

## I.

The debtor, Marian Tudan Van Egas, on September 19, 2002, filed an objection to a claim filed by the Windsor Federal Savings and Loan Association (“Windsor Federal”). Windsor Federal had filed its claim on November 27, 2000, for an unsecured debt of \$51,171 which represents a mortgage deficiency from a certain property sold on December 31, 1998. The debtor argues that the claimed unsecured debt is an incorrect amount because in 1998, when she found a purchaser to buy her home, she and Windsor Federal negotiated an agreement, wherein Windsor Federal agreed to accept a deficiency of \$6,000. A hearing on the matter was held on November 19, 2002, at which time the parties admitted several exhibits into evidence and the debtor and the Vice President of Windsor Federal, John Burns, provided testimony. Thereafter, the parties submitted post-hearing briefs.

## II.

### Facts

The testimony and evidence submitted during the hearing establishes the following factual background. The debtor, on June 22, 1988, executed and delivered a promissory note to Windsor Federal in the amount of \$64,000, which was secured by a mortgage deed on real property located at 1449 Boston Post Road, in Westbrook, Connecticut (“the Property”). The debtor subsequently defaulted on the loan and in December 1995, she and Windsor Federal entered into an agreement wherein the debtor would proceed to make partial payments under the note. The debtor, however, was unable to continue paying the agreed upon payments and soon began discussions with Windsor Federal to sell the Property in a “short sale.” A short sale is a situation where an owner will sell their property for less than the balance due on the

**promissory note, and then make arrangements with their lender to pay the remaining balance due on the note.**

**In November 1998, the debtor contracted with a buyer to sell the Property for \$28,000, which was approved by Windsor Federal with the stipulation that the net sale proceeds would be paid directly to Windsor Federal. Windsor Federal had previously sent a letter to the debtor offering her the opportunity to sign a \$6,000 deficiency note in order to “help speed up this purchase” and to “help minimize the substantial loss the Bank is taking on this property.” (Debtor’s Ex. 4). Thereafter, the debtor, through her attorney, Charles Maglieri, sent a letter to Windsor Federal, dated November 17, 1998, notifying the bank that the debtor planned on filing for bankruptcy in the near future, would most likely never make payments on any deficiency note, and therefore, the debtor would prefer to sign a deficiency note in the full amount, \$51,171, rather than a note for \$6,000, in order to avoid taxes on forgiven debt. Windsor Federal agreed to accept a note for \$51,171. The debtor’s attorney then drafted a note for \$51,171, Windsor Federal requested a few changes as to the payment terms of the note, and the debtor then executed and delivered a note for \$51,171 to Windsor Federal (the “deficiency note”). The sale of the Property was completed on December 31, 1998, wherein Windsor Federal received the net proceeds of the sale equaling \$25,889.20.**

**The debtor testified that she felt she had to sign the deficiency note because otherwise, the bank would not agree to sell the Property, and that at the time she signed the note, even though the note was for \$51,171, she thought there was an oral agreement that she would only be obligated for \$6,000. With respect to the \$51,171 amount, the debtor also testified that she thought the sale proceeds were going to be subtracted from this amount once the sale was**

finalized because she signed the note before the closing date. The debtor also admitted that she never signed a deficiency note for \$6,000.

John Burns (“Burns”), Vice President of Windsor Federal, testified that when the bank agreed to a short sale, the bank never intended on accepting the sale proceeds in full satisfaction of the mortgage note, and that the debtor is the party who requested the deficiency note to be in the full amount. Upon questioning by the court, however, Burns admitted that, at the time the debtor signed the deficiency note, he was aware that the debtor never intended make payments on the note, and that, while he did not anticipate her paying the entire debt of \$51,171, he thought that she may make some payments. He ended his testimony stating that “things change” and that even though the debtor did not intend to pay the debt, he had a duty to protect the bank’s assets.

The debtor never made any payments on the deficiency note, either for \$51,171 or for \$6,000. In October 1999, Windsor Federal sent a demand letter to the debtor with regard to nine unpaid monthly payments since February 1999 and notified her that she must immediately pay the bank \$9,804.96 representing the total amount in default on the deficiency note. Over a year and a half later, the debtor, on August 25, 2000, filed a petition under Chapter 7 of the Bankruptcy Code, and in her schedules she listed Windsor Federal as an unsecured creditor with a claim of \$28,798. Windsor Federal, on November 27, 2000, filed a proof of claim for \$51,171 pursuant to the deficiency note. Thereafter, and within 180 days of her bankruptcy petition, the debtor became eligible for an inheritance, causing her estate to become solvent.

