FIRST DIVISION
JUNE 8, 2015

No. 1-13-0617

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONTRACTORS LIEN SERVICES, INC., as Successor in Interest to BEC Electrical Company, Inc., Plaintiff,	)	
v.	)	Appeal from the Circuit Court of Cook County.
THE KEDZIE PROJECT, LLC, c/o Steven Ornoff, NEIL ORNOFF, LABE BANK, FIRST CHICAGO BANK AND TRUST and UNKNOWN NECESSARY PARTIES AND INTEREST, Defendants and Counterdefendants	)	
(The Kedzie Project, LLC, Steven Ornoff, and Neil Ornoff, Defendants-Appellants;	)	
Northbrook Bank and Trust Company, as Successor in Interest to the FDIC, Receiver for First Chicago Bank and Trust, Successor to Labe Bank, Counterplaintiff and Third-Party Plaintiff-Appellee;	)	No. 08 CH 34403
The Kedzie Project, LLC f/k/a 525 Kedzie, LLC; Quaker Window Products Company; HG Contracting Services, Inc.; Thyssenkrupp Safeway, Inc.; Alliance Fire Protection, Inc.; BEC Electrical Company, Inc.; Contractor's Lien Services, Inc.; Jerry Ryce Masonry Company, Inc.; IG Consulting, Inc.; Gilco Scaffolding Company, LLC; M.R.H. Construction, Inc.; First American Title Insurance Company; Erickson Decorating Products; Inc.; Granite Dezigns of Illinois, Inc.; Ferguson Enterprises, Inc.; Michael Ortiz; Stair One, Inc.; Master Mechanical, Inc.; Arcadia Residential, Inc.; Neil Ornoff; Steven Ornoff; Unknown Owners; and Non-Record Claimants, Third-Party Defendants).	)	Honorable Lisa R. Curcio, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Letter agreement from bank purporting to modify the terms of appellants' loan was unenforceable under Credit Agreements Act because it did not contain the signature of the borrower. The Credit Agreements Act was not satisfied by the signatures on another document that the appellants claimed was signed at the same time as the letter agreement as part of the same transaction, because the letter agreement's language was unambiguous that it intended to "amend and supersede" the other document. The appellants were also bound by the borrower's judicial admission in its verified counterclaim that the letter agreement was "subsequent to" the other document rather than part of the same transaction. As the letter agreement was unenforceable, the appellants could not rely on its terms to dispute the borrower's defaults under the loan documents or to assert a counterclaim for breach of contract.

¶ 2 The Kedzie Project, LLC (Kedzie), Steven Ornoff (Steven), and Neil Ornoff (Neil) (the defendants)[1] appeal the order of the circuit court of Cook County that granted summary judgment and a judgment of foreclosure in favor of Northbrook Bank & Trust Company (Northbrook Bank) and denied the defendants' cross-motion for summary judgment.

BACKGROUND

¶ 3 This appeal arises from a foreclosure complaint based upon a loan made to Kedzie by Labe Bank, Northbrook Bank's predecessor in interest. At all relevant times, siblings Steven and Neil Ornoff were members and managers of Kedzie. In December 2005, Kedzie entered into a loan agreement (the loan agreement) with Labe Bank to fund the construction of residential and commercial units on real property in Evanston, Illinois owned by Kedzie. In conjunction with the loan agreement, Kedzie executed a promissory note of approximately $9.1 million, specifying monthly interest payments to Labe Bank and a maturity date of November 21, 2007. Kedzie also executed a mortgage on the real property as security for

[1] This litigation was initiated by holders of mechanics liens on Kedzie's real property, naming as defendants all entities with an interest in the property. Those lienholders are not parties to this appeal, which instead arises from the third-party complaint for foreclosure filed by Kedzie's mortgage lender against Kedzie, Steven and Neil.

the loan. At the same time, Steven entered into a guaranty of the loan agreement, promissory note, and mortgage.

¶ 4 The loan agreement defined a number of occurrences that would constitute an "event of default," including Kedzie's failure to pay, when due, any amount of principal or interest on the note. The loan agreement also stated that a default would occur if any lien was "filed or served against the Borrower or the Premises" and remained unsatisfied for a period of ten days after Kedzie received notice. The loan agreement provided that upon any event of default, Labe Bank had the right to declare the note to be immediately due and payable, to take possession of the real property, and to "pursue any other remedy, at law or in equity." Kedzie's mortgage likewise specified that an event of default would occur "[i]f default be made in the payment of any installment or principal or interest of the Note," and that such an event would authorize Labe Bank to declare "all Indebtedness Hereby Secured immediately due and payable" and to "immediately proceed to foreclose" the mortgage.

