2017 IL App (1st) 160438-U

SIXTH DIVISION
MARCH 31, 2017

No. 1-16-0438

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NORTHBROOK BANK & TRUST COMPANY, as successor-in-interest to the Federal Deposit Insurance Corporation as Receiver for First Chicago Bank & Trust,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 13 L 4451
v.	)	
MATTHEW O'MALLEY,	)	Honorable Margaret Ann Brennan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment was properly granted in favor of the defendant guarantor. By operation of section 15-1401 of the Mortgage Foreclosure Law, the mortgagor's acceptance of a deed in lieu of foreclosure relieved the defendant guarantor of liability, as the defendant guarantor did not execute a contemporaneous instrument in which he agreed not to be relieved of personal liability. 735 ILCS 5/15-1401 (West 2012).

¶ 2 In this action for breach of a loan guaranty, plaintiff Northbrook Bank & Trust Company (Northbrook) appeals from the January 14, 2016 order granting summary judgment in favor of the defendant guarantor, Matthew O'Malley. For the following reasons, we affirm the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 This appeal arises from an action in which Northbrook Bank sought to recover from O'Malley pursuant to a guaranty executed in connection with a loan from Northbrook's predecessor-in-interest, First Chicago Bank & Trust (First Chicago).

¶ 5 On February 15, 2008, First Chicago loaned Woodsmill Park Limited Partnership (Woodsmill Park) the sum of $6,210,000, evidenced by two notes in the amounts of $5,520,000 and $690,000. The Woodsmill Park loan was secured by mortgages on three separate properties in Chicago: a mortgage on 1344-56 South Michigan Avenue, a junior mortgage on 1416-18 South Michigan Avenue, and a junior mortgage on 1233 South Wabash Avenue.

¶ 6 In addition, three separate individuals, including O'Malley, jointly and severally executed a guaranty agreement, also dated February 15, 2008, in which they personally guaranteed Woodsmill Park's obligations under the loan, including timely payments due under the notes. The guaranty was jointly and severally executed by O'Malley, Brian L. Bruce (Brian) and Bill L. Bruce (Bill).

¶ 7 The guaranty included the following provision:

> "Continuing Guaranty. Each Guarantor agrees that the performance of the Borrower's Obligation by each Guarantor shall be a primary obligation, shall not be subject to any counterclaim, set-off, abatement, deferment or defense based upon any claim that any Guarantor may have against Lender, Borrower, any other guarantor *** or any other person or entity, and shall remain in full force and effect without regard to, and shall not be released,

> discharged or affected in any way by, any circumstance or condition *** including without limitation:
>
> c. Any furnishing, exchange, substitution or release of any collateral securing repayment of the Loan, or any failure to perfect any lien in such collateral ***."

¶ 8 After Woodsmill Park defaulted on the loan, separate actions were instituted against each of the three guarantors; meanwhile, Northbrook became the owner of First Chicago's assets.[1]

¶ 9 In April 2011, First Chicago filed a complaint for breach of guaranty against Bill. On October 4, 2011, Northbrook was substituted as plaintiff in the action against Bill.

¶ 10 On November 15, 2011, Northbrook filed a separate foreclosure action against Woodsmill Park, Bill, and Brian concerning the property at 1344-56 South Michigan Avenue; that action also asserted a count for breach of guaranty against Brian. On April 16, 2012, that action was consolidated with the guaranty action against Bill.

¶ 11 On November 15, 2012, Northbrook, Woodsmill Park, Bill, and Brian (but not O'Malley) executed a "Partial Settlement and Deed in Lieu of Foreclosure Agreement" (settlement agreement), in which Northbrook agreed to resolve its claims against Bill and Brian in exchange for a deed in lieu of foreclosure, as well as Bill's promise to make additional payments. Specifically, Woodsmill Park agreed to transfer to Northbrook a warranty deed in lieu of foreclosure, conveying title to the 1344-56 South Michigan property.

