

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

FIFTH THIRD BANK,	:	APPEAL NO. C-110249
	:	TRIAL NO. A-0908344
Plaintiff-Appellee,	:	
	:	JUDGMENT ENTRY.
vs.	:	
CLEVELAND MOTOR CARS, INC.,	:	
	:	
Defendant,	:	
	:	
and	:	
	:	
JAMES L. BRUCE, JR.,	:	
	:	
and	:	
	:	
MITCHELL C. SIMPSON,	:	
	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Plaintiff-appellee Fifth Third Bank issued a Master Secured Promissory Note to defendant Cleveland Motor Cars pursuant to a Dealer Floor Plan Agreement. Defendants-appellants James Bruce, Jr., and Mitchell Simpson signed as guarantors on the note.

When Cleveland Motor Cars failed to pay the note on time, Fifth Third entered into a forbearance agreement with Cleveland Motor Cars, Bruce, and Simpson. As part of that agreement, and as additional collateral to the original note, Cleveland Motor Cars provided a letter of credit from Community Bank & Trust (CB&T) in the amount of \$500,000 to Fifth Third Bank. Nothing in the agreement changed the terms of the original note, other than to allow additional time for repayment.

Cleveland Motor Cars again failed to pay the amount due under the terms of the forbearance agreement, and Fifth Third filed suit against the defendants. In addition to filing suit, Fifth Third sought to collect through the line of credit with CB&T. The line of credit was not honored, and Fifth Third filed suit for wrongful dishonor. Shortly after, CB&T was closed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. Fifth Third filed a claim with the FDIC, and received a Receiver's Certificate for the amount of the debt.

To date, Fifth Third has received no money for the debt owed by Cleveland Motor Cars, Bruce, and Simpson. Fifth Third and the defendants filed cross-motions for summary judgment. The defendants argued that the Receiver's Certificate should operate to extinguish the debt and relieve them of liability. Fifth Third argued that the certificate only acted to relieve CB&T of its obligations, which are distinct from those of the defendants. The trial court agreed with Fifth Third and granted judgment in its favor.

In one assignment of error, Bruce and Simpson argue that the trial court improperly granted summary judgment. We disagree.

As this court noted, "a guarantor's liability * * * is governed by the terms used in the contract. The guaranty agreement is interpreted as any other contract under Ohio law. If a guaranty's terms are clear and unambiguous, a court may not construe it to have another meaning." (Citations omitted.) *O'Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App. 3d 233, 2006-Ohio-5264; 862 N.E.2d 549 ¶ 23 (1st Dist.).

The guaranty, signed by Bruce and Simpson as guarantors, contained the following language:

The liability of each Guarantor hereunder shall be unconditional * * *.
Each Guarantor does hereby agree that if the Obligations are not paid by Dealer in accordance with their terms, * * * such Guarantor will immediately make such payment. * * * This is a guaranty of payment and

performance and not of collection. The liability of each Guarantor under this Guaranty shall be direct and immediate and not conditional or contingent upon the pursuit of any remedies against Dealer or any other person * * *. Each Guarantor waives any right to require that an action be brought against Dealer or any other person or to require that resort be had to any security or to any balance of any deposit account or credit on the books of the Bank in favor of Dealer of any other person.

Thus, according to the language of the agreement, the obligation of Bruce and Simpson was absolute.

Bruce and Simpson argue that the Receiver's Certificate issued by the FDIC represented payment of the debt and, therefore, the obligation had been satisfied. But the cases they cited contain a common thread—they involve litigation in which the institution in the receivership of the FDIC owed a debt and was the sole debtor. In this case, CB&T, the institution in the receivership of the FDIC, had issued a letter of credit on behalf of Cleveland Motor Cars, which had acted as additional collateral for the joint debt of Cleveland Motor Cars, Bruce, and Simpson. Unlike in the cases cited by Bruce and Simpson, Fifth Third had the contractual right to pursue both the letter of credit and collection from the guarantors, without the pursuit of one foreclosing the ability of the bank to seek the other.

In this context, the "Obligations [were] not paid by the dealer in accordance with their terms[.]" Therefore, the guarantors were liable for payment. We hold that the Receiver's Certificate issued on behalf of CB&T by the FDIC to Fifth Third Bank did not extinguish the bank's right to seek the alternate remedy of pursuit of the guarantors.

The sole assignment of error of defendants-appellants James Bruce, Jr., and Mitchell Simpson is overruled. The judgment of the trial court is affirmed.

OHIO FIRST DISTRICT COURT OF APPEALS

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and HENDON, JJ.

To the clerk:

Enter upon the journal of the court on January 27, 2012

per order of the court _____.

Presiding Judge