¶ 5 Over the next few years, Kedzie negotiated a number of modifications to the loan with Labe Bank, which in 2006 became known as First Chicago Bank & Trust (First Chicago). In December 2007, Kedzie and First Chicago agreed to a loan modification extending the maturity date of the loan to February 5, 2008. In February 2008, a second loan modification further extended the maturity date to September 5, 2008. As part of the second loan modification, First Chicago also increased the amount of the loan by $887,278, to a total principal amount of $10 million. A revised promissory note reflecting the new loan amount was executed at the same time, and Steven also entered into a revised guaranty with respect to the increased loan amount.

¶ 6 Kedzie encountered financial difficulties paying contractors engaged in the construction on the real property. In September 2008, this litigation was initiated when Contractors Lien Services, Inc.

(which is not a party to this appeal), filed a complaint to foreclose a mechanics lien arising from Kedzie's failure to pay amounts owed to an electrical company for work performed on the real property.

¶ 7 Meanwhile, Kedzie negotiated another loan modification with First Chicago to address those difficulties. On or about September 30, 2008, Kedzie and First Chicago entered into a third loan modification agreement (the third loan agreement) in which Kedzie acknowledged "that the Loan is out of balance and in default because there remains $750,000 to be paid to contractors to pay the cost of constructing the Project." Elsewhere in the third loan agreement, Kedzie "acknowledge[d] that certain mechanics liens and notices of claims for liens have been filed against the Real Estate and the existence of these liens is a default of the Loan." The third loan agreement increased the loan amount from $10 to a total of $11 million through Kedzie's execution of two promissory notes: "Note No. 1" in the amount of $9 million with an interest rate of 7 percent per year, and "Note No. 2" in the amount of $2 million with an interest rate of 12 percent.

¶ 8 Another entity owned and managed by Steven and Neil Ornoff named Sibling Properties, LLC (Sibling Properties), was also named as an "Additional Borrower" in the third loan agreement. In conjunction with the third loan modification, Sibling Properties executed an additional promissory note in the amount of $500,000 (Note No. 3) which explicitly incorporated the terms of the other loan documents. As further security for the third loan modification, another entity controlled by Steven and Neil entered into an additional mortgage upon separate real property in Wheeling, Illinois. Steven also executed a "second revised guaranty" in which he guaranteed the performance, including timely payments, of the third loan agreement and the related loan documents, including both mortgages and the notes executed by Kedzie and Sibling Properties.

¶ 9 According to Neil and Steven, between January and March 2009 they had numerous discussions regarding a possible fourth loan modification with John Eck, an officer of First Chicago. According to

affidavits submitted by Neil, Eck repeatedly told him that the documents evidencing the fourth loan modification "would need to be back dated to January 2, 2009, for internal bank purposes." Neil and Steven claim that, at Eck's office in late March 2009, the parties executed various documents related to a new loan modification, including a "Fourth Loan Modification Agreement" (fourth loan agreement). The fourth loan agreement increased the loan amount by $325,000, which was effected by replacing the $2 million "Note No. 2" with a "Revised Note No. 2" in the amount of $2,325,000. The fourth loan agreement specified that the additional $325,000 in funds would "be used to pay interest, soft costs of the Project and construction costs."

¶ 10 Notably, the signature page to the fourth loan agreement states that "the parties hereto have executed this Fourth Modification on January 2nd 2009." The pages immediately following the signature page include notarizations certifying the signatures of Eck, Neil, and Steven; each of those notarizations is also dated January 2, 2009. The defendants maintain that these documents were actually executed in late March 2009, but were backdated at Eck's request.

¶ 11 Also in conjunction with the fourth loan agreement, Steven and Neil both executed a "Third Revised Guaranty of Notes, Fourth Modification, Loan Agreement, Mortgage and Other Undertakings" in which each of them personally guaranteed the performance of each of the preceding loan documents, including the mortgages and the promissory notes executed by Kedzie and Sibling Properties. As in the case of the fourth loan agreement, the notarization accompanying the signatures of Steven and Neil in the third revised guaranty is dated January 2, 2009. The defendants nonetheless maintain that the guaranty and the other fourth loan modification documents were signed at the same time in late March 2009.

¶ 12 The defendants further assert that, on the same date in March 2009 that the fourth loan agreement was executed and backdated, Eck also signed and delivered to them a letter agreement on behalf of First Chicago containing additional terms that were intended to be part of the fourth loan modification. The

letter agreement, which is undated, is on First Chicago letterhead and addressed to each of Kedzie, Sibling Properties, Steven, and Neil. The letter begins: "For good and valuable consideration, this letter is intended to amend and supersede the loan documents existing between the undersigned ('Bank') and the above referenced entities and individuals with respect to the matters addressed below."