[1] In July 2011, First Chicago was closed by the Illinois Department of Financial and Professional regulation, and the Federal Deposit Insurance Corporation became the receiver of First Chicago's assets. Northbrook later executed a purchase agreement with the FDIC by which it acquired substantially all of First Chicago's former assets.

¶ 12 In addition, the settlement agreement provided that Bill would pay an additional "deficiency amount" of $750,000, to be paid to Northbrook in separate installments pursuant to a "Deficiency Note." The settlement agreement specified that "nothing in the Deficiency Note or this Agreement shall relieve [Woodsmill's] and [O'Malley's] obligations under the Note or for the remaining [l]iabilities under the Loan."

¶ 13 Northbrook agreed not to assert any claims against Bill or Brian in connection with the loan if they complied with the terms of the settlement agreement. However, the settlement agreement stated that "nothing in this Agreement shall release or reduce [O'Malley's] obligations under [O'Malley's] Guaranty."

¶ 14 In a separate provision, the settlement agreement further acknowledged that:

> "ACCEPTANCE OF THE DEED [in lieu of foreclosure] BY LENDER WILL NOT RELIEVE BORROWER OR GUARANTORS OF OR FROM PERSONAL LIABLITY FOR PAYMENT OF THE $750,000 DEFICIENCY NOTE ***. FURTHER, NOTHING IN THIS AGREEMENT SHALL RELEASE THE BORROWER OR [O'Malley] OF OR FOR PERSONAL LIABILITY FOR PAYMENT OF THE REMAINING LIABILITIES DUE UNDER THE LOAN AND THE PERFORMANCE OF THE OBLIGATIONS UNDER THE LOAN. All parties hereto acknowledge and agree that this Agreement constitutes an instrument executed contemporaneously *** in which Borrower and Guarantors agree that they are not fully

> relieved of personal liability for a deficiency, as described and set forth in 735 ILCS 5/15-1401 ***."

Significantly, it is undisputed that O'Malley was not a party to the 2012 settlement agreement and that he did *not* execute any contemporaneous agreement regarding his personal liability.

¶ 15 Pursuant to the settlement agreement, Bill, on behalf of Woodsmill Park, executed a "warranty deed in lieu of foreclosure" for the 1344-56 S. Michigan property, dated November 15, 2012, which was conveyed to Northbrook Bank's assignee. The deed in lieu was recorded on December 20, 2012.

¶ 16 Northbrook subsequently voluntarily dismissed its action against Bill, but reinstated the case in November 2013, after Bill allegedly failed to make payments required under the settlement agreement. Counsel for Bill subsequently filed a suggestion of death for Bill; Northbrook amended its complaint to substitute a representative of Bill's estate as a defendant.

¶ 17 On April 30, 2013, Northbrook filed a complaint against O'Malley alleging his breach of the 2008 guaranty. On November 12, 2013, Northbrook Bank filed a separate action against Brian in connection with his obligation under the guaranty. On July 8, 2014, the trial court consolidated the three cases against Bill's estate, Brian, and O'Malley. On December 7, 2015, Northbrook voluntary dismissed its claims against Bill's estate and Brian, informing the court that it had reached a settlement agreement with those parties.

¶ 18 In Northbrook's remaining breach of guaranty action against O'Malley, O'Malley filed an answer and affirmative defenses on October 13, 2015. Relevant to this appeal, the second affirmative defense alleged that, in November 2012, "Woodsmill executed a deed-in-lieu of foreclosure and conveyed to Plaintiff certain real property that secured the obligations for which Plaintiff is seeking to hold Matthew O'Malley liable." O'Malley claimed that since he "did not

agree not to be relieved of those obligations in an instrument executed contemporaneously," Northbrook's claim against him was barred under section 15-1401 of the Mortgage Foreclosure Law. 735 ILCS 5/15-1401 (West 2012). Northbrook answered the affirmative defenses on November 30, 2015, admitting the November 2012 settlement agreement but otherwise denied the second affirmative defense.

¶ 19 On December 1, 2015, O'Malley filed an amended motion for summary judgment, which asserted a single argument: that because Northbrook had accepted a deed in lieu of foreclosure without O'Malley's contemporaneous agreement not to be relieved of liability for the deficiency, O'Malley was relieved of liability by section 15-1401 of the Mortgage Foreclosure Law. 735 ILCS 5/15-1401 (West 2012). That section provides, in relevant part:

> "Acceptance of a deed in lieu of foreclosure shall relieve from personal liability all persons who may owe payment or the performance of other obligations secured by the mortgage, including guarantors of such indebtedness or obligations, except to the extent a person agrees not to be relieved in an instrument executed contemporaneously." 735 ILCS 5/15-1401 (West 2012).

¶ 20 O'Malley argued that, regardless of the 2008 guaranty's language that his liability would not be affected by the transfer of any collateral for the loan, section 15-1401's requirement of a contemporaneous agreement "does not permit an advance waiver of the protection afforded by its terms." O'Malley also submitted an affidavit in support of his motion, attesting that he had never agreed not to be relieved of personal liability in any instrument executed contemporaneously with the 2012 settlement agreement or deed in lieu.

¶ 21 On December 23, 2015, Northbrook Bank filed its response to the summary judgment motion. Citing the guaranty's language that O'Malley's liability would not be affected by "any furnishing, exchange *** or release of any collateral securing repayment of the Loan," Northbrook argued that the 2012 "deed in lieu to Northbrook under the [settlement agreement] was a furnishing (and after the property's sale, a release) of collateral securing the Loan." Northbrook further argued that "O'Malley waived the rights conferred upon him by Section 5/15-1401 when he signed the Guaranty," such that no contemporaneous writing was required.

¶ 22 Northbrook independently argued that section 15-1401 should not apply because Northbrook had not received *all* of the real estate serving as collateral for the loan, but had only received a deed in lieu of foreclosure for one of the properties. Northbrook argued that because it "has not realized upon the full value of the Loan's collateral" there was "no reason to apply a statute negating a deficiency."

¶ 23 O'Malley filed a reply on January 5, 2016 which reiterated his position that "[t]he requirement [in section 15-1401] that the guarantor's written agreement be contemporaneous is an express prohibition against an advance waiver." With respect to Northbrook's argument that not all of the collateral real estate had been transferred, O'Malley urged that the additional collateral "only strengthened the case for discharge of [O'Malley]" as the existence of other collateral "strengthens the presumption that the lender's claim has been or will be satisfied" despite the discharge of his personal liability.

¶ 24 The court heard oral argument on January 14, 2016, although the record on appeal does not contain a transcript of that argument. On the same date, the court entered an order granting O'Malley's motion for summary judgment, without stating its reasoning. The order stated that it

was a "final order; no other matters pending." On February 10, 2016, Northbrook Bank filed a notice of appeal.

¶ 25 ANALYSIS

¶ 26 Before we address the merits, we note that we have appellate jurisdiction, as Northbrook filed a timely notice of appeal from the final order granting summary judgment in favor of O'Malley. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303(a) (eff. June 4, 2008).

¶ 27 "We review *de novo* the circuit court's decision to grant a motion for summary judgment." *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18. "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citations.] " *Id.* ¶ 21. We also note that questions of statutory interpretation are also subject to *de novo* review. *Land v. Board of Education of City of Chicago*, 202 Ill. 2d 414, 421 (2002). Similarly, "[t]he construction of a contract presents a question of law" which is also subject to *de novo* review. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007).

