SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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GULERIA ENTERPRISES, INC.,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff,	:	DOCKET NO.: A-000499-24
v.	:	Civil Action
MULTANI 1510 RT GAS L.L.C. OCEANFIRST BANK, N.A.; JL DAVIS ENTERPRISES, INC.; WMD PROPERTIES GRP. I. INC., BLUESTONE FUNDING I, L.L.C., STATE OF NEW JERSEY; UNITED STATES OF AMERICA; JOHN DOES 1-100, the said names of John Doe being fictitious,	:	On Appeal From: Superior Court of New Jersey Chancery Division, General Equity Part Camden County Docket No.: F-013354-23

BRIEF OF PLAINTIFF/APPELLANT

ON THE BRIEF:
JOSEPH M. PINTO, ESQUIRE

DATE: January 9, 2025

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Preliminary Statement

Plaintiff Guleria Enterprises, Inc. (Guleria) sold its real property and its accompanying gasoline service station business located in Cherry Hill, Camden County, New Jersey to Defendant JL Davis Enterprises, Inc. (Davis) on 08/01/2019.

Davis executed several documents in connection with the sale including without limitation a note, purchase money mortgage, and a Petroleum Marketing Practice Act (PMPA) Franchise Supply Agreement all in favor of Plaintiff, who was also a gasoline supply dealer, obligating Davis to purchase Citgo gasoline and products from Plaintiff for a certain period of time and in a certain minimum amount.

The mortgage secured Davis' obligations under the note and the Franchise Supply Agreement.

Davis sold the property and business to Defendant WMD Properties Grp. I L.L.C., (WMD) with Plaintiff's consent on 10/01/2021, and WMD assumed the obligations of Davis under the note, mortgage and Franchise Supply Agreement with slight modifications to the latter, consented to by all parties, to account for that part of the 15 year term during which Davis operated the business.

Without Plaintiff's knowledge, WMD recorded a forged discharge of

Plaintiff's mortgage on 06/13/2022, first borrowing funds from Defendant Bluestone Funding I, (Bluestone), L.L.C. and then later selling the property and business to Defendant Multani 1510 Rt. Gas, L.L.C. (Multani). Multani executed a note and purchase money mortgage in favor of Defendant Oceanfirst Bank, N.A., (Oceanfirst) borrowing funds to payoff the Bluestone mortgage and the balance of the purchase price to WMD.

Multani did not notify or purchase Citgo branded products from Plaintiff and when Plaintiff learned the property was sold to and occupied by Multani, he investigated and discovered the above transactions and the forged discharge of mortgage.

As WMD was no longer purchasing Citgo products as required under the Franchise Supply Agreement, sold the property and business without Plaintiff's consent and forged the discharge of mortgage, it was in breach of its obligations under the assumed Davis Note, Mortgage and Franchise Supply Agreement as modified. Plaintiff then filed this foreclosure action which the Trial Judge erroneously dismissed, generating this appeal.

Procedural History

The Plaintiff Guleria Enterprises, Inc., (Plaintiff or Guleria) filed a commercial mortgage foreclosure complaint (Pa 11)seeking to foreclose a

purchase money mortgage dated 08/01/2019 in which Defendant JL Davis Enterprises (Davis) was the mortgagor, the subject property being operated as a commercial gasoline and service station located at 1510 Rt. 38 W. Cherry Hill, Camden County, New Jersey. Davis executed a note and a PMPA Franchise Gasoline Supply Agreement both secured by the mortgage which were later assumed as modified by Defendant WMD Properties Grp. I, L.L.C. (WMD) on 10/01/2021 upon purchase of the property and business by it from Davis.

While all Defendants were served, the only Defendants to file an answer were Oceanfirst Bank, NA (Oceanfirst) which included a counterclaim and cross claims, on 01/24/2024 (Pa 23) and 02/23/2024 (Pa 37) and Davis, which filed a non-contesting answer on 02/02/2024 (Pa 32).

Davis was included in the foreclosure action pursuant to N.J.S.A. 2A:50-22e., requiring Plaintiff to join in the action any and all persons alleged to be liable on the note, in the event of a future deficiency action, the Court being required to determine the rights and liabilities between the parties, N.J.S.A. 2A:50-25. In its answer, Davis admitted it executed the Deed to WMD on 10/01/2021 and acknowledged its contents (Pa 13, Par. 7-8; Pa 33, Par. 7-8) but denied liability under the note and mortgage (Pa 34, Par. 17).

Plaintiff filed an answer to the Oceanfirst counterclaim on 01/25/2024 (Pa

30) and Davis filed an answer to Oceanfirst's cross claim on 02/27/2024 (Pa 44). After discovery, all participating parties filed motions for summary judgment - Plaintiff on 08/20/2024 (Pa 46), Oceanfirst on 08/20/2024 (Pa 308) and Davis on 08/19/2024 (Pa 318).

Requests for default were filed by Plaintiff against all other Defendants.

On 09/27/ 2024, after the conclusion of oral argument (1T - 09/27/2024) the Trial Court granted the motions of Oceanfirst (Pa 6) and Davis (Pa 7), dismissing Plaintiff's complaint with prejudice. Plaintiff's motion was denied (Pa 8). An order dismissing Plaintiff's complaint with prejudice as to all other Defendants was entered on 10/23/2024 (Pa 10).

The Plaintiff filed its notice of appeal on 10/22/2024, marked deficient (Pa 328) and an amended notice of appeal on 10/29/2024 (Pa 1).

Statement of Facts

On 08/01/2019, Plaintiff sold to Defendant JL Davis Enterprises, Inc., (Davis) real property commonly known as 1510 Route 38 West, Cherry Hill, New Jersey formerly known as Block 178, Lots 3 and 4 now known as Block 178.01, Lot 3 and the gasoline service station business located thereon, for $850,000.00. (Pa 58, Par. 1; Pa 71)

Davis executed a $650,000.00 note (Pa 76) and purchase money mortgage

(Pa 80) which secured both the balance of the purchase price and the obligations set forth in the PMPA (Petroleum Marketing Practicing Act) Franchise Supply Agreement (Supply Agreement) (Pa 86) and the documents referred to therein. (Pa 59, Par. 2), all executed on the date of the closing.

The recorded mortgage (Pa 80) secured the principal sum due on the note of $650,000.00 plus all obligations of Davis under the said supply agreement (Pa 86) which had a term of fifteen (15) years, terminating July 1, 2034. (Pa 59, Par. 3, Pa 79).

The Supply Agreement required Davis to purchase from Plaintiff, (who besides being the property owner was an authorized distributor of Citgo branded products), not less than the minimum quantities of product set forth for the period from 08/01/2019 to 07/31/2034. (Pa 59, Par. 4; Pa 92-93, Par. 1.5).

On 09/29/2021, Defendant WMD Properties Group I Inc., (WMD) executed an agreement with Davis to purchase the subject property and the business for the purpose of continued operation of the gas station, car wash and convenience store for the remainder of Davis' term. The contract purchase price was $450,000.00 (the balance still owed on the purchase price by Davis to Guleria) of which $50,000.00 would be paid to the Plaintiff at closing to reduce that balance. WMD assumed Davis' existing note, mortgage and Franchise Supply Agreement and

signed the same Franchise Supply Agreement with modifications to account for the time Davis operated the business. Guleria consented to the transfer. (Pa 59, Par. 5; Pa 128a).

At closing on 10/01/2021, WMD specifically assumed the Davis PMPA Franchise Supply Agreement, Note, Mortgage and Assignment of Leases, Rents and the Security Agreement executed by Davis on 08/01/2019. The assumed obligations were to remain in full force and effect except as modified by the note and any other documents signed by WMD on 10/01/2021. (Pa 60, Par. 6; Pa 201; Pa 195).

WMD also executed a note in the sum of $400,000.00 (Pa 137) to Plaintiff and also promised to pay all monies due under the Franchise Supply Agreement as modified. (Pa 140).

A deed dated 10/01/2021 was executed by Davis to WMD which was recorded. (Pa 60, Par. 7; Pa 194).

The Deed specifically stated that WMD was accepting the conveyance subject to the Note and Mortgage of 08/01/2019 ... plus the other obligations set forth therein of which there is currently a balance of $450,000.00 plus the other obligations set forth therein and the Note accompanying that Mortgage and Assignment of Leases ... and all the documents executed by Davis on 08/01/2019

at the time of purchase except as modified by the documents signed by WMD in conjunction with this conveyance on 10/01/2021 with the Mortgagee and dealer. (Pa 60, Par. 8; Pa 195).

An assumption of the Davis Mortgage and other documents was executed by WMD on 10/01/2021. (Pa 60, Par 9; Pa 201).

Without Plaintiff's knowledge or consent, WMD executed a Mortgage and Security Agreement dated 03/04/2022 on the property to Defendant, Bluestone Funding L.L.C. in the sum of $750,000.00 which was recorded on 04/22/2022. (Pa 61, Par. 11; Pa 204).

Previously, a forged discharge of the Davis mortgage was executed by an imposter posing as Plaintiff on 02/16/2022 but not recorded until 06/13/2022. (Pa 220). The document was submitted to the Camden County Clerk by Founder's Title Agency, L.L.C., Marlton, New Jersey. The discharge stated that the aforesaid Davis Mortgage dated 08/01/2019, recorded 09/04/2019 in Mortgage Book 11202, Page 1049 was satisfied and could be discharged of record. A signature appears thereon which is not the signature of the Plaintiff's President, Manjit Guleria or any other agent or representative of the Plaintiff and was falsely notarized by a New Jersey notary, Rasheeda Ali, a person unknown to the Plaintiff. (Pa 61, Par. 12).

Thereafter, WMD again without Plaintiff's knowledge or consent sold the subject premises and business to Defendant, Multani 1510 RT Gas L.L.C. (Multani) for $1,000,000.00 by deed dated 10/19/2023, recorded 12/06/2023. (Pa 61, Par. 13; Pa 224).

Simultaneously, a mortgage on property for $650,000.00 was given by Multani to Defendant, Ocean First Bank, N.A., (Pa 230) dated 10/19/2023, recorded 12/06/2023. (Pa 62, Par. 14).

Plaintiff finally discovered these transactions when, less than a week later, its President, Manjit Guleria drove past the subject premises on 10/23/2023, found Multani had taken possession of the property and was selling unbranded gas (non-Citgo gas) in violation of the Franchise Supply Agreement. (Pa 62, Par. 15).

The Davis and WMD notes state a default occurs if the obligor fails to keep any promise made in the note, mortgage, the assumed mortgage or the Franchise Supply Agreement. Upon default all amounts due and owing were immediately payable. (Pa 62, Par. 18; Pa 77, Pa 138).

The assumed Davis mortgage requires the same (Pa 62, Par. 19; Pa 82a and 201a).

The Franchise Supply Agreements similarly provide that:

A. Guleria must consent in writing to, after receiving written

notice of, any transfer of all or substantially all of the assets of the business or any interest in the business and any such transfer without such is null and void. (Pa 112, Par. 12.1(c); Pa 166, Par. 12.1(c)).

B. The transferee must assume all obligations of the transferor or under the transferor's supply agreement and all supplemental and related agreements. (Pa 114, Par. 12.3(b); Pa 167, Par. 12.3(b)).

C. No transfer can take place without prior notice to Plaintiff who has a right of first refusal by meeting any offer which is acceptable to the franchisee. (Pa 116, Par. 13.1(a); Pa 170, Par. 13.1(a)).

D. During the term of the Davis Supply Agreement, 08/01/2019 to 07/21/2034 (Pa 90; Pa 96) Davis was required to purchase a monthly volume of 60,000 gallons of gasoline, a yearly volume of 720,000 gallons and a total contractual commitment of 10.8 million gallons (Pa 92, Par. 1.5).

At the time of sale to WMD, Davis had not purchased as much gasoline as had been required under its supply agreement and WMD asked for some concessions in the amount of gasoline it was required to purchase. The parties agreed to reduce the number of gallons to be purchased by WMD to 9.24 million over the balance of the term and increase the per gallon liquidated damages from four to five cents per gallon. (Pa 278 - Dep. Pg 37, Line 13 to Pg.

38, Line 9)

The WMD closing took place on 10/01/2021, but the term of the Franchise Supply Agreement continued until 07/31/2034, the same termination date as Davis. The monthly volume amount remained at 60,000 gallons but the WMD purchase obligation was reduced to 9,240,000 gallons, (Pa 146, Par. 1.5) along with the slight modification of the liquidated damage clause. (Pa 118, Par. 14.3; Pa 172, Par. 14.3).

E. The franchisee shall bear all removal site restoration and transportation costs relating to the removal of Guleria's signs, property and equipment. (Pa 118-119, Par. 15.1(e); Pa 172-173, Par. 15.1(e); Pa 62, Par. 20).

Guleria could terminate the Supply Agreement for any default by the franchisee under the agreement or any accompanying or supplemental agreement. (Pa 117-118, Par. 14.1(d), Pa 171-172, Par. 14.1(d)).

As additional security for the payments due under the documents executed by the Defendants, security agreements were executed by Davis (Pa 240) and WMD (Pa 242) and financing statements were filed with the State Division of Revenue (WMD) (Pa 246) on 10/05/2021 and (Davis) (Pa 244) on 08/15/2019. (Pa 63, Par. 22).

The WMD note (Pa 137) required payment of $400,000.00 (the balance of

the Davis purchase price after the $50,000.00 cash payment) at an interest rate of 7% with interest only payments of $2,333.00 due per month. On January 1, 2022, a principal payment was due of $200,000.00. Interest only payments of $1,167.00 per month were then due with another principal payment of $200,000.00 due on February 1, 2022. (Pa 64, Par. 23). A final payment on the principal was made by WMD on 10/19/23 in the sum of $175,000.00. (Pa 284, Dep. Pg. 61-12 to 61-18; Pa 68).

The note also required the WMD to pay all obligations under the Supply Agreement and the obligations assumed. (Pa 137, Page 1). (Pa 64, Par. 24).

Default occurred if any payments required under the note were not made within five (5) days of the due date or if borrower failed to keep any promise made under the note, the assumed obligations or in the Supply Agreement and accompanying documents. Upon default, all payments became immediately due and payable in full. (Pa137, Page 1). (Pa 64, Par. 25).

The note and mortgage would not be deemed satisfied until any damages to the Plaintiff caused by the breach of any of these documents were paid in full. All the documents were incorporated into the note by reference. (Pa 138, Page 2). (Pa 69, Par. 26).

The mortgage incorporated and made a part thereof, all the terms of the note

and the Franchise Supply Agreement. The mortgage would continue to be a first lien on the subject property until the borrower fulfilled all promises made in the mortgage note and Franchise Supply Agreement. (Pa 80, Pa 201; Pa 64, Par. 27).

The Franchise Supply Agreements provided the franchisee was responsible for any act or omission causing Plaintiff or its affiliates to be liable or be found to have assumed liability, for any activity of the franchisee at the marketing premises or relating to the businesses including any claim or judgment arising from any franchisee act or omission. (Pa 120, Par. 17.3(c); Pa 174, Par. 17.3(c); Pa 65, Par. 28).