¶ 13 The letter agreement proceeds to list five numbered items. First, the letter agreement provides that Sibling Properties "will not be responsible for any indebtedness or other obligations or liabilities of" Kedzie, but "will be responsible only for the indebtedness *** evidenced by promissory notes that [Sibling Properties] has executed." Second, the letter agreement states that the mortgage on the Wheeling real property will be released "without [Kedzie] *** first satisfying the conditions set forth in the 4th Modification Agreement." The third item in the letter states that the interest rate on the loans to Kedzie will be reduced to 4% "as of January 1, 2009, and shall be adjusted to 5% as of the date of full occupancy of the building." Fourth, the letter agreement states that First Chicago will bear its own costs in monitoring the construction. Finally, the fifth item of the letter agreement states that First Chicago "agrees to reverse out any past due late fees and penalty interest rate accruals which may have arisen during 2008 and 2009." The letter was signed by Eck, as an "authorized officer" of First Chicago. However, the letter agreement contains no signature by Steven, Neil or anyone else on behalf of Kedzie.

¶ 14 Although the letter agreement is undated, the record evidence suggests, and the parties apparently do not dispute, that it was signed by Eck in late March 2009. On March 23, 2009, Eck sent an email to an assistant attaching an unsigned copy of the letter and requested that it be printed on letterhead; Eck testified at his deposition that he likely signed the letter agreement shortly afterward. The record also contains an email from Eck to Neil dated March 30, 2009 referencing documents "that covered the lower interest rate" in which Eck references "backdat[ing] the change to Jan. 1." Eck also testified that the terms

of the letter agreement were intended to be "coincident with the fourth" loan modification and that the letter was intended to be "part of the loan modification agreement."

¶ 15 According to Northbrook Bank (First Chicago's successor in interest), no payments were made toward Kedzie's loan after November 2008, other than a portion of the $325,000 released in March 2009 pursuant to the fourth loan modification. Northbrook Bank states that approximately $225,000 of those funds were "applied to the outstanding amounts past due" on the loan and the remaining amount, about $100,000, "was applied to cure overdrafts on Sibling Property's checking account." The parties do not dispute that after March 2009, Kedzie made no subsequent payments on the loan.

¶ 16 On July 2, 2009, First Chicago filed a third-party complaint (the complaint) seeking foreclosure of the mortgage on Kedzie's Evanston property. First Chicago's complaint recited the history of the various loan modifications and stated that the fourth loan agreement was entered "on January 2, 2009," but did not indicate that it had been signed at a later time and backdated. The complaint also made no reference to the undated letter agreement.

¶ 17 First Chicago's complaint alleged two grounds for default. First, the complaint alleged a payment default based on Kedzie's failure to make monthly interest payments. The complaint also alleged an independent event of default because Kedzie had permitted liens to be placed on the real estate. First Chicago "declare[d] the entire balance of the Indebtedness" which it claimed was over $12.3 million, to be immediately due and payable. The complaint also included a claim to enforce the guaranty executed by Steven and Neil.

¶ 18 In April 2010, Kedzie filed an answer[2] responding on a paragraph-by-paragraph basis to the complaint. In response to the complaint's allegation that the fourth loan modification agreement had been

[2] Steven and Neil filed a separate answer that contained a substantially identical response with respect to the complaint's allegations regarding the fourth loan agreement. Steven and Neil also asserted

entered on January 2, 2009, Kedzie "admit[ted] that Steven Ornoff and Neil Ornoff executed the Fourth Loan Modification" and related documents and further stated that "these documents speak for themselves and den[ied] any allegation *** inconsistent therewith." Kedzie's answer also "assert[ed] that the Fourth Loan Modification attached to the Complaint is not a full and complete copy of that Agreement." Kedzie's answer otherwise denied that any event of default had occurred.

¶ 19 In the same filing containing its answer to the complaint, Kedzie pleaded a counterclaim including a claim for breach of contract[3] premised upon the letter agreement. Notably, the counterclaim did *not* allege that the letter agreement was entered into in March 2009 at the same time as the fourth loan agreement. Specifically, the first paragraph of the counterclaim states: "On January 2, 2009, Steven Ornoff, Neil Ornoff, *** [and] First Chicago Bank & Trust *** entered into a Fourth Loan Modification Agreement." The second paragraph alleges: "Subsequent to the execution of the Fourth Loan Modification, First Chicago provided [Kedzie] with a side letter, which was agreed upon by all parties, and which amended and superseded all prior loan documents, including the Fourth Loan Modification."

¶ 20 Kedzie's counterclaim went on to allege that First Chicago breached the terms of the letter agreement because it: (1) "failed to make the downward adjustment of 4% to all outstanding Kedzie loans," (2) "failed to release Sibling [Properties] from loans in which Kedzie is an obligor"; (3) failed to release the mortgage on the Wheeling real property; and (4) "failed to waive its claims for attorneys fees, costs, past due late fees and default interest." The pleading was verified by Neil Ornoff on behalf of Kedzie.

