NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5031-09T2

WACHOVIA BANK,
NATIONAL ASSOCIATION,

Plaintiff-Respondent,

v.

THE CREDIT DOCTOR, INC.,
MICHAEL J. FALCONE, and
PHILIP DOUGLAS NELL,

Defendants,

and

BERNARD GOUSS and the
ESTATE OF HARVEY NELSON,

Defendants-Appellants.

Submitted February 3, 2011 - Decided August 31, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6122-08.

Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C., and Michael Weinstock (Weinstock & Scavo, P.C.), attorneys for appellants (Anthony M. Rainone and Mr. Weinstock, on the brief).

Romano & Romano, attorneys for respondent (Janet B. Romano, on the brief).

PER CURIAM

Defendants Bernard Gouss and the Estate of Harvey Nelson (the Estate) (collectively, the appellants) appeal from: the June 19, 2009 order that denied Gouss's motion for summary judgment; the August 14, 2009 order that denied the Estate's motion for summary judgment; and three May 3, 2010 orders, two again denying appellants' motions for summary judgment, and the third granting summary judgment to plaintiff Wachovia Bank, National Association, in the amount of $184,156.25, together with costs of suit. We affirm in part; reverse in part; and remand for further proceedings consistent with this opinion.

I.

On July 29, 2008, plaintiff filed a complaint seeking to recover monies owed under a promissory note executed by defendant The Credit Doctor, Inc.,[1] as borrower, and from the guarantors of the note: Gouss, the Estate as successor to Harvey

[1] The stock purchase agreement dated May 8, 1998, discussed infra, reflects the corporation's name as "The Credit Doctors, Inc." rather than "The Credit Doctor, Inc." Because other records contained in the appendix refer to the corporation as "The Credit Doctor, Inc.," including the pleadings, and the promissory note and guarantees sued upon, we shall refer to the corporation as "The Credit Doctor, Inc." or "The Credit Doctor."

Nelson (the deceased), and defendants Michael J. Falcone and Philip Douglas Nell.[2]

On April 28, 2009, plaintiff filed a motion for summary judgment against Gouss. Gouss filed a cross-motion for summary judgment against plaintiff. On June 19, 2009, the court entered two orders supported by an oral decision denying both motions. On June 25, 2009, the Estate filed a motion for summary judgment. On August 14, 2009, the trial court entered an order with reasons stated denying the motion.

On October 20, 2009, Gouss filed a second motion for summary judgment against plaintiff. Plaintiff filed a cross-motion for summary judgment against Gouss and the Estate; the Estate filed a cross-motion for summary judgment against plaintiff. On May 3, 2010, the court entered three orders supported by a written decision denying appellants' motions and granting plaintiff's motion.

II.

Prior to 1998, Gouss and Nelson each owned 50% of the outstanding stock of Tru-Homes Sales Co., Inc., a New Jersey corporation d/b/a The Credit Doctors. The business involved

[2] Defendants Falcone and Nell were discharged in bankruptcy. On June 14, 2010, Gouss and the Estate voluntarily dismissed all cross-claims against The Credit Doctor, Falcone, Nell and each other.

cashing public assistance checks for individuals and providing installment loans for home furnishings sales. Nell and Falcone assisted Gouss and Nelson in the operation of the business. In anticipation of purchasing Tru-Home Sales, Nell and Falcone formed The Credit Doctor, Inc., a New Jersey corporation, with Nell serving as President and Falcone as Vice President/Secretary. On May 8, 1998, Gouss and Nelson sold and transferred their outstanding stock in Tru-Home Sales to The Credit Doctor. As part of the purchase price, Gouss and Nelson each took back a promissory note in the amount of $985,000 from The Credit Doctor personally guaranteed by Nell and Falcone.

On September 19, 2000, Nell and Falcone executed a promissory note on behalf of The Credit Doctor as borrower in favor of the First Union National Bank as lender. The note secured a line of credit for the operation of The Credit Doctor's business. The note stated the principal amount was $250,000, "or such sum as may be advanced and outstanding from time to time, with interest on the unpaid principal balance at the rate and on the terms provided in this [p]romissory [n]ote (including all renewals, extensions, or modifications hereof, this '[n]ote')." The note required monthly payments of accrued interest only commencing November 1, 2000, and "continuing on the same day of each month thereafter until fully paid."

Interest accrued on the unpaid balance on the note at the lender's prime rate plus 1%.

The note defined itself as "a demand Note" stating that "all Obligations hereunder shall become immediately due and payable upon demand." As previously stated, the note provided for advances from the lender to The Credit Doctor:

> **LINE OF CREDIT ADVANCES.** Borrower may borrow, repay and reborrow, and Bank may advance and readvance under this Note respectively from time to time until the maturity hereof (each an "Advance" and together the "Advances"), so long as the total principal balance outstanding under this Note at any one time does not exceed the principal amount stated on the face of this Note, subject to the limitations described in any loan agreement to which this Note is subject. Bank's obligation to make Advances under this Note shall terminate if a demand for payment is made under this Note or if a Default (as defined in the other Loan Documents) under any Loan Document occurs or in any event, on the first anniversary hereof unless renewed or extended by Bank in writing upon such terms then satisfactory to Bank. As of the date of each proposed Advance, Borrower shall be deemed to represent that each representation made in the Loan Documents is true as of such date. **30-Day Payout.** During the term of the Note, Borrower agrees to pay down the outstanding balance to a maximum of $100.00 for 30 consecutive days annually.[3]

[3] This thirty-day period is referred to by the parties as the "resting period."

