

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 72 104 Y 00183 11 JMLE
Laurel Canyon-Chelsea LLC, a Delaware limited
liability company; and Theodore Stein Jr., an
individual
VS
Cathay Bank, a California corporation

AWARD OF ARBITRATORS

We, the undersigned arbitrators, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 15, 2005 (and later agreements), and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby award as follows:

This arbitration began with an Amended Demand for Arbitration,¹ dated March 17, 2011, and filed with the American Arbitration Association ("AAA" hereafter) by "Petitioners,"² Laurel Canyon-Chelsea LLC and Theodore Stein, Jr. ("Petitioners" hereafter) and served upon counsel for Respondent, Cathay Bank ("Cathay Bank" hereafter.) On April 11, 2011, Cathay Bank filed and served its Answer to Demand for Arbitration, and its Counterclaim against Claimant (denominated "Petitioner") Theodore Stein, Jr. On April 26, 2011, counsel for Theodore Stein, Jr. ("Stein" hereafter) filed and served his Answer To Counterclaim. On June 10, 2011, Laurel and Stein filed and served their Second Amended Demand for Arbitration.

Throughout the arbitration, "Petitioner" Laurel Canyon-Chelsea LLC, ("Laurel" hereafter) and "Petitioner" and Counterrespondent Stein have been represented by the law firm Glaser Weil Fink Jacobs Howard Avchen & Shapiro LLP, and Respondent and Counterclaimant Cathay Bank has been represented by the law firms Miller Barondess LLP and Franszel Robins Bloom & Csato LLC.

Prior to June 16, 2011, arbitrators Robert W. Brown, Esq. and Lawrence B. Gotlieb, Esq. were appointed, made their disclosures, and were confirmed by AAA letter dated June 16, 2011. In that same

¹ A pre-existing Demand for Arbitration apparently was rejected by the AAA, and never became part of our formal record.

² Plaintiffs in arbitration are normally referred to as Claimants. We will keep "Petitioners" to refer to the Claimants, as this was the word they chose for themselves.

letter, Edward J. Costello, Esq. was appointed as the third arbitrator. Mr. Costello made his disclosures, and, at telephone conference with counsel for all parties, on August 23, 2011, the parties accepted the panel as constituted. At that same telephone conference, the parties agreed to hold the evidentiary hearings in this case on March 19 through 23, 2012.

Pursuant to the parties arbitration agreement, the Panel used the Commercial Arbitration Rules of the AAA to administer this case. Extensive discovery was conducted by all parties.

On December 6, 2011, Chair Arbitrator Costello signed a Stipulated Protective Order on behalf of the Panel. On December 30, 2011, Cathay Bank filed two motions for summary judgment. One motion urged the Panel to rule in its favor against Petitioners Laurel and Stein on their claims against Cathay Bank, and the other sought a favorable ruling on Cathay Bank's counterclaim against Stein. The parties' arbitration agreement states, in part, that "[T]he arbitrators shall not have power to make an award of \$1.0 million or more against any party to an arbitration unless it is in the form of a statement of decision as described in California Code of Civil Procedure Section 632"

After considering: (1) Cathay Bank's Motions for Summary Judgment on its Counterclaim for Breach of Contract Against Stein and on Laurel and Stein's Second Amended Arbitration Demand (the "Motions"), (2) Laurel and Stein's Opposition to the Motions (the "Opposition"), (3) Cathay Bank's Supplemental Brief and Reply to the Opposition, (4) all evidence submitted in support of the Motions and the Opposition, and (5) the oral argument of all parties at the March 1, 2012 hearing on the Motions, the Panel issues the following Statement of Decision:

1. On March 10, 2011, Petitioners filed an arbitration demand and thus commenced an Arbitration (the "Arbitration") with the AAA against Cathay Bank. An Amended Demand for Arbitration, dated March 17, 2011 was also filed. On June 10, 2011, Petitioners filed a Second Amended Demand (the "Demand") for Arbitration.

