

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket No. BCD-WB-RE-08-31

Bank of America, N.A.,

Plaintiff

v.

**DECISION AND JUDGMENT**

Charter Westgate, LLC, and  
TD Bank, N.A.,

Defendants

This matter was heard on July 1, 2009, on Plaintiff's Complaint for declaratory judgment and injunctive relief, and on Defendants' counterclaims for declaratory judgment. The parties submitted the matter to the Court on a stipulated record.<sup>1</sup> At the hearing, the parties presented argument on the stipulated record.

Factual/Procedural Background

Defendant Charter Westgate, LLC, (Charter Westgate) owns the Westgate Plaza shopping center on Congress Street in Portland, Maine. Charter Westgate acquired the shopping center from Shaw's Realty, Inc., in 2008. At the time that Charter Westgate purchased the shopping center, Plaintiff Bank of America (Bank of America) and Defendant TD Bank (TD Bank) conducted business from leased space at the shopping center. Bank of America's site is a "stand-alone" building that is near the Congress Street entrance to the shopping center.<sup>2</sup> TD Bank's current location is an "in-line" site at the shopping center and is located next to Shaw's supermarket. TD

<sup>1</sup> The Court also entertained argument on Plaintiff's Motion to Supplement Record. The Court will address the motion in the context of Plaintiff's request for injunctive relief.

<sup>2</sup> Bank of America assumed the site when it took over Fleet Bank in 2004; Fleet Bank acquired the site when it took over Northeast Bank in 1987.

Bank also operates an automated teller machine facility, which it constructed in 1990, in the parking lot of Westgate Plaza.

TD Bank and Charter Westgate have reached an agreement pursuant to which TD Bank would lease space within the Westgate Plaza closer to Congress Street on which space a new branch office would be constructed for TD Bank. Citing a provision of the 1975 lease between one of its predecessors (Northeast Bank) and Charter Westgate's predecessor (Shaw's Realty), Bank of America seeks to prevent TD Bank's relocation within the plaza. Specifically, Bank of America relies upon Section 8A of the lease, which provides in pertinent part:

Landlord agrees that it will not lease space in the Shopping Center to a commercial bank, credit union, savings and loan association or small loan company, so long as Tenant remains open for business during Tenant's normal hours. This restriction, however, shall not apply to a savings bank (or in the event there is no savings bank in the Shopping Center, a savings and loan association) and shall not prohibit Shaw's or any other tenant from allowing its management or employees from conducting normal credit operations for its customer, nor normal credit union operations for its employees and/or relatives within their leased premises.

At the time of the execution of the original lease for TD Bank's site, TD Bank's predecessor, Peoples Heritage Savings Bank (Peoples), was a savings bank and, therefore, Peoples' lease did not violate the Bank of America lease. On June 1, 2000, Peoples converted to a national bank. After a series of transactions, Peoples was ultimately acquired by the Toronto-Dominion Bank, and became known as TD Bank.

Neither Bank of America, nor its predecessors, objected to TD Bank's continued tenancy in the Westgate Plaza after TD Bank's conversion to a national bank. In addition, in connection with the sale of the plaza to Charter Westgate, Bank of America executed two estoppel letters. In the letters, which were issued in October 2007 and March 2008, Bank of America represented that to its knowledge, the landlord (Shaw's Realty) was not in violation of any of the lease terms.

Prior to the completion of its purchase of the Westgate Plaza, Charter Westgate entered into a lease agreement with TD Bank, pursuant to which agreement TD Bank would lease a 3000 square foot branch office at the shopping center, and would discontinue its "in-line" location. When it learned of the proposed relocation of TD Bank within the shopping center, Bank of America informed Charter Westgate that the relocation would be in violation of Section 8A of the lease between Charter Westgate and Bank of America because TD Bank was not a savings bank.

Bank of America subsequently commenced this declaratory judgment action, in which it asked the Court to determine that the proposed relocation of TD Bank within the Westgate Plaza would constitute a violation of the lease, and requested that the Court enjoin Charter Westgate and TD Bank from relocating TD Bank's site. As part of their responses to Bank of America's Complaint, Charter Westgate and TD Bank filed counterclaims seeking a declaration that the Section 8A of the lease does not prohibit the proposed relocation.

### Discussion

Bank of America contends that although the lease with TD Bank's predecessor, Peoples, did not violate the restriction in Bank of America's lease because Peoples was a savings bank, the proposed relocation would violate the lease because TD Bank is not a savings bank. Charter Westgate and TD Bank maintain that Section 8A is not a bar to the relocation because the distinction between a savings bank and a commercial bank is no longer valid, and because Bank of America has waived its ability to enforce the restriction.

