

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MUTUAL OF OMAHA BANK,

Plaintiff/Judgment Creditor,

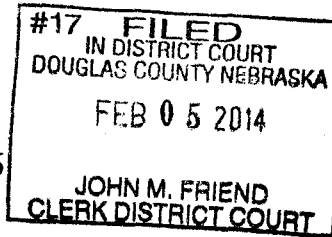
v.

SAM MURANTE,

Defendant/Judgment Debtor.

DOC. 1114 PAGE 856

CI 10 9393009



**ORDER FOR JUDGMENT  
DEBTOR'S EXAM IN AID OF  
EXECUTION**

This matter is before the Court on Plaintiff/Judgment Creditor, Mutual of Omaha Bank's Motion for Judgment Debtor's Exam in Aid of Execution. Being fully advised therein and for good cause shown:

IT IS HEREBY ORDERED that Defendant/Judgment Debtor Sam Murante shall appear on February 24, 2014, at 8:45 a.m. before the Douglas County District Court, in the courtroom of the Honorable Gary B. Randall, Courtroom No. 316, 1701 Farnam Street, Omaha, Nebraska 68183, to be sworn to answer upon examination under oath concerning Defendant/Judgment Debtor's personal and real property subject to execution, and that Defendant/Judgment Debtor bring with him or produce to Mutual of Omaha Bank's counsel prior to, such records as he may have or may be able to obtain which concern his personal and real property, including, but not limited to:

1. Copies of all of his IRS Form 1040s for the three years preceding the date of this Order;
2. Copies of any of his audits, financial statements or reports for the last three years;
3. Bank statements and check registers on all checking accounts belonging to him or in which he has or has had any interest whatsoever or jointly with any other person(s) or entity(ies) for two years preceding the date of this Order;



4. Bank statements and any savings deposit books regarding all savings accounts belonging to him or in which he has or has had any interest whatsoever, either alone or jointly with any other person(s) or entity(ies), for two years preceding the date of this Order;

5. Statements and any savings deposit books regarding money management accounts, money market accounts or any savings accounts of any type, belonging to him or in which he has had any interest whatsoever, either alone or jointly with any other person(s) or entity(ies), for three years preceding the date of this Order;

6. All documents regarding the purchase and/or sale of real property in which he now holds or within the past five years held any interest of any type, either alone or with any other person(s) or entity(ies), including but not limited to condominium management reports, deeds, titles, notes, contracts of any sort, escrow instructions, mortgages and deeds of trust;

7. All evidence and all certificates of any and all stocks, stock certificates, and bonds belonging to him or in which he has or has had any interest whatsoever either alone or with any other person(s) or entity(ies) for three years preceding the date of this Order;

8. All evidence of any and all notes, contracts, negotiable instruments receivable, or accounts receivable, whether due or not due, belonging to him or in which he has or has had any interest whatsoever, either alone or jointly with any other person(s) or entity(ies), for three years preceding the date of this Order;

9. All agreements or other evidence in writing concerning the factoring, transfer and assignment of any of the items referred to in Paragraph 8 above;

10. All real or personal property assessment notices received by him within three years preceding the date of this order from any taxing agency, State or Federal, whatsoever;

11. A complete inventory of any and all items of personal property valued in excess of \$300.00 which are owned by him, including automobiles, boats, fixtures, furnishings, appliances, jewelry, and clothing, whether fully paid for or not. If the personal property is not in his possession and is in the possession of another person or entity, state also the name and address of the person or entity having possession of the property;

12. All documents which represent or evidence any trademark, tradename, copyright or patent in which he has or has had an interest in the last two years, either alone or jointly, with any other person(s) or entity(ies);

13. Any and all records pertaining to his finances which may reflect his present financial status and asset ownership for the past two years prior to and including the date of his appearance required hereby;

14. All information concerning the source of any and all present income, accounts receivable and donations which he has earned or received during the past two years prior to and including the date of his appearance required hereby;

15. All information concerning any and all accounts receivable in which he may have a future or prospective interest, whether determined or contingent, including but not limited to donations, inheritances, gifts, devises, contract rights, wills, trusts, instruments, and any and all other writings whatsoever, which may reflect such income;

16. Any and all records and evidences of any causes of action or legal claims of any nature or kind whatsoever; and

17. Any and all records, writings and information pertaining to or otherwise reflecting assets or properties which he owned or in which he had an interest within the last two years.

