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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1101045

Fred G. Eagerton and Nancy Eagerton

v.

Vision Bank

Appeal from Baldwin Circuit Court
(CV-09-900564)

BOLIN, Justice.

Fred G. Eagerton and Nancy Eagerton appeal from a summary judgment in favor of Vision Bank ("the bank") in the bank's action seeking enforcement of the Eagertons' obligations under certain guaranty contracts. We reverse and remand.

I. Facts and Procedural History

Dotson 10s, LLC, is an Alabama limited liability company organized to operate the Rock Creek Tennis Club located at 142 Clubhouse Drive in Fairhope. John W. Dotson, Jr., and Elizabeth E. Dotson (hereinafter sometimes collectively referred to as "the Dotsons") are the sole members of Dotson 10s.

On December 9, 2007, Dotson 10s executed a "Multipurpose Note and Security Agreement" with the bank in the amount of $550,677.53 (hereinafter referred to as "the original loan"); the maturity date of the original loan was December 9, 2010. In conjunction with the original loan, the bank obtained unlimited personal guaranties from both John W. Dotson, Jr., and Elizabeth E. Dotson. The bank also obtained limited personal guaranties from both Fred G. Eagerton and Nancy Eagerton; the Eagertons are Elizabeth Dotson's parents.[1] The original loan was secured by a mortgage on the real property

[1]Fred Eagerton and Nancy Eagerton each signed individual guaranty contracts. Both contracts contain identical language, and we refer to the contracts throughout this opinion in the plural form, i.e., the Eagertons' guaranty contracts.

located at 142 Clubhouse Drive (hereinafter referred to as "the first mortgage").[2]

On December 11, 2008, Dotson 10s executed a subsequent "Multipurpose Note and Security Agreement" with the bank in the amount of $222,513.56 (hereinafter referred to as "the second loan"); this loan is identified by the bank as loan number 302669.[3] The second loan was guaranteed solely by the Dotsons; the Eagertons neither were parties to the transaction involving the second loan, nor did they execute personal guaranties for the repayment of the second loan. The second

[2]The original loan is actually a renewal of a previous loan executed by Dotson 10s in the amount of $598,363 that matured on December 9, 2007. The documents and the guaranties associated with the previous loan in the amount of $598,363 and the real-estate mortgage securing the previous loan were signed on December 10, 2004. The real-estate mortgage dated December 10, 2004, securing the previous loan is identified as instrument number 858796 and specifically secures "LOAN NUMBER 78476 FOR THE AMOUNT OF $598,363.00." (Capitalization in original.) This mortgage was subsequently re-recorded as instrument number 866854 to reflect the correction of a typographical error regarding the physical address of the property.

[3]The second loan is actually a renewal and/or modification of a previous loan executed by Dotson 10s on October 20, 2006, in the amount of $224,000. This previous loan in the amount of $224,000 is identified by the bank as loan number 97950, and it is secured by a mortgage, dated October 20, 2006, and identified as instrument number 1009685. The mortgage specifically secures "LOAN NUMBER 97950 FOR THE AMOUNT OF $224,000.00."

loan was secured by what is titled a "2nd Real Estate Mortgage" on the same real property located at 142 Clubhouse Drive (hereinafter referred to as "the second mortgage").

In April 2009, the bank declared the original loan and the second loan in default and accelerated the balances due under both loans; Dotson 10s failed to pay the balances. The bank filed a breach-of-contract action in the Baldwin Circuit Court against Dotson 10s, as the primary obligor of the original loan and the second loan; the Dotsons, as personal guarantors of the original loan and the second loan; and the Eagertons, as personal guarantors of the original loan.

On May 28, 2009, Dotson 10s filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Alabama ("the bankruptcy court"). On August 25, 2009, Dotson 10s filed with the bankruptcy court its proposed Chapter 11 plan of reorganization, which provided, in part, that the original loan and the second loan would be combined (hereinafter referred to as "the consolidated loan") and paid in full. The proposed plan states, in pertinent part:

> "This class consists of the Allowed Secured Claim of Vision Bank, which claim is secured by 6.5 acre

> parcel where the clubhouse, tennis courts and swimming pool exist. The two notes comprising this claim and totaling approximately $823,411 will be combined and paid at 6% in equal monthly installments of $5,900 beginning 30 days after confirmation. The notes will be paid in full within 240 months. ... Vision Bank will retain its lien on the subject property until the debt is paid in full."

(Emphasis added.)

On December 1, 2009, the bankruptcy court conducted a confirmation hearing regarding the proposed reorganization plan; the Dotsons and certain bank representatives were present at that hearing. Before the hearing, the bank representatives negotiated additional terms that were favorable to the bank. On December 10, 2009, the bankruptcy court entered an order confirming the plan of reorganization, as amended. The order states, in pertinent part:

> "(2) The secured claim of Vision Bank is determined to be $795,908.84 as of December 1, 2009; (3) [Dotson 10s] shall pay the secured claim to Vision Bank in equal monthly payments of $6,172.64 per month beginning January 1, 2010. Interest is calculated at 7% per annum. The debt to Vision Bank shall mature and become fully due and payable on January 1, 2012; (4) [Dotson 10s] shall have no grace period. If any payment is not paid on or before the due date, the automatic stay shall terminate and Vision Bank is authorized to

> immediately foreclose its mortgage without further order of this Court ...."[4]

(Emphasis added.) The bank thereafter assigned a new loan number to the consolidated loan.

