Cite as 2022 Ark. App. 447

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-21-177

ARKANSAS CAPITAL CORPORATION	APPELLANT	**Opinion Delivered** November 9, 2022
V.		APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. 60CV-19-3560]
BRANDON J. SALAMONE	APPELLEE	HONORABLE WENDELL GRIFFEN, JUDGE
		REVERSED AND REMANDED

BRANDON J. HARRISON, Chief Judge

This appeal from a summary judgment is about whether Brandon J. Salamone remained liable on a personal guaranty of a Small Business Administration (SBA) loan appellant Arkansas Capital Corporation (ACC) issued in 2014 after a "Loan Assumption and Restructure Agreement" (the Assumption Agreement) that Salamone, ACC, and others executed in 2016. The Assumption Agreement concerned a sale of business assets. In the circuit court, both parties argued the relevant documents were *un*ambiguous. The circuit court agreed, ruled for Salamone, and thereby released him from a personal guaranty that might otherwise attach liability in the rough sum of $100,000, according to an affidavit filed by ACC after Salamone noticed this appeal.

If the drafters had added two or three words in key places, we might also agree that the transactional documentation was unambiguous. As it is, we conclude on de novo review

that there remain at least two reasonable constructions, so Salamone's liability could not be determined as a matter of law.

I. *Background*

In April 2014, ACC approved an SBA-backed loan of $215,000 to Major Moves, LLC (Major Moves), to open a Little Rock restaurant called J. Gumbo's. Major Moves had three members: Amber N. Hudson, Albert Glenn Hudson, Jr., and Salamone. The transaction involved a series of documents, all executed on April 4. The Hudsons and Salamone signed the note, and a security agreement for Major Moves, in their capacity as Major Moves members. Each signed an unconditional personal guaranty, in an individual capacity, to pay the debt if Major Moves defaulted.[1] All signed the loan agreement twice: Once as the members of Major Moves, and again as guarantors of the debt.

It appears from the papers that, by 2016, the Hudsons wanted out. All parties to the 2014 instruments, and three new parties, executed the Assumption Agreement dated 13 May 2016. One new party was NOCF, LLC (NOCF), an Arkansas limited liability company. The Assumption Agreement refers to NOCF as the "Assuming Borrower." No one disputes that the Assumption Agreement allows NOCF to assume the liabilities of Major Moves (referred to as the Original Borrower) with its purchase of Major Moves' personal property, which ACC approves in the Assumption Agreement. And no one disputes that the Assumption Agreement releases Major Moves from those liabilities.

[1]Well, we assume the Hudsons signed a guaranty like Salamone's because his is the only guaranty in the record. It is undisputed, however, that the Hudsons were released from any relevant liability in 2016, and they were not parties below.

The two other new parties are Brian P. Speck, one of NOCF's two members, and Kimberly Speck, his wife. The Assumption Agreement refers to Brian individually as the "Assuming Unlimited Guarantor" and to Kimberly as the "Assuming Limited Guarantor, jointly with Assuming Unlimited Guarantor, 'Assuming Guarantors.'" Everyone agrees that, in the Assumption Agreement, the Specks take on the obligations the Hudsons (whom the Assumption Agreement includes in "Original Guarantors") agreed to in 2014 during the first transactional round.[2] In the 2016 Assumption Agreement, the Hudsons are expressly and unambiguously released in paragraph 4, titled "Liability":

> Upon fulfillment of the requirements set forth in this Agreement, Original Borrower, Glenn Hudson and Amber Hudson shall be released from liability for payment of the Note and their obligations under the Loan Documents, and ACC shall release the CD Assignment.

This is where legal trouble took root. Salamone—who like the Hudsons was an Original Guarantor and a member of the Original Borrower, Major Moves—was also unlike the Hudsons and Major Moves in a key way. Salamone is not expressly released in the Agreement.[3] Like Brian Speck, he is a member of the Assuming Borrower, NOCF. But he is not listed among the "Assuming Guarantors" in the 2016 Assumption Agreement. He contends that the Assumption Agreement—and especially the following paragraph—shows the parties intended not only to add the Specks as guarantors, but to remove him as a guarantor:

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[2]Albeit, for Kimberly, with "liability limited as set forth in her Unconditional Limited Guarantee," which is not in the record.

[3]At oral argument, Salamone's counsel conceded that Salamone was not released. Rather, he distinguished the defenses of release and novation and argued that all Original Guarantors received a novation, and the Hudsons also received a release.

> 5. Amendment of All Loan Documents. All references to Original Borrower in the Note and the Loan Documents shall hereinafter refer to Assuming Borrower the same as if Assuming Borrower was an original party to all such documents. Assuming Borrower further adopts, reaffirms and restates the representations, warranties and covenants contained in the Loan Documents the same as if such representations, warranties and covenants were originally made by it. All references to Original Guarantors in the Loan Documents shall hereinafter refer to Assuming Guarantors the same as if Assuming Guarantors were an original party to all such documents. Assuming Guarantors further adopt, reaffirm and restate the guarantor representations, warranties and covenants contained in the Loan Documents the same as if such representations, warranties and covenants were originally made by them.

The business unfortunately faltered. ACC sued NOCF and Salamone for an alleged balance, with interest and fees, of about $87,000. If Salamone is off the hook, no one is on it, because the Specks have filed for Chapter 13 bankruptcy. NOCF, which defaulted and has not appealed, appears to be a turnip.

Each party argued below that summary judgment should be granted because the relevant documents unambiguously favored its position; or, in the alternative, because parol evidence of other undisputed facts attached to its summary-judgment papers demonstrated that the parties intended the favorable meaning.[4] The circuit court heard argument on the motions in November 2020. During argument, Salamone's counsel said that under the Assumption Agreement, "Brian Speck and Kimberly Speck are now taking on the obligations that Mr. Salamone and Mr. Hudson had originally by taking on this." The circuit court observed, "As I recall, Mr. Phillips, from the law of contract, we used to call

[4]ACC also moved to strike an affidavit attached to Salamone's reply that supported his motion for summary judgment. The circuit did not consider the affidavits and found the motion to strike moot.

that a novation." Counsel confirmed so. During ACC's argument, counsel for ACC responded to the novation argument on the merits.

