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F.M. RENAISSANCE LLC, Plaintiff, v. CROWN BANK, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO. ESX-L-4037-20 **CIVIL ACTION** **FOLLOWING TRIAL JUDGMENT**

THIS MATTER having been opened to the Court by the Plaintiff, F.M. Renaissance, LLC (the "Plaintiff") seeking to recover certain amounts it contends were improperly charged as part of a loan pay off by the Defendant, Crown Bank ("Crown" or the "Bank") in December of 2019. Crown bank in response filed a Counterclaim for allocation of attorneys' fees and costs for defending this action. The Court having convened a non-jury trial and having considered the testimony of witnesses, parties as well as the Exhibits admitted in evidence, the Stipulation of Facts and post-trial submissions; the Court having issued the accompanying Findings of Fact and Conclusions of Law; and for good cause shown:

It is on this _22___ day of August, 2024

ORDERED AND ADJUDGED AS FOLLOWS:

1. The Court dismisses the remaining Counts of the Complaint with prejudice.

2. The Court grants judgment on the Counterclaim in favor of Crown Bank and against FM as to liability only. If Crown Bank wishes to pursue its claim for attorneys' fees and costs for defending this action, it shall submit, within thirty (30) days of posting of this Judgment, a Certification of Services with all necessary proofs to support its claim.

3. FM shall have thirty (30) days from receipt of such materials to contest the amount or reasonableness of attorneys' fees and costs submitted by Crown Bank's Certification. Crown Bank may, if desired, submit a Reply to any such opposition within fifteen (15) days of receipt. The Court will entertain and grant oral argument if it is so desired by the parties.

4. A copy of this Judgment shall be served upon Defendants within __5__ days of receipt, service to be made by the New Jersey E-courts system.

J.S.C

This motion was

(X) Opposed

(__) Unopposed

Statement of Reasons

In this action involving a commercial construction loan for a mixed-use redevelopment project, the Plaintiff F.M. Renaissance, LLC ("FM") seeks to recover certain amounts it contends that the lender Crown Bank ("Crown" or the "Bank") improperly charged FM as part of the loan payoff when FM paid the loan in December 2019. Crown contends it properly charged the borrowers for the amounts at issue and seeks, by way of Counterclaim, to recover attorneys' fees and costs, pursuant to the parties' loan agreement and note, incurred in defending this action.

The Court conducted an in-person, non-jury trial in October 2023. The parties entered a Joint Statement of Stipulated Facts, submitted a set of stipulated Exhibits, presented the testimony of the principals to the subject transaction and filed post-trial submissions. The Court was able to observe, as well as hear, the witness's testimony and assess credibility as the fact finder.

Certain of the procedural history is relevant to the Court's findings as set forth herein. Prior to the trial, the parties submitted cross-motions for summary judgment. The Court denied these motions in substantial part as set forth in a Statement of Reasons. It concluded the relevant term of the note was ambiguous and amenable to alternative interpretations. As a result, the Court concluded a trial was necessary to consider extrinsic evidence and resolve the disputed interpretations. The Court dismissed the Plaintiff's claim grounded in the New Jersey Consumer Fraud Act, as set forth in a separate Statement of Reasons, having determined that the Act is not applicable to this commercial transaction the terms of which were specifically negotiated and tailored to the individual circumstances, which negotiation occurred among sophisticated parties, represented at all pertinent times by counsel.

The pivotal issue in the trial relates to the proper interpretation of the promissory note at issue and in particular the term relating to the rate of interest to be applied upon conversion of the construction loan to a permanent loan. FM contends that the parties agreed to a fixed rate of interest of 4.5% for the first five years of the ten-year term of the permanent loan and that the note expressly so provides. It asserts that, during 2019, prior to the then established maturity date of the construction loan – and the concomitant obligation of the borrower to convert to the permanent loan (which required satisfaction of certain conditions by the borrower) – FM repeatedly asked Crown to verify the parties' agreement to the 4.5% rate. It contends the Bank refused – instead asserting the rate would be adjusted upon conversion based on intervening changes in the Prime Rate from the inception of the construction loan to the date of conversion.