The note further provided that any "waivers, amendments or modifications" to the note or loan documents were invalid "unless in writing and signed by an officer of Bank." Moreover, the lender's waiver of a default would not function as a waiver of any other default or a subsequent default of the same type. In a similar vein, "[n]either the failure nor any delay on the part of Bank in exercising any right, power, or remedy under this Note and other Loan documents" could "operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy." The Credit Doctor and other persons liable under the note waived "presentment, protest, notice of dishonor, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale and all other notices of any kind." The Credit Doctor, and other persons liable under the note, also agreed that the lender could

> extend, modify or renew this Note or make a novation of the loan evidenced by this Note for any period, and grant any releases, compromises or indulgences with respect to any collateral securing this Note, or with respect to any other Borrower or any other person liable under this Note or other Loan Documents, all without notice to or consent of each Borrower or each person who may be liable under this Note or any other Loan Document and without affecting the liability of Borrower or any other person who may be

> liable under this Note or any other Loan Document.

Lastly, the note stated that it inured to the benefit of and was binding, not only upon the parties, but also their "respective heirs, legal representatives, successors and assigns."

Gouss, Nelson, Nell, and Falcone executed personal, guaranties of the note on the same day the note was executed. The guaranties stated that they were provided to the lender by appellants "[t]o induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower" and that appellants "absolutely, irrevocably and unconditionally guarantee[] to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates." The instruments specifically stated that "[t]his Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection," and that "[t]he parties to this Guaranty are jointly and severally obligated hereunder."

The guaranties, entitled "UNCONDITIONAL GUARANTY," included a "CONSENT TO MODIFICATIONS" provision that permitted, among other things, the lender to:

> (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms

> of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; [and] (c) waive or consent to the departure from terms of the Guaranteed Obligations . . . ; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor.

By the terms of the guaranties, the appellants waived various rights and defenses, including:

> (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, . . . ; (e) notice of extensions, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor . . . ; [and] (g) the right to assert against Bank any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank.

Further, the guaranties provided that default would occur upon the happening of certain enumerated events including: "(a) failure of timely payment or performance of the Guaranteed Obligations or a default under any Loan Document . . . and/or; (c) the death of . . . [the] Guarantor." The guaranties stated that default would render the obligations "due immediately and payable without notice," and would permit the lender to "exercise any rights or remedies as provided in this Guaranty and other Loan Documents, or as provided at law or equity." Similar to the note, the guaranties provided that "[n]o

waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank" and that "[n]o waiver by Bank of any Default shall operate as a waiver of any other Default or the same Default on a future occasion." Lastly, the guaranties, like the note, stated that they inured to the benefit of "and [were] binding upon the parties and their respective heirs, legal representatives, successors and assigns."

Nelson died on April 8, 2001. The Union County Surrogate's Office issued letters testamentary on October 16, 2001. The Credit Doctor continued to access the line of credit; and by letter dated October 4, 2001, First Union National Bank renewed The Credit Doctor's line of credit for a year. By letter of November 20, 2002, plaintiff, as successor in interest to First Union National Bank, renewed the note for a third year.[4] By letter of November 7, 2003, plaintiff once again extended the line of credit for another year. On October 26, 2004, plaintiff

[4] On April 1, 2002, plaintiff, Wachovia Bank, National Association of Charlotte, North Carolina, acquired First Union National Bank of Charlotte, North Carolina. See New Jersey Bank Mergers, State of New Jersey, Department of Banking & Insurance (Aug. 9, 2011), http://www.state.nj.us/dobi/bankmerger_alpha.htm. On March 20, 2010, post-judgment, Wells Fargo Bank, National Association of Sioux Falls, South Dakota, acquired Wachovia Bank. Ibid.

"extended" The Credit Doctor's line of credit again, but only for an additional six months.

By letter dated May 11, 2005, plaintiff informed The Credit Doctor that the line of credit would not be renewed, indicating that "further requests for advances will not be honored." Although plaintiff demanded "immediate payment in full" of the outstanding "principal and interest," it offered The Credit Doctor an alternative to repay the principal amount due in fifty-nine monthly payments of $4,166.67, together with accrued interest, commencing July 1, 2005 and ending June 1, 2010. The letter stated that nothing therein would "constitute a novation, and all other terms and conditions of the Note, the loan agreements and the guaranties . . . and any other documents, executed in connection therewith . . . shall remain the same." The letter further provided that the "repayment terms are offered as a renewal, rearrangement and extension" of the note obligations "and not in substitution therefor or extinguishment thereof," and that plaintiff "reserve[d] all of its rights under the Loan Documents, which shall remain in full force and effect without amendment except as stated in th[e] letter until the indebtedness" is fully repaid. Plaintiff sent copies of the letter to Gouss, Nell, and Falcone, but not to the Estate.