In March 2010, Dotsons 10s defaulted under the bankruptcy plan, and the bankruptcy court entered an order dismissing the bankruptcy action. On May 12, 2010, the bank conducted a foreclosure sale of the real property pursuant to the bankruptcy court's order set out above.[5] The bank purchased the real property for $600,000 and applied the proceeds entirely to the consolidated loan.

On July 15, 2010, the Baldwin Circuit Court (hereinafter referred to as "the trial court"), in response to a motion for a summary judgment filed by the bank, entered a partial summary judgment in favor of the bank against Dotson 10s but denied the motion as to the Eagertons. The bank, thereafter, filed another motion for a "final partial summary judgment"

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[4]We note that the bankruptcy court's order acknowledges neither that the bank held two separate mortgages on the subject real property nor that the first mortgage secured only the original loan.

[5]The foreclosure deed contained in the record discloses that the bank foreclosed upon the first mortgage--instrument number 858796. See supra note 2.

against the Eagertons, arguing that the Eagertons were responsible under their guaranty contracts for the deficiency remaining on the consolidated loan after allocation of the foreclosure proceeds to that loan. Specifically, the bank argued that because the original loan represented 71.07% of the consolidated loan, the Eagertons should be liable for 71.07% of the balance remaining on the consolidated loan after application of the foreclosure proceeds, as well as 100% of the interest, attorney fees, etc. The Eagertons moved for a summary judgment as well, arguing as a defense a material alteration of their guaranty contracts. On May 24, 2011, the trial court, apparently relying on the bank's pro rata theory, entered a partial summary judgment in favor of the bank and against the Eagertons in the amount of $208,906.40. The trial court certified its judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., specifically reserving jurisdiction to determine at a later date the appropriate amount of attorney

fees and costs owed to the bank, if any, relating to its collection efforts.[6] The Eagertons appeal.[7]

II. Standard of Review and Applicable Law

> "'This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied.

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[6]Because the guaranty contracts in this case specifically state that the guarantors shall be liable for "all attorneys' fees, collection costs and enforcement expenses" and because the trial court reserved jurisdiction to determine at a later date the appropriate amount of attorney fees and costs relating to the bank's collection efforts, we conclude that the summary judgment was final. See Liberty Mut. Ins. Co. v. Greenway Enters., Inc., 23 So. 3d 52, 55 (Ala. Civ. App. 2009). In Liberty Mutual, the Court of Civil Appeals stated:

> "Rule 58(c), Ala. R. Civ. P., states, in pertinent part, that '[t]he entry of the judgment or order shall not be delayed for the taxing of costs.' Hence, the failure to tax costs did not affect the finality of the summary judgment. Holman v. Bane, 698 So. 2d 117, 119 (Ala. 1997). Pursuant to caselaw, the failure to award attorney fees also does not render the summary judgment nonfinal. See Gonzalez, LLC v. DiVincenti, 844 So. 2d 1196, 1201 (Ala. 2002) (holding a summary judgment to be final although motion to assess attorney fees remained pending because award of attorney fees is collateral to judgment)."

[7]The Dotsons have since filed for personal bankruptcy. The underlying action, as it relates to the Dotsons, has been stayed pending action by the bankruptcy court.

> Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12.'"

McKerall v. Kaiser, 60 So. 3d 288, 290 (Ala. 2010)(quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)).

> "Rules governing the interpretation and construction of contracts are applicable in resolving a question as to the interpretation or construction of a guaranty contract. 38 Am. Jur. 2d Guaranty, § 70 (1968); Pate v. Merchants Nat'l Bank, 428 So. 2d 37 (Ala.1983); Colonial Bank of Alabama v. Coker, 482 So. 2d 286 (Ala. 1985). '[A] guarantor is bound only to the extent and in the manner stated in the contract of guaranty.' Pate v. Merchants Nat'l Bank, supra, at 39 (quoting Furst v. Shows, 215 Ala. 133, 137, 110 So. 299, 302 (1926)). When the terms of a contract are unambiguous, it is the court's duty to analyze and determine the meaning of

> the contract, Pate v. Merchants Nat'l Bank, supra at 39; Birmingham Trust Nat'l Bank v. Midfield Park, Inc., 295 Ala. 136, 138, 325 So. 2d 133, 134 (1976); and, when appropriate, those questions may be decided by summary judgment. Williams v. Bank of Oxford, 523 So. 2d 367 (Ala. 1988); Medley v. SouthTrust Bank, 500 So. 2d 1075 (Ala. 1986); Colonial Bank v. Coker, supra. ... Absent fraud in the inducement, an absolute guaranty will be enforced according to its terms. ..."

Government St. Lumber Co. v. AmSouth Bank, 553 So. 2d 68, 75 (Ala. 1989).

III. The Guaranty Contracts

The guaranty contracts executed by the Eagertons are unambiguous, and they expressly provide that the Eagertons agreed to guarantee a very specific "indebtedness." The pertinent parts of the guaranty contracts state:

> "A. If this [box] is checked [as it was by the Eagertons], the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: Loan #78476 and Loan #67423 and any extensions, renewals or replacements thereof (hereinafter referred to as the 'Indebtedness').[8]

[8]The parties stipulate that loan number 67423 (with an approximate balance of $49,667) was paid in full. Accordingly, the Eagertons' personal liability under their guaranty contracts extends only to loan number 78476 "and any

> "B. If this [box] is checked [as it was by the Dotsons], the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the 'Indebtedness'). Without limitation, this guaranty includes the following described debt(s): _____ ____

"The Undersigned further acknowledges and agrees with Lender that:

"....