FM asserts the Bank's refusal to verify the agreed 4.5% rate was an anticipatory repudiation by Crown of the parties' agreement on this point, excusing the borrower from further performance, including the conversion. It asserts it had no choice in the circumstances but to secure alternate financing arrangements, which it proceeded to put in place (on more favorable terms). However, when it sought to pay off the loan, the Bank charged it for default interest – predicated on a default in failing to convert to the permanent loan- and a prepayment penalty, as well as an extension fee it claims the Bank never charged and waived. It seeks to recoup all these fees.

The Bank agrees that the parties' arrangement contemplated a fixed rate of interest for the first five years of the permanent loan (and a continuously floating rate thereafter). However, it contends the parties agreed – and the note provides for – adjustment of the fixed rate itself from 4.5% based upon increases (if any) in the Prime Rate between the time of loan closing and the maturity of the construction loan and conversion to the permanent loan.

The Bank asserts that, when the construction loan matured in November 2019 without extension or conversion, the borrower was in default. It contends it had the right under the loan documents to charge the prepayment penalty upon payoff of the construction loan, as well as default interest to the time of repayment and the extension fee. In the circumstances, it contends that FM is not entitled to any recovery from the Bank. And it seeks, pursuant to the loan documents, an award of attorneys' fees and costs incurred in defending this action.

The Court now enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

Background of the Parties and the Subject Transaction

FM is a real estate development business. It is a sophisticated commercial enterprise with extensive experience in commercial lending, including construction loans that convert to permanent financing. Its principals are Franciso and Adriana Meleiro.

The Bank is a commercial lender. At the time of the transaction and the trial, its Chairman and CEO was Jacinto Rodrigues. The loan officer who principally handled the transaction at issue and the relationship with the borrower for the Bank was Enzo V. Priolo, a Senior Vice President/Commercial Loan Officer.

Prior to the subject transaction, Rodrigues had a long business and personal relationship with Francisco Meleiro and had been acquainted with Ms. Meleiro for many years. However, at all relevant times during the subject transaction, both FM and the Bank were represented by counsel.

The loan at issue was an $8.5 million construction loan with contemplated conversion to a ten-year permanent loan. The purpose of the lending was a redevelopment project involving an industrial building located on McWhorter Street in the Ironbound section of Newark. The redevelopment plan for the project envisioned conversion of this building to a mixed-use residential and commercial project with a 48-unit apartment component and retail/office complex.

The Commitment Letter

By letter dated August 8, 2016, the Bank issued a written Commitment Letter to FM by which it agreed to extend a commercial loan in the amount of $8.5 million. The Commitment Letter provided for a construction loan with a one-year term, subject to a twelve-month extension, and two six-month extensions, in each case with payment of an Extension Fee in the amount of .5% of the outstanding principal balance (an amount both sides acknowledge is $42,500 at the time of each extension). The parties contemplated that, upon maturity of the construction loan, whether at the expiration of the original term or an extension, the loan would convert (upon satisfaction of certain conditions by the borrower) to permanent term financing for ten years with two five-year terms.

The Commitment Letter provided for a $405,000 Interest Reserve to be held by the Bank during the term of the construction loan in an Interest Reserve account to fund interest payments as they would become due. The letter called for the refreshing of the Interest Reserve to cover interest payments to become due during any extension.

As to the interest rate, the original Commitment Letter provided that the interest rate for the construction loan would be “the Wall Street Journal prime rate plus 1.50%, floating, with a floor rate of 4.75%. However, should the prime rate increase during this period, the floor rate on the construction and permanent phase of the loan will increase accordingly." The Commitment Letter further provided, upon conversion to permanent financing, for a rate of interest as follows: "4.50% for the first five years and then adjusts for the next five years at the Federal Home Loan Bank five-year bullet index rate plus 300 basis points with a floor rate of 4.50% for the term of the loan."

The Commitment Letter provided that the Bank would be obligated to convert to permanent financing when certain conditions obtained. In principal part, these conditions were satisfied when (i) FM completed construction of all contemplated improvements and received or tendered final inspection letters from a Bank-appointed inspector and City of Newark inspector; (ii) FM received a Certificate of Occupancy; (iii) FM presented proof of insurance; (iv) FM tendered executed Leases and the Estoppel Certificates from commercial tenants; and (v) the rents from the completed project satisfied a debt service coverage ratio (the "DSCR") by which the Annual Net Operating Income from the project exceeded 1.25 times the amount of the Annual Debt Service payments.