### III.

## Deficiency Note

### A.

The debtor argues that she has presented sufficient evidence to overcome the validity of Windsor Federal's proof of claim, and that Windsor Federal has failed in its burden to prove by a preponderance of the evidence that its claim is valid. The debtor contends that the respective parties shared a meeting of the minds that the debtor would be obligated to a \$6,000 deficiency amount. The debtor claims that she accepted Windsor Federal's offer to sign a \$6,000 note, and the only reason the debtor signed a note for \$51,171 was to avoid paying forgiveness taxes. The debtor requests that the court conclude that the parties entered into an enforceable contract for a \$6,000 deficiency.

Windsor Federal argues that the deficiency note represents a valid legal contract. The bank contends that the debtor "knowingly elected to be obligated to [Windsor Federal] for the sum of \$51,171 rather than \$6,000." (Mem. at 4.) The bank notes that during negotiations for the sale, it initially offered the debtor the chance to sign a deficiency note for \$6,000 to satisfy, in full, the deficiency, but that the debtor's counsel rejected this offer on the basis that the debtor wanted to avoid filing a "Cancellation of Debt" tax form with the IRS. As a result, the debtor, as testified, opted to sign a deficiency note in the full amount of the deficiency due, i.e., \$51,171. Windsor Federal then accepted the debtor's offer, and received a deficiency note in that amount. Therefore, the bank argues, it is quite clear that the debtor knew she was executing a promissory note for \$51,171 and that the parties mutually assented to a contract where the debtor would sign and deliver a promissory note in the amount of \$51,171 to Windsor Federal.

**B.**

According to Bankruptcy Rule 3001(f), “[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” Therefore, the burden of proof lies with the objecting party to provide evidence indicating the claim is not valid. See In re Reilly, 235 B.R. 239, 243 (Bankr. D. Conn. 1999). “If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The burden of persuasion is always on the claimant.” Id. For the reasons discussed below, the court concludes that the evidence submitted by the debtor does not sufficiently overcome the validity of Windsor Federal’s proof claim.

**C.**

“A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words.” Tallmadge Brothers, Inc., v. Iroquois Gas Transmission System, L.P., 252 Conn. 479, 498, 746 A.2d 1277 (2000); see also Levine v. Massey, 232 Conn. 272, 278, 654 A.2d 737 (1995) (“It is the general rule that a contract is to be interpreted according to the intent expressed in its language and not by an intent the court may believe existed in the minds of the parties.”).

Before the court is an express contract, a deficiency note, for \$51,171, which was drafted and signed by the debtor, and which represents Windsor Federal’s proof of claim. Despite the deficiency note, the debtor requests that this court find that the parties entered

into a contract for a \$6,000 deficiency and argues that when she signed the note for \$51,171 there was a meeting of the minds between she and Windsor Federal agreeing to a deficiency of \$6,000. There is no express contract between the parties indicating the parties agreed to a deficiency of \$6,000, but the debtor requests that the court totally disregard an express contract, the deficiency note, and find that there was some kind of contract--either an oral or an implied --between the parties that establishes -somehow - a \$6,000 deficiency obligation.

First, the court declines to disregard the deficiency note for \$51,171 bases upon the well established rule that “[w]here the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. Barnard v. Barnard, 214 Conn. 99, 109, 570 A.2d 690, 696 (1990). “A court cannot import into an agreement a different provision nor can the construction of the agreement be changed to vary the express limitations of its terms.” Massey, 232 Conn. at 278; see also Bank of Boston Connecticut v. Schlesinger, 220 Conn. 152, 159, 595 A.2d 872 (1991) (“It is not within the power of courts to create new and different agreements.”).

Second, even if there was some question as to the deficiency note’s validity, the court finds that there is no evidence whatsoever that the parties entered into an agreement obligating the debtor to \$6,000 deficiency note. There is evidence of negotiations concerning the amount of the note, including an offer from Windsor Federal to have the debtor sign a deficiency note for \$6,000, but the debtor rejected that offer, expressly stating that she had no intention of making payments on any promissory note and that she rather sign a note for the full amount of the deficiency because she was going to file for bankruptcy protection and would like to avoid paying loan forgiveness tax. There is no evidence supporting the debtor’s

testimony that she and Windsor Federal agreed to a \$6,000 obligation. There is only evidence that the parties agreed to her executing a \$51,171 deficiency note. “The making of a contract does not depend upon the secret intention of a party but upon the intention manifested by his words or acts, and on these the other party has a right to proceed.” Nutmeg State Mach. Corporation v. Shuford, 129 Conn. 659, 661, 30 A.2d 911, 912 (1943).

The debtor testified that she thought she entered into a contract to pay \$6,000, and noted that at the time of the agreement she could have made payments on the \$6,000 note, but could not have been able to make payments on the \$51,171 note. This testimony is contradicted, however, by the fact that the debtor never intended on making any payments on any note. Moreover, the debtor never attempted to make payments on an alleged \$6,000 note. The court also finds noteworthy that if the debtor genuinely believed her obligation to Windsor Federal was merely \$6,000, then why did she list her debt to Windsor Federal in her bankruptcy schedules as \$28,798.