"4. The liability of the [Eagertons] hereunder shall be limited to a principal amount of $648,363.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the

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extensions, renewals or replacements thereof ...."

> Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose."

(Emphasis added.)

On each of their guaranty contracts, the Eagertons checked the box indicating the applicability of paragraph "A," which limited their liability to "indebtedness" arising out of loan number 78476, the original loan, as well as any "extensions, renewals or replacements thereof." Paragraph 4 also limited their maximum liability arising out of the original loan to a principal amount of $648,363. Clearly, the function of paragraph A is to provide a convenient method of limiting the guarantor to a specific indebtedness by describing in the blank space the specific obligation of the guarantor. In contrast, the Dotsons' guaranty contracts indicated that they were proceeding under the language in

paragraph B; their guaranty contracts were unlimited. The language in paragraph B is much broader and extends the guarantor's liability to "each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred ...)."

IV. Discussion

A. Material-Modification Argument

The Eagertons argue that the trial court exceeded its discretion in entering a summary judgment in favor of the bank because, they say, the creation of the consolidated loan materially altered their guaranty contracts and also materially altered their underlying obligations in relation to the original loan. They argue that, because these alterations were made without their knowledge and consent, they should be discharged from further liability under their guaranty contracts. The bank, on the other hand, maintains, among other things, that the consolidated loan was a "replacement

note" contemplated by the guaranty contracts and that the Eagertons waived the material-modification defense.

The general rule is that "[a] guarantor is discharged if, without his or her consent, the contract of guaranty is materially altered." 38A C.J.S. Guaranty § 97, at 704 (2008). In Medley v. SouthTrust Bank of the Quad Cities, 500 So. 2d 1075 (Ala. 1986), this Court stated that any alteration beyond the terms of the guaranty contract, regardless of injury or benefit to the guarantor, is fatal:

> "It is fundamental that the liability of a guarantor will not be extended by implication beyond the terms of his contract. It matters not that he or she sustains no injury or even that it may be for his or her benefit. This Court has said that the guarantor 'has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.' Russell v. Garrett, 208 Ala. 92, 96-97, 93 So. 711 (1922), quoting Manatee County State Bank v. Weatherly, 144 Ala. 655, 39 So. 988 (1905). See, also, Furst v. Shows, 215 Ala. 133, 110 So. 299 (1926)."

500 So. 2d at 1081 (emphasis added). In other words, the general rule regarding guaranties is so strict that courts will not stop to inquire whether any alteration was injurious or beneficial to the guarantor. Courts from various

jurisdictions have held likewise. See, e.g., Wigley v. Capital Bank of Southeast Missouri, 887 S.W.2d 715, 724 (Mo. Ct. App. 1994)("[A] guarantor is entitled to strict construction of the guaranty; a material alteration of the obligation guaranteed without the guarantor's consent will discharge the guarantor; if a change enlarges or lessens the liability, it is material and discharges the guarantor; and courts do not inquire whether the alteration was injurious or beneficial."). See also Bright v. Mack, 197 Ala. 214, 197 So. 433 (1916)(holding, in a case involving surety liability, that an intentional material change in a contract by the original parties without the consent of the surety discharges the surety).

The Eagertons argue that the Chapter 11 reorganization of Dotson 10s's debts in the bankruptcy court, i.e., the consolidation of the original loan with the second loan, created a new "indebtedness" and/or contract not encompassed by their guaranty contracts. See Committee of Unsecured Creditors v. Dow Corning Corp., 456 F.3d 668, 676 (6th Cir. 2006)(noting that a confirmed bankruptcy plan is "effectively

a new contract between the debtor and its creditors"). The Eagertons therefore argue that the creation of this new indebtedness, without their knowledge or consent, operated to discharge them from any further obligations under their guaranty contracts. We agree. The guaranty contracts that the Eagertons executed are unambiguous, and the contracts specifically limited the Eagertons' liability to only that "indebtedness" arising out of loan number 78476, the original loan, as well as any "extensions, renewals or replacements thereof." See Beale Bank, S.S.B. v. RBM Co., (No. 03A01-9902-CH-00041, November 30, 1999)(Tenn. Ct. App. 1999)(not reported in S.W.3d). In Beale, the Court of Appeals of Tennessee, applying Georgia law, stated:

> "Beal Bank argues that the 1993 notes did not operate as a discharge because the notes were issued pursuant to the RBM's bankruptcy reorganization plan and, so the argument goes, the changes were not consented to by Beal Bank. It is true that the discharge of a principal debtor's debt in bankruptcy does not of itself discharge the obligation of a guarantor. See Growth Properties of Florida, Ltd. v. Wallace, 310 S.E.2d 715, 718 (Ga. Ct. App.1983); 11 U.S.C. § 524(e) (1993) (discharge of a debt of a debtor in a bankruptcy plan does not discharge the liability of another for the debt). However, this does not mean, regardless of the circumstances, that a guarantor's obligation cannot be discharged by the

> execution of promissory notes issued in accordance with a bankruptcy plan.
>
> "... Looking to the specific terms of the guaranties in the instant case, however, we find that Heffernan and Hammond limited their liability to the 1989 note and any renewals, extensions and charges thereof. Heffernan and Hammond did not guarantee the 1989 note with modifications; thus, when the 1989 note was modified pursuant to the bankruptcy reorganization, Heffernan and Hammond were discharged."

(Emphasis added.)