The Commitment Letter provided for a Prepayment Penalty. During the construction phase, the amount of such penalty was 5% for the "repayment in whole or in part of the Loan before its maturity date or if not converted to a Crown Bank Commercial Mortgage."

<u>Testimony as to the Commercial Background of the Transaction</u>

At the trial, the Bank's CEO Mr. Rodrigues described in extensive and credible detail the commercial background to the transaction and, in particular, the interest rate regime for a loan of this character when issued by Crown. He testified that Crown is a community commercial bank that issues commercial loans primarily for projects such as the one FM was pursuing and that are located in the local community.

Rodrigues testified that construction loans are risky and expensive for a bank like Crown, because the borrower draws the funds over time and on an uncertain schedule. Consequently, a large portion of the funds loaned to the borrower do not begin to the earn the interest contemplated by the loan for a period of time. Meanwhile, the lender must have the funds readily available for the borrower’s draws and thus cannot deploy such funds to other profit-making purposes. Such funds are, as Rodrigues described, on the sidelines. The construction phase of a loan also, according to Rodrigues, involves intensive labor, as the bank must monitor the progress of the project, including by conducting or paying for inspections.

The more profitable phase of the loan is the permanent phase. Once the asset that is the basis for the loan is operating and generating income, the bank’s function is largely limited to ensuring collection.

He stated that Crown uses variable interest rates for these loans. It normally looks to the Prime Rate as the basis for adjusting variable rates in its loans (as opposed to, for example, the LIBOR rate). The use of variable rates protects the bank against interest rate risk.

Rodrigues explained in detail that the Bank was willing to afford FM a fixed interest rate for the first five years of the permanent phase of the loan as it requested (with a variable rate thereafter in the second term). However, the Bank was not in a position to commit to a specific fixed rate at the time of the commitment or the closing of the construction loan. It was comfortable with the 4.5% rate it agreed to provide, but based on market conditions at the time and assuming such conditions were unchanged at the time of conversion one to three years in future.

As a result, according to Rodrigues, it was necessary to build into the loan terms a feature for adjusting the fixed rate to be employed for that five-year period based on intervening changes in the Prime Rate from the commitment to the time of conversion (as well as the initial floor rate for the construction phase prior to the closing on the construction loan). He understood the sentence in the Commitment Letter to the effect that, if the prime rate should increase, the "floor rate on the construction and permanent phase of the loan will increase accordingly" embodied this concept.

Rodrigues testified – credibly, the Court finds- that the Bank could not accept the risk, at the time of commitment or closing the construction loan, that the prime rate would increase over the period from the loan inception to the conversion (up to three years assuming all the extensions on the construction loan were sought). He pointed out that the inability to adjust the fixed rate for the permanent phase, based on interim changes in the Prime Rate since the loan inception, could cause a loan to be non-performing even if the borrower were paying. The bank would not be able to pledge the loan to secure necessary borrowing.

Rodrigues testified the Bank cannot and does not accept the interest rate risk that arises during the period from loan inception to conversion. He said the Bank has never done so. There was no credible fact testimony or any expert testimony to the contrary.

Ms. Meliero testified that she was assured by Mr. Priolo before entering the transaction that the interest rate for the permanent loan would be fixed at 4.5% for the first five years of the term of such loan. But it is apparent that Ms. Meleiro at minimum misunderstood the nature of the assurance given to her – that is, the rate would be fixed, not variable, for that five-year period, but the rate itself would be adjusted from 4.5%, if necessary, to account for changes in the Prime Rate occurring prior to the inception of the permanent phase. Such an interest rate regime is far more consistent with the commercial background, as credibly explained by Mr. Rodrigues, with the better interpretation of the language of the documents, as informed by such background, and with Mr. Priolo's post-closing correspondence after Ms. Meleiro began to question the rate that would be employed upon conversion.

Extensions to the Loan Commitment

By letter dated January 24, 2017, the parties agreed to a modification of the Commitment Letter that extended the expiration of the commitment to March 22, 2017, and adopted certain other changes not relevant here. The Letter contained the following sentence: "The Interest Rate and Floor Rate must reflect the increase on the Prime Rate since the date of the issuance of the commitment." This text established that the extension of the commitment would not change the intended adjustment of interest rates since the original issuance of the commitment. Although a provision to this effect was probably unnecessary, given the term of the original Commitment Letter as to this subject matter, it certainly did not modify in any way intent to adjust the interest rates based on intervening changes in the Prime Rate.