¶ 28 O'Malley's summary judgment motion was premised on application of Section 15-1401 of the Mortgage Foreclosure Law, "Deed in Lieu of Foreclosure," which provides:

> "The mortgagor and mortgagee may agree on a termination of the mortgagor's interest in the mortgaged real estate after a default by a mortgagor. Any mortgagee or mortgagee's nominee may accept a deed from the mortgagor in lieu of foreclosure subject to any other claims or liens affecting the real state. *Acceptance of a deed in lieu of foreclosure shall relieve from personal liability all*

> *persons who may owe payment or the performance of other obligations secured by the mortgage, including guarantors of such indebtedness or obligations, except to the extent a person agrees not to be relieved in an instrument executed contemporaneously.* A deed in lieu of foreclosure, whether to the mortgagee or mortgagee's nominee, shall not effect a merger of the mortgagee's interest as mortgagee and the mortgagee's interest derived from the deed in lieu of foreclosure." (Emphasis added.) 735 ILCS 5/15-1401 (West 2012).

¶ 29 There do not appear to be many reported decisions discussing the effect of this statute. One of the only decisions appears to be *Olney Trust Bank v. Pitts*, 200 Ill. App. 3d 917 (1990), which illustrates that section 15-1401 precludes personal liability after tender of a deed in lieu of foreclosure, absent a contemporaneous agreement in which a party agrees to remain liable.

¶ 30 *Olney* concerned real estate owned by a husband and wife during their marriage, including a tract of land owned in joint tenancy. *Id.* at 920. At the time the wife petitioned for dissolution of marriage in 1987, mortgages on the property were in default. *Id.* The husband conveyed his interest in the real estate to the lending bank through a deed in lieu of foreclosure, but his wife was not a party to that agreement. *Id.*

¶ 31 The bank filed a foreclosure suit against the wife's interest in the property held by joint tenancy. *Id.* The wife moved for summary judgment, claiming that, pursuant to section 15-1401, the bank's acceptance of the deed in lieu had "released her as mortgagor from personal liability and, as the mortgage debt was released, Bank was precluded from foreclosing her

mortgage interest." *Id*. at 920-21. Our court ruled that section 15-1401 protected the wife from a deficiency judgment, but did not insulate her from a foreclosure action:

> "We believe the legislature intended to provide for an alternate to foreclosure by codifying the deed in lieu of foreclosure practice, but wanted to make sure that the mortgagee would be precluded from obtaining and enforcing *deficiency* judgments against the mortgagor, joint mortgagor, guarantor, or any other person owing payment of the mortgage note. We therefore hold that while the Bank may properly foreclose Wife's interest ***, it may not obtain a deficiency judgment against her because she did not agree to be personally liable." (Emphasis in original.) *Id.* at 926.

¶ 32 Returning to the facts of this case, there is no dispute that: (1) Northbrook received a deed in lieu of foreclosure conveying the 1344-56 S. Michigan Avenue property pursuant to the 2012 settlement agreement; (2) O'Malley was not a party to that settlement agreement; and (3) in 2012 there was *not* an "instrument executed contemporaneously" by O'Malley in which he agreed not to be relieved of his liability under the 2008 guaranty. Nevertheless, Northbrook contends that O'Malley waived any such requirement, through the terms of the 2008 guaranty, in which he:

> "agree[d] that the performance of the Borrower's Obligation by each Guarantor shall be a primary obligation, shall not be subject to any counterclaim, set-off, abatement, deferment or defense based upon any claim that any Guarantor may have ***, and shall remain in full force and effect without regard to, and shall not be

> released, discharged or affected in any way by, any circumstance or condition *** including without limitation:
>
> c. Any furnishing, exchange, substitution or release of any collateral securing repayment of the Loan, or any failure to perfect any lien in such collateral ***."

Northbrook argues that this provision waived section 15-1401's requirement, such that no contemporaneous agreement was required at the time of the 2012 deed in lieu to maintain O'Malley's personal liability.