In a March 20, 2007 letter accepted by Nell and Falcone on behalf of The Credit Doctor on March 24, 2007, plaintiff stated it was "changing the repayment terms for the . . . note originally dated May 11, 2005[5] in the original amount of $250,000.00." The letter modified the May 11, 2005 repayment terms by changing the due date of the monthly payments to the tenth day of the month beginning April 10, 2007, and ending June 10, 2010. The note's "other terms and conditions," however, continued unchanged. The Credit Doctor made payments thereafter, but failed to make payments between October 17, 2007, and April 2, 2008. However, The Credit Doctor did make a payment on April 3, 2008.

In the interim, by letter dated January 29, 2008, plaintiff demanded repayment by The Credit Doctor and guarantors of the balance due under the note. On May 6, 2008, plaintiff made a separate, formal demand on Gouss as guarantor for full repayment of the loan by May 20, 2008.

On July 29, 2008, plaintiff filed a complaint against The Credit Doctor, Gouss, Nell, Falcone, and the Estate, alleging a default on the note and demanding judgment for the amount of the

[5] Plaintiff contends this was in error and that the note referenced was the September 19, 2000 note.

principal owed, together with interest, late fees, reasonable attorneys' fees, and costs of suit.

On April 28, 2009, plaintiff moved for summary judgment against Gouss. On May 18, 2009, Gouss filed a cross-motion for summary judgment against plaintiff. On June 19, 2009, the trial court denied the motions. The court concluded that fact questions existed regarding whether a novation had occurred in 2005 when the bank offered and accepted a new note permitting The Credit Doctor to repay the balance of the outstanding principal and interest in installments, and whether plaintiff's claim was barred by the statute of limitations.

On June 25, 2009, the Estate moved for summary judgment against plaintiff and for a stay of discovery, contending that Nelson's 2001 death constituted a default under the guaranty, triggering the running of the six-year statute of limitations contained in N.J.S.A. 2A:14-1. On August 14, 2009, the trial court denied summary judgment, reasoning that the correct "Statute of Limitations . . . is N.J.S.A. 12A:3-118[b], not the 6 year statute contained in N.J.S.A. 2A:14-1." Further, the court noted that "[p]ayments continued until 2008," and as such, the loan was "not in default until 2008."

On October 20, 2009, Gouss again moved for summary judgment on the basis that the complaint was time barred. On November

18, 2009, plaintiff filed a cross-motion for summary judgment, relying on a certification indicating, in relevant part, that a payment had been made as recently as April 3, 2008, and thus, the action was timely. On November 21, 2009, the Estate filed a motion for summary judgment, arguing not only that the complaint was untimely filed, but also that plaintiff had failed to present a claim pursuant to N.J.S.A. 3B:22-4. The Estate also contended that each renewal of the note by plaintiff constituted a new note, and any renewals after Nelson's death did not bind the Estate.

On April 26, 2010, the trial court heard oral arguments on the cross-motions. On May 3, 2010, the court entered orders denying appellants' motions and granting plaintiff's motion. The court rejected the Estate's argument that the complaint was untimely filed because it had been filed more than six years after Nelson's death, reasoning that the promissory note was a demand note, and as such, the applicable statute of limitations governing the action was N.J.S.A. 12A:3-118b. The court determined that pursuant to the terms of the note and guaranties, plaintiff had waived any defaults that occurred prior to The Credit Doctor making its last payment under the note in April 2008.

In denying Gouss's motion for summary judgment, the court rejected the argument that plaintiff could not proceed against him under the guaranty because he refused to execute a new guaranty agreement in 2005 when plaintiff changed the terms of repayment on the note. The court reasoned that plaintiff only extended the note in 2005 upon Gouss's request, having been threatened that Gouss would find Nell and Falcone another bank if plaintiff did not agree to extend the line of credit. As to Gouss's alternate argument that the 2005 renewal constituted a novation relieving him from payment under his guaranty, the court rejected the contention, concluding that the terms of the guaranty permitted plaintiff "to execute a novation, and the Guarantor is not excused from performance."

Lastly, the court granted plaintiff's motion for summary judgment, determining that no genuine issues of material fact existed, and that Gouss and the Estate, as successor in interest of Nelson, were liable to plaintiff under the guaranties. The court entered judgment in favor of plaintiff in the amount of $184,156.25, representing $161,174.75,[6] in principal and interest, plus $19,981.50 in attorneys' fees.

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[6] This is an error; plaintiff requested $164,174.75 in principal and interest, which, along with the attorneys' fees, total $184,156.25.

III.