The circuit court ruled from the bench that Salamone's motion for summary judgment would be granted, and ACC's motion would be denied. It entered an order drafted by counsel for Salamone, which concluded that "[t]he Assumption Agreement is unambiguous and constitutes a novation. Under the unambiguous language of the Assumption Agreement, Salamone is not liable for the payment of the Note. Therefore, Salamone's motion for summary judgment is granted, and ACC's motion for summary judgment is denied." ACC timely moved under Rule 60 for the court to vacate or reconsider its order because Salamone had not pleaded novation and had otherwise failed to prove it. Salamone responded that novation can be pleaded either expressly or "by unequivocal implication," *Camfield Tires, Inc. v. Moseley*, 253 Ark. 585, 588, 487 S.W.2d 268, 270 (1972), and that the circuit court had not raised that defense for Salamone but named the defense Salamone had raised.

Although we have reviewed and accounted for all the words in all these documents, we set out only some particularly relevant parts below as we explain why the circuit court's summary judgment must be reversed, and the case remanded for further proceedings.

A. Loan Agreement

The original 2014 Loan Agreement lists the parties as ACC (defined parenthetically as Lender), Major Moves LLC (the Borrower), and Albert Glenn Hudson, Amber N. Hudson, and Brandon J. Salamone, "hereinafter individually and/or jointly referred to as 'Guarantor.'" It recites that "Guarantor owns a significant portion of the outstanding stock

of Borrower, and Guarantor acknowledges that the loan by Lender to Borrower will be of benefit to Guarantor" and that "Lender, Borrower and Guarantor agree" to its terms.

The term "Loan Documents," a critical part of the analysis of the later 2016 Assumption Agreement, is defined in a paragraph titled "Security Documents": "Hereafter, the security documents required by the Authorization Agreement, and *any other documents executed in connection herewith* or therewith including the Note, shall be collectively referred to as the Loan Documents." (Emphasis added.) Later, Borrower (Major Moves) and Guarantor (Albert Glenn Hudson, Amber N. Hudson, and Brandon J. Salamone) agree to perform "the covenants and obligations contained in the Security Documents to which they are a party and the Authorization Agreement" and "all of the obligations to be performed . . . pursuant to the terms of each indenture, agreement, contract and other instrument by which [the relevant party] is bound including, without limitation, the Authorization." They also agree to "execute and deliver such further agreements, documents and instruments . . . as may be requested by Lender to carry out the provisions and purposes of this Agreement, the Note, and the Security Documents . . . and to create, preserve, maintain and perfect the liens and security interests of Lender under this Agreement and the Security Documents."

The Loan Agreement was to remain in effect "until the Note is irrevocably paid in full." The Guarantor (Albert Glenn Hudson, Amber N. Hudson, and Brandon J. Salamone) "acknowledges that he is familiar with the terms of this Agreement, the Note, and the other Loan Documents and all undertakings related thereto and consents to be bound thereby." The Hudsons and Salamone signed twice: first under the heading "Borrower" for Major

Moves "by" them, its members; and again under the heading "Guarantor" above the description, for example, "Brandon J. Salamone, individually."

B. Note

The six-page Note, on SBA Form 147, defines "Guarantor" to mean "each person or entity that signs a guarantee of payment of this Note." "Loan Documents," here, means "the documents related to this loan signed by Borrower, any Guarantor, or anyone who pledges collateral." Events of default include any reorganization, merger, consolidation, or other change in ownership or business structure without ACC's prior written consent. Upon default, the Lender may "[c]ollect all amounts owing from any Borrower or Guarantor[.]"

ACC reserved general powers, including to "[r]elease anyone obligated to pay" the note, and to "[c]ompromise, release, renew, extend or substitute any of the Collateral" without notice or consent from the Borrower. A paragraph headed "Successors and Assigns" provides that "Borrower" will include its successors, and "Lender" "includes it[s] successors and assigns." "Guarantor" is not addressed.

Although the Note binds the Borrower, not the guarantors directly, some "General Provisions" illustrate the balance of power on each side of the loan:

> A. All individuals and entities signing this Note are jointly and severally liable.
>
> B. Borrower waives all suretyship defenses.
>
> . . . .
>
> D. Lender may exercise any of its rights separately or together, as many times and in any order it chooses. Lender may delay or forgo enforcing any of its rights without giving up any of them.

. . . .

> G. To the extent allowed by law, Borrower waives all demands and notices in connection with this Note, including presentment, demand, protest, and notice of dishonor. Borrower also waives any defenses based upon any claim that Lender did not obtain any guarantee; did not obtain, perfect, or maintain a lien upon Collateral; impaired Collateral; or did not obtain the fair market value of Collateral at a sale.

The Hudsons and Salamone signed the Note, but only for Major Moves, and in their capacity as members.[5]

C. Security Agreement

The Security Agreement gives ACC (the Secured Party) a security interest in the restaurant equipment and furniture purchased with the loan—and also all inventory, all instruments and chattel paper, contract rights, or other intangible property that might now exist or arise later. The parties agree that Major Moves (the Debtor), "voluntarily gives up, waives and surrenders any right to a notice and hearing to determine," upon any default, whether there is probable cause to sustain ACC's claim to possession of the collateral. Further, the parties agree that ACC will not be liable for any loss to collateral in its possession, nor will that loss diminish the debt, even if ACC's own negligence causes or contributes to the loss. Like the Note, the Security Agreement is signed by the Hudsons and Salamone, but only as members of Major Moves.

[5]We think this the better construction of the Note, in no small part because it is consistent with the other documents. Under the heading "Borrower's Name(s) and Signature(s)" and an instruction that "[b]y signing below, each individual or entity becomes obligated under this Note as Borrower," the Note lists "Major Moves, LLC, an Arkansas limited liability company," and three signature lines beginning "By:" over a typewritten title, for example, "Brandon J. Salamone, Member." The "Borrower" listed in the heading of the Note is Major Moves.