2. The dispute between Laurel Canyon-Chelsea LLC and Theodore Stein, Jr. ("Petitioners" hereafter and Cathay Bank stems from two loans provided to Petitioners by Cathay Bank: a loan to Laurel Canyon-Chelsea LLC in the amount of \$3,870,000 secured by a deed of trust (the "Laurel Loan") and a loan to Stein in the amount of \$710,000 (the "Personal Loan" and together the "Loans"). The Loans were memorialized by written loan agreements (the "Personal Loan Agreement" and the "Laurel

Loan Agreement,” together the “Loan Agreements”) and promissory notes (the “Personal Note” and the “Laurel Note,” together the “Notes”).

3. The Loan Agreements and Notes were executed on December 15, 2005. Petitioners obtained the Loans to purchase land in Studio City, California, in order to develop a 32-unit condominium project (the “Property”).

4. The AAA has jurisdiction in the matter pursuant to the arbitration provisions in the Notes.

5. Petitioners alleged that Cathay Bank (i) breached the written terms of the Loan Agreements; (ii) breached an oral agreement with Stein relating to the Loans; (iii) breached the implied covenant of good faith and fair dealing; and (iv) fraudulently induced Petitioners to enter into the Loan Agreements.

6. Petitioners also alleged a claim for Reformation Based on Fraud, but later conceded that reformation is a remedy rather than a cause of action.

7. Petitioners claimed that Cathay Bank orally agreed that: (1) the Loans would be extended indefinitely on reasonable terms; (2) Stein would never be held personally responsible for the Personal Loan; (3) Cathay Bank would not demand payment under the Personal Loan/Personal Note; and (4) the Personal Loan would be rolled over into a construction loan.

8. On April 11, 2011, Cathay Bank filed a Counterclaim against Stein for breach of contract because Stein did not pay \$710,000 on March 1, 2011, as required under the Personal Loan Agreement and Personal Note. The Personal Loan Agreement and Personal Note provide that Stein will pay the principal amount and any unpaid interest upon default or maturity.

9. Nothing in the written agreements provides that the Loans would be extended indefinitely. Instead, the Personal Note provides that if Stein fails to make any payment when due, the Lender may declare the entire unpaid balance and interest immediately due, and Stein will pay that amount.

10. The Loans were extended numerous times for over four years. Each of the extension agreements was documented in writing and provided that Cathay Bank had no obligation to renew the Loans and that the entire outstanding amount on the Loans would be due on the date of maturity. The Loans matured on March 1, 2011, and Petitioners failed to make payment.

Petitioners' Claim for Breach of Written Contract

11. The Loan Agreements provide that "the granting, renewing, or extending of any Loan by Lender at all times shall be subject to Lender's reasonable judgment and discretion." Petitioners claim that Cathay Bank did not exercise its reasonable judgment and discretion in not renewing the Loans in March 2011.

12. Cathay Bank extended the Loans 12 times over a period of more than four years. As a matter of law, Cathay Bank's conduct was reasonable and it properly exercised its judgment and discretion not to extend the Loans beyond March 1, 2011.

13. As of October 2010, the value of the Property securing the Laurel Loan fell from approximately \$7 million to \$3.1 million. As such, the loan to value ratio (LTV) on the Laurel Loan was in excess of 100%. The real estate market was going through an unprecedented decline.

14. Stein defaulted on loan agreements with Cathay Bank on another large project called Glen Oaks. The Property securing the Laurel Loan was vacant, and no progress had been made on construction. Both the Personal Loan and the Laurel Loan were considered impaired by Cathay Bank and were downgraded to reflect that Cathay Bank was less likely to collect. Cathay Bank offered an extension of the Loan Agreements to Petitioners prior to March 1, 2011. Petitioners declined Cathay Bank's offer.