¶ 33 Notably, much of Northbrook's appellate brief is devoted to arguing why a prospective waiver of a guarantor's personal liability is "not contrary to public policy." Northbrook asserts that O'Malley's guaranty was "negotiated among sophisticated" parties and that it is not against public policy to enforce agreements waiving statutory protections to guarantors, particularly when commercial real estate is at issue. Northbrook also notes that whereas the Mortgage Foreclosure Law expressly prohibits the waiver of certain rights, such as the mortgagor's right of redemption with respect to residential and agricultural real estate (735 ILCS 5/15-1601(a) (West 2012)), there is no analogous provision prohibiting waiver of section 15-1401's protection.

¶ 34 Northbrook further argues that "Even if there is public policy set forth in Section 15-1401, a party can still waive the requirement so long as the waiver is knowing." Northbrook contends that "there are material issues of fact *** as to the circumstances under which O'Malley signed the waiver," precluding summary judgment.

¶ 35 Much of O'Malley's brief also focuses on public policy arguments, urging that section 15-1401 "expresses a clear public policy against prospective, pre-default waivers." He argues that the statute expresses a policy which "prohibits the lender from collecting a deficiency against the

guarantor unless the guarantor agreed in a written instrument 'executed contemporaneously' " and that the statute put Northbrook on notice that such an agreement was required to preserve O'Malley's liability. As there is no dispute that he did not execute a contemporaneous instrument at the time of the 2012 deed in lieu, he urges that there is no genuine issue of fact precluding summary judgment.

¶ 36 Although the parties' briefs say much about whether public policy permits an advance waiver, the case presents a threshold question—whether the "continuing guaranty" language relied upon by Northbrook constitutes a waiver of section 15-1401. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) ("A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent.") That is, before we may address whether an advance waiver was contrary to public policy, we must determine whether the relied-upon language actually constituted a "waiver" of section 15-1401. As set forth below, we conclude that the guaranty did not constitute a sufficiently explicit waiver of section 15-1401's requirement of an "instrument executed contemporaneously" to maintain a guarantor's personal liability upon transfer of a deed in lieu of foreclosure.

¶ 37 Northbrook correctly notes that, as a general matter, parties may contractually waive statutory rights. See *Smith v. Freeman*, 232 Ill. 2d 218, 228 (2009). However, "waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *Gallagher*, 226 Ill. 2d at 229. That is, "[a] party may waive a statutory right *as long as there was an intentional relinquishment of a known right*." (Emphasis added.) *Village of Bellwood v. American National Bank and Trust Company of Chicago*, 2011 IL App (1st) 093115, ¶ 25; *In re Estate of Ferguson*, 313 Ill. App. 3d 931, 937 (2000) (waiver of statutory

rights must be "knowing, voluntary, and intentional. [Citation.]"). Accordingly, our courts have required contractual waivers of statutory rights to be explicit.

¶ 38 Our supreme court illustrated this principle in *Gallagher v. Lenart*, 226 Ill. 2d 208 (2007). In that case, the plaintiff, Gallagher, was injured when the truck he was driving for his employer collided with a truck driven by an employee of another company. *Id.* at 211. Gallagher filed a workers' compensation claim against his employer, which was settled through the execution of a settlement contract and a resignation agreement. *Id.* at 212-13. The settlement contract provided in part, that his employer would pay $150,000 " 'in full and final settlement of all claims under the Workers' Compensation Act' " for injuries resulting from the accident. *Id.* at 213. The resignation agreement acknowledged that Gallagher would resign and that it was " 'intended to resolve in good faith any existing or potential disputes or claims arising out of [Gallagher's] relationship and separation' " from the employer. *Id.* at 213-14.

¶ 39 Separately, Gallagher and his wife filed a personal injury lawsuit against the driver of the other vehicle and his employer, reaching a settlement with those defendants. *Id.* at 214. Shortly thereafter, Gallagher's employer moved to intervene, in order to assert a lien against the settlement proceeds pursuant to section 5(b) of the Workers' Compensation Act, under which an employer who has paid workers' compensation to an employee may claim a lien upon "any award, judgment or fund out of which such employee might be compensated" by a third party for the injury. *Id.* at 215-16 (quoting 820 ILCS 305/5b (West 2004)).

