

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

United Central Bank,

Plaintiff,

Chicago Title Land Trust Company, as trustee under trust
agreement dated April 25, 2003 and known as Trust No. 1111977,
1050 Sibley Boulevard, LLC, Amrit J. Patel, Sanjit Shah,
Sunny Cherian, Geeta Shah, Navin Desai, First Plaza, Inc.,
Unknown Owners and Non-Record Claimants,

Defendants.

No. 09 CH 43184

MEMORANDUM OPINION AND ORDER

A contract containing unambiguous language is to be enforced as written. Geeta Shah executed a contract providing for her continuing, absolute, and unconditional guaranty. Since the contract's operative terms are unambiguous, the guaranty agreement is enforceable as written, meaning that Shah's motion to dismiss the complaint must be denied with prejudice.

FACTS

On April 30, 2003, 1050 Sibley Boulevard, LLC, ("1050 Sibley") and Chicago Title Land Trust Company ("Chicago Title") each executed a \$760,000, 25-year promissory note at 8% interest¹ to Mutual Bank ("MB") secured by a mortgage on the property located at 1050-88 Sibley Boulevard, Calumet City, Illinois. The promissory note provides, in part, that, "...unless paid prior to maturity, all unpaid principal accrued [i]nterest, costs and expenses are due and payable in full on April 28, 2008, which is the date of maturity." Also on April 30, 2003, Amrit Patel, Sanjit Shah, Sunny Cherian, Geeta Shah, and Navin Desai each executed a guaranty agreement for the purpose of inducing MB to extend financial accommodation to 1050 Sibley.

The guaranty agreement includes the following provisions:

This guaranty shall in all respects be a continuing, absolute, and unconditional guaranty, and shall remain in full force and effect with respect to each guarantor until written notice by United States registered or certified mail, of its discontinuance as to such guarantor, or of the death or dissolution of such guarantor, shall have been actually received by the Bank and also until all guaranteed debt created or existing before receipt of such notice shall have been paid.

* * *

No compromise, settlement, release, or discharge of, or indulgence with respect to, or failure, neglect, or omission to enforce or exercise any right against, any one

¹ The note indicates that it was a business loan pursuant to the Illinois Interest Act, 815 ILCS 205/4.

or more guarantors or the fact that at any time or from time to time, all the guaranteed debt may have been paid in full, shall release or discharge the undersigned.

* * *

The liability hereunder shall in nowise be affected or impaired by any of the following . . . any sale, pledge, surrender, compromise, settlement, exchange, release, renewal, extension, [or] modification. . . .

On April 28, 2008, 1050 Sibley and Chicago Title each executed a \$709,500.53, 20-year promissory note at 8% interest to MB secured by a mortgage on the same property previously subject to the 2003 promissory note. The 2008 note explicitly states at the top of its first page that: "THIS PROMISSORY NOTE MODIFIES AND REPLACES THE PROMISSORY NOTE DATED APRIL 30, 2003 IN THE ORIGINAL PRINCIPAL AMOUNT OF \$760,000.00." None of signatories to the 2003 guaranty agreement executed a new guaranty agreement in 2008.

On November 3, 2009, United Central Bank² ("UCB") filed a complaint alleging that, as of July 18, 2008, 1050 Sibley had defaulted on the 2008 note. UCB brought two causes of action, the first for foreclosure based on a breach of the 2008 note³ and the second for breach of the 2003 guaranty. Shah filed a motion to dismiss the complaint to which UCB responded, and Shah replied.

ANALYSIS

Shah brought her motion pursuant to 735 ILCS 5/2-619(a)(6) & (9). Such a motion authorizes an involuntary dismissal of a claim based on a defect or defense that negates the cause of action completely or refutes crucial conclusions of law or material fact. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). If the basis for the motion does not appear on the face of the complaint, the motion must be supported by affidavit or supporting documents. *Id.* at n.12; 735 ILCS 5/2-619(a). Here, Shah bases her motion on the 2003 and 2008 promissory notes that she attaches as exhibits. She fails, however, to attach a copy of the 2003 guaranty agreement.

The resolution of this dispute requires first a determination of the controlling document or documents. Shah believes that the 2008 promissory note constituted a novation of the 2003 promissory note that, absent a contemporaneous 2008 guaranty agreement, extinguished her potential liability under the 2003 guaranty agreement. According to Shah, to permit UCB's complaint to stand would impermissibly extend the construction of the 2003 promissory note to impose liability on her. In contrast, UCB argues that the guaranty agreement is the singularly relevant document in this analysis since it is the only one to which Shah is a party and her signature imposes on her a continuing obligation to guaranty 1050 Sibley's potential liability.

As to Shah's argument, novation is defined as:

² In July 2009, the Illinois Department of Financial Professional Regulation closed Mutual Bank and named the Federal Deposit Insurance Corporation as receiver. The FDIC later entered into a purchase and assumption agreement with United Central Bank.

³ UCB's foreclosure count improperly seeks relief from the guarantors, none of whom is a party to the 2008 note.

a substitution of a new contract or obligation for an old one which is thereby extinguished. More specifically, it is the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished. A novation is a mode of extinguishing one contract or obligation by another, that is, the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, the effect of which is to pay, dissolve, or otherwise discharge it.

Kroll v. Sugar Supply Corp., 116 Ill. App. 3d 969, 974, (1st Dist. 1983), *quoting* 15 Williston on Contracts § 1865, at 585-86 (3d ed. 1972), and Restatement (Second) of Contracts §§ 279 & 280 (1979). The essential elements of a novation are: (1) a valid obligation; (2) all of the parties' subsequent agreement to a new contract; (3) the old contract's extinguishment; and (4) the new contract's validity. *See Thomas v. Frederick J. Borgsmiller, Inc.*, 155 Ill. App. 3d 1057, 1061 (5th Dist. 1987).

As to UCB's argument, a guaranty agreement binds a guarantor only to what has been guaranteed. *See Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702 ¶ 16, *citing Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 403 (1st Dist. 2011). A guaranty agreement is interpreted according to the general principles of contract construction, *id.*, *citing Du Quoin St. Bk. v. Daulby*, 115 Ill. App. 3d 183, 185 (5th Dist. 1983), and a court is to resolve any question as to the agreement's terms in the guarantor's favor, *id.*, *citing Schiff v. Continental Nat'l Bk. & Trust Co.*, 255 Ill. App. 333, 340 (1st Dist. 1930), especially if the creditor prepared the agreement, *id.*, *citing Riley*. If a guaranty's language is unequivocal, the agreement is to be interpreted according to its terms. *Id.*, *citing Farmers St. Bk. v. Doering*, 80 Ill. App. 3d 959, 961 (4th Dist. 1980). One particular kind of guaranty – a continuing guaranty – is a contract under which “a person agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee.” *TH Davidson & Co. v. Eidola Concrete, LLC*, 2012 Ill App (3d) 110641, ¶ 11, *quoting* Restatement (Third) of Suretyship and Guaranty § 16 (1996).

In this case, the guaranty agreement provides that it is, “in all respects. . . a continuing, absolute, and unconditional guaranty. . . .” The agreement further provides that it “shall remain in full force and effect with respect to each guarantor until written notice by United States registered or certified mail, of its discontinuance as to such guarantor, or of the death or dissolution of such guarantor. . . .” Illinois courts have found nearly identical language to constitute a continuing guaranty, *see Harris Bk. Argo v. Midpack Corp.*, 151 Ill. App. 3d 293, 295 (1st Dist. 1986), *citing Bank of Naperville v. Holz*, 86 Ill. App. 3d 533, 535-36 (2d Dist. 1980), and Shah has presented no reason for this court to reach a different conclusion. Shah may be correct that the 2008 promissory note is a novation of the 2003 promissory note, but the moniker is irrelevant. Shah is not a party to either promissory note, so changes in their terms do not alter her potential liability. Rather, Shah's obligation arises under the guaranty agreement in which she provided MB and UCB with the assurance they required to extend the financial accommodations that 1050 Sibley sought under the notes. Since Shah did not receive written notice from MB or UCB discontinuing her guaranty and since she is still alive, her guaranty remains a valid and continuing obligation.

Shah's reliance on the promissory notes does not help her argument. The 2003 promissory note indicates that the unpaid principal, interest, costs, and expenses on the \$760,000 sum would be payable in full on April 28, 2008. The execution of the 2008 promissory note was, then, no surprise, but a potential event the parties foresaw in 2003. Thus, were Shah's personal guaranty also to terminate in 2008, the guaranty agreement would say so, but it does not. The court will not read such a clause into an otherwise unambiguous document.

Shah's argument also cannot be correct because, taken to its illogical conclusion, any guaranty would be a legal fiction. Shah argues that the promissory notes' terms changed between 2003 and 2008. True, but they changed, in fact, as early as May 28, 2003. That is when 1050 Sibley made its first \$5,925.43 monthly payment. After that payment, 1050 Sibley owed only \$754,074.57. If Shah's argument were correct, her guaranty would have extinguished at that point, rendering the agreement a nullity. That is simply not the way a guaranty agreement works either in general or under this particular guaranty agreement's unambiguous language. Shah's argument must be rejected.

It is, therefore, ordered that:

1. Shah's motion to dismiss is denied with prejudice; and
2. the 17 July 2013 status in Room 2806 at 10:30 a.m. is stricken.

Dated: 15 July 2013


John H. Ehrlich
Circuit Court Judge

Judge John H. Ehrlich

JUL 15 2013

Circuit Court 2075