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as an affirmative defense that First Chicago had failed to comply with the terms of the letter agreement and thus should be barred from enforcing their guaranties.

[3] The other counts asserted in the counterclaim are not at issue in this appeal.

¶ 21 Pending this litigation, in a separate action against Sibling Properties, First Chicago in July 2010 obtained a default judgment in the amount of $571,280.87 due to Sibling Properties' failure to pay interest due on Note No. 3, which had been executed in connection with the third loan modification agreement. In 2011, First Chicago was closed and placed in receivership by the Federal Deposit Insurance Corporation (FDIC). Northbrook Bank & Trust Company (Northbrook Bank) subsequently purchased First Chicago's assets, including the loan to Kedzie which is at issue in this case. Northbrook Bank continued to pursue the foreclosure action initiated by First Chicago against Kedzie as well as the claims against Steven and Neil as guarantors.

¶ 22 In September 2011, Northbrook Bank moved for summary judgment on the mortgage and promissory notes executed by Kedzie and on the guaranty executed by Steven and Neil. The motion for summary judgment alleged three defaults. First, the motion claimed that Kedzie defaulted by allowing mechanics liens to be placed against the property. Northbrook Bank also alleged default on the basis of Kedzie's failure to pay interest due on the loan in April 2009 or in subsequent months. As a third event of default, Northbrook Bank alleged that, as Sibling Properties' Note No. 3 was secured by Kedzie's mortgage, Sibling Properties' default under Note No. 3 also created a cross-default under the mortgage.

¶ 23 With respect to Kedzie's counterclaim for breach of the letter agreement, Northbrook Bank's summary judgment motion argued that, since the letter agreement was not signed by Kedzie, it did not meet the requirements of the Credit Agreements Act, under which a debtor may maintain an action on a credit agreement only if "signed by the creditor and the debtor." 815 ILCS 160/2 (West 2010). As the letter agreement had been signed only by Eck on behalf of First Chicago, Northbrook Bank argued that Kedzie could not maintain any claim or defense based on the letter agreement.

¶ 24 Northbrook Bank also argued that, even if the terms of the letter agreement waiving fees and lowering the interest rate had been implemented, Kedzie's failure to pay in the months following the

fourth loan modification would nonetheless have exhausted the additional $325,000 in loan funds and caused a payment default. Northbrook Bank further argued that the terms of the letter agreement would not affect the defaults caused by the mechanics liens on the property or Sibling Properties' default under Note No. 3.

¶ 25 In support of its summary judgment motion, Northbrook Bank submitted an affidavit from its senior vice president, Renee Kirin, stating that Kedzie had made no payments on its promissory notes after November 2008. Kirin's affidavit averred that, although a portion of the funds released through the fourth loan modification was applied to the loan's outstanding balance in March 2009, Kedzie failed to make monthly payments due in April, May, June and July 2009. The affidavit further stated that, even if the interest rate had been reduced and the past due late fees and penalty interest had been waived as stated in the letter agreement, the monthly amount due would not have changed and there was still a payment default.

¶ 26 In April 2012, the defendants filed their opposition and a cross-motion for summary judgment in their favor. The defendants submitted an affidavit by their accountant, William Polash, maintaining that there would have been no defaults on the loan had the terms of the letter agreement been honored by First Chicago. Polash calculated that, with the release of the $325,000 additional funds from the fourth loan agreement, as well as the waiver of "late fees, legal fees, and other expenses that were to be reversed" under the terms of the letter agreement, Kedzie's "loans would have been current as of July 1, 2009 and not be in default." Polash's affidavit further opined that none of the $325,000 released from the fourth loan modification should have been applied to Sibling Properties' checking account, because under the letter agreement "[t]he Sibling Properties loan was supposed to be handled separately" from Kedzie's loan. Polash also attached a monthly income statement indicating his view "that the property has sufficient cash flow to service the debt" under the 4% interest rate stated in the letter agreement.

¶ 27 The defendants' motion further contended that the letter agreement was "executed concurrently with" and "was supposed to be part of" the fourth loan agreement, and included Neil and Steven's affidavits that both documents were signed in March 2009 and that the loan agreement had been backdated. The defendants also cited Eck's deposition testimony in which he agreed that the letter agreement was part of the loan modification agreement, as well as the emails suggesting that the letter agreement may have been signed in late March 2009. The defendants thus argued there was "a question of fact surrounding the signing and effective date of the Fourth Loan Modification" and that the terms of the letter agreement presented a question "as to whether the Bank even has standing to claim a default." The defendants urged that summary judgment should be granted in their favor because First Chicago had "completely dishonored the letter agreement, ignored a surplus of funds created by the Fourth Loan Modification and began legal proceedings *** despite the absence of any default."

