

MEADE COMMUNITIES LLC,

Plaintiff

v.

AMBAC ASSURANCE
CORPORATION,

Defendant

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IN THE

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CIRCUIT COURT FOR

*

ANNE ARUNDEL COUNTY

*

MARYLAND

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Case No.: C-02-CV-15-003745

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AMENDED OPINION AND ORDER

This matter came before the Court on September 1, 2017 for a hearing on the parties' counter-motions for summary judgment. Arguments of the parties were heard and the Court held the matter *sub curia*. Having considered the arguments of counsel, the record, and the submitted memoranda, it is by the Circuit Court for Anne Arundel County, hereby determined:

When evaluating a motion for summary judgment, the trial court must decide whether there is any genuine dispute as to material facts, and whether a party is entitled to judgment as a matter of law. Md. Rule § 2-501; *Bagwell v. Peninsula Regional Medical Ctr.*, 106 Md. App. 470 (1995). Further, the purpose of the summary judgment procedure is to decide whether there is an issue of fact that is sufficiently material to be tried. *Bradley v. Fisher*, 113 Md. App. 603 (1997). The evidence offered to show the existence of a dispute of fact must be sufficiently detailed and precise to enable the trial court to make its ruling as to the materiality of the proffered fact. *Beatty v. Trailmaster*, 330 Md. 726, 738 (1993). Conclusory denials or bald allegations will not defeat a motion for summary judgment. *Barber v. Eastern Karting Co.*, 108 Md. App. 659 (1996). While all inferences should be resolved against the moving party, the opposing party must offer more than just a scintilla of evidence to preclude summary judgment. *Beatty v. Trial Master Product, Inc.*, 330 Md. 726, 738 (1993).

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Maryland law requires that a civil action at law be brought within three years from the date the cause of action accrues. Cts. & Jud. Proc. § 5-101 (2014); *Villareal v. Glacken*, 63 Md. App. 114, 127-28 (1985). Parenthetically, if the Amended and Restated Servicing and Lockbox Agreement (“Servicing Agreement”) at issue in this matter had been executed with the formalities and mutually expressed intention of the parties that it be construed as a specialty, the statute of limitations would have been twelve years. Cts. & Jud. Proc. § 5-102 (2014). A simple review of said agreement, contained in the record, reveals that none of the formalities of a specialty are present, as the Servicing Agreement was not signed under seal. *Rouse-Teachers Props. v. Maryland Casualty Co.*, 358 Md. 575, 750 A.2d 1281 (2000).

Plaintiff Meade Communities, LLC (“Meade Communities”) argues that Defendant Ambac Assurance Corporation’s (“Ambac”) counterclaim for specific performance and/or damages is barred by the statute of limitations and Plaintiff is entitled to summary judgment. It is an undisputed material fact that the parties have known since at least November 11, 2008 that the surety bond sold by Ambac no longer satisfied the ratings requirement of Section 4.17(a) of the Servicing Agreement. Ambac did not file suit in U.S. District Court, seeking specific performance and damages until October 14, 2015, and subsequently in the instant counterclaim in this Court on February 16, 2016.

Defendant argues that, under the plain language of the Servicing Agreement, Ambac’s action accrued no sooner than August 21, 2014 when Plaintiff failed to replace the Reserve Account Contract or cash-fund within ten (10) business days after proper contractual notice. The Court is not convinced by this argument. The Maryland Court of Appeals has held that a party cannot unilaterally extend the statute of limitations or prevent it from running by failing to perform some preliminary act as “a condition precedent to filing a claim,” and thereby indefinitely extend the time for that party to file its lawsuit. *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 192 (2012). Here, Ambac failed to send a

cure letter, or otherwise exercise its right to demand cash funding of the Reserve Account Contract, until approximately six years after the parties were notified of the ratings downgrade. The Court finds no legal justification for this delay.

In addition, Defendant claims the email notice given in November 2008 does not comply with Section 10.03 of the Servicing Agreement, which provides:

All notices, consents, approvals and requests required or permitted hereunder shall be given in writing and shall be effective for all purposes (a) if hand delivered, upon receipt; (b) if sent by (i) certified or registered United States mail, postage prepaid, return receipt requested, three days after deposit with the United States Postal Service or (ii) expedited prepaid reputable overnight delivery service, either commercial or United States Postal Service, the next Business Day after delivery to such service, or (c) sent by telecopier, upon telephoning the recipient that a telecopy notice is forthcoming and receipt of a machine-generated confirmation of successful transmission, addressed as follows...

The Court finds that the critical issue in this matter is not the timing and sufficiency of contractual notice to Meade Communities, but rather actual notice to Ambac that its right had accrued under the Servicing Agreement to demand that Meade Communities replace the Reserve Account Contract or cash-fund the reserve. Two emails contained in the record as exhibits, both dated November 11, 2008, acknowledging the downgrade and seeking a resolution with Meade are undisputed and compelling evidence of such actual notice to Ambac.