On appeal, appellants argue: 1) the trial court erroneously determined that the timeliness of plaintiff's complaint was controlled by the ten-year limitations period contained in N.J.S.A. 12A:3-118b, rather than the six-year limitations period contained in N.J.S.A. 2A:14-4, or alternatively, in N.J.S.A. 12A:3-118a; 2) plaintiff failed to prove standing to bring the action against them; 3) appellants' obligations were discharged by novation; 4) the Estate's obligation under the guaranty agreement was discharged pursuant to N.J.S.A. 3B:22-4 because plaintiff failed to present its claim to the Estate within nine months of Nelson's death; 5) the late fees sought by plaintiff constitute "an illegal penalty"; and 6) plaintiff failed to present the court with competent evidence of the amounts due.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on

the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler & Verniero, Current N.J. Court Rules, comment 3.2.1 on R. 2:10-2 (2011). We employ the same standard that governs trial courts in reviewing summary judgment orders. Block 268, LLC v. City of Hoboken Rent Leveling & Stabilization Bd., 401 N.J. Super. 563, 567 (App. Div. 2008).

Appellants argue that plaintiff failed to prove standing to bring the action, contending plaintiff failed to present evidence that it was the holder of the note and guaranties, because First Union is listed on the loan documents. Plaintiff counters that procedurally appellants failed to raise this issue in the Law Division, and substantively, it presented sufficient evidence in support of its motion for summary judgment, proving its entitlement under the note and guaranties via a certification from plaintiff's vice president certifying that "Wachovia Bank is successor in interest to First Union National Bank." We determine that appellants sufficiently raised the issue of standing in the Law Division to assert the argument on appeal.

We conclude that plaintiff presented sufficient evidence establishing its right to bring an action under the note and guaranties. As previously stated, plaintiff acquired First Union on April 1, 2002.[7] This fact was presented to the Law Division through the certification of plaintiff's vice president. Plaintiff's acquisition of First Union was not contested by appellants. As the surviving or receiving bank, plaintiff is vested with the right to sue on instruments previously held by the acquired bank without presenting a separate assignment of the instruments. 12 U.S.C.A. § 215a(e); see also N.J.S.A. 17:9A-139; 17:9A-132; 17:9A-148.

IV.

Appellants argue that the trial court erroneously determined that the complaint was timely filed against them under N.J.S.A. 12A:3-118b. Appellants contend that N.J.S.A. 12A:3-118b only applies to actions to enforce a maker's obligation under a demand note, not as here, an action to enforce a guarantor's obligation under a separate guaranty agreement where the instrument requires payment on default, not on demand. Appellants assert that the timeliness of the complaint against them is controlled by the six-year period of

[7] See New Jersey Bank Mergers, State of New Jersey, Department of Banking & Insurance (Aug. 9, 2011), http://www.state.nj.us/dobi/bankmerger_alpha.htm.

limitations contained in N.J.S.A. 2A:14-4 ("Any action founded upon an instrument under seal bought by a merchant or bank . . . shall be commenced within 6 years next after the cause of any such action shall have accrued."). Alternatively, appellants argue that the timeliness of the complaint is controlled by the six-year period of limitations contained in N.J.S.A. 12A:3-118a. Appellants assert that the complaint was barred by the six-year period of limitations because the action filed against them accrued upon the following default events: 1) Nelson's death on April 8, 2001; 2) plaintiff's notice of Nelson's death on September 26, 2001; and 3) The Credit Doctor's failure to reduce the principal balance to $100 by August 19, 2001.

Appellate review of statutory interpretations is de novo. Jennings v. Borough of Highlands, 418 N.J. Super. 405, 418 (App. Div. 2011). Accordingly, "review of a trial judge's decision as to the applicable statute of limitations is plenary." Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat'l Bank, 390 N.J. Super. 199, 203 (App. Div. 2007).

A surety contract is similar in nature to a guaranty contract. Each concerns an agreement whereby a secondary obligor agrees to assume the obligation of a primary obligor to reimburse an obligee from a loss under defined circumstances. "A traditional surety contract involves three parties: an

obligee who is owed a debt or duty; a primary obligor, who is responsible for the payment of the debt or performance of the duty; and a secondary obligor, or surety, who agrees to answer to the primary obligor's debt or duty." Cruz-Mendez v. ISU/Ins. Servs., 156 N.J. 556, 568 (1999). "Under a guaranty contract, the guarantor, in a separate contract with the obligee, promises to answer for the primary obligor's debt on the default of the primary obligor." Ibid. (emphasis added).

When interpreting the provisions of a guaranty agreement, courts "look to the rules governing construction of contracts generally." Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002). In doing so, we are informed by Housatonic Bank & Trust Co. v. Fleming, 234 N.J. Super. 79, 82 (App. Div. 1989):

> The well settled law of the State is that the language of a guaranty agreement must be interpreted against the bank who prepared the form, and at whose insistence the language was included. It is also said that a guarantor is favored in the law, that he is not bound beyond the strict terms of his promise and that his obligation cannot be extended by implication. Any ambiguity in a guaranty agreement should be construed in favor of the guarantor. On the other hand, a guaranty is a contract and must be interpreted according to its clear terms so as to effect the objective expectations of the parties.
>
> [(Internal citations omitted).]

