d 199, 205 (D.C.1984); citing Bolling Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 475 A.2d 382, 385 (D.C.1984"

The written contract contains an option clause for modification for consideration. The conduct of the parties is consistent with the terms and provisions of the ***19** contract. That is to say, Appellee exercised its modification option for $50,000 consideration in conjunction with and additional $120,000. Therefore, the issue is not one that involves parole evidence. The issue is whether Appellee's agreement with Appellants for modification forbearance was required by the terms of the contract to be reduced to writing and whether the failure to so reduce the agreement to writing constituted fraudulent misrepresentation of material facts as to the payment and acceptance of the $50,000.

APPELLANTS' DEFENSE OF COUNT FOUR OF THE AMENDED COMPLAINT

Claim of Wrongful Foreclosure

Appellants contend that they were not in default by virtue of the forbearance agreement. Irrespective of any statutory adherence by Appellee in providing timely and adequate notice of the two foreclosure proceedings, the primary issue is whether Appellants were legally in default and whether Appellee exchanged its foreclosure option in exchange for the $170,000 consideration for forbearance of foreclosure. A favorable ruling on the issue of fraud and a finding of forbearance agreement, the same will render the foreclosure sale of the property wrongful. Only property legally in default may be foreclosed upon.

***20 APPELLANT'S DEFENSE OF COUNT FIVE OF THE AMENDED COMPLAINT MALICIOUS BREACH OF CONTRACT Order at JA at 67 and Complaint at JA 20.**

The court order of dismissal do not challenge the factual and legal sufficiency of Appellant's pleading. The court concluded “the alleged failure to comply with the terms of a purported oral contract is precluded by the District of Columbia Statute of fraud.

SATUTE OF FRAUD D. C. Code Section 28-3502, Statute of Frauds provide in pertinent parts: An action may not be brought...upon a contract or sale of real estate, of any interest in or concerning it,... unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing,...signed by the party to be charged there with or a person authorized by him”

The forbearance oral agreement between Appellant and Appellee does not come within the preview of the Statute of Fraud. Appellee's promise to reduce the oral agreement to writing, is excepted from the statute of frauds by virtue of promissory estoppel, part performance or waiver. The Appellee does not disputed its Agen's acceptance of the $170,000. Appellee admits acceptance of the amount. Appellants allege the acceptance was for forbearance of foreclosure on the property, Appellee disputes the purpose of the acceptance. Such issues are not prohibited from litigation by the statute of frauds. There exist ***21** genuine issues of material fact as to credibility within the sole province of a jury, not the court. The court's decision to dismiss Appellants claims under Sup. Court Civ. Rule 12 (b) (6) was in error and must be reversed. Discovery is necessary for a decision on the pending issues relative to the credibility of the parties and their acts and omissions that may be considered part performance of the oral agreement.

There are exceptions to the statute of frauds. Those exceptions are:
1. When a document that sufficiently memorized the terms of the agreement. 2. See DC Code Sec. 28-201 (1);(2) where the parties concede that there was an agreement, DC Code 28:2-201 (3) (b) and the Appellee acknowledges acceptance of the (consideration; $170,000.) See Segal Wholesale v. United Drug Service 933 A. 2d 780 (D.C. 2007) at 784, citing the above DC Code sections.

“There are several situations where courts may refuse a statute of frauds defense even if it is properly raised: “[I]n the early history of the statute a defendant was denied the privilege of pleading [it] in three main in- stances: (a) where his own fraud was responsible for the non-existence of the required signed memorandum [equitable estoppel]; (b) where the equitable doctrine of part performance was applicable [promissory estoppel], and (c) where the defendant has admitted the contract [waiver].” Wolf v. Crosby, 377 A.2d 22, 26 (Del.Ch.1977). Hackney v. Morelite Const. D.C. App. 418 A 2d 106 at 1066, citing Wolf.

"A contract which does not satisfy the requirements of subsection (1) [a writing, signed by the party against whom enforcement is sought, "sufficient to indicate that a contract has been made between the parties"] but which is valid in other respects is enforceable" See Hackney at 1067.

In Hackney, the court found that an agreement that contained an option was ***22** enforceable and not prohibited by statute of fraud. Granted, we do not have in the instant case the fruits of discovery, depositions, admissions and response to documents requests, however, there is an issue of credibility to be decided by the jury as to whether Appellee misrepresented the purpose of accepting the consideration of $170,000.
"Option agreements have generally been held or recognized to be sufficiently definite as to price to justify their enforcement is either a specific price provided for in the agreement or a practicable mode is provided by which the price can be determined by the court without any new expression by the parties themselves." See Hackney at 1068.

The $100,000 in attorney fees is exact based on the terms of the option contract. The $50,00 for forbearance of foreclosure fits within the option terms of the contract. $20,000 payment for trustee fees which was never earned, as the $1000,000 was not earned, fit within the forbearance option clause of the contract.

Appellee took advantage of Appellants' mental and physical inabilities to adequately defend themselves against a sophisticated Lender. See Complaint, JA at 30. Throughout the amended complaint, Appellants property and adequately alleges that Appellee defrauded Appellants, willfully, maliciously with the specific ***23** intent to do the same and that Appellants justifiably relied on Appellee to reduce the oral agreement to writing, which Appellee never did. By memorandum opposition, Appellants argued that Appellee defrauded Appellants with the specific intent to use the Statute of Fraud defensively to evade the consequences of the fraudulent acts. Opposition 12 May 03 pg#13. (21).