15. Under the undisputed material facts, Cathay Bank exercised its reasonable judgment and discretion in declining to further extend the Loans beyond March 1, 2011. Cathay Bank's conduct was consistent with the terms of the Loan Agreements and Notes. Cathay Bank did not breach the written agreements. Petitioners breached the Loan Agreements and Notes by failing to make payment on March 1, 2011.

Breach Of Oral Agreement, Breach Of The Implied Covenant Of Good Faith And Fair Dealing And Fraudulent Inducement.

16. Under the parol evidence rule, where the contract at issue is intended by the parties to be the final expression of their agreement, extrinsic evidence is not admissible to contradict express terms in a written contract. Code Civ. Proc. § 1856(d); *see also Duncan v. McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 371 (citing *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1004-1005) (the alleged oral agreement contradicted the contract and was inadmissible under the parol evidence rule); *Bank of America v. Lamb Finance Co.* (1960) 179 Cal.App.2d 498, 502 ("if the false promise

relates to the matter covered by the [integrated written] agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible”).

17. Here, the Loan Agreements are integrated documents demonstrating the final expression of the agreement between Petitioners and Cathay Bank. The oral promises alleged by Petitioners directly contradict the written terms of the Loan Agreements. Moreover, the terms of the alleged oral agreements are so central to the terms of the Loan Agreements that, if they were indeed part of the parties’ agreement, they would have necessarily been included in the written agreement. Accordingly, evidence of Stein’s alleged oral agreements with Cathay Bank is barred under the parol evidence rule. As a result, Petitioners’ claims for breach of oral contract, breach of the implied covenant of good faith and fair dealing and fraud (the “Oral Statement Claims”) fail as a matter of law.

18. The Oral Statement Claims are barred by the Statute of Frauds. The Laurel Loan was secured by a deed of trust, and the proceeds from the Laurel Loan and the Personal Loan were used to purchase the Property. The Loan Agreements were entered into at the same time. As a result, California Civil Code Section 1624(a)(6) precludes Stein’s claims based on oral statements.

19. The Oral Statement Claims also fail under Civil Code Section 1624(a)(7). The Loans were in excess of \$100,000; (2) the Loans were not for personal or family purposes; and (3) Cathay Bank is in the business of lending money. *See* Civil Code Section 1624(a)(7).

20. Parol evidence bars Stein’s fraud claim because the oral statements are inconsistent with the parties’ written agreements. “[W]hile ... a recognized exception to the parol evidence rule permits evidence of fraud in order to nullify the main agreement, that rule has no application where “promissory fraud” is alleged, unless the false promise is independent of or consistent with the written instrument. It does not apply where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement.” *Banco do Brasil, supra*, 234 Cal.App.3d at 1009; *see also Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1436-37 (stating that: “The fraud exception to the parol evidence rule does not apply to such promissory fraud if the evidence in question is offered to show a promise which contradicts an integrated written agreement. Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible.”)

21. Petitioners’ fraud claim also fails because Petitioners cannot demonstrate all elements of the claim: (1) a misrepresentation (false representation, concealment or nondisclosure) of a material fact;

(2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-74. Petitioners cannot show that Stein, an experienced attorney, real estate developer and real estate broker, justifiably relied on alleged oral promises that contradict the written terms of the Loan Agreements.

22. Every loan Stein received from Cathay Bank was documented in writing. In light of that track record, Stein could not justifiably rely as a matter of law—for a commitment critical to his entire relationship with the Bank—on alleged vague oral assurances about being “reasonable” and other assurances that contradict the written agreements.

23. Petitioners’ fraud claim also fails because there was no evidence of Cathay Bank’s intent to defraud Petitioners.

24. Petitioners’ claim for breach of the implied covenant of good faith and fair dealing fails, as that claim relates to the alleged oral agreement between the parties, because the underlying oral promises alleged by Petitioners are inadmissible under the parol evidence rule. *Becka v. APCOA/Standard Parking* (C.D. Cal. 2001) 146 F.Supp.2d 1109, 1117. The implied covenant claim also fails, as it pertains to the written contracts, because Cathay Bank acted in accordance with the express terms of the written agreements and because Cathay Bank’s conduct was reasonable as discussed above. *Carma Developers (California), Inc. v. Marathon Development California* (1992) 2 Cal.4th 342, 371-376.