D. Unconditional Personal Guarantee

Salamone's Unconditional Guarantee, SBA Form 148, is the only guarantee in the record. The Guarantee references the same loan, with Major Moves as Borrower and ACC as Lender. The first two paragraphs read as follows:

> 1. GUARANTEE:
>
> Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.
>
> 2. NOTE:
>
> The "Note" is the promissory note dated April 4, 2014 in the principal amount of Two Hundred Fifteen Thousand and no/100 Dollars, from Borrower to Lender. It includes any assumption, renewal, substitution, or replacement of the Note, and multiple notes under a line of credit.

"Collateral" is defined to mean "any property taken as security for payment of the Note or any guarantee of the Note." "Loan Documents" is defined again, this time as "the documents related to the Loan signed by Borrower, Guarantor or any other guarantor, or anyone who pledges Collateral."

The Guarantee allows ACC to "take any of the following actions at any time," without notice or Salamone's consent, and without making demand:

> A. Modify the terms of the Note or any other Loan Document except to increase the amounts due under the Note;
>
> B. Refrain from taking any action on the Note, the Collateral, or any guarantee;
>
> C. Release any Borrower or any guarantor of the Note;
>
> D. Compromise or settle with the Borrower or any guarantor of the Note;

> E. Substitute or release any of the Collateral, whether or not Lender receives anything in return;
>
> F. Foreclose upon or otherwise obtain, and dispose of, any Collateral at public or private sale, with or without advertisement;
>
> G. Bid or buy at any sale of Collateral by Lender or any other lienholder, at any price Lender chooses; and
>
> H. Exercise any rights it has, including those in the Note and other Loan Documents.

Further, those actions "will not release or reduce the obligations of Guarantor or create any rights or claims against Lender."

Salamone expressly waives defenses based on any claim that ACC (in relevant part) "failed to obtain any guarantee," "did not seek payment from the Borrower, [or] any other guarantors . . . before demanding payment from Guarantor," "impaired Guarantor's suretyship rights," or that "Borrower has avoided liability on the Note." Salamone is required to preserve any collateral pledged to secure the Guarantee. The parties agree, in the same paragraph, that ACC "has no duty to preserve or dispose of any Collateral."

Under the heading "Successors and Assigns," the parties agree that "[u]nder this Guarantee, Guarantor includes heirs and successors, and Lender includes successors and assigns." Amid conventional terms on severability and oral modification, Salamone agrees that his liability "will continue even if SBA pays Lender." He agrees further that "[a]ll individuals and entities signing as Guarantor are jointly and severally liable." ACC reserves the right to "exercise any of its rights separately or together, as many times as it chooses" and may "delay or forgo enforcing any of its rights without losing or impairing any of them."

On the last page, the Guarantor "acknowledges that [he] has read and understands the significance of all terms of the Note and this Guarantee, including all waivers." And the Guarantor recites, just above the signature line, that "[b]y signing below, each individual or entity becomes obligated as Guarantor under this Guarantee." Salamone signed above the printed line, "Brandon J. Salamone, individually[.]"

E. Assumption Agreement

Most, though not all, of the Assumption Agreement is potentially relevant to Salamone's liability, so we quote it at length:

LOAN ASSUMPTION AND RESTRUCTURE AGREEMENT

> This Loan Assumption and Restructure Agreement ("Agreement") is made and entered this 13th day of May, 2016, by and between Major Moves, LLC ("Original Borrower"), Albert Glenn Hudson, Jr. ("Glenn Hudson"), Amber N. Hudson ("Amber Hudson"), Brandon J. Salamone ("Salamone"), NOCF, LLC, an Arkansas limited liability company ("Assuming Borrower"), Brian P. Speck ("Assuming Unlimited Guarantor"), Kimberly Speck ("Assuming Limited Guarantor" and, jointly with Assuming Unlimited Guarantor, "Assuming Guarantors") and Arkansas Capital Corporation, an Arkansas non-profit corporation ("ACC").
>
> WITNESSETH:
>
> WHEREAS, on April 4, 2014, Original Borrower borrowed $215,000.00 from Arkansas Capital Corporation ("ACC") ("Loan") and executed, inter alia, a Note (as amended, "Note") payable to the order of ACC in the original principal sum of $215,000.00; and
>
> WHEREAS, payment of the Note was secured by a Mortgage, Security Agreement and Financing Statement with Assignment of Rents and Leases granted by Glenn Hudson and Amber Hudson to ACC dated April 4, 2014 ("Hudson Mortgage"), said Mortgage granting a lien on certain real property located at 7 Trafalgar Cove, Little Rock, Pulaski County, Arkansas, as more particularly described in the Hudson Mortgage ("Hudson Property") and having been filed of record in the office of the Circuit Clerk and Ex-Officio Recorder of Pulaski County, Arkansas on April 7, 2014, as Instrument No. 2014018948; and

WHEREAS, the Hudson Mortgage was released by ACC in accordance with that certain Release of Mortgage, Security Agreement and Financing Statement with Assignment of Rents and Leases dated May 27, 2015, and filed of record in the Circuit Clerk and Ex-Officio Recorder of Pulaski County, Arkansas on May 27, 2015, as Instrument No. 2015030981; and

WHEREAS, payment of the Note is further secured by a Security Agreement granted by Original Borrower to ACC dated April 4, 2014 ("Security Agreement") granting a security interest in all personal property of Original Borrower ("Personal Property"); and

WHEREAS, ACC's security interest in the Personal Property is perfected by a UCC Financing Statement filed with the Arkansas Secretary of State on April 4, 2014, as Instrument No. 40000086590719; and

WHEREAS, payment of the Note was guaranteed by the execution of Unconditional Guarantees of Glenn Hudson, Amber Hudson and Salamone (collectively, "Original Guarantors"), each dated April 4, 2014, whereby the Original Guarantors unconditionally guaranteed payment of the Note in full and performance of the terms of the Loan Documents (as defined below); and