Under paragraph 18.2, the franchisee is also responsible to defend and indemnify Plaintiff and its affiliates ... from all losses incurred in connection with any action, suit, proceeding, claim, demand ... that arises out of or is based upon ..., (a) the violation ... by franchisee or any operator of any Co-Brand or Non-Citgo offering, of any laws ..., (b) the franchisee's breach of any contract ..., (c) the franchisee's breach or violation of any warranty, representation or obligation of the agreement or any related or supplemental agreement ..., (e) acts, errors, or omissions of the franchisee or any related party ..., (I) franchisee operation of the business ..., (Pa 120; Pa 174; Pa 65, Par. 29).

All losses incurred under paragraph 18.2 are chargeable to and payable by

the franchisee to Plaintiff. (Pa 120, Par. 18.5; Pa 174, Par. 18.5; Pa 65, Par. 30).

Under its agreement with Citgo, Plaintiff, in the event the subject property was not utilized to sell Citgo Products (known as debranding), was responsible to reimburse Citgo the costs incurred in debranding the subject property including the cost for branding materials supplied by Citgo and any installation costs incurred by Citgo. The reimbursement will be the Citgo cost after depreciation. (Pa 249, Par. 9; Pa 65, Par. 31).

At the time of Plaintiff's motion for summary judgment there was due under the Franchise Supply Agreement and the Mortgage the sum of $408,338.00 as set forth in Plaintiff's Certification, Schedule "A", (Pa 68-69) no part of which had been paid, (Pa 65, Par. 32). These were liquidated damages due to the breach of the Franchise Supply Agreements by Davis and WMD and the debranding costs due Citgo.

I. Standard Review

Review of an order granting Summary Judgment is de novo Green v. Monmouth Univ., 237 NJ 516, 529 (2019). An appellate court applies the same standard that governs the Trial Court's consideration, deciding first whether there was a genuine issue of material fact and if none exists, whether the Trial Court's ruling on the law was correct. Henry v. NJ Dept. of Human Services, 204 NJ 320,

330 (2010).

To determine whether a genuine issue of material fact exists, the court considers whether the competent evidence presented, when viewed in the light most favorable to the non-moving party is sufficient to permit a rational fact finder to resolve the disputed factual issue in favor of the non-moving party. Brill v. Guardian Life, 142 NJ 520, 510 (1995).

Cross motions for summary judgment do not preclude existence of fact issues. Great Atl. v. Checchio, 335 NJ Super, 495, 498 (App. Div. 2000).

II. State Contract Law and Mortgage Law are Applicable to the Issues in this Case (Not At Issue Below - Explanation of How Federal Law Applies to PMPA Franchise Agreements)

The Petroleum Marketing Practices Act, 15 USCS 2801 et seq. (PMPA or Act) enacted in 1978, was a congressional response to widespread concern over increasing numbers of allegedly unfair franchise termination and non-renewals in the petroleum industry, establishing minimum federal standards governing the termination and non-renewal of petroleum franchises, Mac's Shell Services Inc. v. Shell Oil Products Co., L.L.C., 559 US 175, 178 (2010). Succinctly, the Act defines a franchise as any contract that authorizes a franchisee to use the franchisor's trademark as well an any associated agreement providing for the supply of motor fuel or authorizing the franchisee to occupy a service station

owned by the franchisor Id. 178-179; 15 USCS 2801 (1); Federal Register Vol. 61, No. 123, Pg. 327.

The pre-emptive scope of the Act is limited. It only pre-empts those state or local laws that govern the termination of petroleum franchises or the non-renewal of petroleum franchise relationships. Outside of those areas franchisors and franchisees can still rely on state law remedies for breaches of the agreement. Id. 187-188; 15 U.S.C. 2506. The Act is narrow in scope. Id. at 194.

This action is governed by State contract and mortgage law since it does not deal with termination or non-renewal of the franchise, 15 U.S.C. 2805(f)(2) and 2806(a)(1). See for example, Jersey City Redevelopment Agency v. Exxon Corp., 208 NJ Super 53, 58-59 (App. Div. 1986); State by Comm. v. Hess Realty, 115 NJ 229, 230-231 (1989).

III. The Trial Judge Erred in Finding that the WMD Franchise Agreement was a New Agreement Not Covered by the Assumed Mortgage (Raised in Trial Judge's Opinion Below (1T 28-16 to 29-7))

Plaintiff moved for a summary judgment of foreclosure (a) setting the amount due as of the date of the default, 10/19/2023 at $408,338.00 plus interest, costs, counsel fees, (2) ordering a sale of the premises and barring the equity of redemption (Pa 48-49), (3) claiming the forged discharge of mortgage was a nullity under the law and (4) the liquidated damages were reasonable.

Oceanfirst's motion for summary judgment sought dismissal of Plaintiff's complaint and claiming the mortgage contained an unenforceable dragnet clause (1) which did not specifically set forth the obligation to which it referred; (2) because the franchise agreement did not reference the mortgage; (3) because a mortgage cannot secure an unspecified amount; (4) because Oceanfirst was a bond fide mortgagee with no notice that the discharge was forged; and (5) the breach of the franchise agreement occurred after it accepted its mortgage interest. (Oceanfirst's Brief below).

At oral argument, the Bank contended ,,, "as a matter of law, the Plaintiff admitted he got paid for the purchase price of the property. His recourse for the breach, the inherent breach of the gas distribution agreement, is elsewhere and it's not to take the real estate back. He already got paid for the real estate. (IT 16-18 to 16-25) ... This is clearly a dragnet clause and it's clearly unenforceable because the franchise agreement, which he's relying entirely on to try to enforce this mortgage makes zero reference to the mortgage". (IT 17-5 to 17-8).

Davis motion claimed it maintained no interest in the property, was not liable for any obligations owed concerning the property because WMD assumed the note and mortgage and the note and mortgage were satisfied when the purchase was paid off. (Davis Brief below).

At oral argument, Davis claimed, Plaintiff admitted the mortgage was satisfied, that it had no interest in the property, owed no further obligation tied to the property or to the franchise agreement. The mortgage was fully satisfied and the JL Davis franchise agreement ... is now void. It was completely replaced by the WMD franchise agreement ... It has completely different terms". (IT 17-11 to 17-25).

The Trial Judge did not directly address these issues. Rather, she principally denied Plaintiff the remedy of foreclosing on its mortgage for two reason, (1) that the WMD PMPA Franchise Supply Agreement was a new agreement which differed from the assumed franchise agreement of Davis in that it changed the terms for the price of buying the gas, and (2) since the WMD agreement did not mention the Davis agreement or the cross-collateralization within its four corners, the assumed mortgage no longer secured the WMD agreement which was not appropriately listed in the documents. As a result the WMD agreement was not enforceable against subsequent bona fide purchasers". (IT 24-19 to 25-2; 25-15 to 26-4; 26-20 to 27-13).

It appears the Trial Judge held that the modified supply agreement of WMD was not secured by the assumed Davis mortgage. The judge's factual finding are not supported by a close review of the documents, certifications and deposition

testimony of Guleria nor do her legal conclusions accord with applicable law.

A close review of the transactional documents must be undertaken to ascertain the error made by the Trial Judge. First, the contract between Davis and WMD (Pa 128) provided in part the following:

A. "It is understood that Seller (Davis) bought the business and real estate at Cherry Hill Citgo from Guleria Enterprises, Inc., (a NJ Corporation, herein after referred to as Guleria) (Mortgagor & Marketer) on August 1, 2019. In order to facilitate the sale, Guleria financed part of the purchase price. Interest only payments have been made along with lump sum payments. Currently $450,000 remains unpaid. In addition, Guleria, a Citgo Marketer has a gasoline supply contract with Seller [Davis] for a total of 15 years as part of the condition of purchase of Cherry Hill Citgo. In order to protect their interest, Guleria has a Mortgage placed on the subject property and business until the balance is paid and the supply contract is satisfied." (Pa 128, Par. 2).

B. Amongst the assets being sold was listed - "D. The Supply Contract with Guleria Enterprises Inc., or any other designated supplier for the remainder of the 15 year contract originally signed (12 year (sic) remaining)" (Pa 128, Par. 3).

C. WMD would make interest only payments at 7% per annum each month on the balance of the purchase price due $400,000.00 (after a $50,000.00

lump sum payment to Guleria) and pay off the principal in two lump sum payments: $200,000.00 on 01/01/2022 and $200,000.00 on 04/01/2022 (Pa 130, Par. 8&9).

D. Seller's Representation: "It is understood that Buyer [WMD] is buying this property and business subject to the existing mortgage by Guleria in the property." (Pa 131, Par. 12A).

E. At closing, the Seller will deliver to Buyer these documents: ... "B. A copy of the Gasoline Supply Agreement and all related documents for supply of gasoline to be signed by the Buyer..." (Pa 134, Par. 15B).

F. "Gasoline Supply: It is understood that as a part of this Agreement All gasoline products have to be purchased from Guleria Enterprises Inc., or another supplier designated by the Seller under the terms as specified in the supply agreement - to be signed at closing. The supply agreement remains in force for a period approximately 12 years from the date of closing ending on October 31, 2033 (Sic) Minimum gallons purchased will be 60,000 gallons/month." (Pa 134, Par. 16).

G. "Par. 23 Other Additional Terms ... D. (Buyer) Has to maintain insurance per the requirements in the Supply Agreement" (Pa 135, Par. 23.D).

H. "Par. 25 ... This transfer is being done at the request of the Seller

(Davis) by Guleria ..." (Pa 135-136, Par. 25).

The agreement was executed by Davis, WMD and Guleria on 09/29/2021 (Pa 136). It was never the intention of the parties to create a new PMPA Franchise Supply Agreement not secured by the existing mortgage. All of the documentation signed by the parties support that conclusion.

The mortgage note signed by WMD provided in part as follows:

A. **"Borrower's Promise to Pay Principal and Interest.** In return for a loan that I received, I promise to pay Four Hundred ($400,000.00) Dollars (called "Principal"), plus interest to the order of the Lender. Interest, at a yearly rate of seven (7%) percent compounded annually will be charged on that part of the principal which has not been paid from the date of this Note until all principal has been paid. Borrower also promises to pay all monies due under the PMPA Franchise Agreement dated 10/01/2021 and the obligations assumed as set forth in this note." (Pa 137).

B. **"Mortgage to Secure Payment.** The Borrower (WMD) is assuming the PMPA Franchise Agreement, Note, Mortgage and Assignment of Lease, Rents and Security Agreement executed by the Seller [Davis] on 08/01/2019. The Mortgage was recorded on 09/04/2019 in the Camden County Clerk's Office in Mortgage Book 11202, Page 1049, and the said assignment was recorded in said

office on said date in ASST R&L Book 11202, Page 1056. These assumed obligations are in full force and affect except as modified in this Note and any other documents signed by the borrower on 10/01/2021 in conjunction with this sale including without limitation the PMPA Franchise Agreement with Guleria Enterprises, Inc., to protect the Lender if the promises made in this Note are not kept. I agree to keep all promises made in the assumed mortgage covering property I own set forth on the attached Schedule located in the Township of Cherry Hill, County of Camden, State of New Jersey and the other assumed obligations. All terms of the mortgage and other assumed obligations are made part of this Note." (Pa 137-138).

C. **"Default.** If I fail to make any payment required by this Note within five (5) days after its due, or if I fail to keep any other promise I make in this Note or in the assumed obligations, or in the PMPA Franchise Agreement and all other documents referred to in the PMPA Franchise Agreement, the Lender may declare that I am in default on the mortgage and this Note. Upon default, I must immediately pay the full amount of all unpaid principal, interest, other amounts due on the Mortgage and this Note and the Lender's costs of collection and reasonable attorney's fees.

This note and the purchase money mortgage securing the obligation of the

Borrower shall not be satisfied for discharge until any damages to the Lender caused by the breach of the above-referenced documents, all of which are incorporated into this note by reference, are satisfied." (Pa 138).

These terms were almost identical to those in the note between Davis and Guleria assumed by WMD except as to the principal amount and monthly payments. (Pa 76).

The mortgage executed by Davis to Guleria on 08/01/2019 provided in part the following:

A. "**Mortgage Note**. In return for a loan that I received, I promise to pay Six Hundred Fifty Thousand ($650,000.00) Dollars (called Principal) plus interest at six (6) percent per annum compounded annually in accordance with the terms of a Mortgage Note dated 08/01/2019 (referred to as the Note). All sums due under the note are due no later than 12/01/2021. All terms of the Note and PMPA Franchise Agreement are made part of this Mortgage. This Mortgage will continue as a first mortgage lien on the property until the Borrower fulfills all promises made in the Mortgage Note and the PMPA Franchise Agreement, which has a 15 year term." (Pa 80).

B. **"Promises.** I make the following promises to the lender:

1. **Note and Mortgage.** I will comply with all of the terms of the

note and this Mortgage and PMPA Franchise Agreement.

2. Payments. I will make all payments required by the obligations set forth in paragraph 1 above.

3. Insurance. I must maintain commercial liability insurance on the property and insurance as required in the PMPA Franchise Agreement." (Pa 80-81).

C. "**Default.** The lender may declare that I am in default on the note and this mortgage if:

(a) I fail to make any payment required by the note and this mortgage, and PMPA Franchise Agreement when due;

(b) I fail to keep any other promise I make in this mortgage;

(c) the ownership of the property is changed for any reason; . . .

(f) I attempt to assign this mortgage or lease the property to another person or entity. Any attempt to do so shall be void ab initio; or

(g) I encumber the property whether voluntarily or involuntarily." (Pa 82).

D. **"Payments Due Upon Default.** If the lender declares that I am in default, I must immediately pay the full amount of all unpaid principal, interest, other amounts due on the note and this mortgage, and PMPA Franchise

Agreement, and the lender's cost of collection and reasonable attorney fees in pursuing collection under the note and this mortgage." (Pa 82).

E. "**Lender's Rights Upon Default.** If the lender declares that the note and this mortgage, and PMPA Franchise Agreement are in default, the lender will have all rights given by law or set forth in this mortgage and the note. This includes the right to do any one or more of the following:

... (c) start a court action, known as foreclosure, which will result in a sale of the property to reduce my obligations under the note and this mortgage; and

(d) sue me for any money that I owe the lender." (Pa 82).

The Assumption of the Davis mortgage to Guleria dated 10/01/2021, by WMD provided in part:

"WMD Properties Grp, I, Inc. (Borrower) with offices at 1510 Route 38 West, Cherry Hill, New Jersey 08002 hereby assumes the Note, Mortgage, Assignment of Leases, Rents and Security Agreement of JL Davis Enterprises, Inc. (Seller) all dated 08/01/2019 except as modified by the Note and other documents signed by WMD Properties Grp. I, Inc., dated 10/01/2021." The Mortgage was recorded on 09/04/2019 in the Camden County Clerk's Office in Mortgage Book 11202, Page 1049. These assumed obligations are in full force and affect except

as modified in the Note and any other documents signed by the borrower on 10/01/2021 in conjunction with this sale including without limitation the PMPA Franchise Agreement with Guleria Enterprises, Inc." (Pa 201).

The Deed from Davis to WMD provided in part:

F. "**Transfer of Ownership.** The Grantor grants and conveys (transfers ownership of) the property (called the "Property") described below to the Grantee. This transfer is made for the sum of Four Hundred Fifty Thousand ($450,000.00). The Grantor acknowledges receipt of this money. The Grantee is accepting this conveyance subject to the Note of 08/01/2019 and the Mortgage dated 08/01/2019 and recorded on 09/04/2019 in the Camden County Clerk's Office in Mortgage Book 11202, Page 1049 between the Grantor and Guleria Enterprises, Inc., on which there is currently a balance due of Four Hundred Fifty Thousand ($450,000.00) Dollars plus the other obligations set for therein and the Note accompanying that Mortgage and the Assignment of Leases, Rents and Security Agreement dated 08/01/2019 and recorded 09/04/2019 in ASST R&L Book 11202, Page 156 in the Camden County Clerk's Office and all the documents executed by the Grantor on 08/01/2019 at the time of purchase except as modified by the documents signed by the Grantee in conjunction with this conveyance on 10/01/2021 with the mortgage and dealer." (Pa 195).

It is evident from these documents that the WMD Franchise Supply Agreement was not a new agreement and was never intended to be by Davis or WMD. These parties in their agreement anticipated and agreed to the slight modifications of the supply agreement for the balance of the Davis term. Query, if these slight modifications had merely been part of a document entitled addendum to the Davis Supply Agreement, would it be treated as a new agreement?

The price of buying gas under these agreements did not change contrary to the trial judge's findings. These remained the same, basically, market drop load price. (Pa 93, Par. 2.2; Pa 147, Par. 2.2). There was an increase of one cent per gallon in the liquidated damage clause but that modification didn't make it a new agreement. That increase was negotiated and contained in the documents at the time of closing. The parties agreed to the modifications in the supply agreement which would be secured by the mortgage. Davis and WMD both benefitted from the reduction in the volume of gasoline required to be purchased under the agreement.

On the first page of both the Davis and WMD supply agreements it states:

"It is understood that simultaneously with this agreement and a condition of its effectiveness, franchisee is also buying the premises located at 1510 Rt. 38, Cherry Hill, NJ from Guleria under the terms of the accompanying mortgage and

note" (Pa 91, Recitals E., Second Par; Pa 145, Recitals E., Second Par.).

The other terms in both supply agreements were also the same, for example:

1. "Simultaneously with this agreement's term, the franchisee shall sign and deliver to Guleria Mortgage, Deed of Trust or other documentation as Guleria may reasonably, specify to establish or perfect Guleria's security interest in the Product Security for the term of the agreement". (Pa 94, Par. 2.4(c); Pa 148, Par. 2.4(c).

2. If franchisee defaults in the payment of any obligation or indebtedness to Guleria (including any indebtedness arising from purchase under the agreement) it being specifically agreed that an event of default by the franchisee under this agreement shall be an event of default under the accompanying mortgage and note, or otherwise fails to comply with any credit terms specified by Guleria, Guleria may without any notice or demand, in addition to any other rights Guleria may have (including termination or non-renewal of this agreement and franchise relationship) immediately suspend delivery of product or apply any product security franchisee may have given Guleria to the payment or obligation. (Pa 094, Par. 2.4(d); Pa 148, Par. 2.4(d)).

3. Guleria had the right upon default on any obligation contained in the agreement or any related or supplemental agreement whether or not Guleria

exercised its rights to terminate or non-renew, to pursue any remedies provided in any related or supplemented agreement or at law or in equity. (Pa 118, Par. 14.4; Pa 172, Par. 14.4).

4. Terms of payment were the same. (Pa 93, Par. 2.3; Pa 147, Par. 2.3). This was not a line of credit. All products had to be paid for by electronic funds transfer on the 3rd day following delivery of the motor fuel product.

Guleria had an option to extend credit in his sole discretion. (Pa 94, Par. 2.4a; Pa 148, Par. 2.4(a)).

5. The franchisee was required to purchase products only from Guleria directly and for delivery to the premises and was required to purchase not less than 80% of the monthly and contract year quantities of the products specified in Par. 1.5, (Pa 93, Par. 2.1(b); Pa 147, Par. 2.1(b). Product is defined as motor fuel sold by Guleria with authorization of resale as a Citgo product or such other brand as Guleria may specify, sold consistent with that authorization and specified in the schedule entitled "Purchase Schedule" attached and incorporated into the agreement, (Pa 93, Par. 2.1(a); Pa 147, Par. 2.1(a)).

There was no new unsecured Franchise Supply Agreement with WMD.

From the colloquy at oral argument, Plaintiff believes the Trial Judge either misunderstood or did not appreciate the import of the facts in relation to the law of

mortgages.

The Trial Judge mentioned that several things bothered her amongst those she considered in reaching her decision:

1. There was no consideration named in the original deed (1T 4-22 to 5-2). (This was incorrect. See Pa 80, Pa 194).

2. How was Oceanbank to know the discharge was forged? (1T 5-3 to 5-6).

3. "No one spent a whole lot of time on this forged discharge and that's been perking in my head. There was a nine month delay. I mean, there was a lot of things about that that bother me." (1T 5-7 to 5-10).

4. How can the Court grant relief to the Plaintiff "with the discharge in the middle" (1T 5-20 to 5-25).

5. "Why is that here with me – this is a foreclosure case, kept coming back to this. It's a foreclosure case on a piece of property that your client testified to that he had received the amount for the mortgage for the property, he's been paid in full for that. His new claim is for the damage as a result of the occupant, the tenant, not tenants, the lease ... so the claim is for damages for not buying the gasoline from them and breaching the agreement, not for – so how is that part of a foreclosure case which I have jurisdiction over? (1T 10-15 to 11-4).

6. "Okay. So, in a foreclosure action, I can grant someone a judgment on the property. But what you are asking me to do is enter a monetary judgment. (1T 12-5 to 12-8).

7. What it all comes down to for me and it did from the beginning ... because I can point to so many things that I found odd ... it goes back to the original deed, which I struggled with and how it was even recorded, because there was no consideration or anything listed in it ... (1T 23-18 to 21-1) ...

8. What really got me was a couple of things ... during your client's deposition when he admitted that WMD properties ultimately paid off the balance of the purchase price pursuant to the assumption in the mortgage ... but where everything fell apart I think in my mind for your client was when your client signed off on WMD assuming the properties, and had an agreement that changed terms for the price of the buying of the gas. I think at that point, JL, the Dragnet clause didn't exist to me ... (1T 24-11 to 24-24) ...

9. I can't find a way to get myself to agree with what you (addressing Plaintiff's counsel) are saying that this would be enforceable by your client because I think it is enforcing an agreement that I – that should have been done in my opinion differently, it wanted to be a Dragnet agreement ... (1T 25-3 to 25-8) ...

10. I think it was clear to me that the WMD franchise agreement did not,

is not – the Dragnet clause no longer existed at the point of enforcing the WMD franchise agreement. And I believe at that point your ability to foreclosure or to enforce that went away. And I think it is this one, because the mortgage is fully satisfied, Plaintiff now only seeking recovery for breach of the WMD franchise agreement is correct, but the problem is when the agreements were all done, the WMD agreement did not satisfy what would be necessary for me to include it or claim it to be part of a, I call it a cross collateralization, Dragnet agreement, but I think at that point is where it fails. And because the WMD franchise agreement does not mention ... this was quite the bear, but because the WMD franchise agreement does not mention the original agreement and a cross collateralization; therefore, I do not – I am granting Defendant's application to dismiss the foreclosure action, as your clients – your client can pursue a civil action, if it so choose to, for breach of a franchise agreement. (1T 25-10 to 26-6) ...

11. I think as a court of equity it would be patently unfair for me to even remotely consider that to be a Dragnet clause. I think that Oceanbank would have a valid mortgage on the property. I believe that this application is a run around or end round to the appropriate remedy of, although creative, not appropriate. If your client has a dispute or a disagreement, it is for the party's, it should be for the breach of the WMD franchise agreement, which is not appropriately listed in the

documents for me to enforce as a cross collateralized or Dragnet agreement. (1T 26-14 to 26-25) ...

12. ... the documents do not incorporate or include this appropriate information, necessary information to support your argument that this, this was binding or is binding on Oceanbank or JL Davis, WMD property's agreement, cut off your client's ability to claim that there is a Dragnet clause or cross collateralization which is enforceable against subsequent bona fide purchasers. (1T 27-6 to 27-13).

13. However, the mortgage, the agreement that was forged with WMD is silent. As to the mortgage and the note it makes absolutely no reference to that, I find that it does not satisfy this Court that it would be enforceable and I think, sir, I just don't see it. When they entered into the new agreements, the JL Davis agreement to me was terminated. You have new franchise agreement with WMD, the opportunity to include it there, to include it would have been at that moment. (1T 28-16 to 28-24).

14. I also find, counsel, that I am a Court of equity and your client was unequivocal. They were paid for the value of the property. Your client was unequivocal. This is an end around of a foreclosure. It couldn't be any more clear to me on agreements that do not clearly articulate. Especially when you got to

WMD, that this was being cross collateralized by the prior agreement. This was a new agreement. (1T 28-25 to 29-7).

The Trial Judge made a critical error in stating that when WMD executed the modified franchise agreement that created a new agreement and the Davis supply agreement ceased to exist because Plaintiff "signed off on WMD assuming the properties".

Plaintiff did not release Davis from any obligation under the assumed note or mortgage. No proof of such a release was ever presented below nor is it found in any document in the record.

Equity regards a grantee's (WMD) assumption of a mortgage debt as a covenant to indemnify his grantor (Davis). As between themselves the grantee (WMD) is held to be the debtor and the mortgagor (Davis) the surety. The covenant inures to the mortgagee (Guleria) on the equitable principle that the surety's security is appropriate to the payment of the debt. The liability of the grantee (WMD) is enforced in equity to avoid circuity actions. If the grantor be not personally liable at the time of the assumption, the covenant is a nullity. Feitlinger v. Helley, 112 NJ Eq. 209, 211 (E&A 1933); Fidelity Union Trust v. Matthews, 128 NJ Eq. 475, 476 (E&A 1940). All that is required is a written assumption agreement signed by the purchaser or by the purchaser's acceptance of

a deed containing a covenant to the effect that the grantee assumes such mortgage debt and the payment thereof. See N.J.S.A. 46:9-7.1

In this case, we have both. The assumption of a mortgage and note by the grantee does not operate as a release of the obligor or of the mortgage. A release is a form of contract and there is no evidence here that the Plaintiff released Davis from its obligation under the note, mortgage or supply agreement. The documents state the opposite. It is settled law in this state that both a mortgage and release from a mortgage obligation must be in writing under the Statute of Frauds. Metro for Sav. v. Nat'l. Community Bank, 262 NJ Super 133, 139 (App. Div. 1993) citing Joseph Naame v. Louis Satanov, 103 NJ Eq. 386, 390 (Ch. 1928) aff'd oth. grds. 109 NJ Eq. 165 (E&A 1929). A surrender of an interest in real estate must be in writing N.J.S.A. 25:1-2 (now N.J.S.A. 25:1-11) Plaintiff has not done so.

The Trial Judge's conclusion that the Davis Supply Agreement as modified by the WMD supply agreement was somehow written out of existence by the latter is not supported in this record.

Davis submitted no affidavits or certifications of any of its principals either in support of its motion or in opposition to Plaintiffs's motion claiming there was any release or new agreement. This was merely a conclusion offered by Davis counsel below incorrectly interpreting Plaintiff's deposition testimony.

There are few limitations on the type of debts for which real estate can be pledged as security. A criminal or illegal transaction comes to mind and see Girard Acceptance Corp. v. Wallace, 76 NJ 434, 444 (1978) - holding a real property mortgage may not be taken as additional collateral security with respect to the Retail Installment Sales Act financing scheme.

In the world of PMPA agreements, it is not unusual to secure the obligations under the agreement with a mortgage on the real property on which the gasoline station is situate. See for example, Riggins Inc., v. Picerno, 2022 W.L. 17985843 (App. Div. 2022) *3 (Pa 332); Kerger & Hartman, L.L.C. v. Ajami, 2014 W.L. 12588568 (Ohio Com. Pl. 2014) # 12-16 - mortgage to secure payment of liquidated damages under PMPA Agreement. (Pa 337); Mobil Oil Corp. v. Flores, 175 F. Supp. 2d 1080 (ND Ill. 2001) - liquidated damage clause.

Any constructions given to a parties mortgage must do justice, respect common sense and enforce the intentions of the parties Simonson v. 2 Cranbury Assoc., 302 NJ Super 179, 185 (App. Div. 1996).

It was not the intention of Davis, WMD or Guleria to treat the WMD PMPA Agreement as a new agreement unsecured by the assumed mortgage. The plain language of the documents executed in the transaction refute any such interpretation.

The Trial Judges reluctance to permit Plaintiff to foreclose on its mortgage was based on her idea of what was equitable rather than the terms of the parties agreement and mistaken belief that it would be unfair for the Plaintiff's mortgage to have priority over the bank's mortgage and possibly result in the bank's loss of some or all of the money it loaned to WMD.

First, the bank did not stand to lose anything as it had title insurance in the event of any loss in this case.

Second, a court is not free to disregard the terms of franchise agreements. All contractual rights are not put at risk in the name of equity Dunkin Donuts v. Middletown Donut Corp., 100 NJ 166, 182 (1985). Settled precedent is that in the absence of fraud, accident or mistake a court of equity cannot change or abrogate the terms of a contract no matter how oppressive, improvident or unprofitable or because it produces hardship . Id. 183-184. The maxim equity follows the law instructs that as a rule, a court of equity will follow legislative and common law regulations of right and also obligations of contract. Id at 183. Although the maxim will "not bar the crafting of a remedy not recognized by legislation or found in the common law, it does prevent the issuance of a remedy that is inconsistent with recognized statutory or common law principles Estate of Shinn, 394 NJ Super 55, 67 (App. Div. 2007). A trial judge cannot allow his or her

personal sense of fairness to override the law. Id. at 67.

In its response to Plaintiff's statement of material facts, (signed only by Davis' Counsel) it stated that it executed a mortgage to secure the principal sum due on the note only and thereafter separately entered into the franchise supply agreement citing Guleria Dep. 75:19-22 (Pa 291, Par. 3).

Davis claimed that the sale to WMD ended any obligations Davis had in connection with the property (Pa 292, Par. 5) citing Guleria Dep. 18-9 - 16; 77-21 to 80-18.

Davis below admitted that WMD assumed the existing note, mortgage and supply agreement, citing Guleria Dep. 68-7 to 69-1; 75-23 to 77-6, but stated as part of the sale of the property between Davis and WMD, they agreed there would be a new franchise agreement between WMD and Plaintiff which would replace the supply agreement between Davis and Plaintiff, citing Guleria Dep. 36-21 to 37-25; 75-25 to 77-6, Pa 292, Par. 5). There is no support in the record in Guleria's deposition, in the agreements executed by the parties or in the factual statements supporting Davis position.

The Plaintiff did not lose its mortgage lien because the WMD agreement did not mention the Davis agreement within its four corners.

Oceanfirst below argued (1) that the Davis mortgage, making all the terms

of the note and PMPA franchise agreement part of the mortgage and a first mortgage lien on the property until the borrower fulfills all promises made therein, was a dragnet clause but not enforceable because it did not reference any specific obligations under the franchise agreement, such as the liquidated damage clause; (2) construing this dragnet clause narrowly, it was insufficiently specific to encompass a contingent liability such as an unspecified liquidated damage penalty; and (3) although the Davis supply agreement included a liquidated damage clause, since the supply agreement made absolutely no reference to the mortgage as security or mention that foreclosure on the real estate is a remedy for any breach, it wasn't enforceable. (Oceanfirst's original brief in support of Defendants summary judgment motion, Pg. 6 of 12).