Similarly, the Eagertons in this case did not guarantee loan number 78476, the original loan, "with modifications." Thus, once the original loan was modified pursuant to Dotson 10s's Chapter 11 reorganization, the Eagertons were discharged from any further obligations under their guaranty contracts securing the original loan.

The Eagertons further argue that this new indebtedness substantially increased the principal amount of their risk under their guaranty contracts. Specifically, the language of paragraph 4 limits the Eagertons' total liability under their guaranty contracts to the principal sum of $648,363. Paragraph 4 additionally states that "indebtedness may be created and continued in any amount, whether or not in excess

of such principal amount, without affecting or impairing the liability of the Undersigned hereunder." The scope of the Eagertons' guaranty contracts, however, was defined in paragraph A, where they agreed to guarantee "the debt, liability or obligation of [Dotsons 10s] to the bank evidenced by or arising out of ... Loan # 78476 ... and any extensions, renewals or replacements thereof (hereinafter referred to as the 'Indebtedness'"). The plain meaning of paragraph A and paragraph 4 is that the Eagertons guaranteed a specific indebtedness, loan number 78476, plus any extensions, renewals, or replacements of that indebtedness, up to a maximum of $648,363. And, although the bank and Dotson 10s between themselves could thereafter create indebtedness in excess of $648,363 without affecting the liability of the Eagertons, the bank and Dotson 10s could not, pursuant to the scope of the Eagertons' guaranty contracts, increase the Eagertons' liability to include an additional principal amount ($222,513.56), which they did not personally guarantee and

which fell outside the limited scope of their guaranties.[9] See, e.g., Keesling v. T.E.K. Partners, LLC, 861 N.E.2d 1246 (Ind. Ct. App. 2007)(noting that the guaranty of a specific debt does not extend to include other indebtedness that is not within the manifest intention of the parties). It is clear from the language of their guaranty contracts that the Eagertons did not intend to guaranty any indebtedness other than that indebtedness arising out of the original loan and

[9]We note that the first mortgage securing the original loan contains a dragnet clause that states that the mortgage secures the original loan as well as "[a]ll future advances from [the bank] to [Dotson 10s] under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this security instrument whether or not this security instrument is specifically referenced." The Eagertons' guaranty contracts did not contain this all-inclusive language. No argument is presented to this Court that the Eagertons are responsible for the second loan by virtue of the dragnet clause contained in the first mortgage. Indeed, the Eagertons were not parties to the original loan or the mortgage securing that loan. They only guaranteed the original loan. Accordingly, their liability cannot be extended beyond the terms of their guaranty contracts. See, e.g., Emrick v. First Nat'l Bank of Jonesboro, 324 Ill. App. 3d 1109, 756 N.E.2d 914, 258 Ill. Dec. 640 (2001)(noting that, where guarantor executed a guaranty contract in a limited amount referring to a specific loan, guaranty could not be applied to second loan, which was not mentioned in the guaranty contract and to which the guarantor was not a party).

any "extensions, renewals or replacements thereof." As previously stated, once the original loan was modified pursuant to Dotson 10s's Chapter 11 reorganization, the Eagertons were at that point discharged from any further obligations under their guaranty contracts.[10]

B. Bank's Replacement-Loan Argument

The bank points out that the Eagertons agreed to guarantee the original loan and any "extensions, renewals or replacements thereof." The bank asserts that the consolidated loan constituted a "replacement" of the original loan.[11] The

[10]We note that both sides present arguments regarding the allocation of the foreclosure proceeds. The Eagertons argue that the new indebtedness altered the manner in which any foreclosure proceeds would be allocated in the event of default. The bank argues that the Eagertons are liable for their pro rata share of the remaining balance due on the consolidated loan following application of the foreclosure proceeds. Because the execution of the consolidated loan between the bank and Dotson 10s without the Eagertons' knowledge or consent operated to discharge the Eagertons from any further liability under their guaranty contracts, how the foreclosure proceeds were allocated is irrelevant. We, therefore, pretermit any discussion of that issue.

[11]In its brief on appeal, the bank argues that the Eagertons are precluded from arguing that the consolidated loan is not a replacement loan for the original loan because, it says, the Eagertons failed to argue this point before the trial court--apparently at a May 17, 2010, hearing. The bank

bank cites four cases for the proposition that courts from other jurisdictions have referred to the term "replacement note" as describing a consolidated note and/or a new note with an increased principal. For example, in Sterling Savings Bank v. Bella Pont Cino, LLC, (No. 09-758, Nov. 2, 2010)(D. Or. 2010)(not reported in F. Supp. 2d), the bank, the obligor, and the guarantors entered into a loan modification and extension agreement, executing a replacement promissory note that increased the principal loan amount to $5,800,000. In Sterling, however, all the parties, including the guarantors, consented to and executed the replacement note. In 8400 N.W. Expressway, LLC v. Morgan (In re Morgan), 360 B.R. 507, 524-25 (Bankr. N.D. Tex. 2007), multiple notes were consolidated into one $15,000,000 note referred to as a "replacement" promissory note. Again, all the parties in Morgan, i.e., the debtor and

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notes that the Eagertons argued only that the consolidated loan was not an extension or a renewal of the original loan. A transcript of the May 17, 2010, hearing is not a part of the record on appeal. In any event, the Eagertons maintain that the bank argued before the trial court that the consolidated loan was a replacement loan. Therefore, the trial court considered that argument, and we will address the issue as it is stated in the bank's brief.