¶ 28 On May 7, 2012, Northbrook Bank filed a response in which it argued that enforcement of the letter agreement's terms was barred by the Credit Agreements Act because it was not signed by both the creditor and the debtor. Northbrook Bank claimed the defendants were attempting "[t]o circumvent the Credit Agreements Act" by asserting that the letter agreement was executed at the same time as the fourth loan agreement. Northbrook Bank acknowledged Eck's deposition testimony suggesting that the letter agreement was executed in late March 2009 but maintained that the documents were *not* executed at the same time, emphasizing the January 2, 2009 date of the notarizations on the fourth loan agreement.

¶ 29 Northbrook Bank also argued that the defendants' pleadings had admitted that the fourth loan agreement was executed on January 2, 2009, and that they could not "contravene their verified answer *** just to avoid summary judgment." Northbrook Bank also noted that the fourth loan modification made no mention of the letter agreement, that the letter agreement stated it would "amend and supersede" the loan documents, and argued "it would be inconsistent to execute two documents simultaneously where

one modifies the other." Northbrook Bank also disputed the defendants' accountant's affidavit and maintained that Kedzie would have defaulted on its payments even under the reduced interest rate stated in the letter agreement.

¶ 30 In May 2012, the defendants filed a reply in which they argued that the letter agreement complied with the Credit Agreements Act's signature requirements, even if it only contained Eck's signature. The defendants reasoned that the letter agreement was "part of" the fourth loan modification and thus should be construed together with the fourth loan agreement, which contained the required signatures. The defendants argued that, since the two documents were part of the same contract, the statutory signature requirement was met.

¶ 31 On June 29, 2012, the trial court entered an order (without opinion) which granted Northbrook Bank's motion for summary judgment and denied the defendants' cross-motion for summary judgment. The court explicitly found that "The letter agreement and Fourth Modification are not part of the same transaction," but the court did not reference the Credit Agreements Act. The order also specified three separate findings of default. The court found there was a payment default, a separate default caused by the mechanics liens on the property, and that "[t]here was a cross-default as a result of the Sibling [Properties] Loan Default."

¶ 32 On September 18, 2012, the trial court entered a judgment of foreclosure and sale in favor of Northbrook Bank in which it found that Kedzie, Steven and Neil were indebted by more than $14 million of principal and interest on the loan. On December 5, 2012, the trial court entered an order confirming the foreclosure sale and entering a deficiency judgment. On January 28, 2013, the trial court entered a final order disposing of all remaining claims by the various lienholders on the real property. The defendants filed a timely notice of appeal on February 20, 2013, challenging the trial court's order granting summary

judgment in favor of Northbrook Bank and denying their cross-motion for summary judgment, as well as the resulting judgment of foreclosure and sale. Accordingly, we have jurisdiction.

¶ 33 ANALYSIS

¶ 34 The applicable standard of review upon a trial court's order granting summary judgment is *de novo*. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 11. "Summary judgment should be granted when the pleadings, depositions 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." *Id.* (quoting 735 ILCS 5/2-1005(c) (West 2012)). "The court must construe all pleadings, depositions, admissions and affidavits against the movant in favor of the opponent to determine whether a genuine issue of material fact precludes summary judgment." *Id.*

¶ 35 In this case, the merits of the parties' arguments depend upon interpretation of the loan documents, particularly the fourth loan agreement and letter agreement. "Summary judgment is generally appropriate when deciding questions of contract interpretation as it involves a question of law. [Citations.] The court must attempt to give effect to the parties' intentions when interpreting a contract. [Citation.] The best indication of the parties' intent is the plain meaning of the contract's language." *Id.*, ¶ 13.

¶ 36 The defendants' arguments depend upon their position that Northbrook Bank's predecessor, First Chicago, breached the terms of the undated letter agreement, and that such breaches preclude the claimed events of default. Northbrook Bank claims the letter agreement is unenforceable under the Credit Agreements Act because it was not signed by Kedzie as the borrower. The statute provides that "[a] debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, *and is signed by the creditor and the debtor*." (Emphasis added.) 815 ILCS 160/2 (West 2010). Thus, "[t]he [Credit Agreements] Act

clearly sets forth that a credit agreement not only must be in writing but also must be signed by both the creditor and debtor." *Avanti Medical Group, LLC v. BMO Harris Bank, N.A.*, 2014 IL App (2d) 140401, ¶ 22 (quoting *McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758, 763 (1995)).