On May 11, 2017, the parties agreed to extend the loan commitment to May 29, 2017. The letter effected certain other changes in the initial payment of the interest reserve and the refreshing of this reserve.

<u>The Closing of the Loan</u>

The construction loan closed pursuant to a Construction Loan Agreement dated May 23, 2017 (the "Agreement"). Other documents executed at the Closing were a Construction Mortgage Note, dated May 23, 2017 (the "Note") and Construction Mortgage and Security Agreement, date May 23, 2017.

FM asserts that its principals had appeared for a closing a few days earlier and declined to execute the loan documentation and close the loan. FM asserts it did so because the loan documents contained text to the effect that the rate to be employed upon conversion was not fixed at 4.5%. FM asserts that its principals returned to close the loan days later only after a modification to the documentation was agreed to establish this point.

Mr. Rodrigues presented a far more credible version of what transpired. He noted that, although he did not personally attend either the aborted or the actual closings and was not privy to the discussions that occurred in these sessions, his office was located next door to the conference room at which the sessions occurred. He testified that closings typically occurred in such conference room so that he could be immediately available if a problem requiring his attention arose.

Rodrigues testified that he was alerted to the issue concerning the fixed rate for the initial five years of the permanent phase. He stated that he issued instructions that the rate, though fixed for five years, would have to adjust from 4.5% if there were intervening changes in the Prime Rate.

Rodrigues stated that FM returned for the Closing a couple of days later. He testified that there were no changes to the loan documents presented at the original closing session based on the objection raised by FM as to the rate for the permanent phase. And FM has not supplied any drafting history of the relevant documents described above to demonstrate to the contrary.

<u>Terms of the Loan Documents</u>

The Agreement expressly incorporated the terms of the Commitment Letter, but it also restated them. The Agreement provided for the Interest Reserve, which was fully funded in the amount of $405,000, with half posted at the time of closing and half upon the second draw by the borrower. It established the terms and conditions for conversion to permanent term financing, including the DCSR in a manner that mirrored the Commitment Letter. The Agreement provided that FM would be in default if it failed to meet the requirements for conversion at the end of the term of the construction loan, as the same may be extended.

The Agreement expressly prohibited oral changes, waivers, terminations or discharges and stated that any modifications required an instrument in writing executed by both parties. Article III(l) provided for the recovery by the Bank of its attorneys' fees and costs as follows:

> Borrower will pay all expenses incurred with respect to any and all transactions contemplated herein and the preparation of any document reasonably required hereunder and the prosecution or defense of any action or proceeding relating to any transaction contemplated herein or affecting the Property or any other security given for the Loan, including (without limiting the generality of the foregoing) all title and conveyancing charges, recording and filing fees and taxes, intangible taxes, escrow fees, insurance premiums (including title insurance premiums), brokerage commissions, finders' fees, placement fees, appraisers', architects', engineers', accountants' and attorneys' fees.

The obligations of the parties as to the construction loan and any permanent loan are further evidenced by the Note executed and delivered to the Bank. The Note provided for the initial one-year term of the construction loan, a twelve-month extension, followed by two six-months extensions, if necessary, as well as an extension fee of .5% per extension. The Note provided for a Prepayment Penalty as follows: "During the Construction Term of the loan, for the loss on income, there shall be a 5% premium for the repayment in whole or in part, of the [principal] of the loan and if the loan does not convert to a Crown Bank permanent loan."

The Note provided for rates of interest for the construction term, and upon conversion of the loan into the permanent loan, for the ten-year permanent term as follows:

> Construction Term: As used in tis Note, the term "Interest Rate" on any particular date during the construction term, will be the Wall Street journal Prime Rate plus One Hundred Fifty Basis point (1.50%) with a minimum rate equal to 5.25%.
>
> Permanent Term: Upon conversion to a permanent term interest will be fixed for the first five years at 4.50% and will then adjust for the next five years at the then prevailing Five Year Federal Home Bank 5-year bullet rate plus 300 basis points with a minimum rate of 4.50% at all times. The floor rate will increase to reflect any and all Prime Rate increases from the closing to the time of conversion.