Before addressing whether the trial court correctly determined that the timeliness of plaintiff's cause of action against appellants is governed by N.J.S.A. 12A:3-118b, or whether it is governed by an alternative statute of limitations as argued by appellants, we must answer the threshold inquiry whether the guaranties fall within Chapter 3 of the Uniform Commercial Code (UCC), N.J.S.A. 12A:3-101 to -605. That chapter applies only to negotiable instruments, N.J.S.A. 12A:3-102a, as defined in N.J.S.A. 12A:3-104a. Although there is no dispute that the note is a negotiable instrument under Chapter 3, appellants argue that their guaranties are not, and thus, N.J.S.A. 12A:3-118b is not applicable. We agree.

A promissory note and accompanying guaranty can be governed by different principles of law. For example, a note is controlled by the provisions of Chapter 3 of the UCC concerning negotiable instruments, while a guaranty agreement where the guarantor is not a party to the note, would not be. See Restatement (Third) of Suretyship & Guaranty § 4 comment a, illustration 2 (1996). The reason is because the guaranty agreement is a separate document from the note. Ibid. To the contrary, if the secondary obligor is an indorser or an accommodation party, then their obligations are governed by Chapter 3 of the UCC because they are parties to the note

itself. Ibid.; see N.J.S.A. 12A:3-204 (defining an "indorser"); N.J.S.A. 12A:3-419 (defining an "accommodation party").

Here, because appellants' guaranty agreements are separate and distinct from the promissory note, appellants are not indorsers or accommodation parties to the note. Accordingly, the guaranty agreements are not subject to Chapter 3 of the UCC; thus, the statute of limitations contained in N.J.S.A. 12A:3-118b is not applicable in determining the timeliness of plaintiff's action against appellants. The timeliness of the action against appellants is governed by the six-year limitations period contained in N.J.S.A. 2A:14-4 if the guaranty instruments are under seal, or the six-year limitations period contained in N.J.S.A. 2A:14-1, as argued in the Law Division, if they are not.

Nevertheless, we determine the trial court's error in determining the applicable statute of limitations is harmless because we conclude that plaintiff's cause of action did not accrue until January 29, 2008, when plaintiff demanded payment in full after The Credit Doctor had failed to make payments under the note between October 2007 and January 2008, and the complaint was filed within six years of the accrual date.

Appellants argue that plaintiff's cause of action under the guaranties accrued upon Nelson's death on April 8, 2001, or on

First Union's subsequent notice of Nelson's death on September 26, 2001, or except for $100 of the principal balance, on August 19, 2001, when The Credit Doctor failed to comply with the thirty-day resting period by reducing the principal credit balance to $100. We conclude that appellants waived their rights to raise the statute of limitations defense.

The capacity of parties to alter by contract how statutes of limitations apply to their arrangements is well-recognized. See Simpson v. Hudson Cnty. Nat'l Bank, 141 N.J. Eq. 353, 357 (E. & A. 1948) (holding that the six-year statute of limitations "may be waived by express agreement" voluntarily agreed to by an obligor in the underlying debt instrument with a bank); G & L Assocs., Inc. v. 434 Lincoln Ave Assocs., 318 N.J. Super. 355, 359 (App. Div. 1999) (stating that "[t]he commencing of the running of the statute of limitations may be altered by the terms of a writing"); see also Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co., 145 N.J. 345, 354 (1996) ("Contract provisions limiting the time parties may bring suit have been held to be enforceable, if reasonable."); Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 162-63, 166-67 (App. Div. 2007) (upholding dismissal of complaint deemed untimely using accrual date fixed by contract).

Here, the guaranties provided that appellants "waive" and "release" the defense of "promptness and diligence in the collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon" and "all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank's lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank." Additionally, under the note, "[n]o waiver by Bank of any Default (as defined in the other Loan Documents) shall operate as a waiver of any other Default or the same Default on a future occasion," and "[n]either the failure nor any delay on the part of Bank in exercising any right, power, or remedy under this Note and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy." The guaranties contained a like provision. The waiver provisions in the note and guaranties permitted plaintiff to choose the accrual date for the cause of action. Plaintiff chose The Credit Doctor's payment default as the accrual date.

The waiver provisions neither extended the statute of limitations on earlier defaults nor perpetually waived plaintiff's application as a defense. Rather, those provisions

allow plaintiff to act on subsequent defaults without enforcing prior ones--the statute of limitations on the subsequent defaults being fully intact as a defense to the action. The policies of "preventing the litigation of stale claims" and promoting repose, Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982), are not contravened by permitting enforcement of subsequent defaults under a contract.

V.

Appellants argue next that they were relieved of their obligations under the guaranties because plaintiff modified the terms of the note after appellants executed the guaranties. Appellants contend that the renewals and extensions of the promissory note constituted new notes which they did not guarantee. They assert that the 2005 modifications altered the terms of the original note with the line of credit becoming a term loan with principal payable in monthly installments, together with accrued interest, and the 2007 modification again changed the terms of payment. Appellants further argue that plaintiff's request that Gouss execute a new guaranty agreement in 2005 is evidence plaintiff knew Gouss would not be bound by his original guaranty once plaintiff modified the payment terms of the note. We reject these contentions.