all the business owners, signed the replacement promissory note for the purpose of consolidating specific debts. In e2 Creditors' Trust v. Farris (In re e2 Communications, Inc.), 320 B.R. 849, 852 (Bankr. N.D. Tex. 2004), the debtor and its director entered into a contribution and release agreement providing for the consolidation of five notes in a "replacement note." In Bellwood v. Dooley,(No. CV01381024, Dec. 6, 2002)(Conn. Super. Ct. 2002)(not reported in A.2d), a case in which the plaintiff sought to discharge a lien on her property, the opinion states that "[t]he debt is now reflected in a new, single promissory note which was executed as a replacement of the earlier notes." In other words, the facts in the cases cited by the bank do not reference situations where, as here, the guaranty contracts limited the guarantor's liability to a specific indebtedness, the guarantor did not consent to a new indebtedness, and the new indebtedness included a different debt, a portion of which the guarantor did not agree to guarantee. In the instant case, the Eagertons agreed to guarantee only that liability arising out of the original loan and any "replacement" thereof. Any

replacement of the original loan with a different indebtedness would necessarily require the Eagertons' knowledge and consent. We conclude that the consolidated loan was not a replacement loan; it was a new loan.

C. Waiver of Material-Modification Defense

The bank argues that the Eagertons waived the material-modification defense. Specifically, the bank argues that any modifications to the Eagertons' guaranty contracts or to the underlying debt do not release the Eagertons from liability because, the bank says, the guaranty contracts anticipated and consented to such modifications. Paragraph 6 of each of the guaranty contracts states that the liability of the undersigned "shall not be affected or impaired by ... any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness...."

Paragraph 7 of each of the guaranty contracts states:

> "The Undersigned waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release, statute of limitations, res judicata, statute of

> frauds, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any other person liable in respect of any Indebtedness, or any setoff available against Lender to Borrower or any such other person, whether or not on account of a related transaction. The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. The undersigned shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the Borrower's obligations had not been discharged."

(Emphasis added.)

The Eagertons agree that they waived any and all defenses relating to the original "indebtedness," as that term is defined in their guaranty contracts. However, they submit that the waiver provisions contained in their guaranty contracts do not apply to the consolidated loan, especially since the new indebtedness included the second loan, which they did not guarantee. We agree. The Eagertons cite Emrick v. First National Bank of Jonesboro, 324 Ill. App. 3d 1109, 756 N.E.2d 914, 258 Ill. Dec. 640 (2001), a case in which an

Illinois court addressed a similar issue. In Emrick, the Appellate Court of Illinois stated:

> "The Bank also argues that, pursuant to paragraph seven of Mildred's guaranty, she waived any defenses she might have had. We disagree. Paragraph seven of the guaranty begins with a general waiver and then more specifically details her waiver of all possible defenses that could be raised by Emrick Trucking or otherwise against the Bank relative to the 'indebtedness.' Mildred's arguments are not centered upon the first loan but upon the fact that she did not guaranty the second loan and should not have had to pay the $30,000 loan. These were not arguments about the legality of the original loan and her guaranty thereof. At best, Mildred waived any defenses she had relative to the original indebtedness. Again, to the extent that the term 'indebtedness' was subject to two meanings--the original loan amount or the total of both loans, we construe that ambiguity against the Bank."

324 Ill. App. 3d at 1115, 756 N.E. 2d at 919, 258 Ill. Dec. at 645 (emphasis added).

As previously stated, there is no ambiguity regarding the term "indebtedness" as that term is defined in the Eagertons' guaranty contracts. The indebtedness as defined in the contracts is specifically limited to loan number 78476, the original loan, plus "any extensions, renewals or replacements thereof." The Eagertons' argument in this appeal does not concern the legality of the indebtedness associated with the

original loan. Instead, their argument relates to the legality of their guaranty contracts as to the consolidated loan, which was created without their consent and which included a loan they did not personally guarantee. Thus, although the Eagertons may have waived any defenses they may have had regarding the original indebtedness, the Eagertons did not waive any defenses regarding the consolidated loan, which was created by the bank and the Dotsons without the Eagertons' consent.

V. Conclusion

In sum, Dotson 10s and the bank negotiated a new loan that not only changed the legal identity of the original loan, but also altered the Eagertons' original obligation under their guaranty contracts. The Eagertons did not consent to guarantee the second loan, which was combined with the original loan to create the consolidated loan -- a new indebtedness. These above-stated alterations occurred without the Eagertons' knowledge and consent. Accordingly, the Eagertons cannot be held personally liable for a loan that no longer exists, i.e., the original loan, nor can they be held

personally liable for a loan that is not an extension, renewal, or replacement of the original loan, as defined by their guaranty contracts.

Based on the foregoing, the trial court's summary judgment against the Eagertons in favor of the bank is reversed, and the cause is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Malone, C.J., and Woodall, Stuart, Parker, Main, and Wise, JJ., concur.

Shaw, J., concurs in the result.

Murdock, J., dissents.

MURDOCK, Justice (dissenting).

The main opinion concludes that the debt obligation from Dotson 10s, LLC, to Vision Bank ("Vision") that is reflected in the terms of the confirmed plan of reorganization of Dotson 10s under Chapter 11 of the Bankruptcy Code (1) materially altered the obligations of Fred G. Eagerton and Nancy Eagerton under their guaranty contracts and (2) did so without their consent. The Eagertons' guaranty contracts, however, reflect their consent, in advance, to the changes that were incorporated into the repayment terms under the plan of reorganization for Dotson 10s. I therefore respectfully dissent.