¶ 37 "There is no limitation as to the type of actions by a debtor which are barred by the [Credit Agreements] Act, so long as the action is in any way related to a credit agreement." (Internal quotation marks omitted.) *Van Pelt Construction Co., Inc. v. BMO Harris Bank, N.A.*,, 2014 IL App (1st) 121661, ¶ 28. "This is true even in the face of harsh results." *Id.* For example, the Third District of this court held that plaintiffs could not sustain claims for breach of a written loan request that had been initialed by the lenders but was not signed by the plaintiffs, as it "did not satisfy the requirements of the Act" without plaintiffs' signature. *McAloon*, 274 Ill. App. 3d at 763. More recently, we held that a purported settlement agreement between a mortgagor and mortgagee, premised upon a series of emails between the parties, was not enforceable under the Credit Agreements Act because "the emails at issue d[id] not evince the relevant terms of that agreement," and because the proponents of the agreement "failed to develop any argument specifying where the signatures of the creditor and each debtor can be found in the writings at issue." *Van Pelt*, 2014 IL App (1st) 121661, ¶¶ 34, 36.

¶ 38 In this case, the defendants do not dispute that the letter agreement was signed only by Eck on behalf of First Chicago but contend that the absence of their signature does not invalidate the document under the Credit Agreements Act. The defendants assert that the letter agreement was not an independent document but was "part of" the fourth loan modification evidenced by multiple documents, including the fourth loan agreement that was signed by the defendants. In other words, the defendants argue that the letter agreement did not need to include both the creditor's and the debtor's signature because it was part of a contract that included documents satisfying the Credit Agreement Act's signature requirements.

¶ 39 As support for the view that the letter agreement must be read together with the fourth loan agreement document, the defendants cite cases for the principle that "[w]here two written instruments are executed as the evidence of one transaction, they will be read and considered together as one instrument in arriving at the intention of the parties." *Illinois Match Co. v. Chicago, Rock Island & Pacific Railway Co.*, 250 Ill. 396, 400 (1911); see also *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 448 (2009) (holding that four documents would be "construed together as a single contract" where they "were entered into at the same time by the same contracting parties as part of the same transaction"); *First National Bank of Geneva v. Lively*, 211 Ill. App. 3d 1, 5 (1991) (finding that "three agreements contemporaneously entered into" would be "considered one contract").

¶ 40 Although the defendants are correct that generally "instruments executed for the same purpose and in the course of the same transaction will be construed as a single instrument," *Community State Bank of Galva v. Hartford Insurance Co.*, 187 Ill. App. 3d 110 (1989), in this case there is considerable dispute regarding whether the two documents at issue were, in fact, executed at the same time and for the same transaction. Thus, before we can assume that the documents are to be read together as part of a single contract, we must address the threshold question of whether the undated letter agreement was contemporaneous with the fourth loan agreement document. On that factual question, the defendants urge us to consider Eck's deposition testimony indicating that the letter agreement was signed in March 2009 as part of the fourth loan modification. They also point to the affidavits of Neil and Steven, which state that the fourth loan agreement document was also signed at the same time as the undated letter agreement but was backdated to January 2, 2009.

¶ 41 The governing principles of contract interpretation allow consideration of such extrinsic evidence *only* if we first determine that there is ambiguity in the contract language. "[T]he best indication of the parties' intent is the plain meaning of the contract's language." *Gomez*, 2013 IL App (1st) 130568, ¶ 13.

Although "extrinsic evidence may be used to aid in interpreting an ambiguous contract," "[i]f a contract is unambiguous on its face, extrinsic evidence may not be used to interpret it." *Id.*, ¶ 14. The "mere fact that the parties disagree over the contract's interpretation does not suffice to establish ambiguity." *Id.* Thus, before we can consider the extrinsic evidence relied upon by the defendants, we must first determine if there is ambiguity in the documents as to whether they were executed as part of the same loan modification.

¶ 42 Our review leads us to conclude that the language of documents is unambiguous in establishing that the letter agreement was *not* intended to be a part of the fourth loan modification. We reach this conclusion for several reasons. First, the letter agreement begins with the explicit statement: "[t]his letter is intended to amend and supersede the loan documents existing" between First Chicago and the defendants. The stated purpose to "amend and supersede" unequivocally indicates that the letter is intended to modify the loan documents that were "existing" prior to the letter agreement. A document must already exist before it can be amended or superseded. Thus, in order for the letter agreement to amend and supersede "existing" documents, the letter must be subsequent to the referenced loan documents.

¶ 43 The letter agreement makes clear that the fourth loan agreement was one of the "loan documents existing" that it was intended to "amend and supersede." Specifically, in referencing the mortgage on the property in Wheeling, Illinois, the letter states that First Chicago "agrees to release the Junior Mortgage without Borrower *** satisfying the *conditions set forth in the 4th Modification Agreement*." (Emphasis added.) At this point, the letter agreement could have easily specified that it was *part of* the fourth loan modification agreement, rather than referring to it as a *separate, preexisting agreement*. For example, the letter could have referred to "*this* 4th Modification Agreement Document" to make it clear that it was part of the same transaction. Notably, the fourth modification agreement document repeatedly refers to "this

Fourth Modification." The fact that, in contrast, the letter agreement refers to "*the* 4th Modification Agreement" as a preexisting document indicates that it was executed at a later time.