The Note provided for Default Interest in the event of any default under the Note. In such event, the borrower became obligated or interest at a rate of 5% above the then applicable rate of interest (up to the maximum amount allowed by law).

The Note explicitly provided that it could not be modified orally, but only by a writing signed by the party against whom the enforcement of any waiver, change or modification is sought. It further provided that "Bank shall not be deemed to have waived any of Bank's rights or remedies under this Note, the Loan Agreement or the Loan Documents unless such waiver is express and in writing signed by the Bank." The Note provided that the Borrower "shall pay all cost of collection of any and all sums due and owing hereunder and not paid, including without limitation court costs and reasonable attorney's fees in connection with the collection of such sums."

The parties agreed in executing the Note to an adjustment of the initial interest rate for the construction phase from 4.75%, as set forth in the Commitment Letter, to 5.25%. The increase in the rate was predicated on the change in the Prime Rate since the date of the Commitment Letter.

FM points out that there was no similar adjustment at this time to the 4.5% initial rate applicable to the permanent phase. It argues that this buttresses its position that the parties had agreed that such rate was to remain fixed at 4.5% regardless of changes in the Prime Rate.

But there was no need to adjust this rate at the time. That would occur based on subsequent developments in the Prime Rate over the ensuing one to three years (depending upon extensions). Indeed, to have adjusted the rate at this time would have disadvantaged the borrower if the Prime Rate were to decline over the ensuing period of time, and would have deprived the borrower of the agreed 4.5% rate if the Prime Rate were unchanged from loan inception at the time of conversion.

FM also point outs that the text of the final sentence of the interest rate provision quoted above provided that the "floor rate" would adjust based on changes to the Prime Rate. However, the text of the January 24, 2017, modification letter provided that the "Interest Rate and Floor Rate" would so adjust. It contends that the deletion of the reference to the Interest Rate – which it asserts in this context meets the 4.5% rate established by the clause – represented an acknowledgment by the parties that changes in the Prime Rate prior to conversion would not have any effect on the 4.5% "fixed" rate.

The Court previously agreed that this deletion supported a conclusion that the clause at issue was ambiguous. But having now heard the full body of extrinsic evidence, the Court concludes the better interpretation of the provision – and the parties' reasonable understanding concerning the same – is that the rate for the first five years of the permanent term was to be fixed, but the rate itself could be adjusted from 4.5% based on intervening changes in the Prime Rate.

Post-Closing Interactions of the Parties

Following the closing in May 2017, the parties agreed to extensions of the construction loan. In April 2018, FM elected to extend for twelve months to May 2, 2019, triggering an obligation to pay the extension fee of $42,500. However, the parties did not memorialize in writing the extension at this time and the extension fee was not billed or paid at this time. Subsequent correspondence from the Bank in April 2019 offering a six-month extension of the maturity of the construction loan confirms that the Bank did consider the loan to have been extended from May 2018.

In or about April 2019, the parties agreed to a further extension of the construction loan through November 2, 2019, thus actuating the first of the two six-month extensions. FM paid $42,500 by check dated April 30, 2019, and replenished the Interest Reserve in the amount of $371,875 by check of the same date. The Bank confirmed in an e-mail the extension to November 2019. There was no payment at this time of an extension fee in relation to the prior exercise of the twelve-month extension.

The record reflects that, beginning in early 2019, FM communicated with the Bank concerning the conversion of the construction loan to permanent financing. In January 2019, the Bank responded to inquiries of FM with a communication showing an interest rate of 5.93%, not 4.5%, for the first five-year phase of a permanent loan if the conversion were to occur at that time. The Bank responded to a March 2019 inquiry as to the terms of the permanent loan with a response stating that, if converted at such time, the rate would be 5.84%.

E-mail communications in April and May 2019 reflect that the parties continued to discuss the interest rate upon conversion. In such communications, FM set forth the position that the Note provided a fixed rate of 4.5% for the first five years after conversion. The Bank's representative expressed the view that the rate would incorporate changes in the Prime Rate between the closing on the construction loan and the conversion date. In a May 3, 2019, email, Priolo stated: "[w]e went over that thoroughly in your office on several occasions and also with your attorney at your office that we cannot determine a rate of interest today for a construction loan to convert to permanent financing several years in the future. The last sentence in the [N]ote states the floor rate will increase to reflect any and all prime rate increases from closing to the time of conversion." This position is entirely consistent with Rodrigues' testimony concerning the commercial background of the transaction.

FM obtained a Certificate of Occupancy for the building in April 2019. However, it is undisputed that FM had not by this time met the DSCR, one of the requirements for conversion. FM continued to provide the Bank with leases and spreadsheets pertaining to leasing activity in the building.

In September 2019, the Bank suggested a second extension of the construction loan through May 2, 2020. Priolo noted that, at the time, FM had not met the DSCR and, indeed, that the Bank had calculated a DSCR based on the leases provided to be ".14xs coverage."

Priolo stated that the extension required the approval of the Bank's Board. FM responded that it believed it would meet the DSCR by November 2, 2019.

In a subsequent exchange in September 2019 as to the DSCR, the Bank reiterated its belief that FM would not meet the requirement by November 2, 2019. FM responded that it would meet the DSCR, and that, in calculating the ratio, the Bank was both understating the revenues, as certain leases were in place that would not commence until after November 2, 2019, and overstating the property taxes and costs for the project.

At the same time, FM asked the Bank to waive the DSCR and to permit FM to place funds in escrow until the rents satisfied the ratio. An internal Bank communication authored by Priolo establishes that he was of the view that there was by mid-September 2019 a "comfortable ratio." However, Rodrigues was looking for additional verification and posited that the Bank "might or might not want to convert."

On October 18, 2019, the Bank offered a final six-month extension of the construction loan to May 2, 2020. However, believing that the Bank had reneged on an obligation to afford a fixed 4.5% interest rate for the first five years after conversion, FM had sought and obtained a commitment from Columbia Bank for alternate permanent financing. The commitment letter from that bank required a debt service escrow account of $250,000 to be released upon achievement of a 1.2x debt service coverage for at least six months.

On November 20, 2019, the Bank offered a conversion to a permanent loan with an interest rate for the initial five-year period of 4.78%. The Bank's offer required FM to place $150,000 in escrow pending satisfaction of the DSCR, but it agreed to waive repayment of principal for six months or such time as the ratio requirement was unsatisfied (up to a year).

FM declined to accept this offer as it had accepted the Columbia Bank commitment. FM closed on this latter loan in December 2019, at a lower interest rate than the Bank's last offer. It used the proceeds of the loan to pay off the balance of the existing construction loan with the Bank.

In connection with this transaction, the Bank imposed a Prepayment Penalty in the amount of $403,749.96 and an extension fee of $42,500, representing the unpaid extension fee for the twelve-month extension from May 2018 to May 2019. FM paid these amounts in order to secure a discharge of the Bank's mortgage lien and proceed with the Columbia Bank financing.

On January 7, 2020, the Bank refunded to FM $11,267, which it determined was the unused balance of the Interest Reserve account. FM refused the reimbursement as it believed the appropriate amount was $44,969.08 The difference represents the Bank's employment of the default interest rate of 11.25% provided in the Note. The Bank's December 6, 2019, payoff letter did not mention application of this rate.

<u>The Proper Interpretation of the Note</u>

As noted, the Court previously determined, on motions for summary judgment, that the terms of the Note as to the interest rate regime, and in particular the text as to the interest rate to govern during the first five years of the permanent phase, were ambiguous. Indeed, that is why the Court concluded a trial was necessary.

The Court agreed that, given the reference in the Note to a "fixed" rate of 4.5% and the subsequent reference to a modification upon conversion of the "floor rate", there was a reasonable construction of this text that supported the position of FM – i.e., that the interest rate for the permanent phase was to be fixed at 4.5%, regardless of changes in the Prime Rate at any time since loan inception; and that the rate for the second five years was variable, with the minimum or floor rate for that period to be adjusted based on changes in the Prime Rate. The Court concluded the final sentence of the clause could reasonably be read to refer only to the minimum interest rate for the second five-year period mentioned in the penultimate sentence. It found such interpretation was supported by the omission of reference to the "interest rate" from this sentence, which term was used in comparable text from the January 2017 letter extending the commitment (and evidence in the summary judgment record that FM had refused to close the loan without recognition that the 4.5% rate was fixed for five years of the permanent phase).

