

No. 1-13-3061

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PNC BANK, N.A., as successor in interest to National City Bank)	
)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 11 CH 25441
)	
ABDUL MATHIN,)	Honorable
)	Robert E. Senechalle,
Defendant-Appellant, and)	Judge Presiding.
)	
MATHIN FAMILY TRUST & HOLDINGS, LLC, FIRST COMMERCIAL BANK OF FLORIDA, UNIQUE FURNITURE and Unknown Owners and Nonrecord Claimants,)	
)	
Defendants.)	

JUSTICE MASON delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Presiding Justice Hyman specially concurred.

ORDER

¶ 1 *Held:* Where evidence submitted by bank in support of its motion for summary judgment established default by primary obligor in payment of real estate taxes, trial court did not err in entering judgment against individual guarantor.

¶ 2 Defendant-appellant, Abdul Mathin, appeals from an order granting summary judgment on a commercial guaranty entered in favor of plaintiff-appellee, PNC Bank, N.A. Mathin contends that genuine issues of material fact precluded a finding that the borrower, Mathin FamilyTrust & Holdings, LLC, defaulted on the loan and, therefore, the trial court erred in ruling, as a matter of law, that PNC was entitled to enforce his guaranty. We disagree and affirm.

¶ 3 BACKGROUND

¶ 4 On September 20, 2006, National City Bank entered into a commercial loan transaction with the Trust in connection with the Trust's purchase of property located at 6220-22 North Lincoln Avenue in Chicago, Illinois. The Trust executed a promissory note in favor of National City in the amount of \$479,267.85 and National City recorded a mortgage on the property. The loan was personally guaranteed by Mathin. The Trust and Mathin later executed a substitute note and guaranty.

¶ 5 For several years following inception of the loan, National City sent a monthly statement to the Trust listing the amount due and automatically deducted the payment from the Trust's National City account. On March 17, 2009, the Comptroller of the Currency approved a merger by which National City was merged into PNC. The record reflects that at least as of February 9, 2010, PNC communicated with the Trust as "successor to National City Bank." PNC continued to use the same loan number that National City had assigned to the loan.

¶ 6 In January 2011, the Trust did not receive a monthly statement on the loan. After he was contacted by a PNC employee regarding a missed payment, Mathin authorized a payment over the phone via electronic check. Mathin was further advised that the bank would resume sending monthly statements, that the Trust's National City account had been closed, a new

loan number had been assigned to the loan and that he would receive a written confirmation of the new loan number. No written confirmation was received.

¶ 7 After no letter was received, Mathin went to a National City branch in Skokie and spoke with the branch manager. Mathin was again told that the bank would provide the Trust with a letter containing the new loan number and payment instructions.

¶ 8 In March 2011, another bank representative contacted Mathin and informed him that the Trust was delinquent in a payment on the loan. While he was on the phone Mathin again authorized a payment to be made via electronic check on the Trust's behalf. Once the payment was made, Mathin was informed that the loan was current according to the bank's records. The Trust made one more payment on the loan in late April or early May 2011.

¶ 9 After the calls regarding the two missed payments, the next communication regarding the loan received by Mathin was an acceleration notice from PNC dated April 27, 2011, demanding payment of the note in full. The loan number used by PNC in its acceleration notice was different than the one that had been used since the inception of the loan. The letter was signed by James B. Hayden, a PNC Vice President. Hayden's letter advised that the loan was in default (i) for failure to make "payments when due" and (ii) for failure to pay real estate taxes.

¶ 10 For two years prior to 2011, the Trust had paid real estate taxes on the property late. On February 9, 2010, PNC advised the Trust that the late tax payments for 2008 constituted a default under the note. PNC further informed the Trust that "[i]n order to cure the default," PNC required the delinquent payments to be made within 30 days of the date of its letter. The Trust paid the first and second installments of 2008 taxes on March 31, 2011, and April 30, 2011, respectively. With respect to the 2009 taxes, PNC never notified the Trust that the

late payments constituted a default or demanded that the default be cured. On April 1, 2011, the first installment of 2010 real estate taxes was due. The Trust failed to pay the taxes on the due date.

¶ 11 After receiving Hayden's letter, Mathin called him several times, but received no response. Mathin responded to Hayden's letter in writing on May 3, 2011. In his response, Mathin informed Hayden that the loan number referenced in Hayden's letter was different than that assigned to the loan since its inception and asked for an explanation. Mathin also stated that the Trust was current on the loan and that all real estate taxes had been paid. When Mathin eventually spoke to Hayden, Hayden told him it was "too late" to make any mortgage payments and that he would have to talk to the bank's attorney.

¶ 12 PNC filed its complaint on July 20, 2011. The complaint contained three counts. In addition to a count seeking to foreclose the mortgage, the complaint also asserted a claim against the Trust for breach of the note and another against Mathin on his guaranty. With respect to the Trust's default, the complaint alleged: "The Mortgagor/Borrower is currently in default under the terms of the [] Note and Mortgage for failure to pay the monthly principal and interest payments when due or at any time thereafter, failure to provide requested financial information, and failure to pay 1st installment 2010 real estate taxes." In their answers, the Trust and Mathin denied the existence of a default.¹

¶ 13 PNC moved for summary judgment on December 11, 2012. In support of its motion, PNC submitted Hayden's affidavit in which he stated summarily, "[A] default occurred based

¹ Although PNC contends that the Trust admitted the existence of a default in its answer, our examination of the pleading belies this assertion. Therefore, we reject PNC's arguments based on this mischaracterization of the record.

on Borrower's failure to make the monthly payments of principal and interest under the terms of the Note when due, failure to submit financial documentation requested by [PNC], and for failure to pay the 1st and 2nd Installments of the 2010 and 1st and 2nd Installments of the 2011 real estate taxes when due." It is impossible to discern from the loan payment history attached to Hayden's affidavit when the alleged default occurred given that the history reflects payments of principal and interest as late as May 6, 2011, after PNC's acceleration notice was sent. Hayden's affidavit also provides no detail as to what financial documentation was requested by PNC that the Trust failed to provide.

¶ 14 The Trust and Mathin responded to PNC's motion with Mathin's affidavit in which he set forth the facts above regarding the Trusts' payment of amounts due on the note. With respect to financial information requested by PNC, Mathin averred that the first request for information he received was in December 2009 and that he complied with that request. An email attached to his affidavit reflected the transmission of Mathin's 2008 tax return and advised that no tax return was filed for the Trust. He also stated that he received a second request in March 2010 and complied with that request as well.

¶ 15 Prior to the hearing on PNC's motion for summary judgment, the Trust filed a bankruptcy petition under Chapter 11 of the U.S. Bankruptcy Code. 11 U.S.C. § 1101 *et seq.* (2010). Due to the automatic stay regarding PNC's claims against the Trust, the trial court proceeded to hear the motion only as it related to Mathin's guaranty. Finding no genuine issues of material fact, the court granted PNC's motion to enforce Mathin's personal guaranty. The court entered a finding pursuant to Illinois Supreme Court Rule 304 (a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement and/or appeal of the judgment and Mathin timely appealed.

¶ 16

ANALYSIS

¶ 17

Summary judgment is appropriate when "the pleadings, depositions, admissions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(West 2012). We review the trial court's order granting PNC's motion for summary judgment *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 18

Mathin raises a number of arguments on appeal, two of which we deal with summarily. Mathin first argues in one paragraph that PNC lacked standing to foreclose the mortgage on the property because it did not establish that it was the current holder of the note and mortgage. Although Mathin did not raise PNC's standing as an affirmative defense, he did argue the issue in response to PNC's motion for summary judgment and we can, therefore, address it. *Salazar v. State Farm Mutual Automobile Insurance Co.*, 191 Ill. App. 3d 871, 876 (1989). We nevertheless find this issue to be without merit. PNC is the successor to National City, having acquired the assets of National City via a merger on November 6, 2009. PNC provided evidence of the merger in the trial court and we could, in any event, take judicial notice of this fact as it is reflected in publicly available records. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 91 (1995); *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 399 (1990). Thus, Mathin failed to raise any genuine issue of material fact regarding PNC's standing to foreclose the mortgage and enforce his guaranty.

¶ 19 Mathin further argues that due to the Trust's bankruptcy filing, the amount due and owing PNC by the Trust was uncertain and, therefore, entering judgment against him for the full amount due under the note was improper. We likewise find no merit in this argument. It is well settled that the liability on a guaranty is unaffected by the primary obligor's bankruptcy filing, discharge or reorganization. See 11 U.S.C. § 524(e) (2010) ("discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt"); *Northern Trust v. VIII South Michigan Assoc.*, 276 Ill. App. 3d 355, 369 (1995) ("An action against a guarantor of a note is separate from the remedy of foreclosure and sale. [citation] An unconditional guaranty does not require a creditor to attempt collection from the principal debtor or collateral before seeking collection from the guarantor."); *Bank of America National Trust & Savings Assn. v. Schulson*, 305 Ill. App. 3d 941, 948-49 (1999) (same).

¶ 20 By the unambiguous terms of the guaranty, Mathin "absolutely and unconditionally" agreed to pay sums due to the lender under the note even if those sums were "barred or unenforceable against" the Trust. Thus, the fact that at the time summary judgment was entered, the amount of PNC's claim against the Trust's bankruptcy estate had not been determined had no bearing on Mathin's liability under his guaranty. It is also immaterial that roughly half of the amount due PNC was ultimately classified as an unsecured claim in the Trust's bankruptcy because the balance of the loan exceeded the value of the property. Again, this after-the-fact determination is irrelevant to Mathin's unconditional obligation to pay the amount of the indebtedness whether or not the value of the property is sufficient to cover it.

¶ 21 We likewise reject Mathin's related argument that the trial court should not have entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 6, 2010) that there was no just reason to delay enforcement or appeal of the order granting summary judgment to PNC on the guaranty. Mathin claims that the Rule 304(a) finding allowed PNC to seek enforcement of the full amount of the indebtedness against him even though the Trust may ultimately pay less than that amount. But that is the precise reason why lenders require personal guarantees. If, after a default, the principal does not satisfy the debt, the guarantor can be called on "absolutely and unconditionally" to perform under the guaranty and the lender need not exhaust collection efforts against the principal. If, at some future date, PNC is granted relief from the automatic stay in order to proceed with the foreclosure and later sells the property, Mathin will, of course, be entitled to a credit in the amount of proceeds realized from the sale, but that prospect does not prevent PNC from enforcing Mathin's guaranty.

¶ 22 We now turn to Mathin's primary contention on appeal – that PNC failed to establish a default by the Trust, a necessary predicate to the enforcement of Mathin's guaranty. As we have noted, the evidence provided by PNC in support of its contention that there had been a default in the payment of principal and interest was non-specific. Even after Mathin contested the existence of a default and the loan payment history showed principal and interest payments after the date of PNC's acceleration notice, PNC failed to provide the trial court with details as to the date and amount of payments that were allegedly due and not paid. Therefore, our review of the record leads us to conclude that genuine issues of material fact preclude a finding as a matter of law that PNC established a default by the Trust in the payment of principal and interest.

¶ 23 PNC likewise failed to establish that the Trust or Mathin failed to provide financial information requested by the bank. PNC never specified what financial information it requested that the Trust and Mathin failed to provide and given Mathin's affidavit in which he affirmatively represented that he had complied with all requests for financial information from PNC, this alleged default cannot support summary judgment in favor of PNC.

¶ 24 That leaves the Trust's failure to timely pay real estate taxes as the sole instance of default cited by PNC. There is no doubt that the loan documents obligate the Trust to timely pay real estate taxes and that the failure to do so, standing alone, would constitute a default entitling PNC to accelerate the note. But Mathin claims there was a course of dealing between the Trust and PNC pursuant to which PNC refrained from accelerating the note even though the Trust failed to make timely payment of real estate taxes for two years running.

¶ 25 Citing *Eppers v. First National Bank*, 151 Ill. App. 3d 902, 906 (1987), and *Allabastro v. Wheaton National Bank*, 77 Ill. App. 3d 359, 365 (1979), Mathin argues that where a party accepts late payments under a contract it may waive or suspend its right to timely payment and the concomitant right to declare a forfeiture unless the other party is given written notice of the intent to require strict compliance with the contract in the future. But the cases Mathin cites involve installment payments on real estate contracts, not mortgages subject to the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1501, *et seq.* (West 2010). The common law doctrine that requires a contract seller who accepts late payments to serve written notice of its intent to demand strict compliance with the contract in the future has no application in this statutory proceeding. See *Federal National Mortgage Ass'n v. Schildgen*, 252 Ill. App. 3d 984, 990 (1993) ("A notice to the mortgagor from the mortgagee requesting strict compliance with the provisions of the mortgage is not required under the Mortgage

Foreclosure Law prior to the mortgagee's initiation of foreclosure.") Here the rights and obligations of the parties are governed by the terms of the mortgage.

¶ 26 The terms of the mortgage clearly gave PNC the right to initiate foreclosure when the Trust failed to timely pay real estate taxes. The mortgage provides that "Grantor shall pay when due (and in all events prior to delinquency) all taxes...." The failure to pay taxes is listed in the mortgage as an event of default. Nothing in the mortgage or the Mortgage Foreclosure Law required PNC to give the Trust notice prior to declaring a default for nonpayment of real estate taxes. Thus, we will not read into the mortgage a requirement that it do so.

¶ 27 Further, PNC's single instance of affording the Trust an opportunity to cure its default for nonpayment of taxes does not support Mathin's position. In its February 9, 2010 letter, PNC advised Mathin, "[n]o course of dealing heretofore or hereafter by [PNC], nor any failure or delay on the part of [PNC] in exercising any rights under the terms and conditions of the [] Note and Mortgage, shall operate as a waiver of [PNC's] rights and remedies under these loan documents." Even after receiving this letter, the Trust waited more than 30 days to pay the tax installments then more than a year past due. Thus, the Trust's repeated and admitted failures to pay real estate taxes warranted acceleration of the note and initiation of foreclosure proceedings.

¶ 28 **CONCLUSION**

¶ 29 Because the predicate to Mathin's liability under his guaranty—a default by the Trust—was established by PNC on this record, the trial court did not err in granting PNC summary judgment on the guaranty. Accordingly, the trial court's August 28, 2013 order is affirmed.

¶ 30 Affirmed.

¶ 31 Presiding Justice Hyman, specially concurring.

¶ 32 I fully concur in the court's decision. I write separately to emphasize a small but powerful point—the presence of even a single mischaracterization can stretch a shadow over an entire brief. As explained at paragraph 12, fn. 1, PNC's brief misstates the nature of the defendants' answer to various allegations in PNC's amended complaint. Although an erroneous portrayal of the facts, without more, may not affect the outcome (and it did not affect the outcome here), nonetheless, it usually gets noticed.

¶ 33 One of the reasons appellate judges read the record is to verify the correctness of the facts, because, as we know, the facts drive the law. Any mischaracterization of the record makes a brief less reliable and, ultimately, less persuasive.

¶ 34 Facts should be presented with lucidity, precision, and candor. Frederick Bernays Wiener noted in his classic work on appellate practice, "If the court finds that you are inaccurate, either by way of omission or of affirmative misstatement, it will lose faith in you, and your remaining assertions may well fail to persuade." Frederick Bernays Wiener, *Effective Appellate Advocacy* 112 (Christopher T. Lutz & William Pannill eds., American Bar Ass'n 2004). This should be incentive enough to carefully and accurately craft the facts.