Although WMD assumed the mortgage and Davis Franchise Supply Agreement as modified, Oceanfirst contended when WMD signed the modified supply agreement, the Davis supply agreement was terminated. Since WMD. did not sign a new mortgage but rather assumed the Davis existing mortgage there is no mortgage which references the WMD agreement and thus no dragnet clause that can be enforced. (Oceanfirst's original brief, Pg. 9 of 12).

If Plaintiff had WMD sign and then recorded a new mortgage, then under the Trial Judge's rationale, Plaintiff's mortgage would have had priority since it

would have been recorded prior to the forged discharge, and the Bluestone and Oceanfirst mortgages, why then should an assumed mortgage be denied priority especially since the Plaintiff never discharged the assumed mortgage?

In a similar context, under N.J.S.A. 46:9-8.2, it is provided that:

> "Notwithstanding any other law to the contrary, the priority of the lien of a mortgage loan which had undergone a modification as defined by this act, shall relate back to and remain as it was at the time of recording of the mortgage. Modification is defined under N.J.S.A. 46:9-8.1, with respect to a mortgage loan other than a line of credit as a change in the interest rate, due date or other terms and conditions of a mortgage loan except an advance of principal."

Plaintiff' did not extend a line of credit to the franchisee nor did it advance principal.

It is difficult to determine whether the Trial Judge agreed or disagreed with Oceanfirst's characterization of the franchise agreement or liquidated damage clause as a dragnet clause since she concluded that the WMD franchise agreement was a new agreement and was not covered by the assumed mortgage. She seemed to suggest that the WMD franchise agreement could not be enforced as dragnet clause since the terms were changed. (See Pb 30, supra, par. 8-10).

Plaintiff argues the Franchise Agreement with the liquidated damage clause is not a dragnet clause at all. For example in Edrisi v. Sarnoff, 715 So. 2d 1124 (Fla. App. 1998) the Court was dealing with a clause in a mortgage which read:

> "The lien of this Mortgage secures and shall continue to secure payment of all indebtedness referred to herein, whether evidenced by the Note or any renewal or extension thereof or otherwise until all such indebtedness shall have been fully paid." Id. at 1126.

The court found that this was not truly a dragnet clause which it defined as a mortgage provision that purports to make real estate security for other usually unspecified debts that the mortgagor may already owe or may owe in the future to the mortgagee Id. See 29 NJ Prac., Law of Mortgages, Sec. 3.30. The Franchise Agreement was not unspecified in the mortgage.

The liquidated damage clause is not a future advance on a mortgage given to cover any future credit granted to a borrower by the lender or any other future obligation that may arise or antecedent debt between them. Rosenthal & Rosenthal v. Benun, 226 NJ 41 (2016). Rather the obligation arose and was fixed at the time of signing of the documents. In its brief, the Bank refers to it as a contingent liability. (Bank's Brief, Pg. 6 of 12). But it's not truly contingent; it is just due on breach just like non-payment under the note in the future trigger remedies previously established in the contract or mortgage..

By analogy, in Rosenthal supra, the Court had to decide the priority of an intervening mortgage versus a previous mortgage and note providing for future advances.

The court held that if the future advances were mandatory, then the prior mortgage took priority no matter when the advances were made. If the future advances were optional then the intervening mortgage had priority over advances made after the intervening mortgage was recorded but only if (1) the first mortgage made the advances optional and (2) the first mortgagee had actual rather than constructive knowledge of the intervening mortgage. This was the rule at common law. Rosenthal supra, 226 NJ at 66.

If one considers the liquidated damages clause in the PMPA Franchise Agreement as a "future advance" based on the acceptance by the New Jersey Supreme Court in Rosenthal v. Benun, 226. N.J. 41 (2016) of the broad definition of future advance as found in the Restatement (Third) of Property: Mortgages Sec. 2.1 cmt. a (1997), future advance "covers all situations in which a mortgagor's obligation. . . is enlarged after the mortgage becomes effective" because "an obligation secured by a mortgage may accrue by virtue of circumstances other than a monetary advance." Id., the holding in Rosenthal does not aid the defendants Oceanfirst and Davis.

Rosenthal reiterated that the common law rule concerning intervening lienors was still alive and well in New Jersey, that is, a mortgagee's intervening mortgage only takes priority over optional future advances made by the original

mortgages if the original mortgagee has actual not constructive notice of the intervening lien.

Even if that rule were applicable, Plaintiff had no actual knowledge of Oceanfirst's lien or for that matter, the Bluestone loan before the breach of the Contract by WMD triggering the liquidated damage provision.

Comparing the liquidated damage clause to an optional future advance is unfair to the Plaintiff. First of all, liquidated damages are not optional but obligatory upon breach of the Contract. Secondly, Davis, WMD and Plaintiff agreed that the liquidated damages were part of the original transaction. It was not a surprise but the intention of the parties that it would be applicable. Third, neither Bluestone nor Oceanfirst relied upon the terms of the mortgage in making the loan since they believed in the validity of the forged discharge. Fourth, as the Court in Rosenthal recognized: "We decline to explore the dragnet clause as it affects the priority of the intervening. . . mortgage because such clauses generally go to the scope of the agreement rather than the priority of prior or intervening liens, and lenders do not consider the dragnet clause as a means to achieve priority over intervening liens", citing 44 Duke, L.J. 657, 673-74. Rosenthal, supra, 226 N.J. at 62 R. 3.

Oceanfirst's argument below, that dragnet clauses should be construed

narrowly, has no effect on the issues in this case. That concept arises when there is a dispute between the parties to the agreement whether a particular debt is captured by the dragnet clause to avoid oppression or use as a device for fraud or to effectuate the intentions of the parties, not for the benefit of an intervening lienor. Evertt Credit Union v. Allied Ambulance, 424 NE 2d. 1142, 1144 (Mass. App. 1981); Lorusso v. Schaible, 2011 WL 4388355 (App. Div. 2011) *6-7 and out of state authority cited therein (Pa. 356).

Neither Davis nor WMD took a position that the franchise agreement was not secured by the mortgage. It is the intention of the parties to the original agreement that controls, not the interpretations of an intervening lienor.

The trial judge in effect changed the parties' agreement rather than give affect to it. She looked at the problem only with the equities of the intervening lienor in mind rather than the intentions of the Plaintiff and the parties to the original transaction.

An examination of a specific transaction requires the court to determine the intentions of the parties beginning with an examination of the documents and the relevant provisions of each document. Lorusso v. Schaible, supra, 2011 WL 4388 355 at *6 (Pa. 356) citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997).

At oral argument, Plaintiff's counsel stressed that Davis and WMD agreed to the terms and that the WMD agreement was not a new agreement but a modification (1T 27-23 to 28-11). The trial judge, however, stated she disagreed (1T 28-12 to 28-13), stating:

> "However, the mortgage, the agreement that was forged with WMD is silent. As to the mortgage and the note it makes absolutely no reference to that, I find that it does not satisfy this Court that it would be enforceable and I think, sir, I just don't see it. When they entered into the new agreements, the JL Davis agreement to me was terminated. You have a new franchise agreement with WMD, the opportunity to include it there, to include it would have been at that moment.
>
> I also find, counsel, that I am a court of equity and your client was unequivocal. They were paid for the value of the property. You client was unequivocal. This is an end around of a foreclosure. It couldn't be any more clear to me on agreements that do not clearly articulate. Especially when you got to WMD, that this was being cross collateralized by the prior agreement. This was a new agreement." (1T 28-16 to 29-7).

Oceanfirst never alleged or presented any facts that Plaintiff was somehow negligent in failing to discover the fraud perpetrated by WMD or that Plaintiff had knowledge of any facts which would have called for an investigation by the Plaintiff prior to its discovery of the sale to Multani. The only thing that Oceanfirst ever raised to challenge the forged discharge was a statement by its counsel at oral argument that (1) whether the document was forged was a question

of fact and the bank had no idea the discharge was forged (1T 15-1 to 15-4), and (2) "it's an interesting case because of the forged discharge, but it's almost a path we don't need to go down because as a matter of law, the plaintiff admitted he got paid for the purchase price of the property." (1T 16-18 to 16-22).

The Trial Court also ignored Oceanfirst's rights to seek indemnity from WMD. When false representations are made to one person with the intent that they be communicated to others for the purpose of inducing others to rely upon them, they may form the basis of a fraud action. Metric Inv. Inc. v. Patterson, 98 N.J. Super. 130, 132-133 (App. Div. 1967); citing Judson v. Peoples Bank, 25 N.J. 17 (1957); Parker Precision v. Metro Life, 407 F2d. 1070, 1076 (3d. Cir. 1969); Lembeck v. Gerken, 88 NJL 329, 332 (E & A 1916).

Davis similarly would have an action against WMD under the covenant in the special warranty deed delivered to it. Hawthorne v. Odenson, 94 N.J. Eq. 588, 593-594 (Ch. 1923).

Nor did Plaintiff have any actual knowledge of the bank's mortgage loan to Multani, although that would not make any difference in this case since the liquidated damage clause is mandatory and existed in the documents as of the date of the execution of the note, mortgage and franchise agreement. The bank is attempting to place a square peg in a round hole.

Both PMPA franchise agreements refer to the mortgage (Pb 18-A, Pb 26, Pa 91, Recital E, Second Par., Pa 145, Recital E, Second Par.)

Both notes and the assumption agreement do likewise.

The mortgage refers to the PMPA franchise agreement and specifically states, "All terms of the note and PMPA Franchise Agreement are made part of this mortgage."

Anyone performing a title search would be remiss in not requesting a copy of the PMPA franchise agreement since it was properly incorporated by reference.

The deed from Davis to WMD would alert a title searcher to the sale and specifically states that the grantee is accepting the conveyance subject to the Davis note and mortgage and all documents executed by Davis on 08/01/2019 except as modified by the documents signed by the grantee in conjunction with this conveyance on 10/01/2021 with the mortgagee and dealer. (Pa 195).

Where instruments such as a note and mortgage are executed simultaneously and in respect to the same transaction and they contain reciprocal references to each other, the terms of one are qualified by applicable provision of the other. Gilbert v. Pennington, 135 NJ Eq. 587, 590 (Ch. 1944).

A purchaser of land is changeable with notice of every matter affecting the estate which appears on face of any deed forming an essential link in a chain of

instruments through which he derived title and also notice of whatever matters he would have learned by any inquiry which recitals in those instruments made it his duty to pursue Camp Clearwater v. Plock, 52 NJ Super 583, 598-599 (Ch. Div. 1958) aff'd 59 NJ Super (App Div.) cert den 32 NJ 348 (1960).

A record which affords record notice of real estate transfer therein may contain a statement of recital which does not of itself give either record notice or actual notice but which does place on inquiry one who is affected by the record and a purchaser so placed on inquiry is chargeable with notice of such facts as might be ascertained by reasonable inquiry. Garden of Memories, Inc. v. Forest Lawn Memorial Park Ass'n., 109 NJ Super 523, 533 (App. Div. 1970)

Had anyone looked at the documents of record they could have reasonably and easily discovered the terms of the transaction.

That did not take place because Oceanfirst relied on the forged discharges of record. That however does not render it a bona fide purchaser for value as indicated in the next legal argument.

IV. Defendant Oceanfirst Bank is Not a Bona Fide Purchaser (Raised in Trial Judge's Decision Below - 1T 27-6 to 27-13; and in Plaintiff's Brief Below, Legal Argument No. I)

Cancellation of a mortgage of record is only prima facie evidence of discharge. If the mortgage was discharged of record solely through the

unauthorized act of another person and a purchaser who buys the title in the belief, induced by such cancellation, that the mortgage is satisfied and discharged, the equities are balanced and the rights in order of time must prevail. The lien of the mortgage must remain despite the apparent discharge Rosenblatt v. Horn, 109 NJ Eq. 75, 96-77 (E&A 1931) citing Heyder v. Excelsior Bldg. L. Assoc., 42 NJ Eq. 403, 407-408 (E&A 1887).

As the mortgage is not satisfied and strictly speaking does not need to be reinstated, it is necessary to reinstate the mortgage of record in order to preserve the priority of the mortgage as against subsequent bona fide purchasers, mortgagees, and judgment creditors 29 NJ Prac., Law of Mortgages, Sec. 13.10 n.43.

Claims for reinstatement and foreclosure may be brought in the same action Id. at n.49 citing R4:27-1 and Wood v. Stover, 28 NJ Eq. 248 (E&A 1877); R4:64-5 - germane claims may be heard in the same foreclosure action. Dudley v. Bergen, 23 NJ Eq. 397, 400 (Ch. 1873) - it is long established law that a mortgage cancellation procured by fraud or without authority will be set aside and the mortgage enforced.

Thus the separate defenses raised by Defendant Oceanfirst Bank (Pa 26), (1) Failure to state a claim because mortgage has been marked released of record, (2)

Plaintiff can't foreclose on a released mortgage until it secures an order in a quiet title action declaring the release a forgery, and (3) Bank was without notice of the forgery are no defense to the foreclosure by the Plaintiff's mortgage.

The Plaintiff has certified that he did not execute the release and did not authorize anyone to do so on his behalf. The Defendant Oceanfirst, has produced no evidence to the contrary or any other reason why the release should be deemed either valid or enforceable .

Nor has the Defendant presented any evidence that Plaintiff knew anything about the unauthorized and forged transactions in which WMD was engaged.

Conclusion

The Court should reverse the trial judge, find that the franchise agreements are secured by the assumed mortgages and since discovery is complete, remand for a determination of the amount due to the Plaintiff and enter a judgment in foreclosure.

Respectfully submitted,

By: _____
JOSEPH M. PINTO, ESQUIRE
Attorney for Plaintiff

Date: January 9, 2025

GULERIA ENTERPRISES, INC. Plaintiff/Appellant v. MULTANI 1510 RT GAS L.L.C.; OCEANFIRST BANK, N.A.; JL DAVIS ENTERPISES, INC.; WMD PROPERTIES GRP I. INC.; BLUESTONE FUNDING I, L.L.C.; STATE OF NEW JERSEY; UNITED STATES OF AMERICA; JOHN DOES 1-100, the said names of John Doe being fictitious, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-000499-24 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION CAMDEN COUNTY DOCKET NO. F-013354-23 Honorable Sherri L. Schweitzer, P.J. CH.

BRIEF OF RESPONDENT, JL DAVIS ENTERPRISES, INC.

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ON THE BRIEF:
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Melissa A. Maione, Esq. (Id. No. 400842022)

Dated: February 21, 2025

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PRELIMINARY STATEMENT

"This is an end around foreclosure." "This was a new agreement." These were essential – and correct – holdings made by the trial court when it dismissed Plaintiff's foreclosure complaint and entered summary judgment in favor of the Defendants. They were key to the court's final determination and are the reason why this appeal should be denied.

This case involves several moving parts, but only a few are relevant to Defendant, JL Davis Enterprises, Inc. ("JL Davis").

In this foreclosure action, JL Davis filed a motion for summary judgment, because it no longer holds any interest in the subject property and is not liable for any current or future debts or obligations to the Plaintiff. JL Davis specifically argued that, by the Plaintiff's own admission, the mortgage held by the Plaintiff on the subject property, had been fully satisfied. Additionally, JL Davis contended that an agreement between the Plaintiff and JL Davis – the JL Davis Franchise Agreement – had been conclusively replaced by a completely new agreement – the WMD Franchise Agreement – rendering the former agreement void. Thus, there was no basis for any claim against or recovery from JL Davis.

The trial court was thus faced with two initial questions: (1) whether the mortgage Plaintiff had with JL Davis was satisfied, and (2) whether the WMD Franchise Agreement replaced the JL Davis Franchise Agreement. The trial court

found that the mortgage had been satisfied and the franchise agreement had been replaced.

These findings formed the crux of the trial court's final decision resulting in the entry of summary judgement in the foreclosure action. Plaintiff sought foreclosure solely based on an alleged breach of the WMD Franchise Agreement, and the trial court held that the mortgage with JL Davis was satisfied, and the JL Davis Franchise Agreement replaced. Consequently, for any foreclosure action based on the WMD Franchise Agreement to be viable, the record must show that the cross-collateralization clause in the JL Davis mortgage – which purported to secure all debts owed by the mortgagor to the mortgagee – properly referenced or incorporated the WMD Franchise Agreement, and vice versa. Moreover, the WMD Franchise Agreement needed to reference the former, JL Davis Franchise Agreement.

The trial court correctly determined that the WMD Franchise Agreement did not properly reference any cross-collateralization, nor did the mortgage properly identify the WMD Franchise Agreement. Similarly, the court correctly found that the WMD Franchise Agreement did not reference the JL Davis Franchise Agreement whatsoever. Consequently, the cross-collateralization agreement in the JL Davis mortgage – if valid in the first instance – was extinguished, and foreclosure was not

justified. Simply put, Plaintiff sought foreclosure under a contractual agreement where foreclosure was not possible as a matter of law.

Because the trial court's analysis of these issues was correct, JL Davis asks this Court to affirm its decision to grant summary judgment in its favor and dismiss Plaintiff's foreclosure action.

PROCEDURAL HISTORY

Plaintiff, Guleria Enterprises, Inc., filed the underlying foreclosure action on November 11, 2023. (Pa011 – Pa022). Plaintiff sought to foreclose on real estate, consisting of a gas station and convenience store, located at 1510 Route 70, Cherry Hill, NJ, 08003 (the "Property"). (Pa011 – Pa022).

JL Davis filed a non-contesting answer on February 2, 2024. (Pa032 – Pa036). Defendant, OceanFirst Bank, N.A. ("OceanFirst"), filed a contesting answer on February 23, 2024. (Pa037 – Pa043). The parties engaged in limited discovery, including the deposition of Plaintiff's owner and corporate representative, Manjit Guleria. (JLDa1 – JLDa85).

Thereafter, Plaintiff filed a motion for final judgment seeking $408,338.00 in liquidated damages, plus costs, and foreclosure and sale of the Property to satisfy the monies allegedly owed to Plaintiff and its attorney. (Pa048-Pa049). JL Davis filed an opposition to Plaintiff's motion and moved for summary judgment in its

favor. (Pa265 – Pa302; Pa318 – Pa323). OceanFirst took similar action. (Pa303 – Pa307; Pa308 – Pa314).

On September 27, 2024, the parties presented their motions before the trial court. (T1 – T29). After reviewing the arguments, the trial court ruled that the WMD Franchise Agreement and the JL Davis mortgage lacked the necessary language and specificity to incorporate the WMD Franchise Agreement into any cross-collateralization agreement referenced in the documents. (T24-20 – T26-6). The court further found that the JL Davis Franchise Agreement had been terminated and replaced by the WMD Franchise Agreement, which contained no provisions referring to the mortgage or any cross-collateralization agreement. (T28-17 – T28-24). Consequently, the court concluded that the WMD Franchise Agreement effectively rendered any cross-collateralization agreement unenforceable. (T27-4 – T27-13).

Relatedly, the court found that Mr. Guleria's testimony on behalf of Plaintiff unequivocally established that the mortgage had been fully satisfied. (T24-10 – T24-15). Without a mortgage to foreclose on or a cross-collateralization agreement properly incorporating or referencing the WMD Franchise Agreement, and vice versa, Plaintiff was unable to pursue a foreclosure action. (T24-20 – T26-6). Instead, the trial court ruled that any claims related to a breach of the WMD Franchise Agreement must be pursued through a civil action. (T25-25 – T26-6).

This appeal followed.

COUNTERSTATEMENT OF FACTS

As reflected in the deed, Plaintiff sold the Property to Defendant, JL Davis, for $850,000.00 on August 1, 2019. (Pa011; Pa071 – Pa073). JL Davis paid $200,000.00 as a down payment for the Property. (JLDa15-18). Plaintiff financed the balance of the purchase price through a loan from Plaintiff. (JLDa15-9 – JLDa15-23). JL Davis executed a note and purchase money mortgage to secure the purchase price of the Property. (Pa012). JL Davis also entered into a PMPA Franchise Agreement (the "JL Davis Franchise Agreement") with Plaintiff, which required JL Davis to purchase certain Citgo branded products for a term of 15 years in connection with its ownership of the Property. (Pa012 – Pa013).

The note executed by JL Davis stated:

> If I fail to make any payment required by this Note within five (5) days after its due date, or if I fail to keep any other promise I make in this Note or in the mortgage, or in the PMPA Franchise Agreement and all other documents referred to in the PMPA Franchise Agreement, the Lender may declare that I am in default on the mortgage and this Note. Upon default, I must immediately pay the full amount of all unpaid principal, interest, other amounts due on the Mortgage and this Note and the Lender's costs of collection and reasonable attorneys fees.

(Pa077).

Relatedly, the mortgage states, in pertinent part:

> All terms of the Note and PMPA Franchise Agreement are made part of this Mortgage. This Mortgage will continue as a first mortgage lien on the property until the Borrower fulfills all promises made in the Mortgage Note and the PMPA Franchise Agreement, which has a 15 year term.

(Pa080).

On September 29, 2021, JL Davis sold the Property, which included its obligations under the mortgage, note, and JL Davis Franchise Agreement, to Defendant, WMD Properties Group I Inc. ("WMD") for $450,000.00. (Pa128 – Pa129; JLDa77-21 – JLDa80-18). To reduce the mortgage on the Property, $50,000.00 was paid to Plaintiff and subtracted from the purchase price. (JLDa18-17 – JLDa19-11). After closing with WMD, $400,000.00 remained due on the note to Plaintiff. (JLDa18-17 – JLDa19-11). The $400,000 was fully paid off by WMD in October of 2023. (JLDa20-22 – JLDa20-24; JLDa29-9 – JLDa29-12; JLDa42-9 – JLDa24-11).

In the Agreement of Sale between JL Davis and WMD, and included in the assets being sold, WMD bought "[t]he supply contract with Guleria Enterprises Inc. or any other designated supplier for the remainder of the 15 year contract that was ***originally signed*** (~12 year remaining)." (Pa128) (emphasis added). All parties—WMD, JL Davis, and Guleria—executed the Agreement of Sale on November 29, 2021. (Pa136).

Thereafter, WMD and its president, Tia Wright, executed a Mortgage Note, with Guleria named as the Lender, on October 1, 2021. (Pa137 – Pa138). WMD also executed an assumption of the JL Davis Mortgage. (Pa201).

That same day, on October 1, 2021, WMD and Guleria executed a new PMPA Franchise Agreement (the "WMD Franchise Agreement"). (Pa143 – Pa180). JL Davis was not a party to this new agreement. (Pa180). Moreover, WMD's president, Tia Wright, executed a Guaranty to "maintain a continuing and unconditional personal guarantee" of all obligations under the WMD Franchise Agreement. (Pa187 – Pa190). There is no evidence in the record showing that any representative of JL Davis signed, or was ever required to sign, a personal guarantee to ensure the fulfillment of the JL Davis Franchise Agreement.

As a part of the sale of the Property between JL Davis and WMD, the parties, including Plaintiff, agreed that there would be a new PMPA Franchise Agreement between WMD and Plaintiff, which would replace the original PMPA Franchise Agreement between JL Davis and Plaintiff. (JLDa36-21 – JLDa37-25; JLDa76-25 – JLDa77-6). Plaintiff admitted to this fact:

> Q. Okay. The franchise agreement with WMD replaced the franchise agreement with JL Davis, correct?
> A. Yes.
> Q. And that was part of the sale, that there would be a new franchise agreement with WMD?
> A. Yes. Yes.

(JLDa76-25 – JLDa77-6).

Notably, and as evidence of the replacement of the agreement, the WMD Franchise Agreement contains new terms not originally reflected in the JL Davis Franchise Agreement. (JLDa36-21 – JLDa38-6) (reducing the number of gallons owed and raising the liquidated damages penalty from four cents to five cents). While the mortgage references the JL Davis/PMPA Franchise Agreement in general terms, it does not reference the WMD Franchise Agreement, which replaced the JL Davis/PMPA Franchise Agreement in its entirety. (Pa080 – Pa083).

The WMD Franchise Agreement also contains an integration clause:

> This Agreement, the documents referred to in the Agreement and the schedules and attachments to this Agreement constitute the entire, full and complete Agreement between Guleria and [WMD] concerning the covered subject matter, and supersede all prior Agreements relating to that subject matter. Except for those permitted to be made unilaterally by Guleria under this agreement, no amendment, change or variance from this Agreement is binding on either party unless agreed in writing by [WMD] and Guleria authorized representative.

(Pa178).

Moreover, and unlike the now nullified JL Davis Franchise Agreement, the WMD Franchise Agreement failed to reference the mortgage.[1] (Pa117 – Pa118; Pa171 – Pa172). In fact, the clause that referenced the mortgage in the JL Davis

[1] The JL Davis Franchise Agreement states, "Any default of the accompanying mortgage and related documents will constitute a default under this PMPA Franchise Agreement." (Pa118.) This clause is distinctly absent from the WMD Franchise Agreement. (Pa172.)

Franchise Agreement was eliminated in the WMD Franchise Agreement.[2] (Pa117 – Pa118; Pa171 – Pa172). Both agreements fail to include foreclosure of the mortgaged Property as a remedy for breach. (Pa117 – Pa118; Pa171 – Pa172).

Because the mortgage was fully satisfied and the JL Davis Franchise Agreement was replaced, Plaintiff was only seeking recovery for breach of the WMD Franchise Agreement. (JLDa29-13 – JLDa29-16). As such, any claims against JL Davis fail as a matter of law. Additionally, as the trial court held, any cross-collateralization agreement that may have existed did not bring the WMD Franchise Agreement into its purview. (T24-20 – T26-5). Therefore, Plaintiff could not bring an action in foreclosure. (T28-17 – T29-7).

For the reasons set forth herein, the trial court's decision should be upheld.

ARGUMENT

The trial court's decision should be upheld because Plaintiff no longer has recourse against JL Davis, and certainly none that could be pursued in the instant foreclosure action.

When reviewing a grant of summary judgment, an appellate court must review the order de novo, applying the same standard as the trial court. *Bhagat v. Bhagat*, 217 N.J. 22, 38 (2014). Therefore, this Court "must review the competent evidential

[2] The WMD Franchise Agreement also fails to reference or incorporate any cross-collateralization agreement or the JL Davis Franchise agreement. (Pa140 – Pa180).

materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." *Id*. (citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995); R. 4:46-2(c). "In conducting this review, the Court must keep in mind that '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.'" *Id*. (quoting R. 4:46-2(c)).

Here, no genuine issue of material fact exists, and JL Davis is entitled to judgment as a matter of law. As such, the trial court's order granting summary judgment in favor of JL Davis and dismissing Plaintiff's foreclosure action should be affirmed.

I. THE TRIAL COURT PROPERLY FOUND THAT THE JL DAVIS MORTGAGE WAS SATISFIED AND THE JL DAVIS FRANCHISE AGREEMET WAS EXTINGUISHED. (T23-18 – T29-9).

First, there is no dispute of fact that any mortgage secured by the Property was fully satisfied. Plaintiff's corporate representative was unequivocal in this fact. (JLDa20-11 – JLDa21-14). Specifically, he affirmed that the note had been satisfied as of October of 2023. (JLDa20-11 – JLDa21-14). As such, he explained, Plaintiff was only seeking foreclosure due to a breach of the WMD Franchise Agreement. (JLDa20-11 – JLDa21-14).

Second, the WMD Franchise Agreement replaced the JL Davis Franchise Agreement. For a contract to be replaced or extinguished, a novation generally must occur. "A novation substitutes a new contract and extinguishes the old one." *Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation*, 414 N.J. Super. 453, 466 (App. Div. 2010) (citation omitted). When the evidence is "one-sided" regarding whether the parties entered into a novation, summary judgment is appropriate. *Tung v. Briant Park Homes, Inc.*, 287 N.J. Super. 232, 239 (App. Div. 1996).

"Novation is generally accepted to mean that there being a contract in existence, some new contract is substituted for it, either between the same or different parties, the consideration mutually being the discharge of the old contract." *Sixteenth Ward Bldg. & Loan Ass'n of Newark v. Reliable Loan, Mortgage & Sec. Co.,* 125 N.J. Eq. 340, 342 (1939). Put differently, for a novation to occur the following elements must be established: (1) a previously valid contract; (2) an agreement to make a new contract; (3) a valid new contract; and (4) an intent to extinguish the old contract." *Wells Reit*, 414 N.J. Super. at 466. A novation may be implied. *Fusco v. City of Union City*, 261 N.J. Super. 332, 337 (App. Div. 1993).

In *Tung v. Briant Park Homes, Inc.,* Tung signed a contract to purchase a condominium unit from Pocaro. 287 N.J. Super. 232, 235 (App. Div. 1996). Pocaro reserved the right to assign the contract to Briant Park and agreed to refund to Tung the excess of his purchase price over that for which other unsold units would

eventually be sold. *Id*. at 236. At the time the first contract was executed, a current POS was not delivered to Tung as required by statute. *Id*. The contract was contingent upon its delivery and, if not delivered within that period, Tung would be entitled to a refund of the deposit with accrued interest. *Id*.

Since Tung's mortgage lender objected to the refund clause, he signed a second purchase contract with Briant Park, which did not contain the clause. *Id*. After the transaction closed, Tung learned that a similar unit had been sold for less money and he demanded a refund from both Pocaro and Briant Park. *Id*. Tung argued that Pocaro was still liable under the first contract because the parties did not intend a novation. *Id*. at 237.

The trial court in *Tung* found there was sufficient evidence of a novation and granted summary judgment on the issue. The appellate court affirmed the decision, concluding that, even when granting Tung all favorable inferences, the evidence overwhelmingly supported the conclusion that Tung consented to a novation of the original contract with Pocaro by entering into a new agreement with Briant Park. *Id*. at 239.

Here, just as in *Tung*, there is no dispute of fact as to a novation occurring. There is no dispute that the JL Davis Franchise Agreement was a valid contract. As to the second novation element, Plaintiff testified that the parties agreed there would be a new PMPA Franchise Agreement between WMD and Plaintiff, which would

replace the original PMPA Franchise Agreement between JL Davis and Plaintiff. (JLDa36-21 – JLDa37-25; JLDa76-25 – JLDa77-6). For the third element, no evidence was presented to dispute the validity of the WMD Franchise Agreement.