WHEREAS, payment of the Note is further secured by an Assignment of and Grant of Security Interest in Certificate of Deposit ("CD Assignment") from Original Borrower to ACC dated April 4, 2014, granting a security interest in a certificate of deposit in the face amount of $20,000.00 issued by First Security Bank ("CD"); and

WHEREAS, the terms, conditions and obligations of Original Borrower to ACC are further evidenced by an Authorization (SBA 7(A) Guaranteed Loan) ("Authorization") dated March 20, 2014, as amended, and by a Loan Agreement (SBA Small Loan Advantage) by and between Original Borrower and ACC dated April 4, 2014 ("Loan Agreement"); and

WHEREAS, the Original Borrower seeks to convey all of the Personal Property to Assuming Borrower; and

WHEREAS, Original Borrower, Assuming Borrower and Assuming Guarantors have agreed, subject to ACC's approval, that Assuming Borrower shall assume all obligations set forth in the documents executed in connection with the Loan, including, without limitation, the Note, the Security Agreement, the Authorization, the Loan Agreement and all documents, certifications and affidavits of Original Borrower (all documents referenced

herein and all other documents executed in connection with the Loan are hereinafter jointly referred to as "Loan Documents") on the terms and conditions set forth herein; and

WHEREAS, Original Borrower, Glenn Hudson and Amber Hudson further seek to be released from all liability and obligations set forth in the Loan Documents and release of the CD Assignment; and

WHEREAS, ACC has agreed to the assumption of the Loan and all obligations contained in the Loan Documents by Assuming Borrower and the release of Original Borrower, Glenn Hudson and Amber Hudson from the same on the terms and conditions set forth herein.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions set forth herein, the parties hereto hereby agree as follows:

1. Balance of Loan. The unpaid principal balance of the Note as of April 25, 2016 is $98,494.42.

2. Assumption. Assuming Borrower hereby assumes and agrees to pay to ACC the indebtedness evidenced by the Note and any and all extensions and renewals thereof. Assuming Borrower hereby further assumes and agrees to be bound by the terms, conditions, warranties, covenants, liabilities and obligations of Original Borrower under the Note and the Loan Documents. Assuming Unlimited Guarantor hereby assumes and agrees to be bound by the terms, conditions, warranties, covenants, liabilities and obligations of Original Guarantors under the Loan Documents. Assuming Limited Guarantor hereby assumes and agrees to be bound by the terms, conditions, warranties, covenants, liabilities and obligations of Original Guarantors under the Loan, with liability limited as set forth in her Unconditional Limited Guarantee.

3. Reaffirmation of Loan Documents. All of the terms and conditions of the Loan Documents are hereby adopted and affirmed by Assuming Borrower and Assuming Guarantors and reaffirmed by Salamone. Assuming Borrower hereby specifically adopts and affirms the applicable terms of that certain Borrower's Certification executed by Original Borrower on April 4, 2014, in connection with the Loan.

4. Liability. Upon fulfillment of the requirements set forth in this Agreement, Original Borrower, Glenn Hudson and Amber Hudson shall be released from liability for payment of the Note and their obligations under the Loan Documents, and ACC shall release the CD Assignment.

5. Amendment of All Loan Documents. All references to Original Borrower in the Note and the Loan Documents shall hereinafter refer to Assuming Borrower the same as if Assuming Borrower was an original party to all such documents. Assuming Borrower further adopts, reaffirms and restates the representations, warranties and covenants contained in the Loan Documents the same as if such representations, warranties and covenants were originally made by it. All references to Original Guarantors in the Loan Documents shall hereinafter refer to Assuming Guarantors the same as if Assuming Guarantors were an original party to all such documents. Assuming Guarantors further adopt, reaffirm and restate the guarantor representations, warranties and covenants contained in the Loan Documents the same as if such representations, warranties and covenants were originally made by them.

6. Conditions Precedent. ACC's obligation to modify the terms of the Note and the Loan Documents shall be subject to the following conditions precedent:

    (a) Execution and delivery by Assuming Unlimited Guarantor of his Unconditional Guarantee;

    (b) Execution and delivery by Assuming Limited Guarantor of her Unconditional Limited Guarantee;

    (c) Execution and delivery by Assuming Guarantors to ACC of a Mortgage, Security Agreement and Financing Statement with Assignment of Rents and Leases on certain real property located at 138 Brown Street, Hot Springs, AR 71913;

    (d) Execution and delivery by Original Borrower to ACC of a Standby Creditor's Agreement agreeing, in the event of default on the Note or request for payment concessions by ACC, to standby on receipt of payments under the Promissory Note by Brian Speck and Assuming Borrower to Original Borrower in the original principal sum of $96,517.00;

(e) Execution and delivery by Original Borrower and Assuming Borrower to ACC of assignments of the existing lease agreements for the real property located at 2050 John Hardin Drive, Jacksonville, Arkansas, and Unit 18, 12911 Cantrell Road, Little Rock, Arkansas, with written consent to such assignments from the respective landlords, TTRL, LLC and The Centre of Ten, LLC (jointly, "Landlords");

(f) Execution and delivery by Landlords to ACC of Landlord Waivers;

(g) Delivery to ACC of a bill of sale evidencing the transfer of the Personal Property from Original Borrower to Assuming Borrower;

(h) Payment of fees and costs incurred by ACC in the assumption of the Loan and the restructuring and modification thereof, including without limitation, ACC's attorney's fees;

(i) Execution and delivery to ACC of duly authorized resolutions of Original Borrower in form acceptable to ACC and its counsel, evidencing the authority of Assuming Borrower to enter into and execute this Agreement and the documents referenced herein;

(j) Execution and delivery to ACC of duly authorized resolutions of Assuming Borrower in form acceptable to ACC and its counsel, evidencing the authority of Assuming Borrower to enter into and execute this Agreement and the documents referenced herein and to assume the liabilities and obligations set forth herein and in the Note and Loan Documents;

(k) Execution and delivery by Original Borrower and Assuming Borrower to ACC of all documents to be executed in connection with this Agreement, and such other documents and instruments as ACC or their legal counsel may require. In that regard, each of the parties hereto agrees to perform, execute and deliver or cause to be performed, executed and delivered any and all such further acts, deeds and assurances as may be reasonably necessary to consummate the transactions contemplated herein; and

(l) Payment by Assuming Borrower of an assumption fee in the amount of one percent (1%) of the remaining principal balance of the Loan.