The Eagertons executed their respective guaranty contracts on December 10, 2004. The guaranty contracts guaranteed "to [Vision] the payment and performance of the debt, liability or obligation of [Dotson 10s] to [Vision] evidenced by or arising out of the following: LOAN # 78476 AND LOAN # 67423 and any extensions, renewals or replacements thereof (hereinafter referred to as the 'Indebtedness')." (Capitalization in original; emphasis added.) Loan number

67423 is not at issue in this appeal.[12] Thus, the remaining discussion will focus on the "debt, liability or obligation of [Dotson 10s] ... that ar[ose] out of ... LOAN # 78476 ... and any extensions, renewals or replacements thereof." (Capitalization in original.)

The promissory note Dotson 10s gave Vision and that evidenced loan number 78476 is dated December 10, 2004 ("the December 2004 note"). The December 2004 note had a maturity date of December 9, 2007. The principal amount of the note was $598,363, and it bore interest at a fixed rate of 7% per annum until the note was paid in full, i.e., the 7% interest rate remained applicable even after the maturity date if Dotson 10s failed to pay off the loan at that time.[13] The note

[12]It appears that loan number 67423 already existed in December 2004 and that the outstanding balance due under that loan was partially refinanced as part of loan number 78476. The remaining balance due under loan number 67423 was renewed. The renewed loan number 67423 was eventually paid in full by Dotson 10s.

[13]The purpose of the December 2004 note was to refinance two loans (loan number 67245 and loan number 77437) and, as noted above, to partially refinance the outstanding balance due under loan number 67423. The balances that were due under the refinanced loans are not disclosed by the record.

called for 36 monthly payments of principal and interest in the amount of $4,788.13 each and a "final payment of the entire unpaid balance of principal and interest" on December 9, 2007. Also, the December 2004 note provided that it was secured by a mortgage that was executed in connection with the loan ("the December 2004 mortgage"). The December 2004 mortgage contained a "dragnet clause," which stated that the mortgage secured, in addition to the December 2004 note, "[a]ll future advances from [Vision] to [Dotson 10s] or other future obligations of [Dotson 10s] to [Vision] under any promissory note ... or other evidence of debt existing now or executed after this Security Instrument whether or not this Security Instrument is specifically referenced." (Emphasis added.)

On December 9, 2007, loan number 78476 was renewed pursuant to a "Multipurpose Note and Security Agreement" ("the MNSA"); the main opinion refers to the loan evidenced by the MNSA as "the original loan." The MNSA specifically states that "THE PURPOSE OF THE LOAN IS: RENEWAL" (capitalization in original), and the MNSA continued to bear loan number 78476.

The MNSA had a maturity date of December 9, 2010. The principal amount due under the MNSA was $550,677.53, and, like the December 2004 note, it bore interest at a fixed rate of 7% per annum.[14] Unlike the December 2004 note, however, the post-maturity rate of interest was 18%. The MNSA called for 4 monthly payments of interest only, followed by 31 monthly payments of principal and interest in the amount of $4,788.13 each, and a "final payment on December 9, 2010 of all remaining principal and interest of $501,774.93." The MNSA also referenced the December 2004 mortgage as securing the obligations of Dotson 10s under the MNSA.

The Eagertons did not argue to the trial court, and they do not argue to this Court, that the extension of the maturity date and other changes in the terms of the December 2004 note, as reflected in the MNSA, were material changes that voided their obligations under their guaranty agreements.

Dotson 10s defaulted on its obligations under the MNSA, and in May 2009 Vision filed the present action against

[14]The principal amount of the MNSA closely approximates the principal balance that remained due on the maturity date of the December 2004 note, i.e., December 9, 2007.

Dotson 10s, John W. Dotson, Jr., Elizabeth E. Dotson, and the Eagertons. A few days later, Dotson 10s filed its bankruptcy petition in the United States Bankruptcy Court for the Southern District of Alabama, and, in August 2009, it filed a proposed plan of reorganization with the bankruptcy court.

Dotson 10s's proposed plan of reorganization addressed Vision's claims relating to loan number 78476 and another loan Vision had made to Dotson 10s, which the main opinion defines as "the second loan." The second loan was initially evidenced by a note executed in October 2006 and subsequently by a renewal note executed in December 2008. The second loan, as renewed in December 2008, was in the principal amount of $222,513.56 and bore interest at the fixed rate of 8% per annum. The principal and interest were "repayable in 23 equal installment payments, amortized over 240 payments, in the amount of $1,877.17 each, commencing January 11, 2008, ... and one final payment consisting of ... the principal and all accrued interest remaining due and payable" on December 11, 2010. The Eagertons' guaranty contracts did not apply to the obligations under the second loan. The second loan was,

however, secured by a mortgage that was executed when the loan originated in October 2006 ("the October 2006 mortgage") and also, based on the dragnet clause in the December 2004 mortgage, by the December 2004 mortgage. Further, I note that the October 2006 mortgage, like the December 2004 mortgage, contained a dragnet clause. As a result of the dragnet clauses in both the December 2004 mortgage and the October 2006 mortgage, both mortgages secured both loan number 78476 and the second loan.