¶ 40 In response to the employer's motion to intervene, Gallagher and the defendants argued that his employer had waived its statutory right to assert a workers' compensation lien, relying on the settlement contract and resignation agreement. *Id.* at 216. The employer responded that the settlement contract contained "no specific waiver" of its right to assert a lien. *Id.*

¶ 41 Our supreme court found that there was no such waiver. First, the court declined to find a waiver in the settlement contract's language, that the employer was "to pay Gallagher $150,000 'in full and final settlement of all claims under the Workers' Compensation Act for injuries allegedly incurred.' " *Id.* at 234. The court reasoned that:

> "[E]ven if the language of the settlement contract did constitute a general release, it would not be sufficiently explicit to waive [the employer's] workers' compensation lien. Considering the integral role the workers' compensation lien plays in the workers' compensation scheme, we do not believe general language is sufficient to effect such a waiver. On the contrary, the waiver of a workers' compensation lien must be explicitly stated. [Citation.] Here, the language of the settlement contract contains no mention of [the employer's] workers' compensation lien and therefore is not sufficiently explicit to waive the lien." *Id.* at 238.

¶ 42 *Gallagher* thus held that "there must be something more than general waiver language before the lien can be considered waived." *Id.* at 239. The court further explained that "it is not uncommon to require the explicit waiver of certain rights. In various other contexts, *where an important statutory right is at issue, an explicit manifestation of intent is required before the right in question can be deemed waived*. [Citations.]" (Emphasis added.) *Id*.

¶ 43 Our supreme court similarly found no waiver in the resignation agreement's language that it was " 'intended to resolve in good faith *any existing or potential disputes or claims arising out of Employee's relationship and separation with employer*.' " (Emphasis added by *Gallagher* court.) *Id.* at 242. The court found that, "like the language of the settlement contract, it contains

no specific reference to [the employer's] workers' compensation lien. As a result, it is not sufficiently explicit to effectuate the waiver of the lien." *Id.*; see also *Burgess v. Brooks*, 376 Ill. App. 3d 842, 846 (2007) (holding, pursuant to *Gallagher*, that a settlement agreement was insufficient to constitute a waiver where it "fail[ed] to specifically mention the employer's right to a lien pursuant to section 5(b) of the [Worker's Compensation] Act.").

¶ 44 Our appellate court has interpreted *Gallagher* as holding that "where a contract is silent regarding waiver, an assumption of waiver contravenes the explicit waiver rule." *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 15 (citing *Gallagher*, 226 Ill. 2d at 238). Thus, our court has declined to find a waiver when the contract language does not *explicitly* refer to the statutory right that is alleged to have been waived. For example, in an eminent domain case, we held that the plaintiff village retained its right under the Eminent Domain Act to abandon its condemnation proceedings prior to taking possession of the property (see 735 ILCS 5/7-110 (West 2004)), where the agreed orders negotiated with the defendants did not explicitly reference that statutory right. *Village of Bellwood v. American National Bank and Trust Company of Chicago*, 2011 IL App (1st) 093115, ¶ 25 ("The agreed orders made no reference to the statutory right to abandon or that Bellwood specifically waived that right. *** Had the parties intended for Bellwood to waive its statutory right to abandon, a provision stating such should have been included.")

¶ 45 The Second District followed the same rationale in *Elsener v. Brown*, 2013 IL App (2d) 120209, in which the trial court found the defendant liable for failing to pay the severance due to the plaintiff, its former employee, under an employment contract. Among other arguments on appeal, the defendant urged that the trial court erred in awarding attorney fees pursuant to the Attorneys Fees in Wage Action Act (705 ILCS 225/1 (West 2012) and prejudgment interest

under section 2 of the Interest Act (815 ILCS 205/2 (West 2012)). *Id.* ¶¶ 81-82. The defendant relied on the involuntary termination provision of the employment contract, which stated that it provided " Employee's sole and exclusive rights *** for any Involuntary Termination of the employee relationship" and that "Employee covenants not to sue or lodge any claim, demand or cause of action against Employer for any sums for Involuntary Termination other than those sums specified in this Section ***." *Id.* ¶ 82. The defendant argued that this provision constituted a "contractual waiver of plaintiff's right to seek attorney fees and interest." *Id.* ¶ 83.

