

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1778-11T4

TD BANKNORTH, N.A.,
n/k/a TD BANK, N.A.,

Plaintiff-Respondent,

v.

LION GATE AT SPARTA, L.P.,
THE ESTATE OF FRANK M. LEO, SR.,
and GREGORY G. LEO, SR.,

Defendants-Appellants.

Argued March 11, 2013 – Decided October 7, 2013

Before Judges Graves, Espinosa, and Guadagno.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-11123-10.

Theodore J. Leo argued the cause for appellants
(Law Offices of Theodore J. Leo, attorneys; Mr.
Leo and Christopher Leo, on the brief).

Jonathan M. Ettman argued the cause for
respondents (Poff & Weber LLC, attorneys; Mr.
Ettman, on the brief).

The opinion of the court was delivered by
GRAVES, J.A.D.

This case arises from a construction mortgage loan made by
Interchange Bank (Interchange) to defendant Lion Gate at Sparta,

L.P. (Lion Gate). The loan was acquired by plaintiff TD Banknorth, N.A., (TD Bank) after its 2007 merger with Interchange. The loan was guaranteed by the estate of Frank M. Leo, Sr.,¹ and Gregory G. Leo, Sr. Defendants appeal from a November 4, 2011 summary judgment order in favor of TD Bank for \$1,147,424.38, the balance due on the promissory note and guaranty agreements. Because the terms of the original and subsequent loan documents are clear and unambiguous, we affirm.

Frank and Gregory were general partners of Lion Gate. On April 20, 2004, Interchange entered into a construction mortgage loan agreement with Lion Gate. Pursuant to the loan agreement, Interchange agreed to lend the sum of \$2,165,000 to Lion Gate for the purchase of land located in Sparta, New Jersey (the property) and "the construction of eighteen single-family houses and related site work." The initial promissory note, which was also dated April 20, 2004, required Lion Gate to repay the loan by making interest-only payments commencing May 1, 2004 until November 1, 2005, at which time a final balloon payment of all principal and accrued interest on the note was due.

On the same day, Lion Gate executed and delivered to Interchange a mortgage on the property to secure the loan. The

¹ Because there are two defendants and other individuals with the same surname, we refer to them by their first names.

mortgage was recorded with the Sussex County Clerk on June 18, 2004.

In addition to the promissory note and mortgage, Frank and Gregory both executed and delivered to Interchange separate written guaranty agreements dated April 20, 2004. The guaranty agreements stated: "Guarantor guarantees, absolutely and unconditionally, to Interchange Bank (the "Bank"), the payment of the Note on the terms and conditions set forth in this Guaranty." The guaranty agreements also provided as follows:

6. Guarantor's liability shall be unaffected by: (i) any amendment or modification of the provisions of the Mortgage, or Note, or any other instrument made to or with Bank by the Borrower; (ii) the extensions of time for performance required; or (iii) the release of Borrower from performance or observance of any agreements, covenants, terms or conditions contained in any of said instrument by operation of law, whether made with or without notice to Guarantor. . . .

. . . .

8. Guarantor agrees that in the event of the failure of Borrower to perform or abide by, in any material respect, the terms of any document made to or with Bank by the Borrower, beyond applicable grace and/or cure periods, the Bank shall be immediately entitled to enforce the obligation of Guarantor hereunder.

. . . .

15. GUARANTOR WAIVES ALL ITS RIGHTS TO TRIAL BY JURY IN ANY LITIGATION RELATING

[TO] THIS GUARANTY OR THE DOCUMENTS OR TRANSACTIONS RELATED HERETO AND ALL DEFENSES AND RIGHT TO INTERPOSE ANY SETOFF OR COUNTERCLAIM OF ANY NATURE, EXCEPT AND ONLY TO THE EXTENT SUCH DEFENSE PERTAINS TO THE EXISTENCE OF AN EVENT OF DEFAULT, OR MANDATORY OR COMPULSORY COUNTERCLAIMS.

16. This Guaranty together with any Loan Documents constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

. . . .

18. This Guaranty shall bind the parties hereto and their respective heirs, executors, administrators, successors and assigns.

On January 10, 2006, at the request of Lion Gate, Interchange and Lion Gate entered into a first mortgage modification and extension agreement, which increased the outstanding principal balance to \$3,850,000 and extended the maturity date of the loan to May 1, 2007. Frank and Gregory both consented to the first modification and extension and acknowledged the original guaranty agreements remained "in full force and effect."

On January 2, 2007, TD Bank merged with Interchange and acquired all of its assets. Thereafter, on May 29, 2007, Frank

died and his son, Theodore Leo, and his wife, Anne Leo, were named as co-executors of Frank's estate.

TD Bank and Lion Gate executed a second modification of the note effective August 3, 2007, which extended the maturity date of the loan to September 1, 2007. Gregory provided TD Bank with his written consent and acknowledged the original guaranty agreements remained "in full force and effect." In December 2007, TD Bank agreed to extend the loan maturity date from September 1, 2007 to January 1, 2008.

On February 20, 2008, TD Bank sent Lion Gate a letter, stating: "The subject loan matured on January 1, 2008. This is to inform you that the default rate will be implemented effective 01/01/08 if the loan modification is not closed by 02/29/08." Lion Gate subsequently entered into a second mortgage modification and extension agreement dated February 22, 2008, which extended the maturity date from January 1, 2008 to December 31, 2009. That same day, Lion Gate executed a new promissory note (restated note) in the principal amount of \$3,850,000. In addition, Theodore and Anne, as co-executors of Frank's estate, and Gregory executed separate guaranty and security agreements.² The agreements provided:

² Anne subsequently died, leaving Theodore as the sole executor of the estate.

Guarantor hereby absolutely and unconditionally guarantees to Lender the prompt and complete payment and performance when due (whether at stated maturity, by required prepayment, acceleration, or otherwise) of all Obligations and the performance of each of Borrower's covenants and obligations under all mortgages, documents and instruments . . . as if each of the foregoing were the direct and primary legal responsibility of Guarantor and not Borrower.

In March 2008, TD Bank learned that Lion Gate had not paid real estate taxes on the mortgaged property since 2006, and the property was subject to a tax lien, which constituted a default under the initial and restated notes. In response to Lion Gate's request, TD Bank agreed to advance additional funds to Lion Gate under the note and mortgage to pay the outstanding real estate taxes. Therefore, Lion Gate and TD Bank entered into a third modification and extension agreement dated March 31, 2008. Pursuant to that agreement, the maturity date of the restated note and mortgage was shortened from December 31, 2009 to December 31, 2008, and the interest rate was increased.

In connection with the third modification agreement, Lion Gate executed and delivered to TD Bank a second restated note in the amount of \$3,850,000. In addition, Frank's estate and Gregory approved the terms and conditions of the third modification agreement, and they acknowledged and confirmed their continuing guaranty of Lion Gate's repayment obligation.

On January 12, 2009, TD Bank and Lion Gate entered into an extension agreement, in which they agreed to extend the maturity date of the note to December 31, 2009. Under this extension agreement, Lion Gate agreed to make all payments due prior to the new maturity date and to pay all accrued interest owed at the time of the agreement, together with a \$2500 extension fee. The guarantors did not execute an additional guaranty in connection with this extension agreement.

Lion Gate subsequently sold nine single-family houses on the property and paid the proceeds to TD Bank. However, Lion Gate failed to make the final balloon payment of principal and interest due on the December 31, 2009 maturity date. As a result of Lion Gate's payment default, TD Bank commenced the within action.

In its complaint filed on November 17, 2010, TD Bank demanded the outstanding balance due on the loan, in the amount of \$1,206,148.26. TD Bank also demanded judgment against Frank's estate and Gregory, as personal guarantors. In their answer dated January 20, 2011, defendants denied that Lion Gate was in default and asserted that the documentation pertaining to the guaranty agreements was "not legally binding." Defendants also raised separate defenses, stating, among other things, that there were "certain agreements and understandings negotiated

between representative of plaintiff and the defendant, Gregory" which extended due dates; and that "plaintiff is guilty of laches."

On September 27, 2011, TD Bank moved for summary judgment. In a supporting certification, Kate Hatch, a vice-president of TD Bank, certified her statements were based upon her own personal knowledge of TD Bank's business records and the management and administration of the loan, and she attached "the business records for and relating to the subject loan."

During oral argument on November 4, 2011, defendants' attorney stated, "I'm not contesting any single document that was signed. I'm contesting the basis and the intent of those documents, dating back when Interchange Bank dealt with [defendants]." In response, TD Bank's attorney argued, "This was a deal negotiated at arm's length between sophisticated parties. They had counsel representing them. The documents are as clear as day. . . . [T]he language is unambiguous."

Following oral argument, the trial court entered summary judgment in favor of TD Bank, reasoning as follows:

The plaintiff, TD Bank, is entitled to summary judgment against the Borrower and Guarantors because the Borrower defaulted on the Second Restated Note, and neither the Borrower nor the Guarantors has satisfied the outstanding balance due on the loan.

The Borrower is liable for the entire indebtedness as a matter of law. Here, the undisputed material facts demonstrate that the Borrower executed and delivered a series of Promissory Notes to Interchange and TD Bank, culminating in the Second Restated Note, which reflected the Borrower's unequivocal unconditional repayment obligation of the Loan, and the terms of the Second Restated Note provide that in the event of default, the Lender is entitled to accelerate the entire indebtedness and commence a collection action.

When the Borrower defaulted under the Note by failing to make the payment of principal and accrued interest due by the December 31, 2009 maturity of the loan, then the entire balance owed on the Loan remains outstanding. As a result of these material facts, the Borrower is liable for the entire indebtedness, as a matter of law. The Guarantors are also liable to the plaintiff, TD Bank, for the entire indebtedness, in accordance with the 2008 Guaranties and the Third Extension.

There is no question that the Guarantors signed and delivered the 2008 Guaranties and the Third extension to TD Bank as a consideration for TD Bank extending the maturity date of the Note from January 1, 2008 to December 31, 2009, and in advancing funds to the Borrower under the Third Extension. By doing so, the Guarantors absolutely and unconditionally guaranteed the Borrower's obligation under the Second Restated Note.

. . . .

Once the Borrower defaulted on its obligations under the Second Restated Note, the Guarantors became obligated to pay the entire indebtedness. As of this date, November 4, 2011, neither the Borrower nor

the Guarantors have satisfied the indebtedness and it remains unpaid, due, and owing. The Guarantors are, therefore, liable for the indebtedness as a matter of law.

The Court will also state that the defendants' separate defenses are meritless and fail as a matter of law.

For those reasons, the plaintiff, TD Bank's motion for summary judgment against the defendants is granted in its entirety.

Defendants argue on appeal that the court erred "because there are sufficient genuine material facts in dispute to warrant trial"; the court "erred in accepting the validity of all bank agreements and guarantees"; the court "erred in not considering equitable estoppel"; and the court "erred in accepting plaintiff's late filings." Based on our examination of the record, we conclude these arguments are clearly without merit, Rule 2:11-3(e)(1)(E), and require only the following comments.

Summary judgment is appropriate where the pleadings and evidence "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). As stated by the Court:

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the

competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

[Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)).]

When reviewing summary judgment orders, we utilize the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We first determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 536 (quoting Liberty Lobby, supra, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). If there is no genuine issue of material fact, we must then decide whether the trial court's application of the law was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

The interpretation of contract terms "are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack

Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 282 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). Therefore, "in ruling on a summary judgment motion that involves the interpretation of a contract, a court must necessarily determine whether there is any genuine issue of material fact regarding the parties' intentions." Celanese Ltd. v. Essex Cnty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009).

On the other hand, "'[i]f the language is plain and capable of legal construction, the language alone must determine the agreement's force and effect.'" CSFB 2001-CP-4 Princeton Park Corporate Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 120 (App. Div. 2009) (quoting FDIC v. Prince George Corp., 58 F.3d 1041, 1046 (4th Cir. 1995)). "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

In the present matter, the motion judge correctly applied these controlling contract principles and determined there is no

genuine issue of material fact to be resolved by a jury because the loan documents are clear and unambiguous. We agree and affirm substantially for the reasons stated by Judge Mark M. Russello in his comprehensive oral decision on November 4, 2011.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION