IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8277

MORTON/SOUTHWEST COMPANY,

Plaintiff-Appellant,

v.

RESOLUTION TRUST CORPORATION
AS RECEIVER FOR BEXAR SAVINGS
ASSOCIATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-765)

(June 1, 1994)

Before KING and WIENER, Circuit Judges, and DOHERTY[*], District Judge:

PER CURIAM:[**]

Morton/Southwest Company ("Morton") appeals from the district court's grant of summary judgment in favor of its creditor, the Resolution Trust Corporation as Receiver for Bexar

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[*] District Judge of the Eastern District of Louisiana, sitting by designation.

[**] Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Savings Association (the "RTC"), in a declaratory judgment action to construe a deed of trust executed by the parties. Finding that the district court erred in interpreting the instrument, we reverse its judgment. We additionally remand the cause to the district court for a reexamination of certain issues which were not reached due to the lower court's disposition of the case.

I. Background

On November 5, 1986, two alleged joint-venturers, Morton and J.H. Uptmore & Associates ("Uptmore") (together referred to as the "debtors") executed a promissory note in the principal amount of $227,500 in favor of Bexar Savings Association ("Bexar Savings"). This note was secured by certain real property owned by the two debtors, as evidenced in the deed of trust executed on the same day. The deed of trust was executed by both debtors as follows:

> That MORTON/SOUTHWEST COMPANY . . . and J. H. UPTMORE & ASSOCIATES, INC. . . . (hereinafter called Grantors, whether one or more), acting herein by and through their duly authorized corporate officers, for the purpose of securing the indebtedness hereinafter described . . . have granted, sold, and conveyed . . . unto HAYDEN GRONA, Trustee . . . the following described property . . . .

The deed of trust also contained an "other indebtedness" or "dragnet" clause providing that the deed of trust would secure, in addition to the promissory note,

> [a]ll other indebtedness and liabilities of all kinds of Grantors to Noteholder, whether related to the mortgaged premises now existing or hereinafter arising or otherwise, whether fixed or contingent, joint and/or several, direct or indirect, primary or secondary, and regardless of how created or evidenced.

The payments due under the promissory note were apparently timely made until February of 1990, when Morton requested a payoff balance from Bexar Savings so that it could satisfy the note in full. Bexar Savings responded by letter of March 1, 1990, that it "would be happy to accept any payment [Morton] may wish to make" in order to satisfy the note obligation, but that it would not release the property subject to the deed of trust lien, contending that the deed of trust also secured the separate and independent debts owed by Uptmore, Morton's co-debtor, to Bexar Savings. Evidently, Uptmore owed in excess of $8,000,000 to Bexar Savings as a result of loans obtained both before and after Morton and Uptmore executed the deed of trust. Bexar Savings refused to release the deed of trust lien until Uptmore's debts were satisfied.

In April of 1990, Uptmore filed for bankruptcy under Chapter 11. During the course of the bankruptcy proceedings, Bexar Savings and Uptmore agreed to a settlement in which Bexar Savings would be allowed to foreclose upon the property subject to the deed of trust. To protect its half-interest in the property, Morton filed a declaratory judgment action in state court in July 1991, seeking a declaration (i) that the promissory note secured by the deed of trust was not in default, (ii) that the dragnet clause applied "solely to the indebtedness created by the joint venture comprised of [Morton] and [Uptmore]," and (iii) that interest and attorneys' fees had ceased to accrue under the promissory note as of June 15, 1990, the date on which Morton

allegedly tendered full payment of the note. The RTC, having been appointed as receiver for Bexar Savings, removed the case to federal court. In the court below, the RTC filed a counterclaim against Morton seeking a declaration that the deed of trust reached any indebtedness owed by either debtor to Bexar Savings. Both parties filed motions for summary judgment premised upon their view that the dispute did not involve genuine issues of material fact and that the interpretation of the deed of trust was a question of law appropriate for the trial court to decide. On April 14, 1993, the district court granted the RTC's motion for summary judgment and denied that of Morton. Judgment was entered accordingly on the same date, and Morton timely filed a notice of appeal.

II. Analysis

The critical issue in this appeal is whether the district court correctly determined that the deed of trust secured additional indebtedness independently incurred by Uptmore to Bexar Savings. Both parties agree that the language of the deed of trust is unambiguous and therefore that its interpretation is a matter of law appropriate for disposition by summary judgment. See Temple-Inland Forest Prods. Corp. v. United States, 988 F.2d 1418, 1421 (5th Cir. 1993). "Yet, the interpretations of the contract by the parties result in diametrically opposed conclusions . . . ." D.E.W., Inc. v. Local 93, Laborers' Int'l Union, 957 F.2d 196, 199 (5th Cir. 1992). Because the interpretation given the deed of trust contract by the court

below is a question of law, it is freely reviewed by this court. See Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994).

A. Texas Contract Principles

There is no dispute that Texas law governs the construction of the deed of trust at issue, and under Texas law, "[a] mortgage is governed by the same rules of interpretation which apply to contracts." Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 633 S.W.2d 811, 815 (Tex. 1982); Meisler v. Republic of Tex. Sav. Ass'n, 758 S.W.2d 878, 885 (Tex. App.--Houston [14th Dist.] 1988, no writ). General Texas principles of construction dictate that we give contractual language "its plain grammatical meaning unless that meaning would defeat the intent of the parties." REO Indus. v. Natural Gas Pipeline Co., 932 F.2d 447, 453-54 (5th Cir. 1991). A contract is not ambiguous merely because the parties have a disagreement on the correct interpretation. Id. Rather, "when it is reasonably open to just one interpretation given the rules of construction and the surrounding circumstances," a contract is unambiguous as a matter of Texas law. Technical Consultant Servs., Inc. v. Lakewood Pipe of Texas, Inc., 861 F.2d 1357, 1362 (5th Cir. 1988). One of the "rules of construction" at issue in this dispute is that mortgage instruments are to be construed strictly. See Kimberly Dev. Corp. v. First State Bank, 404 S.W.2d 631, 636 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.); Murchison v. Freeman, 127 S.W.2d 369, 372 (Tex. Civ. App.--El Paso 1939, writ ref'd). With these principles in mind, we turn to the facts of the case presented.

B. The "Dragnet Clause"

The district court set forth the relevant portions of the deed of trust as follows:

> 1. That MORTON/SOUTHWEST COMPANY . . . and J. H. UPTMORE & ASSOCIATES, INC. . . . (hereinafter called **Grantors**, **whether** **one** **or** **more**), acting herein by and through their duly authorized corporate officers, for the purpose of securing the indebtedness hereinafter described . . . have granted, sold, and conveyed . . . unto HAYDEN GRONA, Trustee . . . the following described property . . . .
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> 2. The term "indebtedness" shall mean and include . . . (1) [a]ny and all sums becoming due and payable pursuant to the Note . . . [and] (4) [a]ll other indebtedness and liabilities of all kinds of Grantors to Noteholder, whether related to the mortgaged premises now existing or hereinafter arising or otherwise, whether fixed or contingent, **joint** **and/or** **several**, direct or indirect, primary or secondary, and regardless of how created or evidenced.
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> 3. It is specifically AGREED that this Deed of Trust also secures [Bexar Savings] in the payment of the following indebtedness: (A) all indebtedness shown above and any and all renewals and extensions thereof or of any part thereof; and (B) all other loans, debts, obligations and liabilities of every kind and character of Grantors, now or hereinafter existing in favor of [Bexar Savings], regardless whether such present or future debts, etc. are direct or indirect, primary or secondary, **joint** **and** **several**, fixed or contingent . . . .

(Emphasis added). The district court focused upon the emphasized portions of these provisions and concluded that the "joint and several" reference clearly evidenced the parties' intention that both the joint and separate debts of Morton and Uptmore to Bexar Savings be secured by the deed of trust lien. On the basis of the clauses set forth above, the court below determined that "the term `Grantors' could refer to MORTON/SOUTHWEST and UPTMORE

either individually or jointly," and concluded that "[t]he Deed of Trust does not limit the indebtedness to that incurred jointly by MORTON/SOUTHWEST and UPTMORE." In so holding, the district court rejected the argument that language such as "or either or any of them" was necessary to extend the scope of the dragnet clause to individual obligations, stating that it was "of the opinion [that] the phrases `joint and/or several' and `joint and several' serve the same purpose [as terms such as "or either or any of them"] to broaden the scope of the indebtedness secured to that incurred by individual Mortgagors under a multiple-Mortgagor instrument."

Morton counters that this dragnet clause is clearly applicable only to obligations created by the joint venture and not by the individual venturers because the term "Grantors" is defined to include both Morton and Uptmore in the conjunctive. Morton also points to authorities from various jurisdictions holding that dragnet clauses are disfavored and should be strictly construed. See, e.g., First Seneca Bank v. Electralloy Corp. (In re Old Electralloy Corp.), 132 B.R. 705, 707 (Bankr. W.D. Pa. 1991); Johnson v. NBD Park Ridge Bank (In re Octagon Roofing), 124 B.R. 522, 528 (Bankr. N.D. Ill. 1991); Waldschmidt v. Park Bank (In re Rude), 122 B.R. 533, 536 (Bankr. E.D. Wis. 1990); see also First Nat'l Bank v. Fink, 736 P.2d 909, 912 (Kan. 1987); Citizens Bank and Trust Co. v. Gibson, 490 N.E.2d 728, 730 (Ind. 1986); Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 390

(Iowa 1988); Farmers and Mechanics Bank v. Davies, 422 N.E.2d 864, 868 (Ill. Ct. App. 1981).

As Morton acknowledges, no Texas court has held that dragnet clauses should be disfavored or strictly construed. In fact, this court has previously held that such clauses are enforceable if the debts sought to be secured were "reasonably within the contemplation of the parties to the mortgage at the time it was made." Kimbell Foods, Inc. v. Republic Nat'l Bank, 557 F.2d 491, 495 (5th Cir. 1977) (quoting Wood v. Parker Square State Bank, 400 S.W.2d 898, 901 (Tex. 1966)), aff'd on other grounds, 440 U.S. 715 (1979). To determine what is "reasonably contemplated," the reviewing court must limit itself to the objective language of the contract when that contract is unambiguous. Id. at 495; see also Bank of Woodson v. Hibbitts, 626 S.W.2d 133, 134-35 (Tex. App.--Eastland 1981, writ ref'd n.r.e.); Hannigan v. First State Bank of Wylie, 700 S.W.2d 7, 8-9 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). This approach does not imply that dragnet clauses are disfavored or should be specially construed. In light of our opinion in Kimbell and the Texas courts' silence on the issue, we are reluctant to heighten this "reasonably contemplated" standard either to impose a presumption of strict construction or to hold that such clauses are disfavored under Texas law. See Broussard v. Southern Pac. Transp. Co., 665 F.2d 1387, 1389 (5th Cir. 1982) (en banc) (holding that one panel of this court may not overrule another panel's interpretations of state law -- even where there exists confusion among the state's

own courts -- "absent a subsequent state court decision or statutory amendment which makes this Court's [prior] decision clearly wrong"). Accordingly, we look to the language of the contract to determine whether it objectively appears that the parties "reasonably contemplated" that the separate debts of Uptmore would also be secured by the mortgaged property. Kimbell, 557 F.2d at 496.

The deed of trust at issue appears to be a standard form document drafted by or for Bexar Savings or an affiliated financial institution.[1] The term "Grantors" is defined to include all conveying parties, "whether one or more," and it appears from the four corners of the instrument that the term was defined in this manner so that the same form document could be used in a variety of transactions regardless of the number of

[1] At oral argument, the court asked counsel to inform it of any portions of the record reflecting that Bexar Savings drafted the deed of trust document. Both parties filed supplemental briefs to address this point. Morton argues that the notation at the bottom of the deed of trust that the document was "[p]repared in the Law Office of Martin, Shannon & Drought, Inc." is sufficient evidence that Bexar Savings' attorneys drafted the document. The RTC counters that this notation is inconclusive of the matter because there is no evidence that Martin, Shannon & Drought, Inc. were the attorneys for either party. We agree with the RTC that the matter is equivocal. For that reason, we do not apply the rule construing documents against their drafters in this case. E.g., Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984) (holding that contracts are generally construed "most strictly" against their drafters); see also Forest Oil Corp. v. Strata Energy, Inc., 929 F.2d 1039, 1043 (5th Cir. 1991) (observing that this presumption is employed "only as a last resort under Texas law -- i.e., after the application of ordinary rules of construction leave a reasonable doubt as to its interpretation"). Nonetheless, as will be discussed below, the document clearly appears to be a form document adaptable to a variety of transactions, and our analysis will be limited to that observation.

grantors involved. Our view is reinforced by another portion of the deed of trust reciting that "[i]f this Deed of Trust is executed by only one person or by a corporation, the plural reference to Grantors shall be held to include the singular . . . ." Consequently, a single grantor would be properly referred to throughout the document as "Grantors"; the same would hold true for two or more grantors, as in the instant case. By its own terms, the deed of trust reference to "Grantors," however, is to a single unit regardless of how many grantors are actually involved.

We turn to the parties' agreed construction of the word "Grantors" to determine how the unit term is defined for purposes of the deed of trust at issue. The parties defined "Grantors" as "MORTON/SOUTHWEST COMPANY . . . **and** J. H. UPTMORE & ASSOCIATES, INC." (emphasis added). The unit term "Grantors" is therefore a conjunctive referent. Consequently, if we substitute the agreed definition in the place of the conjunctive referent in the dragnet clause, the "other indebtedness" secured by the deed of trust consists of "[a]ll other indebtedness and liabilities of all kinds of MORTON/SOUTHWEST COMPANY . . . **and** J. H. UPTMORE & ASSOCIATES, INC. to Noteholder."[2] Accordingly, the dragnet

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[2] Similarly, in the second "other indebtedness" clause, the substitution would yield the following result:

> This Deed of Trust also secures [Bexar Savings] in the payment of the following indebtedness: . . . all other loans, debts, obligations and liabilities of every kind and character of MORTON/SOUTHWEST COMPANY . . . **and** J. H. UPTMORE & ASSOCIATES, INC. now or hereinafter existing in favor of [Bexar Savings] . . . .

clause applies only to debts for which **both** Morton **and** Uptmore are liable. See, e.g., Bank of Woodson, 626 S.W.2d at 134-35 (espousing Kimbell and holding that a dragnet clause "secur[ing] and enforc[ing] the indebtedness now owing or in the future may be owing by mortgagors to mortgagee herein . . .," encompassed only debts owed jointly by all three mortgagors, "not either or any of them"); Hannigan, 700 S.W.2d at 8-9 (Where security instrument defined "Debtor" as "William V. Hannigan [son] and Lucille Hannigan [mother]," the "other indebtedness" clause would be interpreted to secure only joint liabilities and would not be extended to secure son's separate liabilities.).

The RTC contends, however, that the phrases "whether . . . **joint and/or several**" and "regardless whether such present or future debts, etc. are . . . **joint and several**" alter this result. It appears to read "joint and/or several" as "joint and/or separate."[3] We disagree because we are not convinced from our reading of the entire document that the parties "reasonably contemplated" that **all** indebtedness -- both separate and joint -- be secured by the deed of trust. Although admittedly the

[3] Indeed, we are not sure exactly what is contemplated by the phrase "joint and/or several." The parties have not brought to our attention, and we have not found, any Texas cases providing for several liability without joint liability. We note that in Guynn v. Corpus Christi Bank and Trust, 620 S.W.2d 188, 190 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.), the Corpus Christi court of appeals construed separately executed guaranty agreements each of which contained a clause providing that the obligation would be joint and several as being several obligations. However, the court intimated that the liability was also joint. The precise holding in the case was that the release of one guarantor did not release the remaining guarantors because the guaranty obligations were also several. Id.

language is "cloudier than it is clear," see Georgetown Assoc. v. Home Fed. Sav. & Loan, 795 S.W.2d 252, 256 (Tex. App.--Houston [14th Dist.] 1990, writ dism'd w.o.j.), we hold the view that the "joint and several" language in the deed of trust was included to protect Bexar Savings in the event that the secured indebtedness of the "Grantors" involved obligations for which Morton and Uptmore were liable jointly with, and severally from, third parties to the deed of trust. There is no language in the instrument, other than the extremely confusing and vague reference to "joint and/or several," to dictate a different result. Moreover, to hold otherwise would effectively read the term "joint and several" out of a contract where a single entity or individual was defined as "Grantors." See, e.g., Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1193 (5th Cir. 1985) (observing that Texas law requires consideration of each contractual provision with reference to the entire contract, giving effect to each so that no clause is rendered meaningless). Consequently, we find that the dragnet clauses in the disputed deed of trust extend only to the conjunctive debts of Morton and Uptmore. The district court's interpretation of the instrument to the contrary was therefore in error.

C. The Issue of Default

Morton additionally requests that we render judgment in its favor declaring that any interest accruing on the promissory note be tolled from June 15, 1990, the date on which Morton allegedly tendered full payment of the note. The RTC argues that there is

no summary judgment evidence to confirm whether, when, and under what circumstances that tender was made. Alternatively, the RTC claims that the purported tender will not constitute a controversy between the parties unless and until the RTC institutes suit against Morton on the promissory note. We disagree. To obtain relief from the impending foreclosure, Morton had to show (i) that the deed of trust secured only the promissory note jointly executed by Morton and Uptmore, and (ii) that the note was not in default. Morton recognized that it had to negate both of these possibilities before it could prevent the RTC from foreclosing upon the property described in the deed of trust, and it has consistently taken this position since the outset of the litigation, has carried it through the summary judgment stage, and has raised it in this appeal. The RTC did not contest the alleged tender in the court below, and the trial court found it unnecessary to rule upon the issue in light of its finding that the deed of trust secured other debts which were undisputedly in default. Since Morton has convinced this court that the deed of trust is limited to the joint debt, we must give the district court an opportunity to determine whether Morton and/or Uptmore is in default upon that obligation. Accordingly, we remand that issue to the court below for consideration in the first instance.

III. Conclusion

In summary, the dragnet clause of the Bexar Savings deed of trust is simply not susceptible to the interpretation of the

court below, "given the rules of construction and the surrounding circumstances." Technical Consultant, 861 F.2d at 1362. We therefore reverse the judgment of the district court granting summary judgment in favor of the RTC as Receiver for Bexar Savings, holding that the "other indebtedness" clauses of the deed of trust executed by the parties on November 5, 1986, apply solely to the indebtedness jointly owed by Morton and Uptmore to Bexar Savings and not to any separate obligations of the individual debtors. We additionally remand the cause to the district court to determine whether Morton and/or Uptmore's obligation under the promissory note which is secured by the deed of trust is in default. Finally, we remand to the district court for its consideration of the amount of attorneys' fees, if any, due to Morton. Costs shall be borne by the RTC.

REVERSED and REMANDED.