Lastly, there is ample evidence in the record to show the parties intended to extinguish the old contract. The WMD Franchise Agreement modified the fundamental terms of the JL Davis Franchise Agreement, which is a requirements contract with specified quantities. Specifically, the WMD Franchise Agreement altered the rights and remedies of the parties by reducing the number of gallons owed, raising the liquidated damages penalty from four cents to five cents, and eliminating any mention of the mortgage. (Pa118; Pa172; JLDa36-21 – JLDa38-6). The WMD Franchise Agreement also fails to reference the JL Davis Franchise Agreement and contains an integration clause that asserts that it supersedes all prior agreements. (Pa140 – Pa180; Pa178).

Moreover, JL Davis is not a named party to the WMD Franchise Agreement, nor was it signed by JL Davis. (Pa140 – Pa180). Instead, like in *Tung*, Plaintiff remained a party but changed the obligor from JL Davis to WMD. It is evident from the express terms of the agreement that the primary purpose of the modification was to amend the fundamental provisions of the contract – specifically, the quantity of gas to be purchased – and to delineate the new party responsible for compliance with these revised obligations. This is further underscored by the fact that Plaintiff

compelled WMD's president to personally guarantee performance under the WMD Franchise Agreement – an obligation to which JL Davis was not subject. (Pa187 – Pa190).

To refute these facts Plaintiff raises one argument – both franchise agreements have the same termination date. This fact is irrelevant and does not alter the parties' intent: to replace the original agreement with a new, separate one. In fact, Plaintiff previously admitted that this was the intent of parties:

> Q. Okay. The franchise agreement with WMD replaced the franchise agreement with JL Davis, correct?
> A. Yes.
> Q. And that was part of the sale, that there would be a new franchise agreement with WMD?
> A. Yes. Yes.

(JLDa76-25 – JLDa77-6).

The intent of the parties is evident. The WMD Franchise Agreement was meant to replace the JL Davis Franchise Agreement. The JL Davis Agreement was thus extinguished.

Because the mortgage obligations were satisfied and the WMD Franchise Agreement controls, the trial court correctly found that there was no dispute of fact that JL Davis owed no further debts or obligations to Plaintiff and properly entered summary judgement in its favor.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE PLAINTIFF COULD NOT FORECLOSE ON THE PROPERTY BASED SOLELY ON AN ALLEGED BREACH OF THE WMD FRANCHISE AGREEMENT. (T23-18 – T29-9).

Beyond determining that the mortgage was satisfied, and the JL Davis Franchise Agreement was extinguished, the trial court correctly held that the cross-collateralization agreement in the JL Davis mortgage did not extend to encompass the WMD Franchise Agreement.

A cross-collateral agreement is a type of dragnet clause that secures all the debts that the mortgagor may owe to the mortgagee. *Customers Bank v. Reitnour Inv. Properties, LP*, 453 N.J. Super. 338, 351 (App. Div. 2018) (citation omitted). While these agreements are enforceable in New Jersey, they are typically disfavored. *Id*. As such, they must be construed narrowly against the mortgagee. *Id*.

Cross-collateralization agreements require a certain level of specificity to be enforceable against future debts or obligations. *See* Restatement (Third) of Property (Mortgages) § 2.4 (1997). In other words, a cross-collateralization agreement that lacks clarity or detail, may not be enforceable in relation to future financial obligations. *See id*.

Here, the question is whether the specific debt – liquidated damages under the WMD Franchise Agreement – is secured by the Property by way of the JL Davis

mortgage. The language in both the JL Davis Mortgage and the WMD Franchise Agreement establish that it is not.

Plaintiff sought foreclosure on the Property to recover funds allegedly owed due to a breach of the WMD Franchise Agreement, which specifies liquidated damages as the designated remedy. As the trial court held, a breach of the WMD Franchise Agreement did not result in a default on the mortgage and foreclosure on the Property. (T25-10 – T26-5). The trial court correctly held that "[WMD's] agreement, cut off [Plaintiff's] ability to claim that there is a Dragnet clause or cross-collateralization which is enforceable against subsequent bona fide purchasers." (T27-10 – T27-13). The court further emphasized that the JL Davis mortgage "makes absolutely no reference" to the WMD Franchise Agreement, and when WMD and Plaintiff entered into the new agreement, "the JL Davis agreement . . . was terminated." (T28-17 – T28-24). The court correctly concluded that if the Plaintiff sought to cross-collateralize the WMD Franchise Agreement with the JL Davis mortgage, it should and would have done so. (T28-17 – T28-24). Its failure to do so was dispositive.

There were no disputed facts as to this issue. The JL Davis mortgage does not identify the new, WMD Franchise Agreement. (Pa080 – Pa083). The WMD Franchise Agreement does not identify the JL Davis mortgage. (Pa140 – Pa180). There is no mention of any cross-collateralization agreement in the WMD Franchise

Agreement. (Pa140 – Pa180). These facts were not challenged in any sense, nor could they be.

The trial court thus correctly held that the WMD Franchise Agreement, alone, could not permit a foreclosure on the Property. With the mortgage satisfied, Plaintiff has no other avenue to seek foreclosure.

The trial court's decision should be affirmed, and the foreclosure action should be dismissed.

CONCLUSION

The trial court's decision to grant JL Davis' motion for summary judgment and dismiss Plaintiff's foreclosure action was proper. The record supports the trial court's decision. Plaintiff cannot reason otherwise.

Accordingly, JL Davis asks this Court to reject Plaintiff's arguments and affirm the trial court's decision.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

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Dated: February 21, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000499-24

GULERIA ENTERPRISES, INC.

Plaintiff-Appellant,

v.

MULTANI 1510 RT GAS L.L.C.; OCEANFIRST BANK, N.A.; JL DAVIS ENTERPRISES, INC.; WMD PROPERTIES GRP. I. INC.; BLUESTONE FUNDING I, L.L.C.; STATE OF NEW JERSEY; UNITED STATES OF AMERICA; JOHN DOES 1-100, the said names of John Doe being fictitious

Defendants-Appellees

ON APPEAL FROM SUPERIOR COURT, CHANCERY DIVISION, GENERAL EQUITY PARTY, CAMDEN COUNTY; No. 01335423

HONORABLE SHERRI L. SCHWEITZER, P.J. CH. SAT BELOW

AMENDED BRIEF FOR APPELLEE OCEANFIRST BANK, N.A.

Date: March 3, 2025

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PRELIMINARY STATEMENT

Plaintiff/Appellant Guleria Enterprises, Inc. ("Guleria") filed this action to foreclose on a Mortgage executed by JL Davis Enterprises, Inc. ("JL Davis"), a former owner of the subject real estate located at 1510 Route 38, Cherry Hill, NJ, 08003 (the "Property"). The Mortgage was executed by JL Davis as security for seller financing, in conjunction with a sale of the Property by Appellant Guleria to JL Davis. The purchase price for the Property was $850,000.00, with $200,000.00 paid by JL Davis at closing—and the $650,000.00 balance financed by Guleria. The Property was subsequently sold by JL Davis to WMD Properties GRP I, Inc. ("WMD Properties"), and an Assumption of Mortgage was executed and recorded by WMD Properties in favor of Guleria.

At the time the Property was sold to WMD Properties, JL Davis still owed $400,000.00 under the Mortgage. Appellant Guleria *admits* that WMD Properties ultimately paid off the balance of the purchase price, pursuant to the terms of the Assumption of Mortgage. WMD subsequently sold the Property to Multani 1510 RT Gas, L.L.C. ("Multani"). To acquire the Property, Multani obtained a loan from OceanFirst Bank and granted a Mortgage in favor of

OceanFirst Bank.

When OceanFirst Bank financed Multani's purchase, the JL Davis Mortgage was discharged of record. Appellant Guleria now claims that the recorded Discharge is a forgery, but that allegation is moot in view of Guleria's admission that WMD paid off the balance of the original purchase price for the Property. Guleria's attempt to foreclose on the Property now would divest OceanFirst Bank's Mortgage, and therefore fails as a matter of law. Simply stated, OceanFirst is a bona fide mortgagee, and Guleria was admittedly fully paid on account of the sale of the Property.

Guleria argues that even though it was fully paid on the account of the purchase money loan secured by the JL Davis Mortgage, it can still foreclose on the Property because the WMD Franchise Agreement was breached when WMD Properties' buyer (Multani) stopped buying gas from Guleria. The problem with this argument is that the WMD Franchise Agreement did not reference a mortgage foreclosure as a remedy for any alleged breach thereof. In fact, the WMD Franchise Agreement makes no reference to the Mortgage at all. Rather, the JL Davis Mortgage (which WMD Properties assumed) secured only the obligation to repay the purchase money loan given by Guleria to JL Davis. Both the JL Davis Franchise Agreement and the WMD Franchise

Agreement included an array of remedies for breach of the gas requirements contract—just not the remedy of foreclosure on the Mortgage.

PROCEDURAL HISTORY

Appellant Guleria commenced this mortgage foreclosure action by Complaint filed on November 21, 2023, naming as Defendants current owner Multani, current mortgagee OceanFirst Bank, former owner (original Guleria borrower) JL Davis, former owner (second Guleria borrower) WMD Properties, and WMD Properties lender Bluestone Funding I, L.L.C. ("Bluestone"). (Pa011). On January 24, 2024, OceanFirst Bank filed an Answer and Separate Defenses, along with a Counterclaim and Crossclaims. (Pa023). On February 2, 2024, JL Davis filed a Non-Contesting Answer. No other Defendants appeared. (Pa032).

Following discovery, on August 16, 2024, Appellant Guleria filed a Motion for "Final Judgment", which the Court construed as a bid for summary judgment. (Pa46). On August 19, 2024, JL Davis filed a Motion for Summary Judgment, seeking dismissal from the case. (Pa318). On August 20, 2024, OceanFirst Bank filed a timely Motion for Summary Judgment, seeking final judgment against Guleria including a determination that Guleria no longer has a valid mortgage lien against the

property. (Pa308).

After each summary judgment Respondent filed timely opposition to the respective dispositive motions (Pa265, Pa315), the Chancery Division held oral argument on September 27, 2024, before the Honorable Sherri L. Schweitzer. (1T1). Following argument, Judge Schweitzer issued a ruling from the bench in favor of OceanFirst Bank and JL Davis, and against Guleria. (1T24). The Court thereupon entered a series of Orders, each dated September 27, 2024, granting the Motions filed by OceanFirst Bank and JL Davis, and denying Guleria's Motion. (Pa6, Pa7, Pa8). Then, on October 23, 2024, at the request of Guleria, the Court entered an Order dismissing the remaining (non-appearing) Defendants from the case, thereby rendering this case ripe for appeal. (Pa10).

On October 22, 2024, Guleria filed a deficient (premature) Notice of Appeal (Pa328), followed by a timely Amended Notice of Appeal docketed with the Appellate Division on October 29, 2024. (Pa001).

STATEMENT OF FACTS

On August 1, 2019, Appellant Guleria sold the subject Property located at 1510 Route 38, Cherry Hill, NJ, 08003, to JL Davis for $850,000.00. (Pa71).

As Mr. Guleria testified, JL Davis paid $200,000.00 as a down payment for the Property. (Pa272). The balance of the purchase price was financed by Guleria as seller. (Pa272). To secure the $650,000.00 seller financing, JL Davis executed a Mortgage in favor of Guleria (the "JL Davis Mortgage"). (Pa79).

In addition to the sale of the Property, Appellant Guleria and JL Davis entered into a Franchise Agreement. (Pa86). The JL Davis Franchise Agreement obligated JL Davis to buy Citgo branded gasoline from Guleria. (Pa86). The obligation to buy gas from Guleria was independent of the obligation to pay the balance of the purchase price for the Property. (Pa86). The JL Davis Franchise Agreement made no reference to the purchase of the Property. (Pa86). Significantly, the JL Davis Franchise Agreement did not include any provision stating that a default under the Franchise Agreement would entitle Guleria to foreclose on the JL Davis Mortgage. (Pa86). Stated otherwise, the default terms of the JL Davis Franchise Agreement do not include any right to foreclose on the Property. (Pa86). The security for the obligations in the JL Davis Franchise Agreement were, in fact, distinct from the JL Davis Mortgage, and included a personal Guaranty by the owner of JL Davis and a UCC security agreement. (Pa86).[1]

[1] Guleria argues that the JL Davis Franchise Agreement, at ¶ 14.2, incorporates the JL

On October 1, 2021, JL Davis sold the Property to WMD Properties for $450,000.00. (Pa194). As Mr. Guleria testified, at the time of the sale, Guleria was still owed $450,000.00. (Pa273). At the closing, $50,000.00 was paid to Guleria on account of the loan balance. (Pa273). As a result, $400,000.00 remained due and owing to Guleria after WMD Properties acquired the Property. (Pa273). To secure this balance, WMD Properties executed the Assumption of Mortgage in favor of Guleria. (Pa201).

In conjunction with the sale of the Property, Guleria and WMD Properties entered into a new Franchise Agreement (the "WMD Franchise Agreement"). (Pa140). The WMD Franchise Agreement obligated WMD Properties to buy Citgo branded gasoline from Guleria. (Pa140). The obligation to buy gas from Plaintiff was independent of the obligation to pay the remaining ($400,000.00) balance of the original purchase price for the Property. (Pa140). The WMD Franchise Agreement made no reference to the purchase of the Property. Significantly, the WMD Franchise Agreement made no reference to the JL Davis Mortgage or the WMD Assumption of Mortgage.

Davis Mortgage. Guleria, however, misrepresents this provision, which states that "any default under the accompanying Mortgage and related documents will constitute a default under this [JL Davis] Franchise Agreement." The provision does not provide for the converse, *i.e.* it does not state that a default the JL Davis Franchise Agreement constitutes a default under the Mortgage.

As before, the default terms of the WMD Franchise Agreement do not include any right to foreclose on the Property. The security for the obligations in the WMD Franchise Agreement were distinct from the Mortgage, and included a personal Guaranty by the owner of WMD Properties and a UCC security agreement.

The terms of this WMD Franchise Agreement was identical in all respects to the original JL Davis Franchise Agreement, with one notable exception. (Pa86, Pa140). The remedies section, including ¶¶ 14.2 and 14.3, include numerous remedies in favor of Guleria in the event of a breach by WMD Properties of the WMD Franchise Agreement. (Pa172). However, none of the remedies provisions include the right to foreclosure or otherwise enforce the Mortgage. There is not even a reference to the Mortgage, neither in the remedies section, nor anywhere else in the entire WMD Franchise Agreement. (Pa172).

On or about March 4, 2022, WMD Properties mortgaged the Property in favor of Bluestone Funding. (Pa202a). Shortly before the closing on this refinance transaction, the JL Davis Mortgage (which WMD had assumed) was marked as "released" and "discharged" in the public record. (Pa220). Guleria has claimed that the recorded Discharge of the JL Davis Mortgage is a forgery.

(Pa284). However, Guleria did not adduce any evidence during discovery to support this self-serving claim, *i.e.* no handwriting analysis, no testimony or statement from the notary who acknowledged Mr. Guleria's signature, no corroborating witnesses, no proof of his whereabouts on the date the signature was completed on the Discharge. In fact, Guleria *admitted* at deposition that the balance of the purchase price secured by the JL Davis Mortgage (as assumed by WMD Properties) was ***fully paid***. (Pa279).