The Court concluded there was also a reasonable textual basis for the interpretation proffered by the Bank. Such interpretation was consistent with the reference in the final sentence of the subject text to modification of the "floor rate" based on changes in the Prime Rate occurring between the closing and the date of conversion. The reference to the conversion date indicated an intention to adjust the 4.5% rate, which was the rate that would apply at conversion. The interest rate for the second five-year period was variable in all events – and based on an entirely different mode of measurement – and would not require adjustment at conversion.

The Court resolves, as a finding of fact (and conclusion of law), the disputed interpretation in favor of the Bank. Specifically, it finds the Note provided for a fixed rate of interest for the first five years of the permanent loan following conversion, but with the agreed 4.5% rate itself to be subject to adjustment based on any upward changes in the Prime Rate from the time of closing to the date of conversion.

The polestar of interpretation of a contract is the parties' intent. When a contract or term is ambiguous, as here, it is permissible and necessary to examine relevant extrinsic evidence to determine that intent. The Court examines the language, in light of the extrinsic evidence, to arrive at a sensible meaning of the relevant text of the agreement giving effect to all pertinent terms. The Court's function in the circumstances is to determine what the parties intended and not to write a different or better agreement than the parties fashioned between themselves.

The determination of the parties' intention in relation to the interest rate for the first five years is a case specific exercise. Thus, detailed reference to other cases in other circumstances is neither necessary nor helpful.

The Court finds the Bank's interpretation of the subject text is more consistent with the language employed by the parties in the Note and the commitment letters, the commercial background of the transaction, the more credible testimony of Rodrigues as to the events surrounding the loan closing and the consistent stance the Bank maintained as to the 4.5% rate when Ms. Meleiro raised the issue post-closing. The Commitment Letter referred explicitly to adjustments in the rate during the construction and permanent phases. The Agreement explicitly incorporated the Commitment Letter.

The text of the Note is, as noted, readily amenable to a reading that the parties agreed on an adjustment to the 4.5% fixed rate based on changes in the Prime Rate. Such interpretation recognizes the rate as "fixed" for the first five-year term of the permanent loan, thus, giving full effect to the word "fixed", but also recognizes the rate itself is subject to adjustment, thus giving a sensible interpretation to the last sentence of the text at issue.

There is no textual bar to understanding the 4.5% rate to be a "floor rate" as such term was used in this sentence. There would be no reason to tie the adjustment specified in this sentence to the conversion date if the only adjustment to be made upon conversion was to the governing minimum rate that would apply five years later. The relevant rate at such time was the rate to apply upon conversion. The explicit reference to an adjustment as at the conversion date is most sensibly understood in the context of this transaction to refer to the 4.5% rate identified in the first sentence of this text.

The Court is mindful that this language deleted the specific reference to the "Interest Rate" that appeared in comparable text from the January 2017 extension letter. Although this introduced an element of ambiguity, as the Court previously determined, it is not a sufficient basis to accept FM's construction of the language.

The construction of the Note proffered by the Bank and accepted by the Court is more consistent with the commercial background of the transaction. Under such interpretation, the interest rate was fixed for the first five years of the permanent terms, which is what the borrower wanted, and Bank agreed to provide from the outset of the transaction. But the rate itself would adjust based on intervening increases in the Prime Rate as the Bank required to address the interest rate risk in the period between the closing and the conversion as many as three years later. The Bank was willing to agree to a 4.5% fixed rate upon conversion at the time of loan inception, but only with a mechanism to address the risk of intervening increase in the Prime Rate over the ensuing one to as many as three-year period.

The Court finds the credible testimony concerning the closing itself also supports its finding. The Meleiros raised the issue as to the 4.5% rate, and the Bank rejected their position. There is no convincing evidence presented that the loan documentation actually changed in any way from what was presented at the first day of closing to what was executed on the second that supports the borrower's position. If there were drafting history establishing a specific and material change in the loan documents from one closing session to the next, surely the record would contain such history.

It is true that Ms. Meleiro remained persistent in the post-closing period that the rate upon conversion was to remain at 4.5%. But this insistence must be examined against a background that the Prime Rate had increased over time following the closing, indicating that this rate would adjust upon conversion. In any event, it is apparent, at minimum, that Ms. Meleiro either misunderstood or simply refused to accept the parties' agreement on this point, but nonetheless determined to proceed with the transaction. The Bank's position post-closing as to the adjustment of the 4.5% rate based on intervening changes in the Prime Rate was always consistent and comported with the loan documentation, the negotiating record and the commercial background.