Restrictive covenants, such as the one set forth in Section 8A, are enforceable, but are to be interpreted with "a narrow and strict construction." *Boehner v. Briggs*, 528 A.2d 451, 453 (Me. 1987). In this case, because a commercial bank would be prohibited under Section 8A while a

savings bank would be permitted, the parties focus in part on the distinction between a savings bank and a commercial bank.<sup>3</sup>

At the time of the execution of the lease in 1975, a clear difference existed between a savings bank and a commercial bank. The Law Court recognized the distinction in *Androscoggin County Sav. Bank v. Campbell*, 282 A.2d 858 (Me. 1971), when it wrote, "savings banks and commercial banks ... are quite different one from the other in their very nature." *Id.* At 860 (citations omitted). Subsequent to the Law Court's decision in *Androscoggin County*, and after the execution of the lease, the Legislature substantially modified Maine's banking statutes, which modification eliminated at least some of the differences between traditional savings banks and commercial banks.<sup>4</sup>

Throughout the ensuing years, the distinction between commercial and savings banks has blurred significantly. In fact, the distinction between the banks has "largely disappeared." *Lehman Brothers Bank, FSB, et al., v. Frank T. Yoder Mortgage, et al.*, 415 F.Supp. 2d 636, 642 n. 13 (E.D. Va. 2006). Perhaps because of this development, neither Bank of America, nor its predecessors, objected to TD Bank's continued operation in the Westgate Plaza even after TD Bank's predecessor, Peoples, changed its charter to one of a "national bank" in 2000. That is, Bank of America's lack of objection to TD Bank's continued presence and operation in the shopping center is consistent with the fact that as the result of the changes in the industry, there is no longer a material difference between a commercial bank and a savings bank.

The merging of the services provided by institutions that have been historically considered savings banks and commercial banks is significant in this case. In essence, Bank of America requests that the Court enforce a restrictive covenant that apparently has no practical application in

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<sup>3</sup> In support of its argument that Bank of America and its predecessors have consistently provided commercial bank services, Bank of America moved to supplement the record with the affidavit of Frederic Newman, a former chairman of the board of Northeast Bankshares Association, the holding company that owned Northeast Bank. The Court grants Bank of America's motion and, therefore, has considered the affidavit as part of Bank of America's argument.

<sup>4</sup> The new statutes were effective on October 1, 1975.

the current banking industry.<sup>5</sup> In other words, Bank of America asks the Court to enjoin TD Bank's relocation because it is no longer a savings bank in name. Given the significant changes that have occurred in the banking industry regarding the services provided by savings banks during the more than 30 years after the execution of the lease, the Court's inquiry should not be limited to such a superficial analysis. Rather, if the distinction between a savings bank and a commercial bank has continuing relevance, a more meaningful and appropriate inquiry is whether the services provided by TD Bank are consistent with the services of a savings bank in the current market. In this respect, Bank of America has failed to establish that TD Bank now provides services beyond the authority of a savings bank, or services that are not offered by a typical savings bank.<sup>6</sup> More specifically, although the record establishes that TD Bank became a "national bank" in 2000, the Court cannot determine from the record how the services provided by TD Bank are similar to or different from those provided by what might be considered a savings bank in the current market. Without this record evidence, Bank of America cannot prevail on its contention that TD Bank's tenancy is in violation of the lease.<sup>7</sup> Accordingly, Bank of America is not entitled to injunctive relief.

### Conclusion

Based on the foregoing analysis, the Court orders:

1. On Bank of America's Complaint, and on the counterclaims of Charter Westgate and TD Bank, the Court declares that the proposed relocation of TD Bank within the Westgate Plaza does not

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<sup>5</sup> The lease between Shaw's Realty, Charter Westgate's predecessor, and Northeast Bank, Bank of America's predecessor, restricts the operations of Northeast Bank to those of a commercial bank. Because the record contains very little reference to the services actually provided by Bank of America and TD Bank, the Court cannot conclude that either party is currently operating as the parties contemplated at the time the pertinent leases were first executed.

<sup>6</sup> Contrary to Bank of America's contention, the Court does not consider Charter Westgate to raise the "doctrine of changed circumstances", which might shift the burden of proof to Charter Westgate. (Plaintiff Bank of America's Reply Memorandum of Law at 3-4). Instead, in order to prevail in this action, Bank of America must establish that TD Bank's lease violates the restrictive covenant in the lease that governs the relationship between Bank of America and Charter Westgate. Bank of America is thus required to establish that TD Bank is not operating as a savings bank. As explained herein, given the changes in the banking industry, the Court is not convinced that TD Bank is operating in a manner inconsistent with a savings bank in the current market.

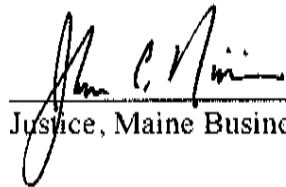
<sup>7</sup> The Court does not suggest that Bank of America failed provide the Court with available, relevant evidence. The lack of such evidence is consistent with the view that the distinction between a savings bank and a commercial bank is essentially non-existent.

violate Section 8A of the lease that governs the relationship between Charter Westgate and Bank of America.

2. Bank of America's request for injunctive relief is denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 10/16/09

  
Justice, Maine Business & Consumer Docket