¶ 44 Furthermore, the fact that the fourth loan agreement, which was signed by all relevant parties, makes no reference to the letter agreement (signed only by First Chicago) further undermines the notion that the two documents were executed as part of the same transaction. See *Sims v. Broughton*, 225 Ill. App. 3d 1076, 1080 (1992) ("If the contract is to be ascertained from more than one document the signed writing must refer expressly to the unsigned writing or writings, or the several writings must be so connected, either physically or otherwise, that it may be determined by internal evidence that they relate to the same contract."). Although the fourth loan agreement references numerous other loan documents, it fails to mention any letter agreement, let alone the specific letter agreement at issue. The fourth loan agreement states that it "shall be effective *** upon Lender's receipt of this Fourth Modification executed by the parties hereto and the following documents and items," and then proceeds to list a number of "Additional Loan Security Documents" to be provided by the defendants, including the revised promissory note and guaranty and corporate documents of Kedzie and Sibling Properties. However, there is no suggestion that First Chicago will also provide a letter agreement with additional terms of the loan modification.

¶ 45 Thus, the fourth loan modification agreement, by its own terms, was "effective" upon its execution and delivery of the enumerated loan documents; this express language conflicts with the suggestion that additional terms of the loan modification would be set forth in a separate document. Indeed, the first sentence of the fourth loan agreement document states: "*This instrument* is a Fourth Loan Modification Agreement." The singular phrase "this instrument" further undermines the suggestion that the parties intended to set forth additional terms of the loan modification in a separate letter.

¶ 46 The letter agreement's explicit intention to "amend and supersede" all other loan documents, including "the 4th Modification Agreement," especially in light of the fourth loan agreement's indication that the terms of the loan modification are set forth in that instrument alone, is unambiguous language that the two documents were *not* simultaneous parts of the same agreement. Rather, their plain language indicates that the letter agreement was intended as a subsequent modification to the fourth loan agreement. As the language of the documents is unambiguous, we will not consider the extraneous evidence relied upon by the defendants. See *Gomez*, 2013 IL App (1st) 130568, ¶ 14. Accordingly, we reject the defendants' alternative arguments as being without merit as applied to the facts and analysis of this case.

¶ 47 Moreover, our analysis also leads to the conclusion that the defendants are bound by the judicial admission in Kedzie's counterclaim which asserts that the letter agreement was separate from the fourth loan agreement. That counterclaim pleaded unequivocally that the letter agreement was subsequent to the fourth loan agreement, and not a part of the same contract. The first paragraph of the counterclaim pleads that the fourth loan modification was entered into on January 2, 2009. The very next paragraph alleges that the letter agreement was "subsequent to the execution of the Fourth Loan Modification," and that the letter agreement "amended and superseded all prior loan documents, including the Fourth Loan Modification." These explicit statements are binding judicial admissions. See *North Shore Community Bank and Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 102. ("Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." (Internal quotation marks omitted)).

¶ 48 The defendants' arguments disputing the binding effect of the counterclaim's allegations are therefore without merit. The defendants concede that the counterclaim "does aver to a January 2, 2009 Fourth Loan Modification Agreement" but argues "it is non specific as to the breadth of documents signed

or not signed, and fails to mention any *** Letter Agreement or any other document that may encompass any such loan transaction." This argument simply ignores that the pleading's very next paragraph states unequivocally that the letter agreement was "*subsequent to*" and "amended and superseded" the fourth loan agreement. That statement establishes an admission that the two documents were not part of a single contemporaneous transaction.

¶ 49 We also note the defendants' argument that since the counterclaim was filed by Kedzie only, Steven and Neil are not bound by any admissions therein. This argument is disingenuous with respect to Neil, since he was the individual who verified the allegations in the counterclaim on behalf of Kedzie. In any case, Kedzie was the borrower under the loan agreement and the mortgagor of the real property, and it is Kedzie's defaults that are at issue in this action. Thus, regardless of whether Steven or Neil also made such admissions, Kedzie's admissions regarding the letter agreement and fourth loan agreement are determinative. Moreover, since Steven and Neil guaranteed Kedzie's obligations under the loan documents, they are liable for Kedzie's defaults whether or not they joined in Kedzie's admissions.

¶ 50 Our conclusion that the statements in Kedzie's verified counterclaim operated as binding judicial admissions precludes the defendants' reliance on the terms of the letter agreement. That is, Kedzie's judicial admissions establish that the letter agreement was "subsequent to" and intended to supersede the fourth loan agreement, precluding the defendants' argument that the letter agreement was part of the same contract. As the letter agreement was not part of the fourth loan modification, it had to independently meet the requirements of the Credit Agreements Act for Kedzie to "maintain an action on or in any way related to" the letter agreement. 815 ILCS 160/2 (West 2010). That is, the letter agreement had to be signed by both the creditor and debtor to be enforceable. 815 ILCS 160/2 (West 2010). However, as the letter agreement was not signed by Kedzie, the defendants may not rely on its terms.