As to Vision's claims under loan number 78476 and the second loan, the proposed plan of reorganization for Dotson 10s provided:

> "C. SECURED CLAIMS.
>
> "Class Three: Allowed Secured Claim of Vision Bank
>
> "This Class consists of the Allowed Secured Claim of Vision Bank, which claim is secured by 6.5 acre parcel where the clubhouse, tennis courts and swimming pool exist. The two notes comprising this claim and totaling approximately $823,411 will be combined and paid at 6% in equal monthly installments of $5,900 beginning 30 days after confirmation. The notes will be paid in full within 240 months. This class is impaired. [Dotson 10s] will keep the property insured with a policy of hazard insurance from a reputable company and will

> show proof of insurance to Vision Bank. Vision Bank will retain its lien on the subject property until the debt is paid in full."

In other words, the proposed plan would have reduced the interest rate applicable to loan number 78476 and the second loan; it would have extended the maturity date of both loans from December 9, 2010, and December 11, 2010, respectively, to sometime after August 2019; and it would have reduced the combined installment payments due under those loans from $6,665.30 per month ($4,788.13 per loan number 78476 and $1,877.17 per the second loan) to $5,900 per month.

Vision initially objected to Dotson 10s's proposed plan of reorganization, but at the December 1, 2009, bankruptcy court hearing concerning the plan, Vision and Dotson 10s agreed to an amendment to the plan. The terms of the amendment were included in the bankruptcy court's December 10,

2009, order confirming Dotson 10s's plan of reorganization.[15]

The order states, in pertinent part:

> "(1) [Dotson 10s] shall pay $20,000 in cash or certified funds to Vision Bank before 5:00 p.m. December 1, 2009 to cure the arrears in adequate protection payments previously ordered. (2) The secured claim of Vision Bank is determined to be

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[15]The Eagertons offered affidavits in support of their motion for a summary judgment. In the affidavits, they averred:

> "3. We were not parties to the bankruptcy proceeding filed by Dotson 10s, LLC. We were not notified -- by Vision Bank or anyone else -- that Dotson 10s, LLC had filed a bankruptcy proceeding. We did not participate in that bankruptcy proceeding. We did not consent to the bankruptcy plan filed by Dotson 10s, LLC. In fact, we were not given the opportunity to consent to or object to the bankruptcy plan. No person from Vision Bank notified us that Vision Bank was agreeing to Dotson 10s, LLC's bankruptcy plan."

Vision did not challenge these averments; thus, I consider them to be admitted for purposes of this writing. Nevertheless, I note that the proposed plan of reorganization specifically named the Eagertons as being among Dotson 10s's "Class Five" creditors; it even described them as possessing a claim for $80,000. The proposed plan further stated that "Classes Three (Vision Bank), Four (General Unsecured Creditors), and Five (Unsecured Claims of Principals and Insiders) are impaired. Class Five creditors consent to the plan." (Emphasis added.) Also, the bankruptcy court's order confirming the plan states that the plan was "transmitted in accordance with applicable law to the creditors and all parties in interest whose acceptance is required by law."

> $795,908.84 as of December 1, 2009. (3) [Dotson 10s] shall pay the secured claim to Vision Bank in equal monthly payments of $6,172.64 per month beginning January 1, 2010. Interest is calculated at 7% per annum. The debt to Vision Bank shall mature and become fully due and payable on January 1, 2012. (4) [Dotson 10s] shall have no grace period. If any payment is not paid on or before the due date, the automatic stay shall terminate and Vision Bank is authorized to immediately foreclose its mortgage without further order of this Court."

When compared to the terms applicable to loan number 78476 and the second loan, the terms of the confirmed plan of reorganization resulted in (1) a debt with the same interest rate as the rate applicable to loan number 78476 and a lesser interest rate as to the second loan, (2) an approximately two-year extension of the maturity date applicable to the debt; and (3) a reduction in the combined installment payments applicable to the debt from $6,665.30 per month ($4,788.13 per loan number 78476 and $1,877.17 per the second loan) to $6,172.64 per month. Because loan number 78476 and the second loan were secured by the same mortgages, and because the promissory notes evidencing loan number 78476 and the second

loan included cross-default provisions,[16] it does not appear that the collateral position of Vision was enhanced, or that the Eagertons suffered any additional detriment to their legal rights, by the treatment of the loans as a single debt for purposes of the repayment terms under the plan of reorganization. Perhaps more important, however, is that, pursuant to the terms of their respective guaranty contracts, the Eagertons consented in advance to the changes that are reflected in the repayment terms of the plan.

Although it is true that "[t]he general rule is that '[a] guarantor is discharged if, without his or her consent, the contract of guaranty is materially altered.'" ___ So. 3d at ___ (quoting 38A C.J.S. Guaranty § 97 (2008)),

> "[a] guarantor may consent in advance to a course of conduct which would otherwise result in his or her discharge. The guarantor is not released where the change is made in accordance with an express or implied provision contained ... in the contract of guaranty. ...
>
> "....

[16]As to each loan, the promissory note contained language to the effect that the failure of Dotson 10s "to pay, or keep any promise, on any debt or agreement [it had] with [Vision]" was a default under that promissory note.

> "A guarantor is free to waive notice or consent to material changes in a guaranty agreement."

38A C.J.S. Guaranty § 96 (2008)(emphasis added). Indeed, as one well recognized treatise states: "[T]he general rule calling for the discharge of a surety does not apply where the suretyship or guaranty agreement itself permits the modification of the underlying obligation." 23 Richard A. Lord, Williston on Contracts § 61:31 (4th ed. 2002)(emphasis added); see also, e.g., Cincinnati Ins. Co. v. Leighton, 403 F.3d 879, 886 (7th Cir. 2005)("Although usually the obligations of a third-party guarantor are discharged when parties to a contract unilaterally effect a material change in their own relationship that also affects the potential liability of the guarantor, a guarantor is free to give prior consent to such modifications."); Bumila v. Keiser Homes of Maine, Inc., 696 A.2d 1091, 1094 (Me. 1997)("[W]here, as here, the guaranty contract contemplates the alteration that the guarantor complains of, there is no discharge.").

