

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5392
Summary Calendar

STATE PROPERTY DALLAS, INC., ET AL.,

Plaintiffs-Appellants,

VERSUS

PARIS SAVINGS & LOAN ASSOCIATION,

Defendant,

GUARANTY FEDERAL BANK, F.S.B.,

Intervenor-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(S-88-248-CA)

(April 21, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:¹

State Property Dallas, Inc., and Marshall B. Tycher, Mack Pogue, and Robert M. Dickson appeal the summary judgment in favor of American Federal Bank, F.S.B., and the FDIC as receiver for Paris Savings and Loan Association.² We **AFFIRM**.

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

² As discussed *infra*, State, Tycher, Dickson and Pogue sued Paris in state court in 1988. Thereafter, the FSLIC as receiver

I.

The facts underlying this appeal are not in dispute. In December 1985, Lincoln Property Dallas, Inc. (the predecessor of State Property Dallas, Inc.), entered into a loan transaction with Paris Savings and Loan Association. Lincoln Property delivered a promissory note for \$8,454,603 to Paris (the Note). The Note, which had recourse and non-recourse portions, was secured by a Deed of Trust on a ten-acre tract of land (the property). And, Marshall B. Tycher, Mack Pogue, and Robert M. Dickson (the Guarantors) each executed an Unconditional Guaranty Agreement in favor of Paris, under which each guaranteed a specified portion of the loan. Finally, Lincoln Property gave Paris an interest in any profits from the sale or appreciation of the property (Net Profits Agreement). This Net Profits Agreement was also secured by the Deed of Trust.

The Note came due in December 1987. Paris notified State Property Dallas, Inc. (Lincoln Property's successor) and the Guarantors that the Note was in default, and demanded they pay the amount due before March 10, 1988. State and the Guarantors responded that they were "prepared to tender payment" of the recourse portion of the Note, provided that Paris release the Deed

for Paris removed the case to federal court. American Federal Bank, F.S.B. (AFB) purchased most of Paris's assets (including the loan in issue) from the FDIC as receiver for Paris, in 1988, and intervened in the suit. Summary judgment for AFB was granted in September 1993. In November 1993, Guaranty Federal Bank, F.S.B. (GFB), merged with AFB and acquired its assets, again including the loan at issue. GFB's motion to be substituted as intervenor-appellee is **GRANTED**.

of Trust. No payment was made, however. Paris sold the property at a trustee sale in May 1988, and was the successful bidder (\$5 million).

Shortly after the sale, State and the Guarantors filed suit in state court, demanding return of the property, an accounting, declaratory relief as to their obligations under the loan documents, and damages and/or setoff of damages against their liability, if any, to Paris.

Paris was declared insolvent in August 1988, and the FSLIC (later, the FDIC), as receiver for Paris, removed the suit to federal court. American Federal Bank, F.S.B. (AFB), later acquired Paris's assets, including the loan documents, from the FDIC, and intervened in the case. The district court dismissed all claims for damages against the FDIC.³ AFB moved for summary judgment, seeking recovery of the principal (approximately \$2.3 million) and interest (approximately \$1.3 million through July 1991, and \$1,133.31 per day thereafter) still due on the Note. The district court granted partial summary judgment, but limited the Guarantors' total liability to \$2,536,380.90.

AFB moved for reconsideration on the limitation of liability; State and the Guarantors, for reconsideration and/or new trial, contending that ambiguities in the loan documents made summary

³ State and the Guarantors do not challenge this dismissal. And, although the district court did not dismiss State's and the Guarantors' claims against the FDIC for declaratory judgment, accounting, and removal of the cloud on the title to the property, these claims were ultimately disposed of in the summary judgment for AFB and the FDIC. The FDIC elected not to file briefs in this case.

judgment improper. The district court granted AFB's motion for reconsideration, removing the limitation on liability, but denied State and the Guarantors' motions for reconsideration and for new trial. AFB moved for summary judgment; this was granted in September 1993.⁴

II.

State and the Guarantors contend that ambiguities in the loan documents created genuine issues of material fact, making summary judgment improper.⁵

"[S]uits on promissory notes provide fit grist for the summary judgment mill." *FDIC v. Selaiden Builders, Inc.*, 973 F.2d 1249, 1253 (5th Cir. 1992) (citing *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir. 1988), *cert. denied*, __ U.S. __, 113 S. Ct. 1944 (1993)), *cert. denied*, __ U.S. __, 113 S. Ct. 1944 (1993). Of course, we review a grant of summary judgment *de novo*, e.g., *Selaiden*, 973 F.2d at 1253, considering the same evidence as the trial court. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 & n.10 (5th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 82 (1992). If the

⁴ An interlocutory appeal by State and the Guarantors was dismissed as premature, pursuant to AFB's motion, in which State and the Guarantors joined.

⁵ State and the Guarantors also contend that the district court abused its discretion by denying their motions for reconsideration and for new trial. In support, they assert only that "by entering the Orders and granting the Summary Judgments [for AFB], prejudicial error was committed and substantial justice was not achieved." As stated, we affirm the summary judgment for AFB. Thus, we need not consider whether the district court abused its discretion in denying appellants' motions for reconsideration and new trial, where those motions are based only on the summary judgment awarded AFB.

movant demonstrates that there are no material fact issues, *i.e.*, "point[s] out ... that there is an absence of evidence to support the nonmoving party's case," **Celotex Corp. v. Catrett**, 477 U.S. 317, 325 (1986), the non-movant, to defeat summary judgment, must "go beyond the pleadings and ... designate `specific facts showing that there is a genuine issue for trial'." **Id.** at 324 (quoting Fed. R. Civ. P. 56(e)).

State and the Guarantors assert that the loan documents were ambiguous with regard to: (1) calculating liability on the loan; (2) defining its recourse and non-recourse portions; (3) timely terminating the Net Profits Agreement and releasing the Deed of Trust; and (4) applying foreclosure proceeds. Under Texas law, a contract is ambiguous if it is susceptible to more than one reasonable interpretation. See **Coker v. Coker**, 650 S.W.2d 391 (Tex. 1983); **Palmer v. Liles**, 677 S.W.2d 661, 666 (Tex. App. -- Houston [1st Dist.] 1984). Therefore, an ambiguous contract is not a proper subject for summary judgment, because its interpretation presents an issue of material fact. **Id.**; **R&P Enters. v. LaGuerta, Gavrel & Kirk**, 596 S.W.2d 517, 518 (Tex. 1980).

In construing a contract, "all [its] provisions must be considered with reference to the whole instrument." **Coker**, 650 S.W.2d at 393. Loan documents executed contemporaneously, such as those at issue, are construed as a single instrument. **Parks v. Frankfurt**, 476 S.W.2d 717, 721 (Tex. App. -- Beaumont 1972).

A.

State and the Guarantors assert first that the loan documents were ambiguous with regard to the method of calculating liability, contending that the following language from the Note is ambiguous as to what liability is limited:⁶

[State and each Guarantor] of this Note shall remain *fully* liable for (i) *the Recourse Portion of the Loan* (hereinafter defined), ... (iii) any amounts payable to [Paris] under paragraph 3(i) or 3(1) of the [Net Profits Agreement] following the release of the lien of the Deed of Trust, and (iv) taxes and insurance; provided, however, *in no event shall the obligation of [State or the guarantors] of this Note with regard to such taxes and insurance exceed the positive difference between \$2,536,380.90 (being 30% of the initial amount of this Note) minus the then amount of the Recourse Portion of the Loan.*

(Emphasis added.)

The district court initially interpreted the quoted language to limit State and the Guarantors' liability for the recourse portion of the loan. In its order granting partial summary judgment for AFB, the court construed the language of clause (iv) to mean that each of the Guarantors was "liable for thirty percent of the recourse amount of the loan amount outstanding at the time of default with a cap of \$2,536,380.90."

In district court, State and the Guarantors had contended that *each* Guarantor was liable only for thirty percent of the \$2,536,380.90 "cap" amount. Now, they contend (as they did in their motion for new trial) that the district court's initial interpretation, in the order granting partial summary judgment, was correct. They assert, citing no supporting evidence, that "taxes

⁶ The Guaranty Agreements contain similar language.

and insurance on the Property could never have exceeded \$2,536,380.90 and that their maximum liability under the Loan Documents was intended to be and is capped at \$2,536,380.90."

By contrast, in its motion for reconsideration, AFB maintained that the Note's "liability cap" language limited liability only for taxes and insurance, whereas the Note expressly states that the borrowers should remain fully liable for the recourse portion of the loan. The district court agreed, stating that it had erred in its original interpretation, and holding State and the Guarantors fully liable for the recourse portion of the Note.

Our reading of the relevant language from the Note reveals no intention to "cap" liability for the recourse portion; only tax and insurance liability is limited. The Note states plainly that State and the Guarantors remain "fully liable for (i) *the Recourse Portion of the Loan*", but that their "obligation ... *with regard to ... taxes and insurance*" is limited. There is no ambiguity.⁷ **Palmer v. Liles**, 677 S.W.2d at 666 (contract is ambiguous where language is uncertain, doubtful or subject to more than one reasonable interpretation). Accordingly, the district court did

⁷ Even aside from the plain meaning of the loan documents, the record contains no evidence supporting State and the Guarantors' remarkable assertion that "taxes and insurance on the Property could never have exceeded \$2,536,380.90". Similarly, they produce no evidence supporting their assertion that the Guarantors' "maximum liability under the Loan Documents was intended to be ... capped at \$2,536,380.90."

not err in holding State and the Guarantors fully liable for the recourse portion of the Note.⁸

B.

State and the Guarantors maintain also that the Note is ambiguous as to the method of calculating its recourse and non-recourse portions. It provides:

... [T]he "Non-Recourse Portion of the Loan" shall mean at any time and from time to time seventy percent (70%) of each dollar of this Note then outstanding, together with the applicable amount of accrued, unpaid interest thereon [T]he "Recourse Portion of the Loan" shall mean the other thirty percent (30%) of each dollar of this Note then outstanding together with the applicable amount of accrued, unpaid interest thereon and all costs of collection.

State and the Guarantors contend that this language is ambiguous because it could mean that the recourse portion of the Loan is "a fluctuating number with interest to be calculated thereon only after the 70/30 allocation of the Note balance."

The above language defines the recourse and non-recourse portions of the loan -- and the amount of interest and costs attributable to each -- unambiguously. The portions are, it is true, "fluctuating" amounts, but only in the sense that they depend on the unpaid balance of the Note. Under a plain reading of the Note, the language is not ambiguous.

⁸ Despite its initial error in interpreting the Note, the district court expressly noted, in granting summary judgment for AFB, that the Note and other loan documents were unambiguous.

C.

State and the Guarantors also claim ambiguity in the definition of the recourse and non-recourse portions of the Note, asserting that it does not provide clearly for application of foreclosure proceeds. The Note and Guaranty Agreements state:

... [P]roceeds of any judicial or nonjudicial foreclosure sale of the property securing this Note shall first be applied to accrued interest on, and the outstanding principal balance of[, the] Non-Recourse Portion of the Loan.

State and the Guarantors contend that, despite the plain meaning of this language, it is ambiguous because it is inconsistent with the definitions of recourse and non-recourse portions of the loan. They claim that

[a]nother equally possible interpretation... is that the Note balance did not become fixed upon the maturity date; that the entire indebtedness [under the loan] was [first] to have been reduced by the foreclosure credit and only upon the application of foreclosure proceeds [to the entire outstanding balance] could the 70/30 allocation [of the non-recourse/recourse portions of the loan] be determined.

This attempt to create ambiguity also fails. Rather than conflicting with the definitions of the recourse and non-recourse portions of the Note, this provision simply provides a method of applying foreclosure sale proceeds to the debt then outstanding. There is no ambiguity, and hence, no material fact issue.

D.

1.

State and the Guarantors contend also that the district court erred in not construing the loan documents to entitle them to a

release of the Deed of Trust pursuant to the Net Profits Agreement.⁹ They contend that the latter entitled them to the release as of December 17, 1987 (Note maturity date), regardless of whether they had paid the Note balance. This assertion is based on the following language from the Net Profits Agreement: "Upon the termination of this Agreement as provided herein, [Paris] shall deliver to [State] in recordable form a release of the Property and [State] from the encumbrance of the Deed of Trust and this Agreement."

But, in order for the Net Profits Agreement to "terminat[e] ... as provided herein", State and the Guarantors were required to pay the loan balance. Under the Net Profits Agreement, they were required to pay AFB a specified percentage of the profits, if there were any, on any sale or appreciation of the property. This profits obligation, however, was "[i]n addition to all other payments required" under the loan. As the district court found, the fact that there had been no sale or appreciation of the

⁹ As part of this assertion, they contend that the loan documents evidenced an intention that the "relationship between State, the Guarantors and AFB was akin to a partnership or joint venture and the Loan Documents reflected the partnership elements of the agreement of the parties." We find nothing to support this. Indeed, the Net Profits Agreement states that the parties

intend that the relationship between them shall be solely that of creditor and debtor. Nothing contained in this Agreement or in any other document or instrument made in connection with the Loan, including [the Net Profits Agreement], shall be deemed or construed to create, or to be, a partnership, tenancy-in-common, joint tenancy, joint venture or co-ownership by or between [the parties].

property to trigger a payment under the Net Profits Agreement did not disturb the primary obligation to make "all other payments required" by the loan documents.

Further, both the Net Profits Agreement and the Deed of Trust explicitly provide that they are to remain in force until the loan debt is satisfied. The former provided that it was to remain in force, "secured as described above [i.e., by the Deed of Trust,] until all obligations of [State] ... have been satisfied fully". Upon any default on the Note or other loan documents, AFB was entitled to "declare immediately due and payable the entire unpaid principal sum of the Note, together with all accrued interest thereon and [amounts due under the Net Profits Agreement]." Likewise, the Deed of Trust provided that it would "become null and void and shall be released" only "[i]f [State and the Guarantors] [have] pa[id] all amounts owing under the Note, the Net Profit Agreement and the other Security Documents".

When viewed in the context of the entire transaction, as it must be, the sentence upon which State and the Guarantors rely cannot support their contention that they were entitled to a release of the Deed of Trust by virtue of a termination of the Net Profits Agreement. As the district court found, "nothing in [the Net Profits Agreement] changes the relationship between the parties or relieves State and the Guarantors from liability."¹⁰

¹⁰ A portion of this liability was for interest between Note maturity in 1987 and judgment in 1993. With regard to this liability, State and the Guarantors contend that Paris wrongfully refused to accept State's March 1988 tender of payment on the recourse portion, and that they should not be required to pay

State and the Guarantors also contend that Paris and the District Court should have applied either the fair market value of the property as of foreclosure, or the \$5,000,000 Paris bid, as a credit against the *entire* loan balance due, rather than applying it first to the non-recourse portion.¹¹ The district court did not

interest that accrued after this date.

The record contains no evidence that payment was actually tendered then or thereafter. To tender payment, State and the Guarantors would have had to "relinquish possession of [payment] for a sufficient time and under such circumstances as to enable the person to whom it is tendered, without special effort on his part, to acquire its possession." **Fillion v. David Silvers Co.**, 709 S.W.2d 240, 246 (Tex. App. -- Houston [14th Dist.] 1986), *citing* **Baucum v. Great Amer. Ins. Co.**, 370 S.W. 2d 863, 866 (Tex. 1963). Further, a tender must be an unconditional offer to pay a sum on a specified debt. See **Arguelles v. Kaplan**, 736 S.W.2d 782, 784 (Tex. App. -- Corpus Christi 1987) (deposit of payment into escrow account, with release conditioned on delivery of note, was not unconditional tender); **Baucum**, 370 S.W.2d at 866. State's predecessor merely stated that it was "prepared to tender payment ... concurrently with [Paris's] delivery of the Release" of the Deed of Trust. This was neither a "relinquish[ing] of payment" nor an unconditional offer to pay.

¹¹ Not surprisingly, State and the Guarantors would prefer the credit to be the fair market value (they claim \$6,250,000), rather than the \$5,000,000 bid. They would be entitled to a fair market value credit only if the foreclosure had been wrongful. **Tarrant Sav. Ass'n v. Lucky Homes, Inc.**, 390 S.W.2d 473, 475 (Tex. 1965); **RTC v. Westridge Court Joint Venture**, 815 S.W.2d 327, 330 (Tex. App. -- Houston [1st Dist.] 1991). The Note provides, however, that upon default, Paris was entitled, *inter alia*, to "foreclose all liens and security interests securing the payment [of the Note]" The Deed of Trust also expressly grants Paris a power of sale upon State and the Guarantors' default. Similarly, the Net Profits Agreement provides that "[u]pon any default under the Note or [the Net Profits] Agreement, the Deed of Trust, or under any other Loan Document, [Paris] may exercise any of the remedies available to it under the Loan Documents"

State and the Guarantors do not dispute either that they defaulted, or that the loan documents authorized foreclosure. Their wrongful foreclosure contention (and entitlement to fair

explain its reasoning for applying the credit against the non-recourse portion, except insofar as it stated that the loan documents were unambiguous.

As noted *supra*, the Note and the Guaranty Agreements specify that foreclosure proceeds first be applied to the non-recourse portion. The Deed of Trust, however, provides that "proceeds of any sale of, and any ... other amounts generated by the holding, leasing, operation or other use of, the Property shall be applied ... first, to ... costs and expenses ... second, to ... all accrued unpaid interest due on the Note; ... third, to the payment of the unpaid principal balance of the Note...." These provisions do not conflict; as AFB points out, the Deed of Trust language pertains to proceeds from all types of sale or use of the property, while the analogous Note provision relates specifically to foreclosure proceeds. It goes without saying that, under longstanding rules of contract construction, a more specific provision controls a general provision. *E.g.*, ***United States Postal Serv. v. American Postal Workers' Union, AFL-CIO***, 922 F.2d 256, 260 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 297 (1991); ***Maxus Exploration Co. v. Moran Bros., Inc.***, 773 S.W.2d 358, 363 (Tex. App. -- Dallas 1989), *aff'd*, 817 S.W.2d 50 (Tex. 1991) (affirming summary judgment in part based on principle that specific contract terms control general ones).

market value credit) is based only on their claim that they were entitled to a release of the Deed of Trust.

The more specific provision with regard to foreclosure sales is that contained in the Note and Guaranty Agreements -- that foreclosure proceeds first be applied against the non-recourse portion of the debt. Once again, the district court did not err in holding that there was no material fact issue.

III.

For the foregoing reasons, the judgment is

AFFIRMED.