In October 2023, WMD Properties sold the Property to Multani for $1,000,00.00. (Pa224). To finance its purchase, Multani obtained a loan from OceanFirst Bank, secured by a Mortgage in favor of OceanFirst Bank in the principal amount of $650,000.00. (Pa230). At the time of Multani's purchase from WMD Properties, the JL Davis Mortgage remained discharged of record. (Pa220a). Accordingly, the purchase monies and financing from OceanFirst paid off the mortgage then held by Bluestone Funding.

According to Guleria, Multani stopped purchasing gas from Guleria at some point after Multani acquired the Property from WMD Properties. (Pa271). Guleria therefore declared a default under the WMD Franchise Agreement, and brought this action against WMD Properties and all other parties that have been involved with the Property since the initial sale by

Guleria to JL Davis. (Pa11). Guleria's action, however, was filed as a mortgage foreclosure action, whereby Guleria sought to foreclose on the JL Davis Mortgage (which was assumed by WMD). (Pa11). Guleria claimed that the recorded discharge was forged, and further that the alleged breach of the WMD Franchise Agreement entitles Guleria to foreclose on the Mortgage—even though (a) he admits the purchase money loan secured by the Mortgage was fully paid (Pa279), and (b) neither Franchise Agreement included foreclosure on the real estate as a remedy for breach of the gas requirements contract. (Pa86, Pa140).

ARGUMENT

I. The Dragnet Clause in the JL Davis Mortgage Is Not Enforceable

Appellant Guleria takes the position that the JL Davis Mortgage not only secured the original $850,000.00 purchase price for the Property, but also secures a liquidated damages penalty buried in the WMD Franchise Agreement. Guleria argues that the current owner, Multani, has not purchased gas from Plaintiff, thereby triggering a penalty under the WMD Franchise Agreement equal to $0.05/gallon of gas that WMD Properties was required to purchase. Even though Guleria admits that the $850,000.00 purchase price for

the Property has been fully paid, and even though the Property has been sold to Multani and mortgaged in favor of OceanFirst Bank, Guleria tried to foreclose on account of an additional "penalty" amount in excess of $400,000.00—an amount which has nothing to do with the purchase price or Guleria's original financing of the real estate purchase by JL Davis.

Guleria argues that a clause buried in the original JL Davis Mortgage that references the Franchise Agreement can be enforced as a "dragnet clause" (also known as a cross-collateralization clause). Guleria sought to enforce this dragnet clause to divest OceanFirst Bank's Mortgage. As the Chancery Division recognized, the dragnet clause in the JL Davis Mortgage cannot be enforced against bona mortgagee, OceanFirst Bank.

A. The Dragnet Clause Is Unenforceable Because the Franchise Agreements Do Not Provide for Foreclosure as a Remedy

Appellant Guleria's right to foreclose on the subject Property only exists if the dragnet clause in the JL Davis Mortgage is enforceable against a subsequent bona fide mortgagee. As observed by the Appellate Division in *Customers Bank v. Reitnour Inv. Props., LP*, 453 N.J. Super. 338, 181 A.3d 1038 (App. Div. 2018)

> A 'cross-collateral' clause is a type of dragnet clause. 29 N.J. Practice, Law of Mortgages with Forms § 3.30, at 192 (Myron C. Weinstein) (2d

> ed. 2001) (citing Black's Law Dictionary 508 (7th ed. 1999)). A dragnet clause "secures all the debts that the mortgagor may at any time owe to the mortgagee." Ibid. While dragnet clauses are enforceable in New Jersey, they are "regarded with disfavor. Courts have tended to construe such clauses narrowly and strictly against the mortgagee." Id. at 193. (emphasis added).

In this case, the JL Davis Mortgage includes a dragnet clause, but it does not reference any specific additional obligation. Rather, it references the JL Davis Franchise Agreement generally. Notably, it does not even mention the liquidated damages clause in the JL Davis Franchise Agreement. If we construe this dragnet clause narrowly as required by New Jersey law, it is insufficiently specific to encompass a contingent liability such as an unspecified liquidated damages penalty.

In *Rosenthal & Rosenthal, Inc. v. Benun*, 441 N.J. Super. 184, 117 A.3d 191 (App. Div. 2015), the Court explained further:

> A dragnet clause is used in conjunction with one type of future advance mortgage. Grant S. Nelson & Dale A. Whitman, *Rethinking Future Advance Mortgages: A Brief for the Restatement Approach*, 44 Duke L.J. 657, 671-73 (1995). Dragnet clauses typically state that if the borrower ever becomes liable to the lender on any other loan, the mortgage will also secure that loan. *Id.* at 671. "The purpose of the dragnet clause is to provide a sort of contingent cross-collateralization; if any other loan is made in the future, the presently mortgaged real estate will serve as additional collateral for it." *Id.* at 671-72.

The Court in *Rosenthal* declined to enforce a dragnet clause and accordingly found in favor of a subsequent mortgagee in a lien priority dispute. The Appellate Division held that even though the prior lender made advances for specific sums to the borrower, those advances were not secured by the first lien priority of the prior mortgage. In this case, the liquidated damages sum was never specified in the JL Davis Mortgage, nor was the liquidated damages penalty even referenced anywhere in the JL Davis Mortgage.

Dragnet clauses are addressed by the *Restatement 3d of Property: Mortgages*, § 2.4. Under this section, the *Restatement* provides that dragnet clauses can only be used to secure future advances under a loan agreement, and furthermore that the advances "must be made in a transaction similar in character to the mortgage transaction." In this case, by contrast, Guleria seeks to use a dragnet clause to secure a liquidated damages penalty that is not "similar in character" to the purchase money loan secured by the JL Davis Mortgage. Moreover, the liquidated damages clause does not even appear in the purchase money loan agreement, but instead in a separate agreement (the WMD Franchise Agreement) which does not even reference the JL Davis Mortgage.

The Comments section of the Restatement specifies that "[a] mortgage will have a 'dragnet' effect only if a specific agreement between the mortgagor and mortgagee so provides." In this case, the specific agreement that Plaintiff seeks to enforce is the WMD Franchise Agreement. This Franchise Agreement includes a liquidated damages penalty for failure to purchase a certain quantity of gasoline. However, as noted above, the WMD Franchise Agreement makes absolutely no reference to the Mortgage as security for this penalty—and likewise does not state that foreclosure on the real estate is a remedy for any breach thereof.

When Guleria consented to the sale of the Property from JL Davis to WMD Properties, Guleria had a new opportunity to implement an enforceable dragnet clause. Yet, rather than draw up a new mortgage with a specific reference to liquidated damages, Guleria simply accepted an Assumption of the original JL Davis Mortgage. As noted above, the JL Davis Mortgage makes no reference to liquidated damages.

Guleria did enter into a new Franchise Agreement with the new owner, WMD Properties. However, as before, the WMD Franchise Agreement was completely silent as to both the Mortgage and any foreclosure remedy. In fact, while the JL Davis Franchise Agreement stated that a breach of the Mortgage

would yield remedies under the Franchise Agreement (but not the other way around), the WMD Franchise Agreement does not include any reference to the Mortgage whatsoever. Accordingly, in two different Franchise Agreements, Guleria did not include a provision stating that a breach thereof would entitle Guleria to foreclose. This is because the JL Davis Mortgage, as found by the Chancery Division, only secured the purchase money loan for the Property.

To summarize, New Jersey appellate case law and the Restatement 3d view dragnet clauses with disfavor, and strict construction is required to enforce one. The limited circumstances where a dragnet clause can secure additional liability are not present here for all of the following reasons: (1) the Mortgage makes no reference to liquidated damages, (2) liquidated damages for failure to buy gasoline is not "similar in character" to the purchase money loan for the real estate acquisition, (3) the JL Davis Franchise Agreement makes no reference to the Mortgage securing obligations thereunder, (4) the JL Davis Franchise Agreement makes no reference to any foreclosure remedy, (5) the WMD Properties Franchise Agreement makes no reference to the Mortgage at all, and (6) the WMD Properties Franchise Agreement makes no reference to any foreclosure remedy.

B. The Dragnet Clause Is Unenforceable Because it Only References the JL Davis Franchise Agreement

Guleria argues that the glancing reference to the JL Davis Franchise Agreement in the JL Davis Mortgage is sufficient to render the dragnet clause enforceable. As noted above, that position is not consistent with applicable law for many reasons. But even if the law were otherwise, the fact is that JL Davis Franchise Agreement *terminated* when JL Davis sold the Property to WMD Properties. Plaintiff consented to the sale of the Property and entered into a new Franchise Agreement with WMD Properties, superseding the original JL Davis Franchise Agreement. The JL Davis Mortgage, however, only references the original JL Davis Franchise Agreement. WMD Properties did not sign a new mortgage; rather, it assumed the original JL Davis Mortgage. Stated otherwise, *there is no mortgage that references the WMD Franchise Agreement*, and the WMD Franchise Agreement is what Guleria claims has been breached by the current owner. Simply stated, there is no dragnet clause in the JL Davis Mortgage that references the operative WMD Franchise Agreement.

For this reason alone, Guleria cannot foreclose on account of a breach of an agreement that is not referenced anywhere in the JL Davis Mortgage.

C. The Dragnet Clause is Unenforceable Because a Mortgage Cannot Secure an Unspecified Amount

Appellee OceanFirst Bank has searched far and wide for any case law supporting the proposition that a dragnet clause can secure additional debt for an unspecified amount. At the time the JL Davis Mortgage was granted, JL Davis owed nothing beyond the balance of the purchase price, *i.e.* the seller financing. When Appellant Guleria filed its Complaint, it claimed damages in the amount of $506,135.72. *See* Complaint, at ¶ 17. (Pa014). Later, when it filed its Motion for "Final Judgment", Guleria represented that WMD Properties owed $408,338.00. (Pa046-Pa047). What changed? No explanation has been provided. Indeed, if the current gas station operator Multani resumed purchasing gas from Guleria, the amount of the penalty would change. If Multani buys enough gas, the penalty could be reduced to zero.

This uncertainty in the amount allegedly owed to Plaintiff by WMD Properties under the WMD Franchise Agreement further supports the conclusion that the dragnet clause is not enforceable. Mortgages can only secure specific debts. The liquidated damages penalty in the WMD Franchise Agreement can change at any time, as shown by Guleria's own inconsistent declarations as to the amount of the penalty.

D. The Dragnet Clause is Unenforceable Because the Liquidated Damages Penalty Is Unenforceable

Under New Jersey law, liquidated damages clauses are deemed reasonable only when they are an attempt to approximate actual damages where actual damages cannot be calculated. Historically, New Jersey courts have distinguished between liquidated damages and penalty clauses. *Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 248, 645 A.2d 100 (1994). On the one hand, "[l]iquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs." *Id.*

On the other hand, "[a] penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." *Id.* at 248-49. As to the latter, because "[t]he settled rule in this State is that such a contract is unlawful… [p]arties to a contract may not fix a penalty for its breach." *Id.* at 249.

In this case, Appellant Guleria did not offer any evidence to support its position that the per gallon penalty for terminating the WMD Franchise

Agreement is reasonable. For example, Guleria produced nothing in discovery to demonstrate that actual damages cannot be tabulated. Yet, Guleria asked the Chancery Division to uphold an obvious penalty so Guleria could foreclose on real estate that it already sold and was fully paid for.

E. The Dragnet Clause is Unenforceable Because OceanFirst Bank Is a Bona Fide Mortgagee

As set forth in the comments of the *Restatement 3d of Property: Mortgages, § 2.4*, subtitled "Limitations when real estate is transferred":

> When real estate is subjected to a mortgage containing a dragnet clause, and is subsequently transferred, the operation of the clause is limited in two particulars. First, indebtedness incurred by or advances made to the original mortgagor after the mortgagee gains actual knowledge of the transfer will not be secured by the mortgage. If this were not so, the purchaser of real estate would be placed in the intolerable position of having his or her land subjected to an encumbrance of uncontrollable dimensions. Absent very clear evidence that the transferee has expressly accepted such a burden, it is not permitted. This rule suggests that a person who purchases land subject to a mortgage containing a dragnet clause is well advised to inform the mortgagee of the purchase immediately.
>
> Second, advances made to, or indebtedness incurred by the transferee of the real estate, rather than to or by the original mortgagor, will not ordinarily be secured. The reason for this limitation is that the transferee (who, of course, did not execute the mortgage) is most unlikely to anticipate that his or her other debts will be secured by it. If the transferee does not specifically evince such an intent, the element of unfair surprise is too great. Again, clear evidence that the transferee intends to allow such advances to add to the mortgage balance should yield a contrary result.
>
> In this case, the penalty allegedly owed under the WMD Franchise

Agreement did not arise until after OceanFirst Bank issued its mortgage loan. When OceanFirst Bank accepted its mortgage interest, there was no breach. Accordingly, OceanFirst Bank is a subsequent mortgagee entitled to additional protection from a dragnet clause, beyond the protections that the law already affords the debtor/mortgagor.

Further, OceanFirst Bank is a bona fide mortgagee, with no notice of the JL Davis Mortgage (which was discharged of record). Even if the discharge was forged, Guleria did nothing to reinstate the JL Davis Mortgage prior to filing this action, which was long after OceanFirst issued its mortgage loan to the new owner.

II. The Presumption of Validity of the Recorded Discharge Was Not Rebutted

A notarized signature on a deed or mortgage is presumed valid in New Jersey. According to § 2A:82-17, titled "Certificates of acknowledgment or proof of instruments as evidence of execution thereof," a certificate of acknowledgment made by a duly authorized officer is regarded as *prima facie* evidence that the person named executed the instrument as their voluntary act and deed. This presumption can only be overcome by *clear, satisfactory, and convincing evidence*. *Mortgage v. Cutrone*, 2021 N.J. Super. Unpub. LEXIS

729 (App. Div. Apr. 27, 2021); *Wells Fargo Bank, N.A. v. Awadallah*, 2018 N.J. Super. Unpub. LEXIS 417 (App. Div. Feb. 23, 2018); *Hmc Assets v. Miranda*, 2022 N.J. Super. Unpub. LEXIS 900 (App. Div. May 25, 2022).

Additionally, § 52:7-10.13, titled "Notarial act in this State," states that the signature and title of an individual performing a notarial act are *prima facie* evidence that the signature is genuine and that the individual holds the designated title. This statute further establishes that the authority of the notarial officer to perform the act is conclusively established. § 52:7-10.13. Notarial act in this State.

Case law also supports this presumption. In *Mortgage v. Cutrone*, the Court held that a notarized signature is presumed valid and that the presumption is only overcome by "clear, satisfactory, and convincing evidence." 2021 N.J. Super. Unpub. LEXIS 729 (quoting *Potter v. Steer*, 122 A. 685 (Ch. 1923)). Upon finding that the defendant mortgagor did not meet their heavy burden to overcome the presumption of validity, the trial court in *Cutrone* observed as follows:

> A party does not create a genuine issue of fact simply by offering a sworn statement. *Carroll v. N.J. Transit*, 366 N.J. Super. 380, 388, 841 A.2d 465 (App. Div. 2004). "[C]onclusory and self-serving assertions in certifications without explanatory or supporting facts will not defeat a

> meritorious motion for summary judgment." *Hoffman v. Asseenontv.com, Inc.*, 404 N.J. Super. 415, 425-26, 962 A.2d 532 (App. Div. 2009). Defendant's mere statement alleging she and her husband did not sign the note and mortgage, without any additional supporting facts cannot form the basis of raising a genuine issue of material fact."

