IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

THE TALBOT BANK OF EASTON MARYLAND,	:	
	:	**C.A. No. 10L-06-011 RBY**
Plaintiff,	:	
v.	:	
KIRK D. ALBERTSON, and EDWARD M. ALBERTSON,	:	
Defendants.	:	

Submitted: October 21, 2013
Decided: January 9, 2014

Upon Consideration of Defendants' Motion for Partial Summary Judgment
DENIED

OPINION

David J. Weidman, Esquire, Sergovic, Carmean & Weidman, P.A., Georgetown, Delaware for Plaintiff.

Steven Schwartz, Esquire, Schwartz & Schwartz, Dover, Delaware for Defendants.

Young, J.

SUMMARY

Defendants Kirk D. Albertson (Defendant Kirk Albertson) and Edward M. Albertson (Defendant Edward Albertson) (collectively "Defendants") move for Partial Summary Judgment on the ground that Talbot Bank of Maryland ("Plaintiff") has no valid mortgage claim against the property interests of the surety, Defendant Edward Albertson, because that mortgage interest was discharged by Talbot Bank's release of a co-obligor, Roger Brown. The issue of Defendant Edward Albertson's liability under the mortgages he signed, cannot be resolved without a presentation of evidence surrounding the circumstances and language in Defendant Edward Albertson's mortgages as well as in Roger Brown's release. Hence, Defendants' Motion for Partial Summary Judgment is **DENIED**.

PROCEDURE

On June 2, 2010, Plaintiff filed a foreclosure action on its second and third mortgages. The first mortgage ($200,000), which is to MERS for Quicken Loans is also in separate foreclosure proceedings. Defendants answered Plaintiff's Complaint, raising affirmative defenses. By decision on June 5, 2013, this Court granted Plaintiff Summary Judgment on two of the three affirmative defenses raised by the Defendants in this foreclosure action. The Court denied Plaintiff's request for Summary Judgment on Defendant Edward Albertson's defense that he should be released from the mortgages which he signed, when Plaintiff released the co-obligor, Roger Brown.

Following the Court's June 5, 2013 decision, the Defendants performed additional discovery. Defendant Edward Albertson now requests Partial Summary

Judgment in his favor on the remaining affirmative defense. Defendants filed an opening brief in support of their request for Partial Summary Judgment on August 27, 2013. The Plaintiff filed an answering brief in opposition to Defendants' motion.

STATEMENT OF FACTS

The instant action concerns a home farm ("Subject Property"), which was acquired by deed on October 31, 1991, by Defendant Edward Albertson and his wife, Dolores L. Albertson ("Mrs. Albertson"). Then, by deed dated November 20, 1998, Defendant Edward Albertson transferred his interest in the property to Mrs. Albertson, who died on December 6, 2005. Defendant Edward Albertson's and his son, Kirk Albertson's interests in the Subject Property derive from Mrs. Albertson's last will and testament. Even though Defendant Edward Albertson did not sign a note or guaranty obligating himself personally to repay the loan, on June 13, 2008, Defendants executed the $350,000 mortgage. That mortgage secured the $350,000 note to Plaintiff as well as the guaranty signed by Defendant Kirk Albertson. To secure that $350,000 note and his guaranty, Roger Brown had also given a Mortgage on his home property. To secure the same $350,000 note and his guaranty, William Haddaway and Dawn Hinkle had given a mortgage on real property owned by them.

_____There was no money disbursed to Defendant Edward Albertson from the June 13, 2008 $350,000 mortgage. Defendant Edward Albertson signed the mortgage as a surety. Allegedly, Defendant Edward Albertson would have been unwilling to sign the mortgage, which he gave but for the fact that William

Haddaway and Roger Brown were co-obligors on the note. William Haddaway and Roger Brown had given mortgages on their own properties to secure that note. In giving the mortgage, Defendant Edward Albertson relied upon the obligations of William Haddaway and Roger Brown on the note. Defendant Edward Albertson also relied upon the collateral security on which William Haddaway and Roger Brown gave their mortgages.