The contract options retained exclusively by Appellee lay the ground for the parties reasonable expectation at the Appellee's discretionary exercise of the options. Appellee was duty bound to reduce the oral agreement to writing. Any writing agreement is inevitably preceded by a verbal agreement. Otherwise, there could be no agreements between the parties. Appellee acknowledge receipt of the consideration but deny the purpose for which the consideration was received.

By exercising the option, Appellee waived statute of fraud protection. Intent of the statute of frauds is not to invalidate any oral agreement in one of the enumerated classes, but merely to suspend ts enforcement until statute is satisfied by reduction of agreement to writing.

COUNT SIX

Fraudulent Misrepresentation of Material Fact and Fraudulent Concealment

***24 Complaint JA#25.**

Again, the court dismiss count six as mater of law without testing the sufficiency of the pleading. The parol evidence rule and the statute of frauds are the based upon which the court dismissal rest.

Parol Evidence Rule as a matter of Law
" Parole evidence rule is a matter of substantive law." *See Affordable Elegance Travel v. Worlds L.P.* 774 A. 2d 320 (D.C. 2001) at 320; and applies only to the actual terms of the contract itself. The language of an unambiguous contract is the best objective manifestation of the parties' intent. Ld at 320. Enforceability of the terms such as payment, time for payment, etc.

However, ambiguity in a contract will be construed against the drafter. *Id* at 329. Where there is ambiguity, the reasonable person standard is applied. *Id.* at 323.

Applying the Unambiguous standard, the $100,000 is attorney fees is permissible.
The ambiguous terms are. (1) "Borrower will be responsible for all cost of collection including without limitation, court costs, attorney fees of at least 20% of the outstanding indebtedness under the Note and all other costs of collection to the extent not prohibited by applicable law. " The ambiguity lies within the absence of (i) Specificity as to exactly when the attorney fees become due; is the commencement of the collection process a condition prerequisite to the payment ofthe attorney fees? (2) Are the fees to be determined according to the hourly rate of attorney billings, or is there a flat $100,000 owed by Appellants by virtue of simply falling behind on the mortgage payment?

Unconsciousability: If the court finds that the $100,000 became due by virtue of payment delinquency that subject Appellants to foreclosure, then there are thee ***25** consideration that make the payment unconscious able: (I) Payment of the Attorney fees in the amount of $100,000, when not earned by Appellee, would detract from Appellants **financial** ability to advance the amount toward to rearage to bring the payments current, (ii) the amount in unavoidable by Appellants in the event of delinquent payments, and (iii) because payment of the $100,000 preceded the collection process, the amount was not earned and was unjustifiable charged to Appellants.

Modification Clause of the Contract is ambiguous:

What is meant by the language, "Additionally, in the event of Default and at the sole discretion of the Lender, if said note is modified....

Does the Lender the modification clause infer. (i) Was the acceptance of the $170,000, since the amount was not earned, triggered the modification clause discretionary option as a matter of contract law?

Applying the reasonable person Standards:

What reasonable persons would pay Appellee $170,000 toward property that would be taken from them by way of foreclosure auction sale less two months later.

ORAL AGREEENT: Under the District of Columbia Law, parties may enter into an arrangement obligating them to prepare and execute a subsequent written ***26** contract. However, the Appellee, who had the sole responsibility of reducing the agreement to writing, refused and otherwise failed to do so because Appellee depended upon the statute of fraud for the unenforceability of the agreement. *See Anchorage - Hymning & Co.* 697 F 2d 316 at 363. Appellee understood the enforceability of the agreement required a writing. Appellee maliciously relied defensively on the statute of fraud.

The statute of frauds is to prevent fraud not to allow a person to use the statute defensively to avoid fraud.

Usage of the trade: The usage of the trade as to activation of the acceleration clause of a contract holds that acceptance of consideration less that the total amount due, modifies the contract as a matter of law. See UCC 1-303. Forbearance which is refraining from the assertion of a legal right is valuable consideration.

Exercise of the Discretionary Clause: Appellee has an obligation exercise the discretionary clause, the (Option), reasonably and appropriately and in good faith. The option was inappropriately exercised as to the $100,000 Attorney Fees because the

condition prerequisite had not occurred and the fees were not yet earned and no action for the application of payment of the fees had yet occurred.

***27** *Contract Ambiguity:* The options contained in the contract, on their face, are ambiguous and therefore the question of ambiguity is for the jury not for summary dismissal under a 12 (b) (6) motion.

Promissory-Equitable- Estoppel: "Appellants by virtue of the Amended Complaint, are entitled to the protection of Promissory Estoppel because Injustice will prevail if the court refuses to grant Appellant the relief they seek.
"Noncompliance with the statute of frauds may be rendered inconsequential on the basis of equitable estoppel where party's own fraud is responsible for the noncompliance, or on the basis of promissory estoppel where the doctrine of part performance applies, or on the basis of waiver where the party has admitted to the contract." See *Tauber v. District of Columbia* 511 A,2d 23 (D.C. App. 1986) at 23,24.

Only Appellee was authorized to reduce the oral agreement into writing to recognize the $50,000 forbearance payment .Appellants had to rely on Appellee's promise to reduce the oral agreement to writing. The $20,000 payment was fraudulently obtained. Tendering the $70,000 constitutes part performance by Appellants.

*28 RELIEF REQUESTED

Appellants seek remand of the cause to the District of Columbia Superior Court for summary judgment/ trial discovery.

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