The Eagertons' respective guaranty contracts guaranteed "to [Vision] the payment and performance of the debt,

liability or obligation of [Dotson 10s] to [Vision] evidenced by or arising out of the following: LOAN # 78476 ... and any extensions, renewals or replacements thereof (hereinafter referred to as the 'Indebtedness')." (Capitalization in original; emphasis added.) The terms of the confirmed plan of reorganization reflect a combined payment scheme as to two debts owed by Dotson 10s to Vision; one of these is a "debt, liability, or obligation" "arising out of" "LOAN #78476" or an "extension, renewal or replacement thereof." Although Vision and Dotson 10s agreed to the terms reflected in the confirmed plan of reorganization, they did not, in so doing, change the origins of the underlying debts, liabilities, or obligations of Dotson 10s to which the plan refers. Most of Vision's claim under the plan of reorganization still "aris[es] out of" the "debt, liability, or obligation" reflected by "LOAN #78476," or an "extension, renewal or replacement" of that loan, and, in fact, the terms of the plan itself could be considered an "extension, renewal or replacement" of "LOAN #78476," albeit with the inclusion of additional debt from

another loan, i.e., the second loan, as to which the Eagertons have no liability.[17]

In addition to the foregoing, the Eagertons' respective guaranty contracts state:

> "6. ... The liability of the [Eagertons] shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the [Eagertons]): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any and all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the

[17]The actions taken by Vision and Dotson 10s also are in line with the general tenor of the Eagertons' guaranty contracts. The contracts state that "[t]he liability of the Undersigned hereunder shall be limited to a principal amount of $648,363.00," but that "Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder." (Emphasis added.) The latter quoted passage clearly authorizes Vision and Dotson 10s to create a principal amount of "Indebtedness" in excess of the principal amount of the Eagertons' guaranty obligations. In other words, Vision and Dotson 10s could both continue the debt obligations as referenced in the guaranty contracts and "create" debt obligations over and above what existed at that time, even obligations in excess of the principal amount of the Eagertons' obligations. As to that excess principal amount, however, and any interest or charges associated with the excess amount, the Eagertons would have no liability.

> interest rates, maturities or other contractual terms applicable to any Indebtedness."

(Emphasis added.)

The agreement between Vision and Dotson 10s, as reflected in the repayment terms of the plan of reorganization, falls within Vision's rights under the foregoing provision. The Eagertons agreed that Vision needed no approval from them concerning any "extension or renewal" of the "debt, liability, or obligation" "evidenced by or arising out of" "LOAN #78476" or an "extension, renewal or replacement thereof." Indeed, the Eagertons agreed in their guaranty contracts that Vision needed no approval from them concerning "any modification of the interest rates, maturities or other contractual terms applicable to any" "debt, liability, or obligation" "evidenced by or arising out of" "LOAN #78476" or "any extensions, renewals or replacements thereof."

Further, the Eagertons' guaranty contracts were "absolute, unconditional and continuing guarant[ies] of payment." Paragraph 6, which is quoted above, continues by stating that the Eagertons' liability would not be "affected or impaired by ... (vii) any foreclosure or enforcement of any

collateral security; ... [or] (ix) any order of application of any payments or credits upon Indebtedness." Indeed, the Eagertons expressly agreed in paragraph 11 of their respective guaranty contracts that Vision "shall not be required first to resort for payment of the Indebtedness to Borrower ... or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this guaranty." (Emphasis added.) Also, in paragraph 10 of their respective guaranty contracts, the Eagertons

> "waive[d] any claim, remedy or other right [the Eagertons] may now have or hereafter acquire against [Dotson 10s] ... arising out of the creation or performance of [the Eagertons'] obligation[s] under this guaranty, including any right of subrogation, contribution, reimbursement, indemnification, ... and any right to participate in any claim or remedy [the Eagertons] may have against [Dotson 10s] [or] collateral ... whether or not such claim, remedy or right arises in equity, or under contract, statute or common law."

Nothing in the Eagertons' guaranty contracts, or in any of the documents discussed above as to the obligations of Dotson 10s arising out of loan number 78476, gave the Eagertons the right to insist that the proceeds from a foreclosure be applied in any particular manner or that their legal rights be preferred

in some manner as to those of Vision.[18] Indeed, as is usual in the context of guaranty contracts, virtually the entire contract speaks in terms of the rights of the lender, i.e., Vision, and the protection of those rights, as against any rights of the guarantors, i.e., the Eagertons, or the borrower, i.e., Dotson 10s.

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[18]Paragraph 4 of the Eagertons' guaranty contracts acknowledges that Dotson 10s might have debt obligations to Vision that exceeded the principal amount of the Eagertons' respective guaranties. See note 17, supra. Paragraph 4 continues:

> "[Vision] may apply any sums received by or available to [Vision] on account of the Indebtedness from [Dotson 10s] ... out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder."

(Emphasis added.) Neither this provision nor any other provision of the Eagertons' guaranty contracts gives the Eagertons an affirmative right to require Vision to apply proceeds from any collateral to any part of a debt obligation or to any particular debt obligation.