Defendant further argues that Meade's repeated acknowledgments revived the statute of limitations. When there is a subsisting agreement to perform an obligation other than the payment of money, the acknowledgment of that obligation coupled with a promise to perform that obligation removes the limitation bar. *Potterton v. Ryland Grp., Inc.*, 289 Md. 371, 377 (1981) (discussing *Hall v. Barlow*, 260 Md. 327 (1971)). Here, there is no promise or acknowledgment contained in the case record that would warrant the removal of the limitation bar.

Ambac argues that even assuming the statute of limitations accrued, Meade has a continuing obligation to maintain an adequate Debt Service Reserve, and violations that are continuing in nature are not barred by the statute of limitations. Ambac relies on *Singer Co., Link Simulation Systems Div. v. Baltimore Gas and Elec. Co.*, 79 Md.App. 461, a case where the Court of Special Appeals of Maryland held, “where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute of limitations anew.” While Maryland law will allow the continuing breach of contract rule to prevent the statute of limitations from barring a claim, Maryland’s theory of continuing breach of contract is a limited one. It is black-letter law that “[c]ontinuing violations that qualify under this theory are continuing unlawful acts, for example, a monthly over-charge of rent, not merely the continuing effects of a single earlier act.” *Bacon v. Arey*, 203 Md. App. 606, 655-56 (2012). In the instant case, Meade Communities’ alleged failure to replace the Reserve Account Contract or cash-fund within ten (10) business days after contractual notice was given is not akin to a monthly over-charge of rent or any other continuing unlawful act and/or acts. It is a singular event. Thus, the Court rejects Ambac’s continuing breach argument.

There is no genuine dispute as to the material fact that Ambac was on actual notice that its cause of action accrued on November 11, 2008. As it unjustifiably failed to bring an action within the three-year statute of limitations, Meade Communities is entitled to judgment as a matter of law.

Plaintiff also seeks a Declaratory Judgment under Count V of its Amended Complaint, that “an Ambac Default, as it is defined in the Grantor Trust Agreement, has occurred and that consequently Defendant Ambac Assurance Corporation lacks standing to assert rights or bring claims under Section 4.17 of the Servicing Agreement.” The Court need to look no further than the 2010 rehabilitation proceedings in the State of Wisconsin in which the Wisconsin Commissioner of Insurance was appointed by the Circuit Court in that State as the Rehabilitator for Ambac as a result of a deterioration

in its finances due to the nationwide downturn in the housing market. In that Court's Order which confirmed said rehabilitation plan, a 'segregated account' was established and capitalized to assure payment of certain critical obligations of Ambac. The value of Ambac assets impaired by the control of the Rehabilitator included a secured note for \$2 Billion, and an Excess of Loss Reinsurance Agreement that impaired all of the rest of Ambac's assets, save a minimum of \$100 Million. There can be no genuine dispute that such a significant impairment of a material portion of Ambac's assets constituted an "Ambac Default" as defined in Sec. 1.01 of the Grantor Trust Agreement (in relevant part):

"Ambac Default" means the occurrence of any of the following events: ...has an order for relief entered against it under any federal or state law relating to insolvency, bankruptcy, rehabilitation, liquidation or reorganization that is final and nonappealable; or (c) a court of competent jurisdiction or another competent regulatory authority enters a final and nonappealable order, judgment or decree (i) appointing a custodian, trustee, agent or receiver for Ambac or for all or any material portion of its property or (ii) authorizing the taking of possession by a custodian, trustee, agent or receiver of Ambac (or taking of possession of all or any material portion of Ambac's property).

As such an Ambac Default did occur, its continuing actions are a nullity pursuant to Sec. 7.20(p) of the Grantor Trust Agreement, and Plaintiff is entitled to Count V declaratory relief as a matter of law; wherefore it is:

ORDERED, that Plaintiff Meade Communities, LLC's Motion for Summary Judgment is **GRANTED**, in part. As the statute of limitations issue is dispositive, the Court need not reach all other issues; therefore

DECLARATORY JUDGMENT is entered in favor of Plaintiff, as to Count II of the Amended Complaint, to wit:

Any claims by Defendant Ambac Assurance Corporation that Plaintiff Meade Communities, LLC has breached Section 4.7 of the Servicing Agreement, including claims for specific performance for replacement of the Debt Service Contract and/or cash funding of a reserve, are barred by the Maryland statute of limitations.

DECLARATORY JUDGMENT is entered in favor of Plaintiff, as to Count V of the Amended Complaint, to wit:

An Ambac Default, as it is defined in the Grantor Trust Agreement, has occurred and that consequently Defendant Ambac Assurance Corporation lacks standing to assert rights or bring claims under Section 4.17 of the Servicing Agreement, including but not limited to the right to consent to approve the Out-Year Development Plan; and it is further

ORDERED, that as the Summary Judgment herein granted as to Plaintiff's Count II and Count V constitutes a complete resolution to the controversy in Plaintiff's declaratory relief action, and further acts as a complete bar to Defendant's counterclaim, Defendant Ambac Assurance Corporation's Motions for Summary Judgment are **DENIED** , and its counterclaim, as to all counts, is **DISMISSED, WITH PREJUDICE.**

Signed: 1/18/2018 04:37 PM



Judge Glenn L. Klavans