25. With respect to the alleged 1997 oral agreement between Cathay Bank and Stein, Petitioners put forth no evidence of such agreement. In addition, all claims stemming from this alleged oral agreement fail for the reasons specified above in paragraphs 16-24.

Cathay Bank’s Counterclaim For Breach Of The Personal Loan Agreement And Personal Note

26. The written terms of the Personal Loan Agreement and Personal Note require Stein to pay the Personal Loan upon maturity. The Personal Loan Agreement provided that Cathay Bank shall exercise its reasonable judgment and discretion in determining whether to renew or extend the Loan Agreement. As noted above, Cathay Bank exercised its reasonable judgment and discretion in declining to renew the Personal Loan in March 2011. The Personal Loan became due on March 1, 2011. Stein’s failure to pay is a default and material breach of the Personal Loan Agreement and Personal Note.

27. There are no triable issues of material fact and Cathay Bank is entitled to judgment on both motions as a matter of law. Summary judgment for Respondent Cathay Bank is hereby granted as to both Defendant's Motion for Summary Judgment on Petitioner's Second Amended Arbitration Demand and Defendant's Motion for Summary Judgment on its Counterclaim for Breach of Contract Against Stein. *See* Code Civ. Proc. § 437c(c).

28. Cathay Bank is the prevailing party in this arbitration and is entitled to collect its' reasonable attorneys' fees, costs and interest pursuant to the Loan Agreements and Notes.

29. Pursuant to agreement of the parties, matters relating to attorneys' fees, costs and interest were determined upon motion filed by the prevailing party, Cathay Bank, and opposed by Petitioners. We found that all expenses incurred by counsel for the prevailing parties were reasonable, and we found that \$657,621.88 represented reasonable attorneys' fees for this arbitration.

Award

A. Laurel Canyon-Chelsea LLC and Theodore Stein, Jr. take nothing for their claims against Cathay Bank;

B. Cathay Bank recovers the principal sum of \$710,000.00 from Theodore Stein, Jr. as damages for Stein's breach of the Loan Agreement and Note.

C. Cathay Bank recovers the additional sum of \$79,342.50 from Theodore Stein, Jr. as interest on the amount loaned to him.

D. Cathay Bank has reasonably expended the sums of \$657,621.88 for attorneys' fees and \$46,041.66 for costs associated with this arbitration. As a result Cathay Bank recovers the additional sum of \$703,663.54 from Theodore Stein, Jr. and Laurel Canyon-Chelsea LLC.

E. The administrative filing and case service fees of the AAA, totaling \$6,200.00, shall be borne as follows: entirely by Laurel Canyon-Chelsea LLC, a Delaware limited liability company, and Theodore Stein Jr., an individual. The fees and expenses of the arbitrators, totaling \$31,804.17, shall be borne as follows: entirely by Laurel Canyon-Chelsea LLC, a Delaware limited liability company, and Theodore Stein Jr., an individual. Therefore, Laurel Canyon-Chelsea LLC, a Delaware limited liability company, and Theodore Stein Jr., an individual shall reimburse Cathay Bank, a California corporation,

the sum of \$15,902.07, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Cathay Bank, a California corporation.

F. Cathay Bank recovers the total sum of \$1,508,908.11 pursuant to this Final Award

That sum shall bear interest at ten (10%) per cent per annum simple from the date of this award until paid.

G. This final award is in full settlement of all claims submitted to this arbitration. Any claim not specifically decided is denied.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

5/24/12
Date

Robert W. Brown
Robert W. Brown

5/24/12
Date

Lawrence B. Gotlieb
Lawrence B. Gotlieb

5/24/12
Date

Edward J. Costello, Jr.
Edward J. Costello, Jr.