¶ 46 The Second District disagreed. After discussing *Village of Bellwood*, 2011 IL App (1st) 093115, the court in *Elsener* concluded: "[W]e assume that, if the parties had intended to preclude plaintiff from seeking attorney fees or interest, that intention would have been overtly expressed in the employment contract. No such manifestation of intent appears in the uniformly general language above." *Id.* ¶ 85**.**

¶ 47 Other decisions have similarly indicated that an explicit reference to the statutory right to be waived is required. See, *e.g*. *In re Marriage of Kolessar*, 2012 IL App (1st) 102448, ¶ 21 ("Since the Marriage Act requires that interest be paid on orders for child support, and the agreed orders at issue did not contain an explicit waiver by Kolessar of her right to the statutory interest, the trial court erred in failing to award interest on the arrearages."); *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 16 ("the agreed bankruptcy order did not contain an explicit waiver of Terry's right to postjudgment interest. We see no reason *** why we should impute to Terry an intent to waive her right *** to such postjudgment interest when the agreed bankruptcy order is silent regarding the issue."). In other words, "if a party intends to waive its statutory right a provision stating such should be included in the agreement." *In re Marriage of Kolessar*, 2012 IL App (1st) 102448, ¶ 20.

¶ 48 Following this reasoning, we cannot find that the guaranty signed by O'Malley in 2008 explicitly waived the statutory protection of section 15-1401, requiring a contemporaneous agreement to maintain his personal liability upon transfer of a deed in lieu of foreclosure. Although the "continuing guaranty" provision states generally that his obligation will not be affected by the "furnishing, exchange, substitution or release of any collateral" securing the loan, we do not find this is sufficiently explicit to constitute a prospective waiver of section 15-1401.

¶ 49 We note that the "continuing guaranty" clause never uses the term "waiver," and the language relied upon by Northbrook does not explicitly reference section 15-1401 or the effect of a deed in lieu of foreclosure. As noted by Northbrook, the 2008 guaranty was negotiated by sophisticated parties; had they intended the guaranty to constitute a waiver of the statutory requirement of a contemporaneous agreement by the guarantor, they certainly could have included explicit language to that effect. We will not read into the guaranty a statutory reference that the parties could have included. *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 13 ("A court may not add to a contract terms that the parties have not expressly included. [Citation.]"). Without more explicit language, we do not find that the guaranty constituted an intentional waiver of section 15-1401.

¶ 50 We further note that requiring an explicit waiver of a guarantor's protection under section 15-1401 is consistent with our precedent recognizing that doubts arising from a guaranty agreement should be construed in favor of the guarantor. See *Southern Wine and Spirits of Illinois, Inc. v. Steiner*, 2014 IL App (1st) 123435, ¶ 16 ("A guarantor has acquired status as a favorite of the law, and when construing liability the court accords the guarantor the benefit of any doubts that may arise from the language of the contract.").

¶ 51 Our holding is further guided by principles of statutory construction, which require us to apply section 15-1401's clear requirement of a "contemporaneously" executed instrument. "In interpreting a statute, a court's primary goal is to ascertain the intent of the legislature. [Citation.] The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. [Citation.] When the plain language of the statute is clear and unambiguous, the legislative intent that is discernable from this language must prevail ***." *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002). Northbrook makes no argument that section 15-1401's requirement of an "instrument executed contemporaneously" is ambiguous. 735 ILCS 5/15-1401 (West 2012).