In December, 2008, Plaintiff released Roger Brown from his obligations under that $350,000 note and his guaranty, then released his home property from the mortgage, which secured that note. The release document(s) contained no express reservation of Plaintiff's rights against either of Defendants, or the property of Defendants. Plaintiff at no time sought or received consent from Defendant Edward Albertson, to the release of the security furnished by Roger Brown to secure that $350,000 note. On February 13, 2009, Defendant Edward Albertson executed a mortgage to secure a note for $75,000, pledging his property as security. After Plaintiff filed the foreclosure complaint, $355,672.32 was due under the first loan, with $78, 429.81 due under the second loan. Plaintiff has alleged default in payment and has foreclosed on the mortgage given by Defendants.

STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 56, summary judgment is appropriate when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. In ruling on a Motion for Summary Judgment, the

Court must consider the facts in the light most favorable to the non-moving party.[1] The moving party bears the burden of showing that no genuine material of fact exists.[2] If, in a properly supported motion for summary judgment, the moving party shows that there is no genuine issue of material fact, then the burden shifts to the non-moving party to prove that there is a material issue of fact in dispute.[3] In order to carry its burden, the non-movant must produce specific facts, which would sustain a verdict in its favor.[4] The non-movant cannot create a genuine issue for trial through bare assertions or conclusory allegations.[5] In weighing a motion for summary judgment under this rule, the Court must examine the record, including pleadings, depositions, admissions, affidavits, answers to interrogatories, and any other product of discovery.[6]

DISCUSSION

Defendants argue that Plaintiff has no valid mortgage claim against the property interests of the surety, Defendant Edward Albertson, in that the mortgage claim was discharged by Plaintiff's release of a co-obligor, Roger Brown. Delaware follows the Restatement (First) of Security Section 122, which states

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[1] *Schagrin v. Wilmington Medical Center, Del. Super.*, 304 A.2d 61 (1973).

[2] *Moore v. Sizemore, Del. Super.*, 405 A.2d 679 (1979).

[3] *Id*. at 681.

[4] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[6] *G.R. Sponaugle & Sons v. Mcknight Construction Co.*, Del. Super. Ct., 304 A.2d 339 (1973); *Oliver B. Cannon & Sons v. Door Oliver, Inc.*, Del. Super. Ct., 312 A.2d 322 (1973).

that where the creditor releases a principal, the surety is discharged unless: a) the surety consents to remain liable notwithstanding the release, or b) the creditor in the release reserves his rights against the surety. Defendants cite the Restatement of Security Section 122 (1941): "Where the surety and principal are bound jointly, the release of one is the release of both unless the rights of the obligee are reserved against the other." Defendants allege that Defendant Edward Albertson never consented or agreed to remain liable when Plaintiff released Roger Brown and his property from the $350,000 note and mortgage. Defendants contend that Defendant Edward Albertson would not have been willing to sign the $350,000 mortgage, except for the fact that Roger Brown was a co-obligor on the note and had given a mortgage on his own properties to secure that note.

In addition, Defendants argue that Plaintiff's release documents contained no express reservation of its rights against Defendant Edward Albertson or his property. Defendants allege that Defendant Edward Albertson and his property interests were discharged as surety on the $350,000 note by the release of Mr. Brown; thus, Edward Albertson is entitled to partial summary judgment on that part of Plaintiff's claim. In support of this argument, Defendants cite Restatement of the Law, Security, Section 122, Comment a., stating that the words "a principal" rather than "the principal" are used to indicate where there is more than one principal, and the principal or one or more of several principals is released, the surety is discharged.

Defendants cite the Restatement of the Law, Security, Section 122, stating that "the surety may also be bound not on a promise but by pledging of a chattel,

mortgaging of a chattel or land, or by otherwise using his property to secure the creditor." From this section, Defendants conclude that Defendant Edward Albertson was released from his suretyship according to Delaware law, when Talbot Bank released Roger Brown and his property without Mr. Albertson's consent, without reserving rights against him.

However, there is a genuine issue of material fact that precludes summary judgment on Defendant Edward Albertson's claim that he should be released from the mortgages that he signed. In fact, Section 39 (b) (ii) of the Restatement (Third) of Suretyship and Guaranty specifically provides that the obligor, Defendant Edward Albertson, would not be released from his mortgage if "the language or circumstances of the release otherwise show the obligee's intent to retain its claim against the secondary obligor." Further, Section 39 (c) (i) specifically states that, even if the obligor is not released under subsection (b), then the obligor would only be released "to the extent of the value of the consideration for the release." The June 13, 2008 mortgage states that, Defendant Edward Albertson executed the mortgage to secure the $350,000 Note executed by the co-obligors. In particular, Defendant Edward Albertson's mortgage states that, if a default in payment of a principal debt or interest is made, payment of the principal amount then unpaid and all interest thereon, may be enforced and recovered at once. The mortgage language further states that the mortgage secures all future advances made pursuant to the terms of the "above-referenced note" executed by the debtor.

From this language, the fact finder may be able to find that Defendant Edward Albertson was on notice of the Bank's intent to retain any and all claims

against his mortgage as a security for the $350,000 note. In addition, there was evidently no consideration for Plaintiff's release of Roger Brown from his mortgage. This is a factual issue that the Court must consider under Section 39 (c) (i) of the Restatement (Third) of Suretyship and Guaranty in order to determine if Edward Albertson is fully liable under both mortgages for the outstanding debt. Furthermore, the February 13, 2009 mortgage that Defendant Edward Albertson signed to secure the $75,000 note specifically states that the mortgage secured "not only the existing indebtedness at any given time, but shall also secure future advances..."

According to Defendant Edward Albertson, he executed this second mortgage on February 13, 2009, reaffirming his pledge of the property as security for the $350,000 Note, after the Bank had already released Roger Brown from his mortgage, with his son Defendant Kirk Albertson's consent. Therefore, Defendant Edward Albertson's February 13, 2009 mortgage reaffirmed his promise to remain liable under both mortgages, regardless of whether the Plaintiff released any other co-obligor. Defendant Edward Albertson alleged that when he pledged his property as security, it was conditioned on the obligations of Roger Brown. Yet, Defendant Edward Albertson executed the February 13, 2009 mortgage after Brown's release, which evidences Defendant Edward Albertson's intent to be bound by both mortgages as security for the underlying debt. The language in the February 13, 2009 mortgage undermines Defendant Edward Albertson's position where it states, "Any forbearance by Mortgagee in exercising any right or remedy shall not be a waiver of or provide the exercise of any right or remedy."

The Court has already established in its June 5, 2013 decision, that there are genuine issues of material fact surrounding the language and circumstances of Brown's release[7], which preclude Defendant Edward Albertson's request for partial summary judgment. Plaintiff relies on *Manufacturers and Trade Trust Co. v. Harris et. al.*, 2013 WL 3833603 (Del. Super. Ct. July 19, 2013)(hereinafter "*Harris*"), which addresses the issue of a co-obligor's release under Section 39 (b) of the Restatement (Third) of Suretyship and Guaranty.

In *Harris*, a debtor defaulted on a loan to a bank. Subsequently, the bank released the debtor from its obligations, leaving four other co-debtors potentially liable. The co-debtors claimed that the bank's release of one of the debtors constituted a complete satisfaction of the underlying debt, so that the co-debtors did not have any further obligations to the bank. The Court determined that the agreements permitted the bank to proceed against the co-obligors. The Court noted that, when interpreting a contract, the Court gives deference to the intentions of the parties as reflected in the four corners of the document."[8]

The Court's deference to the documents executed by the parties must be extended to the circumstances and language of Defendant Edward Albertson's two mortgages in this case, specifically the February 13, 2009 mortgage, as well as the circumstances surrounding the release of Brown. The issue of Defendant Edward

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[7] *Talbot Bank of Easton, Maryland v. Albertson*, 2013 WL 4093328 (Del. Super. Ct. June 5, 2013).

[8] *Harris* at *3 (citing *GMG Capital Investments, LLC v. Athenian Venture Partners LP.*, Del. Super., 36 A.3d 776, 779 (2012))

Albertson's liability under the mortgages he signed cannot be resolved without a presentation of evidence surrounding the circumstances and language in Defendant Edward Albertson's mortgages as well as in Roger Brown's release. Pursuant to *Harris'* directive that the contract between the parties is controlling, Defendants' Motion for Partial Summary Judgement is **DENIED** in order to allow Plaintiff the opportunity to present this evidence.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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