CADWALADER

I Would Prefer Not to – a Scriveners Tale – Not Bartleby

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On March 5, 2024, the Supreme Court of the State of New York, ruled that an obvious scriveners error in a guaranty, exempting a guarantor from full recourse liability for the loan's debt, could be corrected to impose personal liability.**[1]**

Defendant, Bersin Properties, LLC ("Bersin"), entered into a $135 million loan as borrower, with Nomura Credit Capital, Inc. ("Nomura") as Lender. Nomura later conveyed the loan to NCCMI, Inc. ("NCCMI"), which funded $44 million to Bersin. The loan matured and Bersin did not repay any portion of the debt in breach of the loan. NCCMI brought an action against Bersin to foreclose on the mortgage to the property, however, the property was subsequently lost in a sheriff's sale that was held to satisfy a junior lienholder's judgement against the property. NCCMI released its mortgage on the property to the new owner for only $4 million, as the property was never developed by Bersin. NCCMI converted its foreclosure action to a plenary action seeking recourse on the underlying promissory note and guaranty.

Although the loan was nonrecourse, the Loan Agreement included carve-outs for losses resulting from specific bad acts ("Loss Recourse Indemnity") and recourse for the entire debt upon the occurrence of certain triggering events ("Full Debt Recourse Liability"). Scott Congel, Bersin's principal, was designated as the guarantor and executed an Indemnity and Guaranty Agreement (the "Guaranty"). The Guaranty provided that Bersin and Congel would, jointly and severally, guarantee payment of recourse obligations, and would be collectively, the Indemnitor. The Guaranty specified that Indemnitor assumed liability for the Loss Recourse Indemnity, while the borrower assumed liability for the Full Debt Recourse Liability, seemingly insulating Congel from loan indebtedness.

NCCMI disputed the defense that Congel should be shielded from the loan indebtedness by arguing that the recourse language was an obvious scrivener's error. NCCMI noted that the provision was almost an exact duplicate of the recourse language in the Loan Agreement inserted into the Guaranty, but the term "Borrower" was not replaced with Indemnitor. In addition, NCCMI argued that the Guaranty clearly intended for the liability to run to Congel for the Full Debt Recourse, pointing to the preamble in the Guaranty and other additional terms and provisions. One of NCCMI's main arguments was that to make only Bersin liable, a single-purpose entity with no assets other than the property, would be absurd causing Bersin to become its own guarantor.

The defendants argued that reformation of the contract was time barred under the six-year statute of limitations. However, the court noted that a scrivener's error outside of a claim of reformation of a contract may be corrected in "those limited instances where some **absurdity** has been identified or the contact would otherwise be unenforceable either in whole or in part."**[2]** The court determined that a literal reading of the full recourse provision, allowing the borrower to guarantee its own debt, would be illogical and would render the Guaranty illusory and meaningless. The Court pointed to a ruling in a similar case, *PNC Capital Recovery v Mechanical Parking Sys.*, (282 AD2d 268 [1st Dept 2001], *lv dismissed* 69 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]) in which, Shlomo Kadosh, the president of a corporation signed a guaranty for a corporation's debt. However, the president argued that since his signature block listed his title as president, he should not be held personally liable under the guaranty. The Court

rejected that argument noting “to permit a corporation to guarantee its own indebtedness was illogical and rendered meaningless the entire guaranty.”

Lastly, the court noted that certain provisions of the Guaranty confirmed that the full debt recourse liability runs to Congel, as an Indemnitor. The terms of the Loan provided clear and convincing intrinsic evidence that the phrasing was a scriveners error. Thus, the court granted NCCMI’s motion for summary judgement as to Congel’s personal liability under the Guaranty.

The ruling in this case provided much needed relief from an obvious scrivener’s error. However, the Court’s ruling highlights that not only must the error be “absurd”, the party seeking reformation has a high burden of showing an obvious error by clear and convincing evidence.**[3]** Absent a clear error making a contract unenforceable, clear and complete writings will still be enforced according to their terms in order to create stability and safeguard against fraudulent claims.**[4]** While the Lender “won” this case (absent any appeal), the Lender’s win was somewhat pricey. How many years of litigation and attorney’s fees were expended to get to this result. We would argue that this “win” is further evidence that a scrivener’s error, even when you “win”, is extremely costly. We will continue to monitor any appeal of this decision and update this article accordingly.

[1] *See NCCMI, Inc. v. Bersin Props.*, 2024 N.Y. Slip Op. 1161 (N.Y. App. Div. 2024)

[2] *See Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547-548[1995]; *see also Jade Realty LLC v Citicorp Commercial Mtge. Trust 2005-EMG*, 20 NY3D 881, 883-884[2012].

[3] *See Warberg Opportunistic Trading Fund, L.P. v Georesources, Inc.*, 112 AD3d 78, 84-85 [1st Dept 2013].

[4] *See W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 160, 162 [1990].