¶ 51 Our conclusion that the letter agreement was unenforceable compels us to affirm the trial court with respect to both summary judgment motions at issue. First, the defendants' arguments in support of their cross-motion for summary judgment were premised on alleged breaches of the letter agreement's terms. As we have determined that the letter agreement was not actionable, we affirm the trial court's denial of the defendants' cross-motion for summary judgment.

¶ 52 Similarly, as the defendants relied upon the terms of the letter agreement in disputing the alleged events of default, the unenforceability of the letter agreement leads to the conclusion that there is no genuine issue of fact that at least one event of default occurred, warranting summary judgment in favor of Northbrook Bank and the subsequent judgment of foreclosure. Notably, the defendants do not dispute that Kedzie failed to make payments due on the loan in April, May, June, and July 2009. Their only defense to the payment default is that, if the letter agreement's terms reducing the interest rate and waiving fees and penalties had been honored, they "would have had sufficient funds to pay their loan obligations." However, as the letter agreement was not enforceable under the Credit Agreements Act, the defendants cannot rely on its terms to excuse their nonpayment. As the defendants do not assert any other basis to dispute the payment default, we concur with the trial court's finding that a payment default occurred.

¶ 53 Under the mortgage, only a single default was necessary to trigger foreclosure proceedings. Thus, the payment default alone would be sufficient to affirm the trial court's order granting summary judgment in favor of Northbrook Bank and the subsequent judgment of foreclosure. Nonetheless, we also agree with the trial court's findings of independent defaults.

¶ 54 The trial court found not only a payment default, but found two additional defaults resulting from the mechanics liens on the property, as well as "a cross-default as a result of the Sibling [Properties] Loan Default." We likewise conclude that the undisputed mechanics liens on the real property constituted a

default. The loan agreement specified that an event of default occurs if "any lien or notice of lien" was filed against the real property and remained unsatisfied "for a period of ten days after the Borrower receives notice thereof." The defendants do not dispute that mechanics liens were placed on the property and remained unsatisfied for the requisite time period. Indeed, the third loan modification explicitly acknowledged that mechanics liens had been filed against the real estate.

¶ 55 The defendants argue that First Chicago "was fully aware of the mechanics lien claims and worked in tandem with Steve and Neil Ornoff in disputing the amounts claimed due," and that despite having "full knowledge of the liens *** the Bank never declared any default." Thus, the defendants essentially claim that First Chicago forfeited the right to assert a default on this basis. However, the loan documents preclude this forfeiture argument. The loan agreement states: "No failure by the Bank to exercise, or delay by the Bank in exercising, any right, power or privilege hereunder shall operate as a waiver therefore." The mortgage similarly provides that "[n]o delay or omission of Mortgagee in the exercise of any right, power or remedy shall impair any such right, power or remedy or be construed to [be] a waiver of any default or acquiescence therein." The defendants alternatively argue that "with the surplus funds created by the interest reserve" under the terms of the letter agreement, "there would have been funds available to either pay or negotiate a reduced payment to the [mechanics] lien claimants." However, in light of our conclusion that the letter agreement was not enforceable, this argument is unavailing.

¶ 56 We also agree with the trial court's conclusion that Sibling Properties' default on the promissory note (Note No. 3) that it executed in connection with the third modification of Kedzie's loan also established an event of default by Kedzie. The third loan agreement expressly modified the loan documents such that any references to "the Note" were amended to refer to all promissory notes relating to the loan, including Note No. 3. In addition, the third loan modification amended the mortgage so that it secured Note No. 3 in addition to Kedzie's notes. As a result, the loan agreement provision specifying

default upon the "fail[ure] to pay, when due, any principal amount under the Note or any installment of interest on any of the Note[s]" created an event of default when Sibling Properties failed to perform under Note No. 3. The defendants do not dispute Sibling Properties' failure to pay under that note, but argue that such a default was precluded by the terms of the letter agreement. As we have previously determined that the letter agreement was not enforceable, that defense is without merit.

¶ 57 Finally, we note that Northbrook Bank asserts a fourth event of default that was not addressed in the trial court's order granting summary judgment. Specifically, Northbrook Bank states that Kedzie filed for bankruptcy in December 2009 and that the mortgage specifies that the filing of a bankruptcy petition is an event of default. Although Northbrook Bank appears to be correct, we need not decide the issue as we have already concluded that summary judgment was warranted on the basis of the three defaults stated by the trial court.

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 59 Affirmed.