7. Acknowledgment of ACC's Performance.

(a) Original Borrower and Original Guarantors hereby acknowledge and agree that ACC has acted in good faith throughout all business transacted by and between ACC and Original Borrower and has fully and in good faith performed all of its obligations under the Loan Documents describing, evidencing, securing or otherwise pertaining to the Loan.

(b) As a material part of the consideration for ACC's agreement to allow the assumption and restructure of the Loan as herein provided, Original Borrower and Original Guarantors hereby waive, release, relinquish, discharge and acquit forever ACC, its directors, officers, employees, agents and attorneys, past, present and future, from any and all Claims of whatsoever kind existing as of the date hereof. As used herein, the term "Claims" shall mean, without limitation, any and all liabilities, claims, defenses, demands, actions, causes of action, judgments, deficiencies, interest, liens, costs or expenses (including, without limitation, court costs, penalties, attorneys' fees and disbursements, and amounts paid in settlement) of any kind and character whatsoever, including claims for usury, breach of contract, breach of commitment, negligent misrepresentation or failure to act in good faith, in each case whether now known or unknown, suspected or unsuspected, asserted or unasserted or primary or contingent, and whether arising out of the Loan Documents, other written documents, this Agreement, unwritten undertakings, course of conduct, tort, violations of laws or regulations or otherwise, which Original Borrower or Original Guarantors have, or may have, against ACC.

8. Modification. Any modifications to this Agreement shall be in writing and shall be signed by the parties hereto.

9. Headings. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning hereof.

10. Severability. In the event that any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

11. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date and year first written above.

Salamone signed three times: (1) as one of three members of Major Moves, (2) as one of three Original Guarantors, and (3) as one of two members (with Brian Speck) of NOCF.

II. *Standard of Review*

We have often stated that when parties file cross-motions for summary judgment, they "essentially agree that there are no material facts remaining, and summary judgment may be an appropriate means of resolving the case." *Union Pac. R.R. Co. v. SEECO, Inc.*, 2016 Ark. App. 466, at 8, 504 S.W.3d 614, 620. In truth, as we have also stated, the principle is more nuanced. A party who moves for summary judgment after an opposing party has done so, but under a different legal theory, does not admit that there are no disputed facts material to the opponent's theory. *Chick-A-Dilly Props., Inc. of Camden v. Hilyard*, 42 Ark. App. 120, 126–28, 856 S.W.2d 15, 18–20 (1993). If the movants take opposite sides of the same theory, with the same material facts, the cross-motions "may be probative of the non-existence of a factual dispute." *Id.* at 128, 856 S.W.2d at 20 (quoting *Schlytter v. Baker*, 580 F.2d 848, 849–50 (5th Cir. 1978)). But if both parties are wrong about the absence of an issue of material fact, both motions should be denied. *See Wood v. Lathrop*, 249 Ark. 376, 383–84, 459 S.W.2d 808, 812 (1970).

Here, the Loan Agreement, Note, Security Agreement, and Guarantee were executed the same day, as part of the same transaction, so they must be construed together. *See Stokes v. Roberts*, 289 Ark. 319, 711 S.W.2d 757 (1986) (holding that when two instruments are executed contemporaneously by the same parties in the course of the same transaction, they should be considered as one contract for purposes of interpretation in the absence of a contrary intention). We must gather the parties' intent "not from particular words and phrases, but from the entire agreement." *E B Mgmt. Co., LLC v. Houston Specialty Ins. Co.*, 2019 Ark. App. 294, at 8, 577 S.W.3d 408, 413. And "[d]ifferent clauses in a contract must be read together and construed so that all of its parts harmonize," if possible, and "it is error to give effect to one clause over another on the same subject if the two clauses are reconcilable." *Lee v. Bolan*, 2010 Ark. App. 209, at 9, 374 S.W.3d 718, 724. Although parol evidence cannot be used to vary the terms of an agreement, the parol-evidence rule does not prohibit the court from acquainting itself with the circumstances surrounding the making of the contract. *First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992).

As sometimes happens, our appellate courts have given inconsistent statements of the test for ambiguity. The parties took opposite sides on that point below, so our first task is to decide how much interpretive doubt a written instrument must present to make it ambiguous. Salamone argued in the circuit court that "if a contract is subject to uncertainty or susceptible to more than one interpretation," the court must construe the ambiguous contract against the drafter. The case he cited used the phrase "susceptible to more than one *reasonable* construction[.]" *Elcare, Inc. v. Gocio*, 267 Ark. 605, 608, 593 S.W.2d 159, 161

(1980) (emphasis ours). ACC responded that a contract is not ambiguous "unless there is doubt and uncertainty as to its meaning and it is susceptible to two or more *equally reasonable* interpretations[.]" (emphasis ACC's).

We have stated so, using the words "equally reasonable" (without emphasis), many times. *E.g.*, *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 339, 260 S.W.3d 322, 326 (2007). Other tests for ambiguity have been stated. *See Hanners v. Giant Oil Co. of Ark.*, 373 Ark. 418, 422, 284 S.W.3d 468, 472–73 (2008) ("Where there is uncertainty of meaning in a written instrument, an ambiguity is present.").

Which test applies determines how many written instruments can be interpreted as a matter of law by the court, instead of by a finder of fact. And whether competing *equally* reasonable interpretations, not just reasonable ones, are needed to make a writing ambiguous is decisive in this appeal. We interpret these documents three different ways. Each of us agrees that the parties' competing interpretations are reasonable. That is enough under the law to warrant a reversal and a remand on this record. We resist the siren call of going further to state whether the parties' views are equally reasonable.