Conclusions of Law

As FM points out in its post-trial briefing, the disposition of the parties' claims and counterclaim turns entirely on the Court's resolution of the proper interpretation of the Note as to the rate of interest to apply at the time of conversion. That is so because the Plaintiff's claim of an anticipatory repudiation of the parties' agreement by the Bank – the only basis asserted as grounds for the affirmative relief it seeks – is tenable only if the Court were to find that the proper interpretation of the relevant terms of the parties' agreement is that claimed by FM. Put differently, if the Bank correctly interpreted the Agreement to require an adjustment of the 4.5% rate at the time of conversion, then its refusal to commit otherwise was justified and did not in anyway give rise to a repudiation of the agreement.

As the Court has determined that this is the case, it concludes that there is no viable claim grounded in anticipatory repudiation of the parties' agreement. There is therefore no need to address the question of whether the Bank's conduct, in pressing (consistently) its construction of the Agreement, actually constituted an anticipatory repudiation, warranting relief.

In all the circumstances, FM had the right to secure other financing for its project (as the Bank acknowledges). But with the attendant consequences as the loan documents explicitly provide. As FM prepaid the loan, it was liable under the loan documents for the prepayment penalty. Moreover, because the loan was never extended (as it might have been and as the Bank offered) from its maturity date in November 2019, and because the borrower did not satisfy the DSCR at the time the construction loan matured and thus the loan could not and did not convert, FM was in default. In the circumstances, it was also liable for interest at the default rate provided in the Note, until the time the loan was paid.

FM does not contest these points, save for its contention as to an anticipatory repudiation. Nor has it challenged the commercial reasonableness of the default interest rate established by the Note or the specific amounts charged for prepayment or default interest at the time of payoff.

The Court finds the Bank properly charged FM upon payoff of the loan for the then unpaid extension fee of $42,500 for the first extension of the construction loan from May 2018 to May 2019. There is no dispute that the Agreement provided for payment of an extension fee upon exercise of any of the rights to extend the term of the construction loan. And there is also no dispute that the borrower sought and obtained the twelve-month extension, giving rise to a right to the extension fee.

FM contends that the Bank somehow waived such right to the fee for this extension, because it did not seek or bill for it at the time. But this of itself is not grounds for a determination that the Bank voluntarily relinquished its known right to the extension fee – the legal standard it must satisfy to establish a waiver. Indeed, both the Agreement and the Note explicitly bar waiver of rights of the lender save upon a written instrument. There is no such instrument provided in this record.

For these reasons, the Court dismisses the remaining Counts of FM's Complaint with prejudice. FM has not established any basis for recoupment of the amounts the Bank charged to close out the construction loan and discharge the Note and mortgage.

This leaves the Bank's Counterclaim for attorneys' fees incurred in defending this action. The Agreement provides explicitly for recovery by the Bank of attorneys' fees and costs incurred in litigation relating to the subject transaction, including such expenses incurred in the defense of any such action. As a result, the Court concludes that the parties agreed to a contractual alteration of the so-called American Rule that ordinarily governs attorneys' fees and that such contractual fee shift arrangement encompasses the present circumstances, as the Bank was required to defend this action and has prevailed on all the claims asserted against it by FM. This is so even though FM established a right to a trial during the summary judgment motion practice and otherwise had at all times a good faith basis for the claims asserted in this case (the Court renders no determination at this time concerning what fees and costs the Bank is entitled to recover).

For these reasons, the Court grants judgment on the Counterclaim in favor of the Bank and against FM as to liability only. If the Bank seeks to pursue its claim for attorneys' fees and costs, it shall submit, within thirty (30) days of posting of the Court's Judgment, a Certification of Services with all necessary proofs to support its claim. FM shall have 30 days from receipt of such materials to contest the amount or reasonableness of such fees and costs. The Bank may submit a Reply within 15 days of receipt any opposition. The Court will grant oral argument if desired. It respectfully urges the parties to attempt to resolve the claim for attorneys' fees and costs on their own, noting as it has the good faith assertion of rights by FM.