Similarly, in *Wells Fargo Bank, N.A. v. Awadallah*, the Court reiterated that a notarized signature is presumed valid, and the burden of proof for any invalidity lies on the party making such an argument. N.J. Super. Unpub. LEXIS 417. *See also Dencer v. Erb*, 142 N.J. Eq. 422, 426, 60 A.2d 282 (Ch. 1948) ("A certificate of acknowledgment made by a duly authorized officer is regarded as prima facie evidence that the person therein named executed the instrument to which it is attached as his voluntary act and deed"); *Puder v. Buechel*, 183 N.J. 428, 440-41, 874 A.2d 534 (2005) ("Conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion."

In this case, the Chancery Division found that the JL Davis Mortgage did not secure the obligations in the Franchise Agreement, and therefore the Court did not need to reach the question of whether or not the recorded Discharge of the JL Davis Mortgage contained a forgery of Mr. Guleria's signature. In view of the statutory provisions and case law discussed above, Appellant Guleria's

self-serving assertion that his signature was forged, with no corroborating evidence, is insufficient as a matter of law to overcome the presumption that the Discharge is a valid instrument. Guleria was required to adduce "clear" and "convincing" evidence to rebut the statutory presumption, which it admittedly did not do.

Appellant Guleria could have taken discovery concerning the circumstanced surrounding the execution of the Discharge. It could have subpoenaed the licensed notary whose notarial seal appears under the Acknowledgment at the end of the Discharge instrument. It could have provided proof of Mr. Guleria's whereabouts on the day the Discharge was executed. It could have served discovery directed to WMD Properties or Bluestone Funding concerning the Discharge. But Guleria took none of these steps to gather the requisite evidence necessary to overcome the evidentiary presumption that the Discharge, which is duly acknowledged and recorded, is genuine.

CONCLUSION

The Chancery Division correctly determined, as a matter of law, that the JL Davis Mortgage was no longer a lien against the Property. Aside from the fact that Appellant Guleria failed to rebut with "clear and convincing evidence" the strong statutory presumption that the duly acknowledged Discharge of Mortgage was validly recorded, the Court below did not err when it declined to enforce the dragnet clause buried in the JL Davis Mortgage.

Respectfully submitted,

CURLEY & ROTHMAN, LLC

Date: March 3, 2025

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March 7, 2025

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RE: Guleria Enterprises, Inc. v. Multani 1510 Rt Gas L.L.C., et al.
Docket No.: A-000499-24
Civil Action on Appeal from a Final Judgment of the Superior Court, Chancery Division, General Equity Part, Camden County
Sat Below: Honorable Sherri L. Schweitzer, P.J.Ch.

PLAINTIFF'S LETTER REPLY BRIEF TO THE BRIEFS IN OPPOSITION FILED BY DEFENDANTS, OCEANFIRST BANK, N.A. AND JL DAVIS ENTERPRISES, INC.

To the Honorable Judges of the Appellate Division:

Please accept this Letter Brief of Plaintiff in Reply to the Briefs in Opposition filed by Defendants, Oceanfirst Bank, N.A. and JL Davis Enterprises, Inc.

TABLE OF CONTENTS

LEGAL ARGUMENT:

I. The Validity of the Recorded Discharge Was Not an Issue Raised Below by Oceanfirst or Considered by the Trial Judge.

Oceanfirst Bank in its Brief in Opposition raises in its Legal Argument II (Ob. 22) that the presumption of the validity of the recorded Discharge was not rebutted.

This is an issue not considered by the Trial Judge below, nor raised by the Defendant, Oceanfirst, in its Motion for Summary Judgment or in Opposition to Plaintiff's Motion for Summary Judgment.

The Trial Judge made no findings of fact or conclusions of law on the issue of forgery other than to briefly mention in her Opinion that no one spent any time on the issue (1T 5-7 to 5-10).

The only thing that counsel for Oceanfirst ever said about it was at Oral Argument when he stated it was a question of fact: "You know, we didn't discuss it too much in the motion because it's probably a fact issue as to whether the discharge was forged." (1T 15-2 to 15-4). Nor was there any evidence that the alleged notary who acknowledged the forged discharge was a properly qualified notary or authorized officer.

This is not a case where Guleria is merely stating he did not sign the discharge. All of the facts and actions taken by him after the date of the discharge point to one who had no knowledge of it. The circumstances of the recording of the discharge are suspicious. Why would Guleria sign a discharge when the Franchise Agreement was still secured under the mortgage?

In fact, the only reason given it is brief below as to why Oceanfirst was a bona fide mortgagee was that it had no knowledge of the forgery (Ob. 22).

II. A Mortgage Can Secure an Unspecified Amount if it is Capable of Being Reduced to Monetary Terms.

The Defendant, Oceanfirst, makes numerous unsupported and erroneous

factual representations and legal arguments in its Brief in Opposition.

Oceanfirst argues that a mortgage cannot secure an unspecified amount (Ob. 19). Although it claims it looked far and wide for any case law supporting the proposition that a dragnet clause can secure additional debt for an unspecified amount, it did not look far or wide enough. A mortgage is security for the payment of a debt or performance of some other act or duty. JW Pierson v. Freeman, 113 N.J. Eq. 268, 270 (E&A 1933). Mortgage means a consensual interest in real property which secures payment or performance of an obligation. N.J.S.A. 12A:9-102 (55).

The performance for which the mortgage stands as security need not be a debt in the technical sense, although it would seem to be essential that the performance should be capable of reduction to a money equivalent. 29 N.J. Prac. Sec. 4.1 - Law of Mortgages. This is the position taken by the Restatement (3rd) Property - Mortgages.

Restatement (3rd) Property Mortgages Sec. 1.4 provides that the obligation whose performance a mortgage secures must be measurable in terms of money or readily reduceable to a monetary value at the time of enforcement of the mortgage. The comment to that section states the nature of the obligation must be such as to permit a court to reduce it to a monetary value with reasonable certainty.

A recent example of application of these principles is found in Majestic Asset Mgt. v. Colony at Calif. Oaks, 107 Cal. App. 5th 413 (Cal. App. 2024), in which the Court upheld foreclosure of a mortgage which secured the obligation of performance of a maintenance obligation, which was unliquidated but subject to valuation through the testimony of an expert witness as to the reasonable cost to put the land in question, a golf course, in the condition that it would have been in had the required maintenance performance taken place. Id. at 426-427.

In addressing situations where a mortgage secures non-monetary obligations rather than repayment of a loan, the Court stated:

> If the secured obligation "cannot be reduced to money terms by its own provisions, either by virtue of a liquidated damages clause or otherwise, the trustor would not be able to [cure the default to avoid loss of the property], and the beneficiary would not be able to make a monetary bid [at the foreclosure sale] or determine the amount of its debt or loss.
>
> Therefore, if the secured obligation is not measurable in monetary terms, . . . [e]nforcement of the lien may not be possible except by judicial proceedings, where the obligation can be reduced to monetary terms by the court." Id. at 425.

See Stub v. Billmont, 124 P. 2d. 826, 829 (Cal. 1942) - repayment of loan secured by mortgage that also secured performance of five year consignment contract did not entitle debtor to satisfaction of mortgage upon payment of loan because it still secured performance of the contract during the term thereof.

Additionally, under the aforesaid Restatement Sec. 1.5, a mortgage need not describe the obligation whose performance it secures provided the parties have otherwise reached an agreement identifying the obligation (1.5a) nor need the mortgage recite the monetary value of the obligation whose performance it secures (1.5c).

It is not even essential to the validity of the mortgage that it should contain any reference to the debt secured since extrinsic evidence is always admissible to show the existence of the debt the mortgage was intended to secure. 29 N.J. Prac. - Law of Mortgages, Sec. 3.13 n. 1 & 3.

III. It is Not Necessary for the Franchise Agreement to List Foreclosure as a Remedy for Breach as it is Set Forth in the Note and Mortgage, but Even if it Was the Franchise Agreement Does in Paragraph 14.4.

Many of the factual statements or claims made by Oceanfirst in its Brief are either incorrect, unsupported by the record or are legally irrelevant to the issues on appeal and were shown to be in Plaintiff's original Brief. For example:

1. The WMD Franchise Agreement makes no reference to the mortgage, assumption or purchase of the property (Ob., p. 5 & 9). This is incorrect - see Pb. Pgs. 26-27.

2. The WMD Franchise Agreement did not reference mortgage foreclosure as a remedy for breach (Ob. p. 5 and 10). This statement ignores the

last paragraph of Article 14.4 which states: "Guleria's rights and remedies under this agreement are distinct, separate and cumulative and no one of them, whether or not exercised by Guleria, is in exclusion of any others under this agreement or any related or supplemental Agreement or at law or in equity." (Pa. 172). The WMD note (Pa. 137-138) states breach of the WMD Franchise Agreement constitutes a default under the note and assumed mortgage permitting foreclosure.

Default provisions here were not intended as limitations but enhancements to the owner's range of remedies for default, not a restriction on them. Torcon v. Alexian, 209 N.J. Super. 239, 241 (App. Div. 1986).

3. The Davis mortgage secured only the obligation to repay the purchase money loan (Ob. p. 5), the Davis Franchise Agreement made no reference to the purchase of the property (Ob. p. 8) and did not state default would entitle Guleria to foreclose (Ob. 8). These observations fail for many of the same reasons set forth in examples 1 and 2 above. The Davis note states that among other things, a default occurs if Davis fails to keep any promise made in the Franchise Agreement and incorporates the mortgage by reference (Pa. 77) and the mortgage provides for foreclosure if there is a default under the Franchise Agreement (Pa. 82). The Davis Franchise Agreement states that Davis is buying the property under the terms of the note and mortgage (Pa. 91 - Bottom pg. 1).

4. Both Davis and Oceanfirst keep referring to the WMD Franchise Agreement as a new agreement but have not addressed the arguments made by the Plaintiff in its original Brief that it is not (Pb. Arg. III, Pg. 15). Other than stating it is a new agreement, nothing by way of documentation, affidavits or certifications were submitted to support such a contention or prove that was the intention of the parties.

They also ignore the fact that the Assumption Agreement states that WMD is specifically assuming among other things the Davis Franchise Agreement (Pa. 201).

It is obvious from these examples that the documents in question were not diligently read or analyzed by the Defendants.

IV. Even if the Franchise Agreement's Liquidated Damage Clause Can Be Considered a Dragnet Clause, it is Enforceable in This Case.

Plaintiff argued in its original Brief the liquidated damage provision is not a dragnet clause (Pb. 39-40).

Assuming for the sake of argument that it could be construed as a dragnet clause, as Oceanfirst argues (Ob. pp. 2-17), it's contention that the clause should be construed narrowly and strictly against the mortgagee (Ob. 14) is applied incorrectly in this case.

The Restatement (3rd) Property-Mortgages defines future advances as "All situations in which the mortgagor's obligation or the amount or value of a mortgagor's secured performance arises or is enlarged after the mortgage becomes effective." Sec. 2.1 comment a. This is mentioned and seems to have been adopted by our Supreme Court in Rosenthal v. Benun, 226 N.J. 41, 50-51 (2016) - circumstances other than a money advance such as a personal guaranty.

The Restatement of Property-Mortgage Sec. 2.4 - Priority of Future Advances - states that the principle of narrow construction arose for the protection of the mortgagor because a mortgagor may not have noticed the clause in the mortgage or understand its significance, referring to general clauses that state that the security covers not only the debt incurred in the instant transaction, "but in addition all other debts or obligations that are presently owed or may in the future be owed to the mortgagee by the mortgagor". In order to level the playing field, the law imposed a limitation that in these instances, the mortgage will generally secure only advances made in transactions of a character similar to that in which the mortgage was taken. See Comment C to Sec. 2.4. See 29 N.J. Prac. Law of Mortgages, Sec. 3.30.

Restatement (3rd) on Property Mortgage 2.4 addresses securing advances not specifically described. If the obligation is only referred to in general terms such as

"all future debts mortgagor may owe, the law imposes certain limitations: (1) the parties must agree that such advances are secured and (2) they must be made in a transaction similar in character to the mortgage transaction unless the mortgage describes with reasonable specificity the additional types of transactions in which the advances will be secured.

This is to mitigate the potential for unanticipated coverage. Id. at 2.4(b); Lorusso v. Schaible, 2011 WL 4388355 *7 (App. Div. 2011), citing the Restatement (Pb. 43, Pa. 359).

The Restatement supra states that the similar in character test can be satisfied in many ways such as, the advances assist in financing the same or similar type business venture or simply states it is for business loans without specifying otherwise. Id.; L.B. Nelson v. Western American, 722 P.2d. 379 (Az. App. 1986); Garnett St. Bk. v. Tush, 657 P.2d. 508 (Kan. 1983); Smith v. Um. St. Bk., 452 NE 2d. 1059 (Ind. App. 1983); Lorusso, supra at *6 - multiple commercial transactions (Pa. 359).

The mortgage and franchise agreements in question in this appeal were all part of the same transaction. Additionally, it is specifically set forth that the mortgage secures all obligations under the Franchise Agreements.

Plaintiff Guleria was not required to spell out each and every obligation

covered. If the mortgagor read the agreement before signing, then the mortgagor understood what these obligations were. If not read, the mortgagor is still bound by the contract.

The Bank's point in this regard is not well taken and misconstrues the law. The liquidated damage clause was not some subsequent debt dissimilar in character and unexpected by the mortgagor. It was there from the beginning.

Since 2001, our version of the UCC has rejected any test which attempts to determine whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as the earlier advances and obligations secured by the collateral. Rather, it is the agreement and the intent of the parties that is considered. N.J.S.A. 12A:9-204c Comment 5.

If one considers a contingent contractual liability such as liquidated damages in the Franchise Agreement at issue as a future advance, then applying the common law rule as set forth in Rosenthal, supra, Id. at 48, 61-64, i.e., that when a future advance is optional, the first mortgagee must have actual not just constructive notice of the intervening lien before the future advance is made to subordinate the future advance to the intervening lien.

That is not what happened here as Guleria had no actual notice of either the Bluestone or Oceanfirst mortgages before the breach of the Franchise Agreement

by WMD.

Also, the liquidated damage provision is not optional. It is mandatory for breach of the agreement thus the priority of the mortgage is not lost to intervening liens.

Further, the contingent contractual liability can be included under the mortgage modification relation back provision, N.J.S.A. 46:9-8.2 since in this case the liquidated damage provision is not optional and would be protected under that part of the statute which covers any amount in excess of the original mortgage which constitutes "other payments made by the mortgagee pursuant to the terms of the mortgage."

CONCLUSION

Any construction given to a party's mortgage must do justice, respect common sense and enforce the intention of the parties. Simonson v. Z Cranbury Assoc., 302 N.J. Super. 179, 185 (App. Div. 1996).

The Trial Judge's analysis and the Defendant's contentions ignore this

simple principal of law and the intentions of the parties to these transactions.

Respectfully submitted,

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