Not long after this court's creation, ambiguity was first stated to require more than one "equally reasonable construction" in a two-page opinion where this court held that one sentence in an insurance policy "is not ambiguous but is very poor English usage." *Wilson v. Countryside Cas. Co.*, 5 Ark. App. 202, 203, 634 S.W.2d 398, 399 (1982). The holding in the case cited for that proposition, *Union Life Insurance Company v. Rhinehart*, was that "[w]hen all of the terms and conditions of the binding receipt and the application are considered, there is some ambiguity, which must be construed against the insurance

company, as the receipt and application were on the printed forms of the company."[6] The "equally reasonable construction" branch of the ambiguity cases often appears in insurance-coverage disputes, where it might tend to limit the application of the rule that an ambiguity is construed against the insurer. *E.g.*, *Smith v. Prudential Prop. & Cas. Ins. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000).

Nonetheless, ambiguity was said to require only more than one "reasonable construction" earlier, in *Missouri State Life Insurance Co. v. Martin*, 188 Ark. 907, 910, 69 S.W.2d 1081, 1083 (1934), and is still stated that way now by our supreme court. *E.g.*, *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 297, 57 S.W.3d 165, 169 (2001). So that is the test we use here. Finally, our contract analysis is potentially subject to two other context-specific rules the parties offer. Because Salamone's obligation stemmed from a guarantee, he invokes the principle that a guarantor, like a surety, "is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent." *Nat'l Bank of E. Ark. v. Collins*, 236 Ark. 822, 826, 370 S.W.2d 91, 94 (1963).

But he also contends that, though he didn't use the word "novation" in his pleadings, that was, in substance, his defense below. Intent to make a novation "need not be expressly declared, but may be found upon examining the surrounding circumstances." *Barton v.*

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[6]229 Ark. 388, 391, 315 S.W.2d 920, 922 (1958). If any opinion from that case supports the construction that competing interpretations must be equally reasonable, it is Justice George Rose Smith's protest, in dissent, that "[t]he courts have often condemned the practice of creating an ambiguity, where there really is none, in order to resolve it against the insurer; but it is something new for a court merely to announce the rule and on that basis hold the insurer liable, without at least suggesting what language is ambiguous." *Id.* at 396, 315 S.W.2d at 925 (Smith, J., dissenting).

Perryman, 265 Ark. 228, 232, 577 S.W.2d 596, 599 (1979). That analysis is not limited to examining the four corners of the instrument. *See id.* at 233, 577 S.W.2d at 600. But the party claiming novation has the burden to prove "a clear and definite intention on the part of all concerned" that the creditor would "release an old debtor and substitute a new debtor." *McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 220, 713 S.W.2d 469, 473 (1986).

III. *Discussion*

Although both parties assert that the relevant instruments are unambiguous and dispositive as they each see the scene, we conclude that the four corners of these documents leave at least one reasonable interpretation under which Salamone remains liable as a guarantor, and at least one reasonable interpretation under which he was discharged in 2016. Therefore, the circuit court erred when it determined that no ambiguity was presented and entered judgment for Salamone when it did. We reverse and remand for further proceedings.

A. Interpretation One: Salamone is Off the Guarantee Hook

Salamone is among the "Original Guarantors" but not among the "Assuming Guarantors" as defined in the Assumption Agreement. Paragraph 5 provides that "[a]ll references to Original Guarantors in the Loan Documents shall hereinafter refer to Assuming Guarantors the same as if Assuming Guarantors were an original party to all such documents." And in paragraph 2, the Assuming Unlimited Guarantor "hereby assumes and agrees to be bound by the terms, conditions, warranties, covenants, liabilities and obligations of Original Guarantors under the Loan Documents," and the Assuming Limited Guarantor

"assumes and agrees to be bound by the terms, conditions, warranties, covenants, liabilities and obligations of Original Guarantors under the Loan, with liability limited as set forth in her Unconditional Limited Guarantee."

Salamone contends that the "Loan Documents" amended in paragraph 5 include his Guarantee and that Assuming Guarantors are substituted or supplanted, *not just added*, by that paragraph. That being so, the Specks "assume[d]" his "liabilities and obligations" under the Guarantee, just as NOCF "assume[d]" Major Moves' "liabilities and obligations" under the Loan Documents and the Note. His agreement to "reaffirm" the Loan Documents—in an instrument he signed only as an Original Guarantor and member of the Assuming Borrower—cannot "be read as agreement that the Guarantee continued to impose any obligations on Salamone" and "as to any ongoing obligations" Salamone contends he signed solely as a member of NOCF.

The term "Loan Documents" was defined by this paragraph in the 2016 Assumption Agreement:

> WHEREAS, Original Borrower, Assuming Borrower and Assuming Guarantors have agreed, subject to ACC's approval, that Assuming Borrower shall assume all obligations set forth in the documents executed in connection with the Loan, including, without limitation, the Note, the Security Agreement, the Authorization, the Loan Agreement and all documents, certifications and affidavits of Original Borrower (all documents referenced herein and all other documents executed in connection with the Loan are hereinafter jointly referred to as "Loan Documents") on the terms and conditions set forth herein[.]

Salamone's Guarantee was executed the same day as the Note, the Security Agreement, and the Loan Agreement, which are enumerated "Loan Documents," "in connection with the Loan." The Guarantee would also be among "Loan Documents" as defined in the

Guarantee itself, which includes "documents related to the Loan signed by Borrower, Guarantor or any other guarantor[.]" And ACC argued below, and contends on appeal, that the Guarantee was among the Loan Documents.

An "assumption" is defined, in relevant part, as "[t]he act of taking (esp. someone else's debt or other obligation) for or on oneself" or "the agreement to so take." *Assumption*, *Black's Law Dictionary* (11th ed. 2019). And other recitations and provisions could be interpreted, on this limited record, as suggestions that, although Salamone was not expressly released as the Hudsons were, he would be treated more like the Hudsons, who were leaving the arrangement, than the Specks, who were coming on.