Generally, a guarantor is chargeable only according to the strict terms of the guaranty agreement "and its obligation cannot be extended by implication." Ctr. 48, Ltd., supra, 355 N.J. Super. at 405. "Nevertheless, the terms of a guarant[y] agreement must be read in light of a commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved." Id. at 405-06. Accordingly, not all subsequent modifications to the underlying obligation discharges the guarantor. "[A] modification of the obligation between the principal obligor and the obligee does not discharge the secondary obligor unless 'the modification creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the transaction prior to modification. . . .'" Id. at 410 (quoting Restatement (Third) of Suretyship & Guaranty § 41(b)(i) (1996)).

Nevertheless, even these rules may be changed by contract. See Nat'l Westminster Bank NJ v. Lomker, 277 N.J. Super. 491, 498 (App. Div. 1994) ("The liability of a guarantor is measured by that of the principal, unless the agreement explicitly provides otherwise."), certif. denied, 142 N.J. 454 (1995); Restatement (Third) of Suretyship & Guaranty §§ 6 comments a-b, 48(1) comments a-d (1996). The contract must be clear on the

waiver, and where it is so, such provisions can be enforced. Nat'l Westminster Bank NJ, supra, 277 N.J. Super. at 498-99.

In Mount Holly State Bank v. Mount Holly Washington Hotel, Inc., 220 N.J. Super. 506 (App. Div. 1987), we construed a guaranty agreement that contained provisions similar to those here. The agreement, a "broad" one, covered "any and all" of the debtor's obligations to its creditor "then existing or thereafter created;" provided that the guarantors waived "notice of any of [the obligor's] indebtedness heretofore or hereafter incurred, or contracted or renewed or extended;" and permitted the bank, in its discretion and without affecting the guarantors' liability to "renew, extend, modify, change or waive the time of payment and/or the manner, place or terms of payment of all or any part" of the debt, "or any renewal thereof." Id. at 508 (internal quotations omitted). The guaranty provided it was "continuing, absolute and unconditional" in nature, and a guarantor's revocation would be ineffective as to then-existing liability based on renewal or extension of the debt. Id. at 509.

The guarantors sold their interests in the obligor-business after executing the guaranties. Ibid. Though the bank's president was made aware of the sale, the guarantors did not give notice revoking their guaranties. Ibid. When the obligor

failed to pay the loan, the obligor obtained a "renewal loan" for the balance of the original debt, evidenced by a new note at a different rate of interest and with different terms of payment. Ibid. Pursuant to the bank's "customary procedure," the first note was "presumably . . . marked 'paid' and returned to the borrower," and the guarantors at issue did not sign new guaranties although the person remaining in the business did. Ibid. When the obligor defaulted on the loan, the bank sued the obligor-business and guarantors. Id. at 509-10. The trial court entered judgment in favor of the guarantors, finding that the bank's acceptance "of a new note with changed terms (interest rate and manner of payment) resulted in a novation," and while neither the "mere extension of time" nor increased interest rate discharged the guarantors, the return of the old note "created a new note" and discharged the original guarantors. Id. at 510.

In reversing the trial court's judgment, we held that the return of the original note was "irrelevant," as the parties clearly intended "to extend the note for an additional year and to memorialize that extension and the balance yet remaining due by the new note." Ibid. We stated that "[w]hether characterized as an extension or novation, the broad powers given the [b]ank by the guaranty permitted it to handle the

technical details in whatever manner it wished." Id. at 511. We determined that the guaranty was to be read "in light of commercial reality," that is, in a way that comports with "the reasonable expectations of persons in the business community involved in transactions of this type." Ibid. Because the parties intended to renew or extend the loan and the guaranty permitted renewal or extension without discharging the guarantors, we concluded the guarantors remained liable for the past due indebtedness. Ibid.

Moreover, we determined that even if the new note had satisfied the old loan and discharged the guarantors' liability concerning the old indebtedness, the guarantors "would still be liable for the new indebtedness" because the guaranties covered loans made after their execution by virtue of a "hereafter arising" clause, and the guarantors could not revoke their liability as to advances made prior to giving notice of revocation of their guaranties to the bank. Ibid; accord Housatonic Bank & Trust Co., supra, 234 N.J. Super. at 84.

Here, the guaranty agreements contained several provisions relevant to waiver of any defenses concerning subsequent modifications to the note or novations. At its beginning, the agreement read in pertinent part:

> To induce Bank to make, extend or renew loans, advances, credit, or other financial

> accommodations to or for the benefit of Borrower, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates . . . however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof.
>
> [(Emphasis added).]

The agreements also stated it "is a continuing and unconditional guaranty of payment and performance and not of collection." (Ibid.) Additionally, they contained a "CONSENT TO MODIFICATIONS" provision that read in pertinent part:

> Guarantor consents and agrees that Bank may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; . . . all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor.

