2017 IL App (2d) 170335-U
No. 2-17-0335
Order filed December 5, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANCO POPULAR NORTH AMERICA, Plaintiff-Appellee, v. PAUL CHENIER, VIDA CHENIER, SANDRA SLAGER, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS, Defendants (Paul Chenier and Vida Chenier, Defendants-Appellants).	)	Appeal from the Circuit Court of Kane County. No. 12-CH-3163 Honorable Mary Katherine Moran, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: No genuine issue of material fact existed that Vida guaranteed Paul's promissory note and that Banco did not release defendants' obligations under the note. Therefore, we affirmed summary judgment for Banco.

¶ 2 In this action to foreclose mortgage and for breach of note and guaranty, Banco Popular North America (Banco) moved for summary judgment for breach of note and guaranty against

defendants, including appellants Paul and Vida Chenier. The trial court granted summary judgment in favor of Banco. For the reasons stated herein, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 21, 2005, Vida executed a commercial guaranty (the Guaranty), wherein she guaranteed to pay Paul's existing and future indebtedness to Banco. The Guaranty defined "indebtedness" to include "any and all debts, liabilities and obligations *** now existing or hereafter arising or acquired, on an open and continuing basis." The Guaranty further stated that Vida's "obligations were continuing" and that it was a " 'CONTINUING GUARANTY' " for Paul's indebtedness.

¶ 5 The Guaranty listed Loan number 19001 at the top of the second through fourth pages. Loan 19001 was Paul's loan for the property commonly known as 727 North Lake Street, Aurora, Illinois, 60507 (the 727 Property). The Guaranty never explicitly referenced the 727 Property, nor any note or mortgage for the 727 Property. On May 8, 2012, Banco signed a deed of release for the indebtedness secured by the 727 Property, and recorded the deed the following day. The release stated that the indebtedness secured by the property had been paid in full.

¶ 6 On June 22, 2006, Paul and Banco entered into several agreements related to the property located at 630 North Lake Street, Aurora, Illinois, 60507 (the 630 Property). Paul executed a promissory note (the Note), in which he promised to pay a $360,000 loan (the Loan) from Banco. The Loan number was 19002. Paul and Banco also executed a mortgage for the 630 Property (the Mortgage) to secure the Loan. Finally, Paul and Banco entered into an assignment of rents for the 630 Property (the Assignment of Rents) to secure the Note. The Note matured on June 22, 2011, and the full outstanding Loan amount became due.

¶ 7 Banco filed a three-count complaint against defendants on August 8, 2012. Count I was to foreclose the Mortgage. Count II was for breach of the Note, alleging that Paul defaulted when he failed to pay back the Loan by its maturity date of June 22, 2011. In particular, Banco alleged that Paul owed $383,912.92 under the Note as of July 15, 2012. Count III was for breach of the Guaranty by Vida, alleging that after Paul defaulted on the Note, she failed to pay off his obligations. Therefore, Banco was seeking the balance due under the Note of $383,912.92 for breach of the Guaranty.

¶ 8 The trial court entered an order of default against defendants on April 17, 2013. The court set a sheriff's sale for September 5, 2013, but the sale was later canceled and never rescheduled.

¶ 9 On October 29, 2015, Banco executed a "release of mortgage and assignment of rents" (the Release) for both the Mortgage and Assignment of Rents for the 630 Property.

¶ 10 On December 15, 2015, Banco moved to prove up damages on counts II and III of its complaint, and it filed an amended motion for the same on June 2, 2016. In its motions to prove up damages, Banco acknowledged that "unresolvable title issues" had arisen with respect to the 630 Property, and it had declined to conduct a judicial sale of the property. Banco argued that counts II and III were legally distinct claims from an action to foreclose mortgage and that they remained pending before the court. Banco alleged that its damages under the Note and Guaranty were $471,313.56, and that its attorneys' fees and costs were $32,740.60. Accordingly, Banco requested that the court grant it judgment in the amount of $504,054.16.