The fact of the matter is that at the time the debtor was preparing to sign a deficiency note, she was already planning to file for bankruptcy which would have resulted in a discharge of all her unsecured debt, including a promissory note given to Windsor Federal. Therefore, whether the note was for \$6,000 or for \$51,171 was irrelevant as far as she was concerned because she never intended on making any payments on the deficiency. These facts were directly communicated to Windsor Federal in a letter from Attorney Maglieri, stating “you cannot expect any payment from my client, in accordance with the promissory note.” (Ex. 7.)

The issue that remained, however, was the fact that if the debtor signed a deficiency note for \$6,000, then she would have had to pay income taxes on the forgiven debt even after

filing for bankruptcy. So the debtor knowingly opted to sign a promissory note for \$51,171, in order to avoid paying income taxes and Windsor Federal accepted the debtor's offer for a deficiency note in the full amount. Indeed, the bank had to accept something due to the fact that the debtor had not yet filed for bankruptcy, and until she did file her petition she would be obligated to Windsor Federal for the monthly payments as indicated in the note. John Burns conceded during the hearing that, based upon the debtor's communications, he did not believe the debtor was going to pay the full deficiency of \$51,171, but that he thought the bank would be able to collect on some of the debt, and that in any case, he had a duty to protect the bank's assets.

The fact remains, however, that at the time the debtor sold the Property, the parties agreed that the debtor would give Windsor Federal a deficiency note of \$51,171. The debtor cannot now attempt to change history due to the fact that she is now solvent and will be forced to pay on the deficiency note. "In the absence of a claim of impossibility of performance, fraud or other extraordinary circumstances . . . , a party to a contract may not unilaterally change the agreement because he comes to conclude that circumstances have changed to his detriment." Dills v. Enfield, 210 Conn. 705, 717-20, 557 A.2d 517 (1989); Osborne v. Locke Steel Chain Co., 153 Conn. 527, 533, 218 A.2d 526 (1966) ("The courts do not unmake bargains unwisely made.").

#### IV.

##### Amended Proof of Claim

##### A.

Windsor Federal also argues that, despite its original filing which stated a claim of \$51,171, the bank now asserts that the current debt is \$58,990.87, which represent the balance on the note as of the petition date, including interest and late fees. When asked on cross-examination why the bank failed to amend the claim, Burns testified that when the bank filed its claim, it attached a copy of the promissory note, and believed that that was sufficient notice to indicate the debtor owed the bank the original note amount plus accrued interest and late fees.

The debtor asserts that Windsor Federal should not be allowed to amend its proof of claim on the trial date because the bank negligently failed to timely amend its proof of claim, and allowing an amendment now would “prejudice the debtor in her ability to contest the amount of the claim and determine whether the amount asserted was correct either factually or legally.” (Debtor’s Br. at 10.)

**B.**

“In determining whether to permit an amendment, courts commonly apply a two part test. First, it must be determined whether the proposed amended claim is reasonably related to a timely filed claim. An amendment will not be allowed if it is merely a guise for an attempt to file a new claim. . . . Second, the court should determine whether allowing the amendment would be equitable. Leonard v. Bishop, 112 B.R. 67, 71 (Bankr. D. Conn. 1990). “Particularly important factors in the latter inquiry are whether other claimants might be prejudiced by an amendment and whether there is a justification for the movant’s failure to properly file its proof of claim within the relevant time period. . . . Ordinarily, in the absence of prejudice to the opposing party or some other contrary equitable consideration, amendments to claims are

allowed.” Id.; see also In re Mercer's Kwik Stop Food Stores, Inc., 1993 WL 761989 , \*2 (Bankr. N.D.N.Y. June 2, 1993) (“[T]he court to [must] balance the equities and determine whether allowance of the amendment would be fair to all parties involved.”)

In this case, the amended claim is clearly related to the original proof of claim, the principle amount owed on the deficiency note, which was timely filed. The proposed amendment represents the amount of pre-petition interest and late fees with respect to the note. The final issue is whether it is equitable to allow Windsor Federal to amend its claim to reflect the accrued pre-petition interest and late fees. The court does acknowledge Windsor Federal’s tardiness in attempting to amend its claim on the day of the hearing. The court concludes, however, that there would be no real prejudice to the debtor in allowing the amendment because the amendment is merely a reflection of the terms of payment that are expressly articulated in the deficiency note, and which were agreed to by the debtor. In addition, there are no real factual or legal issues as to the amount of the of interest and late fees because the debtor has already testified that she made no payments on the note, and the note itself - which was admitted into evidence - explicitly provides the terms of payment.