Because the guaranty agreements contained broad waivers of modification of the payment terms and novations, appellants remain liable under their guaranties for the indebtedness notwithstanding plaintiff's 2005 and 2007 modifications to the terms of the original note.

VI.

Appellants argue next that the Estate is not liable because plaintiff failed to present a claim under N.J.S.A. 3B:22-4, and plaintiff cannot circumvent the statute by "waiving" Nelson's death as a default event. Plaintiff counters that appellants failed to raise the issue in the Law Division; plaintiff was not subject to N.J.S.A. 3B:22-4 because it was not a creditor as contemplated by the statute; the Estate's executor had acknowledged the obligation after Nelson's death; and even if the executor is discharged from liability pursuant to the statute, the Estate's beneficiaries can be compelled to refund distributions to the Estate to satisfy the obligation.

We reject plaintiff's contention that appellants failed to argue the issue in the Law Division, noting that the Estate had raised the defense in the trial court via the executor's affidavit and the Estate's counsel had argued the issue in opposition to plaintiff's motion for summary judgment.

Accordingly, although the trial court did not address the issue in its written opinion, we will consider the argument.

The purpose of a rule limiting creditors "is to bar belated creditors from participating in the orderly settlement of the estate"; it is "not to furnish a vehicle by which executors, administrators, legatees or devisees may refuse to apply the assets of the estate to the payment of debts." Robinson v. Hodge, 4 N.J. 397, 405 (1950). "The object of [N.J.S.A. 3B:22-4] is to enable the representative to determine within a limited time whether the estate is to be settled as a solvent or insolvent estate, and thus to settle the estate with dispatch." 7 New Jersey Practice, Wills and Administration § 1320, at 499 (Alfred C. Clapp & Dorothy G. Black) (rev. 3d ed. 1984). The failure of a claimant to timely present his or her claim frees the "personal representative" from "liabil[ity] to the creditor with respect to any assets which the personal representative may have delivered or paid in satisfaction of any lawful claims, devises or distributive shares, before the presentation of the claim." N.J.S.A. 3B:22-4.[8]

Before we address appellants' argument, we must clarify the statutory language controlling the issue. Although appellants

[8] N.J.S.A. 3B:22-4 was substantially amended in 2004, after Nelson's death. L. 2004, c. 132, § 84. Prior to that enactment, N.J.S.A. 3B:22-9 contained a similar provision.

rely on the current provisions contained in N.J.S.A. 3B:22-4, requiring creditors to present claims to an estate's personal representative within nine months of the decedent's death, the statute in effect at the time of Nelson's death differed. See L. 2004, c. 132, § 84. In 2001, the statute provided that:

> At any time after granting letters testamentary or of administration, the Superior Court, or surrogate, as the case may be, may, whether the estate be solvent or not, order the personal representative to give public notice to creditors of the decedent to present to him their claims in writing and under oath, specifying the amount claimed and the particulars of the claim, within 6 months from the date of the order.
>
> [N.J.S.A. 3B:22-4 (amended 2004) (emphasis added).]

The 2001 version of the statute controls the issue before us. See N.J.S.A. 3B:1-8.1 (providing 2004 revisions "shall apply to any decedent dying on or after February 27, 2005").

The term "claims" is defined in Title 3B, Administration of Estates - Decedents and Others, broadly:

> "Claims" include liabilities whether arising in contract, or in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent, including funeral expenses and expenses of administration, but does not include estate or inheritance taxes, demands or disputes regarding title to specific assets alleged to be included in the estate.
>
> [N.J.S.A. 3B:1-1.]

See Pitale v. Leroy Holding Co., 65 N.J. Super. 361, 366 (Ch. Div. 1961) (internal quotations omitted) (stating that under the predecessor statute, N.J.S.A. 3A:24-3, the term claims had been construed to encompass "all claims enforceable by suit terminating in a money judgment"). The term "creditor" has also been defined broadly. Ibid. ("The term 'creditor' as used in the statute has been liberally construed to include one entitled to prosecute a suit upon a tort of the deceased.").

Plaintiff's claim for damages under Nelson's guaranty agreement falls within purview of the statute. Although plaintiff argues that it did not possess a "claim" upon Nelson's death because The Credit Doctor was then making payments, the guaranty agreement defined Nelson's death as a default event, which permitted plaintiff to seek the remedies it reserved. Simply because it did not seek to enforce its rights at that time does not mean it could not have done so. See N.J.S.A. 3B:22-5 (providing that "[a] liquidated claim, not due and payable, but payable in the future, may be presented for allowance, a reasonable rebate of interest being made when interest is not accruing thereon").

Because we determine N.J.S.A. 3B:22-4 applies, plaintiff's claim was subject to the then six-month presentment window. Nonetheless, because the record concerning the applicability of

the statute was not fully developed in the trial court, we are unable to discern whether plaintiff was required to present notice of its claim pursuant to N.J.S.A. 3B:22-4, and if so, the effect of failure to do so.