¶ 11 On March 23, 2016, the trial court granted defendants' motion to dismiss count I of the complaint to foreclose mortgage. On September 7, 2016, the court also granted defendants' motion to vacate the order of default on counts II and III. On September 21, 2016, defendants

filed an answer to counts II and III, including four affirmative defenses: release, waiver, estoppel, and fraud. Banco moved to strike the affirmative defenses, and following a hearing, the trial court granted the motion without prejudice on December 20, 2016. Defendants did not replead their defenses.

¶ 12 On January 19, 2017, Banco moved for summary judgment on counts II and II. Banco argued that no genuine issue of material fact existed on either count, as defendants' affirmative defenses were struck, they failed to provide any factual bases for their denials in their answer, and Banco established a *prima facie* case of breach of the Note and Guaranty, supported by the attached affidavit of Gary Walker. In his affidavit, Walker averred that he was Vice President and Special Assets Officer at Banco; he was responsible for supervising and managing Paul's loan account; Paul's $360,000 loan dated June 22, 2006, was evidenced by the Note; the Note was secured by Vida's Guaranty; Paul was in default of the Note; and Banco was entitled to recover amounts due under the Note and Guaranty, including attorneys fees.

¶ 13 After a hearing, the trial court granted summary judgment on counts II and III in favor of Banco on March 31, 2017. The judgment against Paul and Vida totaled $541,334.05, which included $326,902.76 for the principal of the Loan and $51,572.10 in attorneys fees.

¶ 14 Paul and Vida timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Corbett v. County of Lake*, 2016 IL App (2d) 160035, ¶ 19. We review *de novo* a trial court's grant of summary judgment. *Chicago Tribune v. College of Du Page*, 2017 IL App (2d) 160274, ¶ 29.

¶ 17 Defendants' argument is two-fold: (1) the trial court erred in finding that the Guaranty was relevant to the Note; and (2) the trial court erred in finding that the language of the Release was immaterial. Accordingly, they argue that material questions of fact existed, and the trial court's grant of summary judgment in favor of Banco should be reversed. We address both arguments in turn.

¶ 18 A. The Guaranty

¶ 19 Defendants argue that there was a genuine issue of material fact whether the Guaranty was valid and relevant to Banco's complaint. They argue that the Guaranty was for a separate and distinct loan that they had with Banco, and that it did not apply to the Loan or Note for the 630 Property. In particular, they argue that the loan number for the 630 Property was 19002, but the loan number listed on the Guaranty was 19001. They assert that loan number 19001 was for the 727 Property, and therefore the Guaranty did not cover Paul's obligations for the 630 Property. Defendants cite an affidavit from attorney Melanie Matiasek, who represented defendants in their real estate closing for both the 630 Property and the 727 Property, wherein she stated that the closings on those properties were separate and that the two loans for those properties were also separate and not bundled together. She further stated that "any insertion" by Banco of the Guaranty into the 630 Property file was improper and contradicted the parties' intent.

¶ 20 Banco responds that defendants ignore the "explicit terms and continuing nature of the Guaranty itself" as well as Walker's affidavit. Banco asserts that the Guaranty was not simply a guaranty of the debt for the 727 Property but was instead a continuing guaranty, whereby Vida agreed to guaranty Paul's future obligations to Banco. Banco directs us to the language of the

Guaranty, which began "CONTINUING GUARANTY OF PAYMENT AND PERFORMANCE" and further provided:

> "**CONTINUING GUARANTY**. THIS IS A 'CONTINUING GUARANTY' UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PEFORMANCE AND SATISFACTION OF INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LABILITY UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INBEDTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME."

The Guaranty also provided that Vida authorized Banco to "make one or more additional secured or unsecured loans" to Paul.

¶ 21 Banco continues that the Guaranty is unambiguous and should be enforced as written. Banco contends that Matiasek's affidavit has no bearing on the nature of the Guaranty, because neither when the Guaranty was executed nor where it was stored changed the fact that it was a continuing guaranty.

¶ 22 We agree with Banco. A guaranty contract is a promise to pay a debt or perform an obligation upon default by a third party liable in the first instance. *Navistar Financial Corp. v. Curry Ice & Coal, Inc.*, 2016 IL App (4th) 150419, ¶ 27. We construe a guaranty according to the principles governing contracts generally. *TH Davidson & Co., Inc. v. Eidola Concrete, LLC*, 2012 IL App (3d) 110641, ¶ 10. We must try to ascertain the objective intent of the parties

(*Carey v. Richards Building Supply Co.*, 267 Ill. App. 3d 724, 726-27 (2006)), and where a guaranty's language is unequivocal in its terms, it must be interpreted as written (*Bank of Naperville v. Holz*, 86 Ill. App. 3d 533, 537 (1980)).

¶ 23 "A different type of guaranty—referred to as a continuing guaranty—is a contract pursuant to which a person agrees to be a secondary obligor to all future obligations of the principal obligor to the obligee." (Internal quotation marks omitted.) *Navistar Financial Corp.*, 2016 IL App (4th) 150419, ¶ 28 (quoting *TH Davidson and Co., Inc.*, 2012 IL App (3d) 110641, ¶ 11). Under such a contract, the continuing guarantor guarantees all future extensions of credit to the principal lender until the guaranty is terminated. See Restatement (Third) of Suretyship & Guaranty § 16 cmt. a (1996). "Continuing guaranties of future obligations are valid, binding, and have a long history in Illinois." *Navistar Financial Corp.*, 2016 IL App (4th) 150419, ¶ 28.

¶ 24 Courts look to the agreement's language to manifest the parties' intent to enter a continuing guaranty. *Id.* Where the terms of a written guaranty look to the course of future dealings between the parties, that guaranty is generally considered to be a continuing guaranty. *Id.* Moreover, a guaranty that covers an indefinite series of loans may be characterized as a continuing guaranty. *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 483 (2006).

¶ 25 Here, there was no genuine issue of material fact that the Guaranty was a continuing guaranty. Paul and Vida rely on their satisfaction of the 727 Property mortgage loan to argue that the Guaranty cannot apply to their obligations stemming from the 630 Property, and they cite Matiasek's affidavit averring that the two properties had separate closings and that Banco's "insertion" of the Guaranty into the 630 Property file was improper. These arguments ignore the express terms of the Guaranty, which are clear and unambiguous. The Guaranty explicitly states

that it is a continuing guaranty that covered "any and all debts, liabilities and obligations *** now existing or hereafter arising or acquired, on an open and continuing basis." We have held that where the parties agreed that the guaranty would cover " 'any and all indebtedness *** whether now owing or due,' " the guaranty was continuing and unambiguously covered all debts, past and present, including existing debts incurred by a prior corporation. *Holz*, 86 Ill. App. 3d at 538. Furthermore, a guaranty that stated that it was a continuing and unconditional guaranty, remaining in effect until written notice of its discontinuance, was a continuing guaranty that covered past, present, and future debts. *Harris Bank Argo v. Midpack Corp.*, 151 Ill. App. 3d 283, 295-96 (1986).

¶ 26 Here, the Guaranty contains no language that satisfaction of indebtedness—much less satisfaction of the indebtedness for the 727 Property—terminated the Guaranty. Rather, the plain language provided that the duration of the Guaranty was indefinite, that is, it would remain in full force and effect until Paul fully satisfied his indebtedness and Banco received Vida's written revocation of the Guaranty. Even if Paul's indebtedness fell to $0, the Guaranty provided that it would not terminate absent Vida's written revocation.

¶ 27 Defendants do not argue that Vida ever sent written revocation of the Guaranty to Banco. They do not dispute the meaning of the Guaranty's language at all, except to argue that it was executed in conjunction with a loan separate from the Loan for the 630 Property. However, as we have explained, a continuing guaranty by its very nature contemplates future loans or obligations (see *Navistar Financial Corp.*, 2016 IL App (4th) 150419, ¶ 28), and the Note was just such a future obligation contemplated in the Guaranty's definition of indebtedness (defining indebtedness as "any and all debts *** now existing *or hereafter arising or acquired*" (emphasis added) that Paul owed Banco). Given the Guaranty's express language, it was immaterial

whether the Guaranty was executed in conjunction with a separate property or whether the Guaranty was stored in the proper bank file. *Cf. Holz*, 86 Ill. App. 3d at 538 (neither creation of a new corporation nor erroneous date of execution of guaranty affected which debts the continuing guaranty covered, because it covered all past, present, and future debts). Accordingly, the trial court correctly entered summary judgment for Banco.

¶ 28 B. The Release

¶ 29 Defendants next argue that the Release's language created a genuine issue of material fact whether Banco had any claim against them under the Note and Guaranty. They argue that the Release is clear on its face that it extinguished and released any claim or lien secured by the 630 Property that Banco had against defendants. Specifically, they argue that it released any claim for breach of the Note and Guaranty. Therefore, they conclude that summary judgment was inappropriate.

¶ 30 Banco responds that the trial court considered the Release but found that the Note and Guaranty were not affected by it. Banco contends that defendants' arguments are rebutted by the terms of the Release, the Note, and the Guaranty, which all evidence that Banco's release of collateral did not extinguish defendants' obligations under the Note and Guaranty. Banco asserts that the Release did not apply to the Note and Guaranty, that there was no issue of material fact, and that summary judgment should be affirmed.

¶ 31 We agree with Banco. A release is a contract where a party abandons a claim against another, and its interpretation is governed by the principles of contract law. *Johnson v. Maki & Associates, Inc.*, 289 Ill. App. 3d 1023, 1026 (1997). The rights of the parties are limited to the terms expressed in the release; where the release is clear and explicit, we must enforce it as written. *C.O.A.L., Inc. v. Dana Hotel, LLC*, 2017 IL App (1st) 161048, ¶ 67. Releases are

strictly construed against the benefitting party and must be written with particularity. *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1006 (2011).

¶ 32 Here, the Release is clear, explicit, and unambiguous. It reads, in relevant part:

> "[Banco] for and in consideration of the sum of one dollar, the receipt and sufficiency of which is hereby acknowledged, does hereby REMISE and RELEASE all of the right, title, interest, claim or demand whatsoever that [it] may have acquired in, through or by that Mortgage and Assignment of Rents executed by PAUL CHENIER, in favor of [Banco] that Mortgage dated June 22, 2006 *** and that Assignment of Rents dated June 22, 200 [*sic*] and recorded *** on July 28, 2006 *** in and to the [630 Property]."

The Release specifically released claims under the Mortgage and the Assignment of Rents, but made no mention of the Note or the Guaranty. We note that "where both a mortgage and an accompanying promissory note exist, the two documents constitute separate contracts." *Affronti v. Bodine*, 155 Ill. App. 3d 755, 758 (1987). We strictly construe the Release against defendants, as they benefitted from it, and any release of the Note and Guaranty had to be made with particularity. Here, because the Release specifically released two agreements but was silent on the Note and Guaranty, the only reasonable interpretation is that it did not release the Note and Guaranty. See *Mortgage Syndicate, Inc. v. Do & Go Equipment, Inc.*, 7 Ill. App. 3d 106, 109 (1972) ("A holder of a note may discard the mortgage entirely and sue on his note."); see also *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (1985) (upon default, a mortgagee may sue on the note itself or sue to foreclose the mortgage, and these remedies may be pursued consecutively or concurrently). Accordingly, Banco's rights under the Note and Guaranty remained in place.

¶ 33 Furthermore, Banco is correct that it made a *prima facie* case for recovery under the Note. It was undisputed that the Note was executed by Paul and Banco, it matured on June 22, 2011, and Paul was in default of the Note. Defendants' only argument that a genuine issue of material fact existed was that their obligations under the Note and Guaranty extinguished with the execution of the Release. Having rejected that argument, we hold that the court properly granted summary judgment for Banco.

¶ 34 III. CONCLUSION

¶ 35 For the forgoing reasons, we affirm the judgment of the Kane County circuit court.

¶ 36 Affirmed.