In paragraph 7, the Original Borrower and the Original Guarantors, as a class, agree that ACC has acted in good faith with respect to the Original Borrower. The Original Borrowers and Original Guarantor agree to a broad release and waiver of any claims known and unknown that any of them may have against ACC and its agents. The provisions are consistent with an interpretation that dealings between ACC and *all* the Original Guarantors are at an end.

Other references in the Assumption Agreement, which are not explained, might hint at a reason (other than an intent to keep Salamone as a guarantor) to release the Hudsons expressly. The record includes no indication that Salamone, who lives in Ohio, had put up any collateral other than his Guarantee. That does not seem to have been true for the Hudsons. The second and third WHEREAS paragraphs refer to their grant, and ACC's past release, of the "Hudson Mortgage" on the "Hudson Property." Paragraph 4 of the

Assumption Agreement, which releases the Hudsons from liability, also releases "the CD Assignment," apparently referring to this paragraph:

> WHEREAS, payment of the Note is further secured by an Assignment of and Grant of Security Interest in Certificate of Deposit ("CD Assignment") from Original Borrower to ACC dated April 4, 2014, granting a security interest in a certificate of deposit in the face amount of $20,000.00 issued by First Security Bank ("CD")[.]

The Original Borrower, who owned the CD, was also expressly released. These references could reasonably be read to imply that the Hudsons, but not Salamone, needed an express release so third parties could tell—without engaging in some thirty pages of legal analysis—that any liability to ACC had ended.

Finally, as the circuit court observed in its bench ruling, although "[a]ll of the terms and conditions of the Loan Documents" are "adopted and affirmed" by the Assuming Guarantors and "reaffirmed" by Salamone in paragraph 3 *only* the Assuming Guarantors "adopt, reaffirm and restate the guarantor representations, warranties and covenants contained in the Loan Documents" in paragraph 5.

B. Interpretation Two: Salamone is On the Guarantee Hook

The Assumption Agreement, construed with the rest of the instruments, also supports at least two reasonable interpretations under which Salamone could remain liable. First, the terms of the Guarantee support ACC's suggestion at oral argument that it, not the Assumption Agreement, is the governing document. In the Guarantee, Salamone signed away any defense to paying the debt even if ACC decided, for example, to recover from him alone, after releasing all the collateral for nothing. Short of reserving a security interest in Salamone's major organs, the Guarantee could hardly have been less favorable to him. It

unambiguously provides that it will remain in effect until the Note—including "any assumption, renewal, substitution, or replacement of the Note"—is paid in full.

It is undisputed that has not been done. If the Guarantee is not among the "Loan Documents" modified by the Assumption Agreement, then Salamone could remain liable under its terms. Although ACC concedes that the Guarantee is a Loan Document, and we accept that concession for this appeal, there is a reasonable interpretation under which it is not a Loan Document. We turn to that interpretation now.

The Guarantee's omission from the instruments expressly referenced as "Loan Documents" is conspicuous because the Guarantee was executed the same day. And interpretating "Loan Documents" to include the Guarantee yields awkward results elsewhere in the sentence where that definition appears. The sentence recites that the "Assuming Borrower shall assume all obligations set forth in the *documents executed in connection with the Loan*"—the same language as the catchall phrase—"including, without limitation," the same referenced documents (emphasis added). If Salamone's Guarantee is among those documents, that paragraph recites that NOCF has committed to guarantee its own debt, and to pay ACC if NOCF defaulted.

Because Salamone's existing Guarantee gave him no power as guarantor to object to an assumption of the debt, whether he was involved with the new borrower or not, ACC would not have needed to modify the Guarantee; nor would it have needed him to reaffirm it. The Assumption Agreement's references to obligations of the Original Guarantors would not be surplusage because other Loan Documents impose obligations on the guarantors. For example, paragraph 4.02(h) of the 2014 Loan Agreement is a covenant that "Guarantor will

not sell or otherwise transfer any shares of stock of Borrower or any debt owed by Borrower to Guarantor."[7]

More importantly, even if Salamone's Guarantee is modified in the Assumption Agreement, he is not discharged unless the modification that adds the Specks also removes him. But the Assumption Agreement and the Loan Documents, as modified, can reasonably be construed to leave him in. In general, "when rights are assigned and duties delegated, . . . the original obligor remains liable as a surety unless he is discharged by novation." *Barton*, 265 Ark. at 230, 577 S.W.2d at 597–98 (citing Restatement (First) of Contracts § 160 (Am. Law Inst. 1932)).

Just as litigation might have been avoided if the Assumption Agreement had expressly referred to, or defined, Salamone as a "Continuing Guarantor" (for example), perhaps ACC would not have tried to recover on Salamone's Guarantee if the Assumption Agreement had used terms like "substituted" or "replaced" (for example).

For example, paragraph 5 amends the Loan Documents, including the Guarantee, to "refer to [the Specks] the same as if [they] were an original party" to it. But in this view, in the phrase "an original party," the word "an" is most important. Salamone himself was only *an* original party to any document, including his Guarantee, which only he signed. It is nonetheless undisputed that, until the Assumption Agreement was made in 2016, two other guarantors shared Salamone's original liability. And the Guarantee, whose last

[7]Because Salamone was a member of both the Original Borrower and the Assuming Borrower, securing this promise as to the new entity would have been a sensible reason to require his reaffirmance of the Loan Agreement, even if his other guarantor obligations would have survived without it.

paragraph indicates that "by signing below, each individual or entity becomes obligated as Guarantor under [the] Guarantee," provides that "[a]ll individuals signing as Guarantor are jointly and severally liable."

In the 2016 Assumption Agreement, ACC's obligation to modify the Loan Document is subject to conditions precedent that include the execution and delivery of other documents, including "duly authorized resolutions of Original Borrower" and "Assuming Borrower" evidencing their authority to execute the Agreement and related documents. The required documents do not include a new note, which might have been a persuasive indication that ACC had intended a novation. ACC does require execution and delivery "by Assuming Unlimited Guarantor of his Unconditional Guarantee" and "by Assuming Limited Guarantor of her Unconditional Limited Guarantee." Because we infer that each Original Guarantor signed an Unconditional Guarantee like Salamone's,[8] and all were jointly and severally liable as Guarantors, requiring the Specks to sign and deliver Unconditional Guarantees of the same note was consistent with—or at least not inconsistent with—an intent to add them guarantors, as ACC contends, not to replace Salamone.