¶ 52 Similarly, our conclusion is supported by the principle that statutes "should be construed, if possible, so that no term is rendered superfluous or meaningless." *In re Marriage of Kates*, 198 Ill. 2d 156, 163 (2001). Our holding gives effect to the explicit requirement of an "instrument executed *contemporaneously*." (Emphasis added.) 735 ILCS 5/15-1401 (West 2012). Had section 15-1401 required only some instrument, executed at *any* time, in which the guarantor agreed not to be relieved of liability, we may have concluded that the 2008 guaranty sufficed. However, section 15-1401 indicates a clear legislative intent that the transfer of a deed in lieu relieves a guarantor's personal liability, unless the guarantor "contemporaneously" agrees to maintain his personal liability. We must assume that the legislature found this term significant and enforce its plain meaning.

¶ 53 Having concluded that the 2008 guaranty did not include an express waiver of section 15-1401's contemporaneous writing requirement, we need not analyze the parties' arguments as to whether such an advance waiver is contrary to public policy.

¶ 54 We now address Northbrook's independent argument that — since the 2012 deed in lieu concerned only *one* of the three mortgaged properties that secured the underlying loan — it would be improper to fully release O'Malley from personal liability. Northbrook argues, without citing any authority, that "in order for the trial court to fully exculpate O'Malley from any personal liability, it would have to assert that the mortgage that was the subject of the deed in lieu *fully* secured the underlying loan." Northbrook contends that since the 1344-56 South Michigan mortgage did not fully secure the underlying loan, "O'Malley's resulting release unduly benefitted O'Malley, to the detriment of the remaining guarantors."

¶ 55 Northbrook reasons that "O'Malley was given the full benefit as though only one mortgage was involved" and that this "could not have been the intent" of section 15-1401. Northbrook essentially makes an equitable argument that the release of O'Malley's liability, based on the 2012 settlement agreement to which he was not a party, gives him an unfair benefit to the detriment of the other guarantors, who were parties to that agreement.

¶ 56 We find this argument unavailing. First, we note that section 15-1401 simply does not require that the deed in lieu of foreclosure must transfer *all* of the property that served as collateral for the underlying loan, in order for a guarantor to be relieved of liability. The legislature could have, but did not, specify such a qualification, and we will not read it into the statute. See *Land*, 202 Ill. 2d at 426 ("[W]here the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the legislature did not express.").

¶ 57 Moreover, although the 2012 settlement agreement among Woodsmill, Northbrook, Bill and Bruce stated repeatedly that the agreement was not intended to relieve O'Malley of his personal guaranty, those parties could not simply circumvent section 15-1401 with that language.

To the extent that Northbrook complains that enforcing section 15-1401 unfairly benefits O'Malley, that is a result that Northbrook, Woodsmill, Bill and Bruce could have contemplated at the time of their agreement. Indeed, the 2012 settlement agreement specifically references section 15-1401 in stating that it was "an instrument executed contemporaneously" in which "Borrower [Woodsmill] and Guarantors [Bill and Bruce] agree that they are not fully relieved of personal liability for a deficiency as described and set forth in 735 ILCS 5/15-1401." The parties to the 2012 settlement clearly were on notice of section 15-1401 but did not obtain O'Malley's consent to remain liable through a contemporaneous instrument. They could not avoid the effect of section 15-1401 merely by stating their intent that O'Malley should not benefit from that statute.

¶ 58 In conclusion, we determine that the 2008 guaranty did not contain an explicit waiver of section 15-1401's requirement of an "instrument executed contemporaneously" to maintain each guarantor's personal liability upon transfer of a deed in lieu of foreclosure. There is no factual dispute that, in conjunction with the 2012 deed in lieu, O'Malley did *not* execute a contemporaneous instrument in which he agreed to remain personally liable. As a result, we agree with the trial court that O'Malley was entitled to summary judgment pursuant to section 15-1401.

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

¶ 60 Affirmed.