The record contains a copy of an "executor short certificate," indicating that the Union County Surrogate issued Letters Testamentary on October 16, 2001. And according to the deposition testimony of Robert Nelson, one of the Estate's four co-executors, the Estate never received a notice of a claim from plaintiff, and the Estate's assets were fully distributed several years after Nelson's death. However, the record does not contain evidence of an order limiting creditors or proof of publication of notice thereof.

Moreover, the record contains conflicting evidence regarding whether Nelson's obligation under the guaranty agreement was to continue after his death. For example, there is a bank record with entries dated September 26, and October 1, 2001, indicating that "Harvey Nelson is deceased" and that the Estate "acknowledges [Nelson's] guaranty of this debt and "acknowledges continuation of Mr. Nelson's guaranty." In contrast, another record dated November 20, 2002 contains a handwritten notation to the effect that Nelson was deceased and "[r]emoved as [guarantor]." Further, although the Estate was

not copied on plaintiff's May 11, 2005 demand letter, it did receive plaintiff's January 29, 2008 demand letter. Additionally, David Lewis, plaintiff's Vice President who reviewed The Credit Doctor's account in October 2004, repeatedly made reference in his deposition testimony to three guarantors--never mentioning the Estate.

What is more, a creditor's claim is not totally barred if not timely submitted; the personal representative's liability may be discharged, but the estate may remain liable. See Pitale, supra, 65 N.J. Super. at 365-67. For example, if a creditor fails to present a timely claim under N.J.S.A. 3B:22-4, and assets remain after payment of the timely claims, the creditor can present the claim for payment before the remaining assets are distributed. N.J.S.A. 3B:22-10. Additionally, an estate's distributees may be ordered to pay the debt. See N.J.S.A. 3B:22-16 (providing that a claimant who fails to timely present a claim pursuant to N.J.S.A. 3B:22-4 "may bring an action in his own name without leave of court on a refunding bond given by a devisee or heir and recover the proportion of his claim which ought to be paid out of the devise or distributive share for which the bond was given"); N.J.S.A. 3B:22-40 (providing that a creditor may bring an action "against the heirs and devisees of his deceased debtor dying seized or

possessed of any real or personal property[,]" and "[t]he heirs and devisees shall be liable to pay the debt by reason of the descent or devise of the real or personal property to them in the manner provided in this article").

Because of the absence of evidence of an order limiting creditors and the proof of publication of notice thereof, and of conflicting documents contained in the record, we conclude that it is necessary to conduct further proceedings to flesh out whether the Estate obtained an order limiting creditors and duly published notice thereof triggering the applicability of N.J.S.A. 3B:22-4. See Petrie v. Voorhees' Executor, 18 N.J. Eq. 285, 291 (Ch. 1867) (providing that publication of the notice limiting creditors "is essential" to bar a creditor's late claim). Additionally, it is necessary to determine whether the Estate's executors waived presentation and verification of the claim recognizing that The Credit Doctor was maintaining the line of credit under the promissory note after Nelson's death. See Clapp & Black, supra, at 500 ("The representative may waive a proper presentation verification by recognizing or paying the claim."). Accordingly, we reverse that part of the May 3, 2010 order entering judgment against the Estate only, and remand.

On remand, the court should conduct a case management conference to determine the nature of the proceedings required,

not only to answer the aforestated questions and any other issues it deems appropriate, but also to decide whether judgment can be entered against the Estate without plaintiff having joined the deceased's heirs and devisees, as parties possessing interests in the action if the executors are entitled to the protection of N.J.S.A. 3B:22-4 and plaintiff intends to pursue its claim against those other parties. We take no position as to the appropriateness of joining additional parties to the action at this late hour.

VII.

We address appellants' remaining arguments. Appellants argue that the trial court erroneously awarded plaintiff late fee charges under the note and guaranties. Appellants contend that the late fee charges constituted illegal contractual penalties and, thus, were not enforceable. Appellants assert that plaintiff failed to present competent evidence to support its claim of $136,754.82 for principal, $19,123.33 for interest, and contractual attorneys' fees of $19,981.50. None of these arguments were raised in the Law Division. Accordingly, we decline to consider them because to do so would require us to deviate from a sound rule of appellate practice. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973) (providing that generally, unless the issue goes to the jurisdiction of the

trial court or concerns a matter of substantial public interest, appellate courts will not consider it on appeal in the first instance). The rule insures that all parties have an opportunity to present relevant evidence and that the trial court has the opportunity to address the issue in the first instance.

The certification of plaintiff's vice president specifically set forth the requested amounts of principal, interest, and late fee charges, and the basis for the claims. Plaintiff's claim for attorney's fees was supported by an affidavit of its counsel. Nonetheless, appellants did not challenge the claim or the amounts requested either in their opposing motion papers or at time of oral argument. Therefore, we will not entertain the arguments on appeal.

We affirm the judgment as to defendant Gouss; we reverse and vacate the judgment as to defendant Estate of Harvey Nelson; and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION