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Superior Court of New Jersey, Appellate Division.

Frank LORUSSO and Judith Lorusso, Plaintiffs–Appellants,
v.
Lawrence SCHAIBLE and Lisa Schaible, Defendants–Respondents.

Submitted Dec. 1, 2010.
|
Decided Sept. 22, 2011.

On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. F–46285–08.

Attorneys and Law Firms

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for appellants (Richard P. Haber, of counsel and on the brief).

Maselli Warren, P.C., attorneys for respondents (David Fornal, of counsel and on the brief; Paul J. Maselli, on the brief).

Before Judges CUFF, SAPP–PETERSON and FASCIALE.

Opinion

PER CURIAM.

***1** Three men, defendant Lawrence Schaible, Charles Lewis, and Bryan LoRusso, borrowed funds from a bank to fund a business enterprise. When the business failed, each man filed for bankruptcy. Several months later, plaintiffs Frank LoRusso and Judith LoRusso, the parents of Bryan LoRusso, purchased the secured debt from the bank and then sought to recover the outstanding debt. Plaintiffs appeal from an order directing discharge of a mortgage given by defendants. Plaintiffs also appeal from another order that provided that a payment received by plaintiffs in a related bankruptcy proceeding extinguished certain debts between the parties. Plaintiffs contend the debt owed to them from an equipment lease by defendants is premised on a cross-collateralization agreement; defendants deny that the debt from the equipment lease is subject to a cross-collateralization agreement they signed on other debt and further argue that plaintiffs misapplied funds received from a consent order with one of the other men. Defendants argue that the application of the funds as directed by the consent order satisfies any obligation defendants owe to plaintiffs.

At issue is the enforceability of a cross-collateralization clause in a mortgage agreement and whether it extends to the guaranty given by defendant Lawrence Schaible on two subsequent loans. We hold that cross-collateralization clauses are enforceable. Where, however, a later commercial transaction is constructed as separate from and independent of the earlier agreement containing a cross-collateralization agreement, the earlier mortgage will not be construed to extend to the subsequent debt. We, therefore, affirm the order discharging the mortgage given by defendants. In addition, we also affirm the order holding that the remainder of the debt owed by defendants to plaintiffs has been extinguished.

Institutional Systems Service Corporation (ISSC) has three shareholders: defendant Lawrence Schaible, Bryan LoRusso, and Charles Lewis. In anticipation of taking out two business loans, Schaible,[1] Bryan LoRusso, Lewis, Mark Picard, and Ralph Edwards executed personal guarantees on March 12, 2004. The Guaranty of Payment (the guaranty) provided:

> Guarantor unconditionally and absolutely guarantees the due and punctual payment within applicable grace periods of the principal of the Notes, the interest thereon and any other monies due or which may become due under the Loan Documents.... All debts shall include those of all affiliates of Commerce Bancorp including but not limited to Commerce Bank, N.A., Commerce Bank/Pennsylvania, N.A., Commerce Bank/Shore, N.A., Commerce Bank North, Commerce Bank/Delaware, N.A. and Commerce Commercial Leasing, LLC, and any other existing or future subsidiary or affiliate of Commerce Bankcorp, Inc. and their successors and/or assigns.

[1] Throughout this opinion we refer to defendant Lawrence Schaible as Schaible.

> The loan that is the subject of the guaranty is described as "two loan facilities to [ISSC] ... in the aggregate principal amount of up to ONE MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS and NO CENTS ($1,250,000.00)...." The guaranty also states that "[i]n the event this Guaranty is placed in the hands of an attorney for enforcement, Guarantor will reimburse Bank for all expenses incurred in connection therewith, including reasonable attorney's fees."

***2** Defendants Schaible and his wife Lisa Schaible also executed a second mortgage (the mortgage) on their property located at 4 Truman Court, Robbinsville, on March 13, 2004. On December 29, 2004, defendants recorded the mortgage. The document recites that the mortgage is for $250,000, and was given to Commerce Bank/North, its successors and/or assigns because "Borrower owes Lender the aggregate principal sum of up to ONE MILLION TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (U.S. $1,250,000.00) ... [which] is evidenced by Borrower's Notes and Loan Agreements to two separate loan facilities...."

Furthermore, the mortgage states:

> This Mortgage secures the performance by Lawrence E. Schaible under a Joint and Several Limited Guaranty of Payment dated March 12, 2004 (the "Guaranty"), relating to a loan from the Mortgagee to Institutional Systems Service Corp. Anything in the Guaranty to the contrary notwithstanding, the maximum indebtedness secured by this Mortgage is Two Hundred Fifty Thousand and 00/100 ($250,000.00). Lisa Schaible is not personally liable under the Guaranty; she joins in this Mortgage solely to the extent necessary to mortgage her right, title and interest in and to the Property.

The mortgage also contains a cross-collateralization clause, which states:

> In addition to the Notes, this Second Mortgage secures all obligations, debts and liabilities, plus interest hereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any Statute of Limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

The mortgage provides that if the Lender expends money for "enforcing collection of the indebtedness secured," it will be entitled to a lien on the property in that amount. The mortgage does not define the term "Grantor," but defines "Lender" only as Commerce Bank/North, its successors and/or assigns. Charles Lewis and his wife and Bryan LoRusso and his wife granted similar mortgages to Commerce Bank/North.

On March 15, 2004, ISSC took out two loans (the ISSC loans) from Commerce Bank/North. The first ISSC loan is evidenced by a "Loan Agreement" and a document entitled "Secured Revolving Note" in the amount of $750,000. The note provides that it is secured by a first lien security interest in all of the assets of the borrower as well as three mortgages for residential properties located at 15 Greystone Court, Warwick, New York; 17 Smith Drive, Allentown; and 4 Truman Court, Robbinsville (the residential properties), and, upon its purchase, a second mortgage on a commercial property located at 160 Hopper Avenue, Waldwick (the commercial property). The second ISSC loan is evidenced by a "Loan Agreement" and a document entitled "Note" in the amount of $500,000. The note states that the security for the loan consists of second mortgages on the residential properties and a second mortgage on the commercial

property. Both Notes and Loan Agreements provide for attorney's fees.

***3** On March 30, 2004, L.M.B. Management, LLC (LMB), whose members include Schaible, Bryan LoRusso, and Picard, also took out a loan (the LMB loan) from Commerce Bank/North. The LMB loan is evidenced by a Loan Agreement and Note in the amount of $920,000. The note provides that it is to be secured by a first mortgage on the commercial property and an assignment of LMB's rights under a lease agreement. The Loan Agreement contains an integration clause, which states: "This Agreement and the Loan Documents contain the entire agreement between the parties relating to the subject matter hereof and supersede all oral statements and prior writings with respect thereto." The Note and Loan Agreement contain provisions for attorney's fees. Bryan LoRusso, Schaible, and Picard signed the Loan Agreement as "Guarantors" of the LMB loan.

ISSC also leased equipment (the lease) through Commerce Commercial Leasing, LLC. This is evidenced by a "Master Lease Agreement" and a "Surety Agreement" dated November 28, 2005. Schedule One of the lease agreement obligates ISSC to make sixty monthly payments of $2,237. The lease agreement provides that

> [i]n the event that Lessee grants to any affiliate of Lessor (including any direct or indirect subsidiary of Commerce Bankcorp, Inc.,) a lien or security interest in any real or personal property of Lessee other than the Equipment, Lessee agrees that such lien or security interest shall, without further action, by Lessee also secure the Lease Payments and the Performance by Lessee of its obligations under the Lease and that such affiliate shall be deemed Lessor's agent for the purpose of perfecting such lien or security interest in such additional collateral.

Schaible executed the Surety Agreement on November 28, 2005, with respect to the lease. The surety contains an integration clause, which states: "This Surety Agreement embodies the whole agreement and understanding of the parties hereto relative to the subject matter hereof. No modification or waiver of any provision hereof shall be enforceable unless approved by you in writing." There is no specific mention of collateral for this surety.

Bryan LoRusso and his wife filed for relief under Chapter Seven of the Federal Bankruptcy Code, 11 *U.S.C.A.* §§ 701 to 784, on June 1, 2006. No proof of claim was filed in their matter because it was a liquidation case.

Schaible and Lisa Schaible filed for relief under Chapter Thirteen of the Bankruptcy Code, 11 *U.S.C.A.* §§ 1301 to 1330, on July 28, 2006. On October 17, 2006, Commerce Bank/North filed a proof of claim in this matter for $120,188.90 in secured debt and $50,150.21 in unsecured debt.

Charles Lewis and his wife filed for relief under Chapter Thirteen of the Bankruptcy Code on August 7, 2006. On October 17, 2006, Commerce Bank/North filed a proof of claim in their matter with the Bankruptcy Court for debts incurred on March 12, 2004 and November 28, 2005. The proof of claim indicated that it held a $120,188.89 secured claim and a $17,817.05 unsecured claim.

***4** On December 19, 2006, plaintiffs Frank LoRusso and Judith LoRusso purchased from Commerce Bank/North and Commerce Commercial Leasing, LLC, an assignment of the two ISSC loans, the LMB loan, and the lease, all of which were in default. The assignment agreement states that as of December 19, 2006, there was a balance of $10,338.56 and $42,274.16 owing on the two ISSC loans, "inclusive of unpaid principal, accrued interest, legal, field examination, appraisal and other expenses...." With respect to the LMB loan, there was a balance of $32,760.76, inclusive of the same items. There also remained a total of $18,809.25 on the lease, inclusive of the same. Plaintiffs purchased these debts for $104,182.73.

On April 10, 2008, plaintiffs entered into a consent order, confirmed by the Bankruptcy Court, in which Lewis's Trustee in Bankruptcy paid plaintiffs $60,000 to release their $120,188.89 secured claim on the residence owned by Lewis and his wife. The order provided that the balance of $17,817.05 would be allowed as a general unsecured claim.

The trustee in the Bryan LoRusso bankruptcy proceeding sold the residence that secured his obligation under the ISSC loans on December 16, 2008. Plaintiffs stated that

they "consented to receiving less than the full amount due on the mortgage relating to the business debt at the time Bryan LoRusso's house was sold." They noted that they "felt it was appropriate to consent to receiving less than the full amount due on the mortgage when Bryan sold his home, and to seek the remaining balance from Lawrence Schaible, the one partner who has contributed nothing either financially or through sweat equity to the reduction of the debt and/or winding down of the business." Bryan LoRusso's bankruptcy proceeding closed on April 23, 2008.

Defendants assert, and plaintiffs do not contest, that after seeking relief under the Bankruptcy Code, their "bankruptcy plan was confirmed by the court ... [and] does not provide for any treatment of the mortgage that [they] granted to secure the [ISSC loans]. Accordingly, once the Plan was confirmed, [they] continued to own their home subject to the mortgage securing the [ISSC loans]."

Plaintiffs filed a complaint to foreclose the mortgage on defendants' house on November 20, 2008. Defendants filed an answer in which they admitted that Schaible executed a guaranty and mortgage but asserted that the cross-collateralization clause did not extend to subsequent loans. They further alleged that plaintiffs misapplied funds received from the liquidation of collateral of Schaible's business partners and co-debtors. The parties filed cross-motions for summary judgment and by an order dated March 15, 2010, Judge Sypek denied plaintiffs' motion to strike defendants' answer. By orders dated March 15 and 19, 2010, Judge Sypek granted defendants' motion for summary judgment and ordered plaintiffs to immediately issue a discharge of mortgage to defendants.

In her March 15, 2010 opinion, the judge held that the money plaintiffs received from the April 10, 2008 consent order entered in the Lewis's bankruptcy proceeding was sufficient to satisfy the balance remaining in the ISSC loans. She also determined that the LMB loan was secured by the commercial property only. She reasoned that an integration clause demonstrated that the parties intended the LMB loan to be "self-contained." Thus, the language of the subsequently executed LMB loan took precedence over the general language found in the cross-collateralization clause in the mortgage executed in conjunction with the initial loan to ISSC. According to the judge, "[t]hrough its integration clause, and with its own cross-collateral provision, the LMB Agreement reveals the parties' intention that the LMB loan transaction be distinct from the [Schaible] mortgage."

***5** With respect to the equipment lease, the judge also concluded that its "specific merger language exempts the Surety Agreement and associated debt from the mortgage that the [Schaibles] executed...." For the same reasons, she found that the lease was not secured by Lewis's mortgage either. The judge found that the proof of claim filed by Commerce Bank/North in the bankruptcy proceeding listed the lease as an unsecured claim. The judge concluded her opinion as follows:

> Since Charles Lewis' mortgage, too, secured only the two ISSC loans, Plaintiffs were not entitled to apply any of the funds received from the sale of the Lewis property to either the LMB loan or the Lease. The Court therefore [found] that the funds received from the sale of the Lewis property satisfied any amounts outstanding on the ISSC loans, since the ISSC loans carried a balance of $54,290.92 and the LoRussos received $60,000 from the sale proceeds. Since neither the Lewis mortgage nor the Schiable [sic] mortgage secured the LMB loan or the Lease, the Court conclude[d] that the Plaintiffs have no right to foreclosure under the terms of the Schiable [sic] mortgage.

I

Plaintiffs argue that the cross-collateralization clause in the mortgage executed in conjunction with the first loan secures Schaible's performance under the guaranty executed in conjunction with the LMB loan and the equipment lease. Therefore, all debts are secured by the second mortgage on the Schaible's house. They also contend it was permissible to apply the proceeds obtained in bankruptcy as they saw fit, and they are entitled to attorneys' fees.

Defendants respond that the general cross-collateralization clause in the second mortgage was

superseded by the specific integration clauses found in the LMB loan and equipment lease documents. Therefore, neither the LMB loan nor the equipment lease are secured by the mortgage. They further argue that plaintiffs were required to apply the proceeds obtained through the bankruptcy court proceedings to the two ISSC loans, thereby satisfying that debt in its entirety.

The threshold issue is whether a cross-collateralization clause is enforceable. Such clauses are also known as dragnet clauses. 29 *New Jersey Practice, Mortgages* § 3.30, at 192 (Myron C. Weinstein) (2d ed.2001). Generally, dragnet clauses "state[ ] that the mortgage will secure not only the debt incurred in the instant mortgage transaction, but in addition all other debts or obligations that are presently owed or may in the future be owed to the mortgagee by the mortgagor." *Restatement (Third) of Property: Mortgages* § 2.4 comment (1996). Both parties assume that such clauses are enforceable in this state. Interestingly, we have located no authority that expressly addresses the issue in this state.

The *Restatement* permits this type of cross-collateralization provision. It provides that

> [a] mortgage may secure future advances that are not made in connection with the transaction in which the mortgage is given, and that are not specifically described in the mortgage or other documents executed as part of that transaction, subject to the following limitations:
>
> ***6** (a) The parties must have agreed that such future advances will be secured....
>
> (b) The advances must be made in a transaction similar in character to the mortgage transaction, unless
>
> (1) the mortgage describes with reasonable specificity the additional type or types of transactions in which advances will be secured; or
>
> (2) the parties specifically agree, at the time of the making of the advances, that the mortgage will secure them.
>
> (c) If mortgaged real property is transferred, the mortgage will secure only advances made prior to the mortgagee's gaining actual knowledge of the transfer.
>
> [*Restatement, supra,* § 2.4.]

Several states recognize the enforceability of dragnet clauses. *See e.g., Lundgren v. Nat'l Bank of Alaska,* 756 *P.*2d 270, 278 (Alaska 1987); *Citizens & S. DeKalb Bank v. Hicks,* 206 *S.E* .2d 22, 24 (Ga.1974); *Newton Cnty. Bank, Louin Branch Office v. Jones,* 299 *So.*2d 215, 217 (Miss.1974); *First Sec. Bank of Utah v. Shiew,* 609 *P.*2d 952, 957 (Utah 1980); *Capocasa v. First Nat'l Bank of Stevens Point,* 154 *N.W.*2d 271, 274 (Wis.1967); *Wong v. Beneficial Sav. & Loan Ass'n,* 128 Cal.Rptr. 338, 342–43 (Ct.App.1976); *see generally* Milton Roberts, Annotation, *Debts Included in Provision of Mortgage Purporting to Cover All Future and Existing Debts (Dragnet Clause)-Modern Status,* 3 *A.L.R.*4th 690 (1981).

In determining whether a particular debt is covered by the dragnet clause, some states look only to the clear and unambiguous language of the clause itself, "so that if the clause states that the collateral secures all debt now or hereafter existing, the intent of the parties must be deemed to have been to secure all debt ." *Lundgren, supra,* 756 *P.*2d at 277. Other courts seek to determine what the parties actually intended. *See, e.g., Wong, supra,* 128 Cal.Rptr. at 343. Thus, "[d]ecisions adopting this approach have pointed out that such clauses are usually 'boilerplate' in a document drafted by the lender, seldom the subject of negotiation, and often the debtor is unaware of its presence or implications." *Lundgren, supra,* 756 *P.*2d at 277. Generally, however, courts have reacted with disfavor towards dragnet clauses and construe them narrowly against the mortgagee. *See e.g., Capocasa, supra,* 154 *N.W.*2d at 275; 29 New Jersey Practice, Mortgages, *supra,* § 3.30, at 193; *Restatement, supra,* § 2.4 comment; *see also* Newton Cnty. Bank, *supra,* 299 *So.*2d at 217; *First Sec. Bank of Utah, supra,* 609 *P.*2d at 957.

We hold that such provisions are enforceable. We discern no reason for striking such a provision in a commercial transaction between knowledgeable parties. This is the type of provision that has gained general acceptance in the commercial community. Nevertheless, the majority of courts that have expressly held that such clauses are enforceable also construe these clauses narrowly against the mortgagee.

***7** The question then becomes whether the specific debt at issue is secured by the mortgage. *See Lundgren, supra,* 756 *P.*2d at 278. In this respect, there is a difference between antecedent and subsequent debts. *See Restatement, supra,* at § 2.4 comment b ("A dragnet clause

can have only a prospective effect."); *see also Lundgren, supra,* 756 *P.*2d at 278 ("A key rationale underlying these holdings is that since the antecedent debt is already owed by the borrower to the lender, the parties would have had no good reason not to identify it in the subsequent security instrument if they had truly intended the deed of trust or mortgage to cover it.").

The *Restatement* requires that the subsequent debt be "made in a transaction similar in character to the mortgage transaction...." *Restatement, supra,* at § 2.4(b). The reason for such a limitation is

> to mitigate the potential for unanticipated coverage of the clause. If an advance claimed by the mortgagee to be secured arises out of a transaction of a wholly different character from the original mortgage transaction, an inference arises that the parties did not intend to cover it, even though the language of the mortgage's dragnet clause is so broad that the advance literally falls within its terms.
>
> [*Id.* at § 2.4 comment c.]

The following cases present issues similar to this case. In *Citizens & Southern DeKalb Bank,* the defendant executed a personal guaranty and a deed to secure debt to secure a note executed by a partnership in favor of the plaintiff. 206 *S.E.*2d at 23. The partners then formed a separate corporation and executed a note in the name of the corporation, which was secured by liens on equipment, inventory, accounts receivable, and personal guarantees by the principals, including the defendant. *Ibid.* The defendant's deed to secure debt contained a dragnet clause, "which provided that the deed secured the present indebtedness 'together with any and all other indebtedness now owing or which may hereafter be owing by grantor to grantee, however incurred.' " *Ibid.* The court held that the personal guaranty for the corporate note "created a debt or obligation which could be tacked onto the original deed to secure debt." *Id.* at 24. Thus, a dragnet clause can serve to secure a subsequent guaranty.

In *First Security Bank of Utah,* the court discussed a dragnet clause in relation to a subsequent debt instrument that contained an integration clause. 609 *P.*2d at 957. The court stated:

> [T]he dragnet clause was a standard boiler plate provision inserted by the mortgagee in the mortgage on the Shiews' home.... There was no evidence this clause was a subject of negotiation between the parties, or that the attention of the mortgagors was directed to this provision.... [Later,] the Shiews entered into an entirely different type of transaction, a security agreement to finance a business venture, cattle raising.... The cattle and feed were recited as the security for this subsequent loan. Furthermore, the security agreement failed to mention the obligation was also secured by the real estate mortgage, and, in fact, refuted such a consequence by an integration clause which recited it constituted the entire agreement between the parties.
>
> ***8** [*Ibid.*]

The court then held that "[t]he legal effect of this integration clause was the preclusion of any claim by the bank that it had accepted the mortgagors' continuing offer to secure future advances with the real estate mortgage on their home." *Ibid.* Thus, an integration clause can serve to prohibit subsequent cross-collateralization.

In *Capocasa,* the court addressed the relationship between a dragnet clause and a co-mortgagor. 154 *N.W.*2d at 274. In that case, the question posed was "whether the mortgage will secure a subsequent note given by one of the borrowers ... for a consideration unrelated to the original purpose of the mortgage when the other party had no knowledge of the other mortgagor's personal note and did not consent to subjecting the mortgaged property to this additional debt." *Ibid.* The court held that

> when a "dragnet" clause is made a part of a mortgage executed by joint tenants, each mortgagor pledges his undivided interest in the mortgaged property to secure (1) the joint indebtedness or other indebtedness specifically named in the instrument, and any existing or future *joint* indebtedness of the mortgagors to the mortgagee; (2) any existing or future individual indebtedness to the mortgagee; and (3) any future debt of his comortgagor which is known to him and to which he consents to be a lien upon his interest; provided (4), in addition, that whenever the proceeds or the benefits derived from the other mortgagor's contracting a further obligation inure to the enhancement of his interest, the "dragnet" clause will be construed to cover such indebtedness to the extent of that enhancement notwithstanding the fact that the mortgagor did not know of or consent to the indebtedness.

[*Id.* at 278].

These cases, although not binding on this court, demonstrate some of the considerations relevant to determining whether the cross-collateralization clause at issue here acts to secure the LMB loan and the lease through Schaible's guaranty.

Any examination of a specific transaction requires us to determine the intention of the parties. We commence that inquiry with an examination of the documents and the relevant provisions of each document. *Nester v. O'Donnell,* 301 *N.J.Super.* 198, 210 (App.Div.1997) (citing *Barco Urban Renewal Corp. v. Hous. Auth. of Atlantic City,* 674 *F.*2d 1001, 1009 (3d Cir.1982)).

The second mortgage executed by defendants on their home on March 13, 2004, recites that it secures the performance of a guaranty dated March 12, 2004, executed by Lawrence Schaible for a loan from Commerce Bank/North to ISSC. It also provides that the second mortgage "secures all obligations, debts and liabilities, plus interest hereon, of [Schaible] to [Commerce Bank/ North] ... whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note ..." The November 2005 Surety Agreement associated with the equipment lease does not identify specific collateral for the transaction but provides that

> ***9** [i]n the event that Lessee grants to any affiliate of Lessor (including any direct or indirect subsidiary of Commerce Bankcorp, Inc.,) a lien or security interest in any real or personal property of Lessee other than the Equipment, Lessee agrees that such lien or security interest shall, without further action, by Lessee also secure the Lease Payments and the Performance by Lessee of its obligations under the Lease and that such affiliate shall be deemed Lessor's agent for the purpose of perfecting such lien or security interest in such additional collateral.

The Surety Agreement also contains an integration clause which provides, "This Surety Agreement embodies the whole agreement and understanding of the parties hereto relative to the subject matter hereof."

The express terms of the 2004 cross-collateralization agreement are evidence that the parties intended to be bound by such an agreement. *See, e.g., Newton Cnty. Bank, supra,* 299 *So.*2d at 218 (holding that the clear and unambiguous express terms of the agreement are evidence of intent to be bound by the provision). In fact, this is not so much a case of intention to be bound but of the scope of the agreement. Furthermore, the subsequent ISSC debt must be similar in character to the antecedent debt. *Restatement, supra,* § 2.4(b). The antecedent debt, the LMB loan, was extended to purchase commercial property to serve as the corporate headquarters of LMB and ISSC. The November 2005 lease to ISSC is for equipment to be utilized in the business. *See id.* at § 2.4(b) and comment c; *see also Citizens & S. DeKalb Bank, supra,* 206 *S.E.*2d at 24.

On the other hand, a cross-collateralization agreement operates only prospectively. In other words, it does not secure pre-existing debt. *Restatement, supra,* § 2.4 comment b. Here, the language in the November 2005 lease agreement is stated in the present tense with no reference to prior debt. The inclusion of a cross-collateralization provision in this agreement adds a degree of ambiguity to the document. The lender sought and obtained a cross-collateralization agreement for future debt, made no mention to the antecedent debt and earlier cross-collateralization agreement, and finalized the document with an integration clause. The language utilized in the subsequent lease agreement is telling because generally a cross-collateralization provision does not extend to pre-existing or antecedent debt, and as recognized by the *Restatement*

> if the parties wish to secure preexisting indebtedness, it is a simple matter for them to make specific reference to that debt in the mortgage or in a concurrent agreement. When this is not done, it is reasonable to assume that the parties did not focus their negotiations on the preexisting debt, and did not intend to make the mortgage secure it.
>
> [*Ibid.*]

The use of the present tense, the failure to refer expressly to antecedent debt, and the integration provision introduces substantial ambiguity about the scope of the earlier

cross-collateralization agreement and counsels against application of the earlier cross-collateralization agreement to the November 2005 lease agreement. Any ambiguity in a document drafted by the lender, and there is nothing in this record that suggests otherwise, must be construed against the drafter. *In re Miller's Estate,* 90 *N.J.* 210, 221 (1982). In addition, the proof of claim submitted by the lender in the Schaible bankruptcy proceeding, which listed the ISSC equipment lease as unsecured, is also telling of the lender's understanding of the breadth and limitations of the earlier cross-collateralization agreement. *See Cnty. of Morris v. Fauver,* 153 *N.J.* 80, 103 (1998) (party's practical construction of agreement is evidence of intention).

***10** In sum, the cross-collateralization agreement as executed by defendants in March 2004 is enforceable. The express language of the various agreements evinces an intention by defendants to be bound by the security they provided in March 2004. On the other hand, the express terms of the November 2005 agreements make no mention of the pre-existing debt and the integration agreement bars incorporation of terms of other previously executed agreements. We, therefore, affirm the order granting defendants' motion for summary judgment.

II

We also reject the position advanced by plaintiffs that they could apply the proceeds of the consent order in any manner they chose. Plaintiffs decided to apply the $60,000 recovered by them to all four debts evenly. By doing so, they applied $15,000 against Lewis's indebtedness but he was not a guarantor of the LMB loan and the consent order expressly provided that plaintiffs retained their unsecured claim in the amount of $17,817.05 for Lewis's liability on the ISSC equipment lease. According to defendants, if plaintiffs had applied the $60,000 to the ISSC loans, their indebtedness would have been satisfied

The "payment application rule" states that "where a debtor owes multiple obligations to a creditor, the debtor has the right to designate to which debt a payment should be applied." *United Orient Bank v. Lee,* 208 *N.J.Super.* 69, 72 (App.Div.1986). This general rule was reaffirmed in *Craft v. Stevenson Lumber Yard, Inc.,* 179 *N.J.* 56, 72 (2004), in which the Court stated: "As a general proposition, a creditor who is owed more than one debt by a debtor may apply the payments to the debtor's account in any manner it chooses so long as the debtor has not issued specific directions to the contrary."

Here, the consent order plaintiffs entered into with Lewis's Trustee in Bankruptcy is clear. The payment was made to "release the secured lien claim on premises owned by the Debtors...." Furthermore, "the balance of $17,817.05 representing the balance of the filed Proof of Claim of Frank LoRusso and Judith LoRusso [was] ... allowed as a general unsecured claim." Thus, despite language in the loan documents purporting to allow plaintiffs to apply payments in whatever manner they saw fit, Lewis, through his Trustee in Bankruptcy, directed payment to the ISSC loans only, and plaintiffs agreed to these terms.

Furthermore, Lewis was not a guarantor of the LMB loan. Thus, his residence could not serve as collateral for that loan. As such, Judge Sypek correctly determined that the payment provided by the consent order could only be applied to the two ISSC loans.

We remand, however, for consideration of whether plaintiffs are entitled to attorneys' fees and, if so, the amount of those fees. This issue was not addressed by Judge Sypek. Plaintiffs' argument that the motion judge considered facts not properly in the motion record is without sufficient merits to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

***11** The March 15 and 19, 2009 orders are affirmed; plaintiffs' application for attorneys' fees is remanded for consideration by the trial court.

All Citations

Not Reported in A.3d, 2011 WL 4388355

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