That is reinforced in paragraph 3, in the sentence, "All of the terms and conditions of the Loan Documents are hereby adopted and affirmed by Assuming Borrower and Assuming Guarantors and reaffirmed by Salamone." Salamone contends that he signed only as a member of NOCF, the Assuming Borrower. But his signature in that capacity more naturally serves as evidence of authority for the Assuming Borrower's agreement in the same

[8]Reasonably so, we think, given that his Guarantee is a standard SBA form, and the Original Guarantors signed the other Loan Documents in identical capacities and are not differentiated in this respect in the Assumption Agreement.

sentence. Salamone must "reaffirm" as an Original Guarantor, in this view, because the Specks are lumped as Assuming Guarantors—the capacity they share—though only *Brian* Speck was a member of NOCF, the capacity Salamone claims.

In this view, reading paragraphs 2 and 5 in isolation might suggest that the Assumption Agreement was a novation or release of the Original Guarantors, including Salamone. But that tail is attached to a dog that Salamone's interpretation would wag: the Assumption Agreement expressly releases the Hudsons after indicating from the opening paragraph that the three Original Guarantors will not be treated identically. The terms "Original Borrower," "Assuming Borrower," and "Assuming Guarantors" are defined as the parties are first listed. Glenn Hudson, Ashley Hudson, and Salamone are simply named. They are defined as "Original Guarantors" six paragraphs later, in a recital that they "unconditionally guaranteed payment of the Note in full and performance of the Loan Documents[.]"

The eleventh WHEREAS paragraph recites that "Original Borrower" and "Glenn Hudson and Amber Hudson"—not "Original Guarantors"—"further seek to be released from all liability and obligations set forth in the Loan Documents" and the release of the CD. In the following paragraph, the parties recite that "ACC has agreed to the assumption of the Loan and all obligations contained in the Loan Documents by Assuming Borrower and the Release of Original Borrower, Glenn Hudson and Amber Hudson from the same" on its terms. The Agreement expressly releases the Hudsons by name, but does not recite that Salamone sought, or that ACC agreed to, his own release.

In this view, these recitals, the later terms of agreement, and the conditions precedent that require the Assuming Borrower and Assuming Guarantors to execute implementing documents before ACC will be bound to accept any of these modifications demonstrate that the parties did not intend to discharge the original parties through the adoption, assumption, or agreement of new parties to their existing obligations, or by modifying the Loan Documents to include them as if they were original parties. If the language in paragraphs 2 and 5 relieved Salamone of liability without express words of discharge or release, it would also have been sufficient to release the other Original Guarantors and the Original Borrower. Yet the parties took care to release them expressly in other paragraphs. Setting aside the guarantors, if modifying references to the Original Borrower in the Loan Documents to "refer to Assuming Borrower the same as if Assuming Borrower was an original party" substituted the Assuming Borrower for the Original Borrower, what "liability for payment of the Note" or "obligations under the Loan Documents" by the Original Borrower would remain to release?

Salamone's counsel addressed this point at oral argument, arguing that the Hudsons received a release and novation, while Salamone received only a novation. Both a release and novation discharge the original obligor. *See Barton*, *supra*. The Assumption Agreement, though not free from all legal doubt, is carefully drafted. Setting aside whether the parties meant to discharge Salamone one time, why would they have discharged the Hudsons twice? Arguably, the notion that ACC meant to gratuitously release (by implication) Salamone from the unconditional guarantee he had been gill-hooked with since 2014, though he was the only Original Guarantor who continued as a member of the Assuming

Borrower, does not seem plausible on this record. Even the Original Borrower was not let go that cleanly.[9]

C. Waiver

On appeal, ACC renews its argument that Salamone was precluded from raising any novation defense by the Guarantee provision in which he "waives defenses based upon any claim that [ACC] modified the Note terms [or] has taken an action allowed under the Note, this Guarantee, or other Loan Documents." The circuit court expressly ruled that the Assumption Agreement "is unambiguous and constitutes a novation" and that, under its unambiguous language, "Salamone is not liable for the payment of the Note." Even if the circuit court's express ruling interpreting the Assumption Agreement conflicts with ACC's interpretation of the waiver provisions in the Guarantee, we do not construe the court's ruling on novation as being a direct ruling on waiver. *See, e.g.*, *TEMCO Constr., LLC v. Gann*, 2013 Ark. 202, 427 S.W.3d 651.

ACC, however, renewed that argument in its posttrial motion, which was deemed denied. We agree with ACC that, under the Guarantee, Salamone could not have claimed discharge solely because the original debt was assumed or the Original Borrower and other Original Guarantors were released. But ACC concedes the Guarantee was among the Loan Documents whose terms Salamone "reaffirmed" in the Assumption Agreement. If so, it

[9]*See* Assumption Agreement ¶ 6(d) (requiring, as a condition precedent to modification, the "Execution and delivery by Original Borrower to ACC of a Standby Creditor's Agreement agreeing, in the event of default on the Note or request for payment concessions by ACC, to standby on receipt of payments under the Promissory Note by Brian Speck and Assuming Borrower to Original Borrower in the original principal sum of $96,517.00[.]").

was also modified by the Assumption Agreement. As we set out above, the Assumption Agreement is ambiguous on how the Guarantee was modified. So this too is an issue for remand.

D. Was Novation Sufficiently Pleaded?

We agree that Salamone adequately pleaded novation, and that the circuit court merely identified novation as the defense he had raised, and ACC had met. But because the circuit court erred in concluding there was no dispute of material fact on Salamone's liability, even under a contract analysis, it also necessarily erred by concluding that the same documents unambiguously discharged Salamone by novation, a concept under which his burden was to prove that it was the "clear and definite intent of all parties" to the Agreement to do so.

Reversed and remanded.

BARRETT and MURPHY, JJ., agree.

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