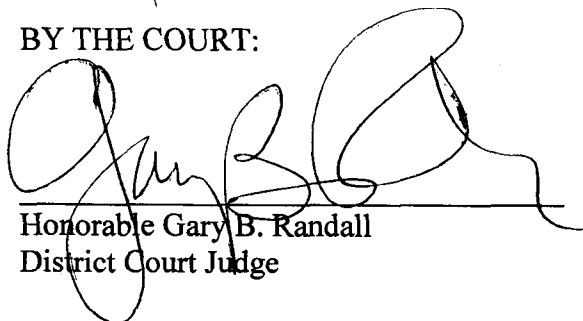
IT IS FURTHER ORDERED, that after Mr. Murante is sworn, the debtor's examination shall proceed at the office of Kutak Rock LLP, 1650 Farnam Street, Omaha, Nebraska 68102 before an officer of the Court and shall be recorded by stenographic means and preserved by written transcript.

IT IS FURTHER ORDERED, pursuant to Neb. Rev. Stat. § 25-1572, that any property that legally or equitably belongs to Sam Murante now or later acquired or becoming due to him (not exempt by law) be applied towards the satisfaction of the judgment.

IT IS FURTHER ORDERED that Sam Murante, pursuant to Neb. Rev. Stat. § 25-1573, is forbidden from making or suffering any transaction or other disposition of or interference with any of his money or property (not exempt from law) that might be used to satisfy the judgment.

Dated this 4 day of February, 2014.

BY THE COURT:



Honorable Gary B. Randall  
District Court Judge

Prepared and Submitted by:

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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MUTUAL OF OMAHA BANK,

Appellee,

vs.

SAM MURANTE,

Appellant.

CI 10-9393009

DOC. 111~~4~~ NO. 856

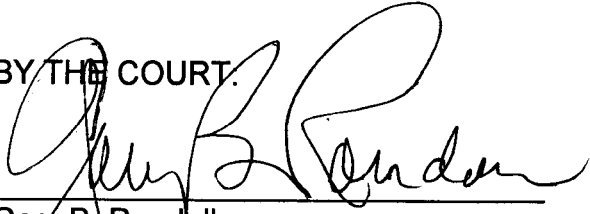
ORDER ON MANDATE

Pursuant to mandate from the Nebraska Supreme Court, the appeal from the judgment of the District Court of Douglas County, Nebraska, is affirmed and costs in the amount of \$125.00 are to be paid by Appellant.

IT IS SO ORDERED.

DATED this 28<sup>th</sup> day of May, 2013.

BY THE COURT:

  
\_\_\_\_\_  
Gary B. Randall,  
District Court Judge



J00140257D01

FILED  
MAY 29 2013  
CLERK OF DISTRICT COURT  
DOUGLAS COUNTY, NEBRASKA

IN THE DISTRICT COURT OF DOUGLAS COUN



MUTUAL OF OMAHA, as successor  
by merger to NEBRASKA STATE  
BANK OF OMAHA

Plaintiff,

vs.

SAM MURANTE, an individual,

Defendant.

Doc. 1114 Page 856  
CI 10 9393009

**ORDER ON DEFENDANT'S  
MOTION TO AMEND AND  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

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DISTRICT COURT

This matter comes before the Court pursuant to a Motion for Summary Judgment filed by the Plaintiff, Mutual of Omaha Bank ("MOB") on May 25, 2011, and a Motion to Amend Answer filed by Defendant, Sam Murante, on July 28, 2011. A hearing on MOB's Motion was held July 21, 2011. A hearing on Murante's Motion was held on August 4, 2011. The parties appeared through counsel, arguments were heard, briefs were submitted, and the matter was taken under advisement. For the reasons discussed below, this Court hereby denies Murante's Motion to Amend, and grants MOB's Motion for Summary Judgment.

**FACTS**

This action was filed by Mutual of Omaha Bank ("MOB") on January 18, 2011, to recover on a breach of a continuing commercial guaranty for payment ("the Guaranty") executed by Defendant, Sam Murante, on October 31, 2005, in connection with a loan made by Nebraska State Bank of Omaha ("NSBO") to Sutherlands Plaza, L.L.C. ("the Borrower"). MOB is a federal savings bank with its principle place of business in Omaha, Douglas County, Nebraska, and is the successor in interest to NSBO. The parties dispute the extent and amount of Murante's liability as guarantor on promissory notes executed by the Borrower.

Sam Murante, a real estate broker, entered into a business relationship with Robert L. Pelshaw in 2000. In 2005, Murante and Pelshaw began the development of the Sutherland's property at 29<sup>th</sup> and L Street in Omaha, and formed the Sutherland Plaza, L.L.C. (Affidavit of Sam Murante ¶ 1, 2). From October 2005 through June 2009, Sutherlands Plaza, L.L.C. took out four loans from NSBO and its successor MBO in connection with the development of the Sutherland's property. The details of each transaction are as follows:

### **Borrower's Loans**

#### **1. The First Loan**

On October 31, 2005, NSBO loaned \$2,233,950.00 ("Initial Loan") to the Borrower, evidenced by a promissory note ("Initial Note") executed by the Borrower on the same date (Affidavit of John Cox ¶ 2; Ex. A). To secure the First Loan and First Note, the Borrower executed a "Construction Deed of Trust" on October 31, 2005 ("First Deed"), and a "Deed of Trust" on September 29, 2006 ("Second Deed") (Cox Aff. ¶ 3; Exhibits A, B). Borrower modified the First Deed on January 4, 2008, and amended it on October 26, 2009 (Cox Aff. ¶ 4; Ex. D, E). Collectively, the documents modifying and amending the First Deed are the "2005 Deed of Trust" and, prior to foreclosure, (i) encumbered real estate described as: Lots 1 and 2 Sutherlands Plaza Replat, an addition to the city of Omaha, Douglas County, Nebraska; and (ii) encumbered and assigned all leases and rents arising from and relating to the Sutherlands Plaza Property (Cox Aff. ¶ 5). Borrower also modified the Second Deed on January 15, 2008, and amended it on October 26, 2009. Collectively, the documents modifying and amending the Second Deed are the "2006 Deed of Trust," and prior to foreclosure, (i) encumbered real estate described as: Lot 1 Railcar Addition, Omaha, NE 68107; and (ii) encumbered and assigned all leases and rents arising from or relating to the Railcar Addition Property (Cox Aff. ¶ 6). In

November 2007, NSBO merged with MOB, so that MOB became the holder of the Initial Note and the Initial Loan, and the beneficiary of the 2005 and 2006 Deeds of Trust (Cox Aff. ¶ 7).

On January 4, 2008, the Borrower refinanced the Initial Note and executed a promissory note in the original principal amount of \$2,337,078.00 ("First Note"), evidencing a loan of the same amount to the Borrower ("First Loan"). Prior to foreclosure, the First Note and First Loan were secured by the 2005 Deed of Trust and the 2006 Deed of Trust (Cox Aff. ¶ 8).

## **2. The Second Loan**

On May 9, 2006, NSBO loaned \$619,250.00 to Borrower ("Second Loan"), evidenced by a promissory note ("Second Note"). Through the merger with NSBO, MOB became the holder of the Second Note (Cox Aff. ¶ 9; Ex. H).

## **3. The Third Loan**

On December 22, 2008, MOB loaned \$122,500.00 ("Third Loan") to Borrower, evidenced by a promissory note in the same amount ("Third Note") (Cox Aff. ¶ 10; Ex. I). The Third Note provides that it is "guaranteed by the Guaranty of Payment dated of even date herewith and executed by Robert Pelshaw, as an individual" (Ex. I, p. 3). Borrower executed a deed of trust ("Third Deed") on December 22, 2008, to secure the obligations owing from Borrower to MOB under the Third Note (Cox Aff. ¶ 11; Ex. J). Prior to foreclosure, the Third Deed of Trust (i) encumbered the Sutherlands Plaza Property and the Railcar Addition Property and (ii) assigned and encumbered all rents and leases arising from or relating to the Sutherlands Plaza Property and the Railcar Addition Property (Cox Aff. ¶ 12). Murante asserts he had no knowledge of the Third Loan, was not asked to guarantee the Third Loan, and did not sign anything in connection with the Third Loan (Murante Aff. ¶ 4).



#### **4. The Fourth Loan**

On June 4, 2009, MOB loaned \$75,000 to Borrower ("Fourth Loan"), evidenced by a promissory note in the same amount ("Fourth Note") (Cox Aff. ¶ 13; Ex. K). The Fourth Note provides that "In support of this transaction, a Guaranty dated June 4, 2009 has been executed by Robert L. Pelshaw; and a Guaranty dated June 4, 2009 has been executed by Sam Murante" (Ex. K, p. 1). Murante asserts that he did not sign the guaranty or the promissory note for the Fourth Loan (Murante Aff. ¶ 5). Borrower executed a deed of trust ("Fourth Deed") to secure the obligations owing from Borrower to MOB under the Fourth Note, which, prior to foreclosure, (i) encumbered the Sutherlands Plaza Property and the Railcar Addition Property; and (ii) assigned and encumbered all rents and leases arising from or relating to all rents and leases arising from or relating to the Sutherlands Plaza Property and the Railcar Addition Property (Cox Aff. ¶ 14).

MOB is the current owner and holder of the First Note, Second Note, Third Note, and Fourth Note (Complaint ¶ 9; Answer ¶ 17). Prior to foreclosure, MOB was the beneficiary of the 2005 Deed of Trust, the 2006 Deed of Trust, the Third Deed of Trust, and the Fourth Deed of Trust (Cox Aff. ¶ 16).

#### **The Guaranty**

On October 31, 2005, in connection with the First Loan, Murante executed a "Commercial Guaranty," ("the Guaranty") naming NSBO as the Lender, Sutherlands Plaza, L.L.C. as the Borrower, and Sam Murante as the Guarantor (Ex. M, p. 1). Under the Guaranty, "Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents" (Ex. M, p. 1). The Guaranty specifies:

This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's

remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty, or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order, on demand ... without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing. (Ex. M, p. 1).

The Guaranty later recites, "This is a continuing guaranty under which guarantor agrees to guarantee the full and punctual payment, performance and satisfaction of the Indebtedness of borrower to lender, now existing or hereafter arising or acquired, on an open and continuing basis. (Ex. M, p. 1). The Guaranty defines "Indebtedness" as:

... all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon ... arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans ... whether: ... barred or unenforceable against Borrower for any reason whatsoever ... (Ex. M, p. 1).

The Guaranty defines "Related Documents" as "all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness" (Ex. M, p. 3).

The "Duration of Guaranty" subsection provides:

This Guaranty ... will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. If Guarantor elects to revoke this Guaranty, Guarantor may only do so in writing. Guarantor's written notice of revocation must be mailed to Lender, by certified mail, at Lender's address listed above or such other place as Lender may designate in writing. Written revocation of this Guaranty will apply only to advances or new Indebtedness created after actual receipt by Lender of Guarantor's written revocation. ... This Guaranty will continue to bind the Guarantor for all the Indebtedness incurred by Borrower or committed by Lender prior to receipt of Guarantor's written notice of revocation ... (Ex. M, p. 1).

The Guaranty further provides, "Guarantor authorizes Lender . . . (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower . . ." (Ex. M, p. 1). Under the subsection "Guarantor's Waivers," Guarantor expressly waives:

. . . any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. (Ex. M, p. 2).

Finally, the Guaranty specifies:

If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other untermiated guaranties. (Ex. M, p. 1).

### **Default**

Borrower defaulted under the four Notes executed in connection with the Loans by, *inter alia*, (a) failing to make payments of principal and interest when due under the four promissory notes; (b) failing to pay real estate taxes on real property that secures some of the promissory notes; and (c) commencing a voluntary Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Nebraska, Case No. 10-82588, on September 2, 2010

(Complaint ¶ 12; Answer ¶ 12). Pelshaw commenced a voluntary bankruptcy proceeding in the United States Bankruptcy Court for the District of Nebraska, Case No. 10-80982, which also constitutes an Event of Default under each of the Deeds of Trust and the Borrower's Notes (Cox Aff. ¶ 23). Subsequently, the Substitute Trustee under the 2005 Deed of Trust, the 2006 Deed of Trust, the Third Deed of Trust, and the Fourth Deed of Trust recorded four separate Notices of Default with the Register of Deeds of Douglas County, Nebraska, and served copies of the notices with demands for payment on Borrower on June 18, 2010, and Guarantor on July 22, 2010 (Cox. Aff. ¶ 26; Affidavit of Robert D. Garman ¶¶ 8-10 ). Neither Borrower nor Guarantor has paid the amounts due on each of the four Notes (Garman Aff. ¶ 12).

### **The Current Dispute**

MOB filed its Complaint on January 18, 2011, alleging that Murante breached the Guaranty by refusing to pay Borrower's Indebtedness subsequent to Borrower's default (Complaint ¶¶ 16-21). MOB's Complaint alleges that Murante owed as of January 1, 2011: 1) the unpaid principal balance on the First Note of \$2,312,455.90, accrued interest of \$150,816.05, and late charges of \$3,068.13; 2) the unpaid principal balance on the Second Note of \$570,157.95, accrued interest of \$47,909.95, and late charges of \$2,219.10; 3) the unpaid principal balance on the Third Note of \$122,118.09, accrued interest of \$4,720.21, and late charges of \$73,461.74; and 4) the unpaid principal balance on the Fourth Note of \$73,461.74, accrued interest of \$4,468.85, and late charges of \$500.000 (Complaint ¶ 14). The total amount of Borrower's Indebtedness is \$3,292,839.33 (Cox Aff. ¶ 24). MOB alleges interest is accruing on the outstanding Indebtedness at: 1) \$1,608.65 per day on the First Note; 2) \$395.95 per day on the Second Note; 3) \$39.01 per day on the Third Note; and 4) \$51.37 per day on the Fourth Note (Complaint ¶ 15).

On March 14, 2011, after MOB filed its Complaint but before Murante filed his Answer on April 1, 2011, the Substitute Trustee under each of the Deeds of Trust executed a Notice of Trustee's Sale, which provided that the Sutherlands Plaza Property and the Railcar Addition Property would be sold at a public auction to the highest bidder on April 26, 2011, and published copies of the Notice once a week for five consecutive weeks in the Daily Record from March 17, 2011, to April 14, 2011 (Cox Aff. ¶ 27). Three parties, including MOB, appeared at the auction (Cox Aff. ¶ 28). MOB's credit bid of \$1,658,000 was the highest at the auction for the Sutherlands Plaza Property and the Railcar Addition Property, which was conveyed to MOB through a Trustee's Deed dated April 28, 2011, and recorded with the Douglas County, Nebraska Register of Deeds (Cox Aff. ¶ 28). MOB concedes that Murante is entitled to credit for the sale price at the auction (Transcript 12:20-25; 13:1-25).

Murante does not dispute that pursuant to the Guaranty he is obligated on the First Note and Second Note, although he contends that the fair market value of the property on the date of the auction should be credited to his obligation, rather than MOB's actual bid (Answer ¶ 14; Trans. 14:2-25; 15:1-5). Murante denies that pursuant to the Guaranty he is obligated on the Third Note and Fourth Note (Answer ¶ 14). Murante asserts that in 2008, he terminated his business relationship with Pelshaw and the Sutherlands project. Murante alleges that MOB knew of this termination (Murante Aff. ¶ 3). Murante states that MOB loaned Borrower the Third Loan and Fourth Loan after Murante ended his involvement with the Sutherlands project, and that he had no knowledge of, nor guaranteed or was asked to guarantee either Loan (Murante Aff. ¶ 4).

MOB filed its Motion for Summary Judgment on May 25, 2011. Murante filed a Motion to Amend Answer on July 28, 2011. Both Motions are presently before this Court.

## STANDARDS OF REVIEW

### 1. Motion to Amend

Parties may amend their pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, parties may amend it within 30 days after it is served. Otherwise parties may amend their pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires. NEB. CT. R. § 6-1115 (2011); *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 163, 741 N.W.2d 184, 193 (2007). A district court's denial of leave to amend pleadings is appropriate in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated. *Bailey*, 16 Neb. App. at 162-63, 741 N.W.2d at 193. If the motion is made in response to a motion for summary judgment and the parties have presented all relevant evidence in support of their positions, then the amendment should be denied as futile when the evidence in support of the proposed amendment creates no triable issue of fact and the opposing party would be entitled to judgment as a matter of law. *Id.* at 169, 741 N.W.2d at 196-97.

### 2. Summary Judgment

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there are no genuine issues as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Malolepszy v. State*, 273 Neb. 313, 314, 729 N.W.2d 669, 672 (2007). The party moving for summary judgment has the burden of producing evidence and demonstrating that there are no genuine issues of material fact. *Malolepszy*, 273 Neb. at 323, 729 N.W.2d at 677. The moving party makes a *prima facie* case by offering sufficient evidence to demonstrate they are entitled to

a judgment if the evidence is undisputed at trial. *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W. 2d 219, 223 (2005). Once the moving party has made out a *prima facie* case, the burden of production shifts to the party opposing the motion. *Cerny*, 270 Neb at 710, 708 N.W.2d at 223. On a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences deducible from the evidence. *Malolepszy*, 273 Neb at 323, 729 N.W.2d at 677.

## DISCUSSION

### **I. Defendant's proposed affirmative defense is futile as a matter of law**

After the hearing on MOB's Motion for Summary Judgment was held July 21, 2011, Murante filed a Motion to Amend his Answer to include an additional affirmative defense. Specifically, Murante alleges that MOB failed to file a deficiency judgment against Borrower within three months of the date of the foreclosure sale pursuant to the Nebraska Trust Deeds Act, Nebraska Revised Statute § 76-1013.<sup>1</sup> Murante contends that because MOB can no longer seek a deficiency judgment against Borrower, Borrower has no "Indebtedness" to MOB that Murante is responsible for as guarantor. This Court finds that Murante's affirmative defense is futile under Nebraska law.

Murante directs this Court's attention to *Surety Life Insurance Co. v. Smith*, 892 P.2d 1 (Utah 1995), and *First Interstate Bank of Nevada v. Shields*, 730 P.2d 429 (Nev. 1986) to support his affirmative defense. In *Smith*, the Utah Supreme Court concluded that the Utah Trust Deeds

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<sup>1</sup> This section provides, "At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security." NEB. REV. STAT. § 76-1013 (2011).

Act's three month statute of limitations<sup>2</sup> barred a deficiency action brought after three months against a guarantor, overruling prior decisions which had limited the Act's protections only to borrowers. *Smith*, 892 P.2d at 3. Similarly, the Supreme Court of Nevada in *Shields* overruled prior cases that held the protection of deficiency judgment legislation is inapplicable to actions on guaranty contracts. *Shields*, 730 P.2d at 430. However, the Nebraska Court of Appeals in *Boxum v. Munce*, 16 Neb. App. 731, 751 N.W.2d 657 (2008) adopted an approach that directly contradicts *Smith* and *Shields*, and determined that a suit on a guaranty of payment is subject to the five year statute of limitations on contracts provided for in Nebraska Revised Statute § 25-205, rather than the three month statute of limitations for a deficiency action under the Nebraska Trust Deeds Act. *Boxum*, 16 Neb. App. at 739-40, 751 N.W.2d at 663.

This Court notes that Murante's affirmative defense is not that MOB failed to bring a deficiency action against him as guarantor within three months after foreclosure, as discussed in *Boxum*, *Smith*, and *Shields*, but that MOB's failure to bring a deficiency action against Borrower within three months discharges Borrower's "Indebtedness," relieving Murante from his guarantor's obligation. Murante's position ignores the provision of the Guaranty which defines "Indebtedness" to include "loans . . . whether: . . . barred or unenforceable against Borrower for any reason whatsoever . . ." (Ex. M, p. 1). Moreover, in the Guaranty, Murante waived raising any rights or defenses based on "any disability or other defense of Borrower . . . or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness." (Ex. M, p. 2). Further, the Nebraska Supreme Court has accepted the rule that "If the principal obligation is not void, but is merely unenforceable against

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<sup>2</sup> The relevant provision construed by the court in *Smith* is identical to the Nebraska Trust Deeds Act, and provides: "At any time within three months after any sale of property under a trust deed as provided in [this Code], an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security..." UTAH CODE ANN. § 57-1-32 (2011).



the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty.” *Dep’t of Banking v. Keeley*, 183 Neb. 370, 372, 160 N.W.2d 206, 207-8 (1968); *Accord*, 38 AM. JUR. 2D *Guaranty* § 37.

This is an action to enforce the guaranty contract Murante made when he guaranteed payment of the Notes. Pursuant to the Guaranty’s terms, the fact that MOB can no longer bring a deficiency action against Borrower does not extinguish its underlying “Indebtedness” that Murante guaranteed to pay. Therefore, this Court concludes that because Murante’s affirmative defense creates no triable issues of fact, Murante’s Motion to Amend Answer is denied.

## **II. Plaintiff is entitled to judgment as a matter of law**

After reviewing the record and evidence submitted at the summary judgment hearing held on July 21, 2011, this Court concludes there is no genuine issue of material fact. MOB is suing Murante for breach of the Guaranty. Murante admits he signed the Guaranty on October 31, 2005, and does not dispute that he was served with a demand for payment and did not pay. The parties do dispute the extent of Murante’s obligations under the Guaranty. A guaranty is a contract, and is interpreted using the same general rules as are used for other contracts. *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 110, 738 N.W.2d 805 (2007). The meaning of a contract is a question of law. *Builders Supply Co., Inc. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). Thus, the question before this Court is one of law.

### **1. Murante does not dispute that he is liable as guarantor on the First Note and Second Note**

In Murante’s Answer, he denies his liability on the Third Note and Fourth Note, but does not deny that the Guaranty obligates him to pay as guarantor on the First Note and Second Note (Complaint ¶ 14; Answer ¶ 14). The parties also do not dispute the amount of “Indebtedness”

that Borrower owed MOB before foreclosure (Complaint ¶ 14; Answer ¶ 14; Transcript 12:16-20). The only dispute with regards to the First Note and Second Note is how much credit Murante is entitled to receive against the Indebtedness pursuant to the foreclosure of the property secured by the Deeds of Trust (Transcript 12:20-25; 13:1-18; 14:12-25; 15:1-5). Thus, this Court finds that MOB is entitled to summary judgment on its claim that Murante is liable on the Guaranty for the First Note and Second Note.

## **2. Murante is liable as guarantor on the Third Note and Fourth Note**

Murante disputes that the Guaranty obligates him to pay on the Third Note and Fourth Note. Murante contends that MOB knew he terminated his business relationship with Borrower in 2008, the Third Loan and Fourth Loan were taken out without his knowledge or signature, and that the Third Note and Fourth Note are secured by separate guaranties executed by Pelshaw only. This Court finds that the plain language of the Guaranty unambiguously shows that Murante is liable as guarantor on the Third Note and Fourth Note.

A guaranty is a contract and is a collateral undertaking by one or more persons to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). Under an absolute guaranty of payment, the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor. *Rodehorst*, 266 Neb. at 849, 669 N.W.2d at 685. Nebraska adheres to the rule of strict construction of guaranty contracts; when the meaning of the guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled



absolutely by such meaning and limited to the precise terms. *Builders Supply Co., Inc. v. Czerwinski*, 275 Neb. 622, 631-32, 748 N.W.2d 645, 654 (2008).

The terms of the Guaranty Murante signed on October 31, 2005, are clearly defined and unambiguous, and therefore control Murante's liability as guarantor. Under the Guaranty, Murante "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents" (Ex. M, p. 1). The Guaranty specifies that "this is a guaranty of payment and performance and not of collection," and that "Guarantor's liability is unlimited and Guarantor's obligations are continuing" (Ex. M, p. 1). The Guaranty later recites, "This is a continuing guaranty under which guarantor agrees to guarantee the full and punctual payment, performance and satisfaction of the Indebtedness of borrower to lender, now existing or hereafter arising or acquired, on an open and continuing basis" (Ex. M, p. 1). The Guaranty "authorizes Lender . . . to make one or more additional secured or unsecured loans to Borrower . . ." prior to the guarantor's revocation of the Guaranty (Ex. M, p. 1). The Guaranty specifies that it "will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full" (Ex. M, p. 1). The Guaranty provides that the guarantor may revoke the Guaranty only in writing mailed to Lender by certified mail, and that the Guaranty "will continue to bind the Guarantor for all the Indebtedness incurred by Borrower or committed by Lender prior to receipt of Guarantor's written notice of revocation . . ." (Ex. M, p. 1).

According to the unambiguous terms of the Guaranty, it is an absolute, unconditional, continuing guaranty of payment. The Guaranty was explicit that it continued to bind Murante as

guarantor in full force until he revoked it or until Borrower's Indebtedness was paid in full. The Guaranty authorized Lender to make additional loans to Borrower, while continuing to bind the Guarantor, until the Guarantor sent a written notice of revocation by certified mail to Lender. Murante does not allege he sent such a written notification of revocation pursuant to the Guaranty's terms, and acknowledges the Indebtedness has not been paid in full. Thus, according to the plain language of the Guaranty, Murante continued to be bound by the Guaranty on the Third Note and Fourth Note, despite his departure from Sutherlands Plaza, L.L.C.

Murante's argument that the Third Note and Fourth Note were secured by the new and separate guaranties executed by Pelshaw, rather than the Guaranty, also fails under the plain language of the Guaranty. The Guaranty provides:

If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other untermiated guaranties. (Ex. M, p. 1).

This provision of the Guaranty contemplated that new guaranties may be signed by Guarantor in the future, but specifies that the lender's rights under all the guaranties is cumulative, and that Guarantor's liability is aggregate under the terms of this Guaranty. The fact that Pelshaw executed new guaranties for the Third Loan and Fourth Loan, therefore, does not affect the continuing, cumulative nature of the Guaranty signed by Murante on October 31, 2005. This result is not contrary to Nebraska law or generally accepted principles of suretyship. *See, 780 L.L.C. v. DiPrima*, 9 Neb. App. 333, 343 611 N.W.2d 637, 646 (2000) ("When the additional security taken by the creditor is a new guaranty, the prior guaranty is not extinguished by the execution of the subsequent guaranty unless the subsequent guaranty was executed as a substitute for the earlier one.") (quoting 38 AM. JUR. 2D *Guaranty* § 75); 38A C.J.S. *Guaranty* §

107 (“For a guarantor to be released from liability by a subsequent guaranty, it must appear that the later guaranty was intended and accepted as a substitute for the former, otherwise the creditor may resort to both guaranties.”). Thus, this Court finds that MOB is entitled to summary judgment on its claim that Murante is liable on the Guaranty for the Third Note and Fourth Note.

### **3. The Amount of Murante’s Liability**

Having concluded that Murante is liable as guarantor on all four Notes as a matter of law, this Court must determine the amount of his liability. As of January 1, 2011, the total amount of “Indebtedness” of Borrower was \$3,292,839.33 (Cox Aff. ¶ 24). MOB maintains that Murante is entitled to credit its bid of \$1,658,000 at the auction against his obligation. Murante argues that this Court must determine the fair market value of the property at the time of the auction pursuant to Nebraska Revised Statute § 76-1013. Nebraska courts have not specifically addressed whether guarantors are entitled to a fair market determination pursuant to § 76-1013, but upon review of *Boxum v. Munce*, this Court concludes Murante is not entitled to a fair market value determination pursuant to Nebraska Revised Statute § 76-1013.

In *Boxum*, the Nebraska Court of Appeals determined that the three month statute of limitations for deficiency actions provided for under Nebraska Revised Statute § 76-1013 does not apply to a suit on a guaranty of payment. The borrowers in *Boxum* were discharged in bankruptcy on two notes secured by trust deeds, causing the secured property to be sold at a trustee’s sale. The lender submitted the only bid at the sale, and sued the guarantors on their guaranty more than a year later. The guarantors argued that the lender’s action was barred by the three month statute of limitations in § 76-1013. In rejecting the guarantors’ argument, the Nebraska Court of Appeals explained that the undertaking of the debtor is independent of the promise of the guarantor, and the responsibilities which are imposed by the contract of guaranty

differ from those created by the contract to which the guaranty is collateral. *Boxum*, 16 Neb. App. at 740, 751 N.W.2d at 663. The Court focused on the plain language of the section, which provides it applies to actions “to recover the *balance due upon the obligation for which the trust deed was given as security...*” *Id.* at 736, 751 N.W.2d at 661 (quoting NEB. REV. STAT. § 76-1013) (emphasis in original). The Court determined that the “obligation” upon which a deficiency suit must be brought within three months of foreclosure is the promissory note, not the guaranty of payment. *Id.* at 739, 751 N.W.2d at 663. Thus, the Court found that the action against the guarantors was not a suit to collect a deficiency *on the obligation secured by the foreclosed trust deed*, rather, it was a suit to collect on the separate and different contract: the guaranty of payment. *Id.* at 736, 751 N.W.2d at 661. The Court concluded the guarantors were “not entitled to the protection of the short statute of limitations under the Nebraska Trust Deeds Act.” *Id.* at 740, 751 N.W.2d at 663.

The Court in *Boxum* did not reach the issue of whether the fair market valuation provision under § 76-1013 applies to actions to recover on a guaranty, but using the same analysis in *Boxum*, this Court concludes it does not. As in *Boxum*, the case before this Court is a suit upon a guaranty of payment subsequent to foreclosure on property secured by a trust deed. The Nebraska Court of Appeals made it clear that a guaranty is a separate and different contract than the obligation secured by the foreclosed property. Nebraska Revised Statute § 76-1013 applies to actions “to recover the balance due upon the obligation for which the trust deed was given as security,” which the Court concluded does not include the guaranty’s obligation. This section continues:

... *in such action* the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale . . . Before rendering judgment, the

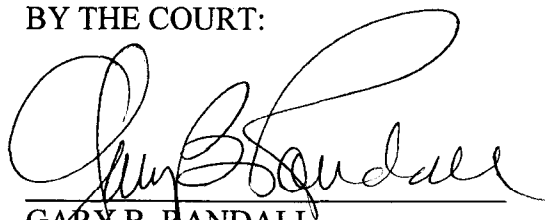
court shall find the fair market value at the date of sale of the property sold. . . . NEB. REV. STAT. § 76-1013 (emphasis added).

The plain language of the statute makes clear that the action for which the court must find the fair market value of the foreclosed property refers to “such action” as the action to recover “on the obligation secured by the foreclosed trust deed.” Because the Nebraska Court of Appeals in *Boxum* has concluded that the action “on the obligation secured by the foreclosed trust deed” does not include an action on the guaranty, it follows that the fair market value determination “in such action” also excludes an action on the guaranty. Therefore, this Court concludes that Nebraska Revised Statute § 76-1013 does not require this Court to determine the foreclosed property’s fair market value at the date of the auction because the present action is one to recover on Murante’s guaranty of payment.

**IT IS THEREFORE ADJUDGED, ORDERED, AND DECREED** that Defendant Sam Murante’s Motion to Amend Answer is denied, and Plaintiff Mutual of Omaha Bank’s Motion for Summary Judgment is granted. Murante is liable as guarantor to Mutual of Omaha for the full amount of the Sutherlands Plaza, L.L.C.’s Indebtedness, including accruing interest as calculated pursuant to the First Note, Second Note, Third Note, and Fourth Note, less Mutual of Omaha’s credit bid of \$1,658,000.

DATED this 22 day of November, 2011.

BY THE COURT:

  
GARY B. RANDALL  
DISTRICT COURT JUDGE





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DOUGLAS COUNTY, NEBRASKA

MUTUAL OF OMAHA BANK,  
Plaintiff/Judgment Creditor,  
v.  
SAM MURANTE,  
Defendant/Judgment Debtor.

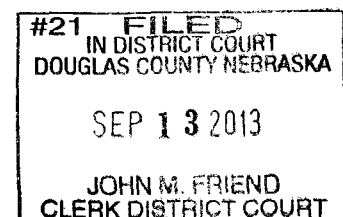
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**APPLICATION FOR CHARGING  
ORDER AGAINST SAM MURANTE'S  
INTEREST IN  
YORK PROPERTIES, LLC**

Plaintiff/Judgment Creditor, Mutual of Omaha Bank, through undersigned counsel, hereby respectfully requests, pursuant to Nebraska Revised Statute § 21-142, this Court issue an Order charging the transferable interest of Defendant/Judgment Debtor Sam Murante (hereinafter, "Murante") in York Properties, LLC, a limited liability company organized under the laws of the State of Nebraska, in the unsatisfied amount of the judgment owing to Mutual of Omaha Bank entered in the above referenced matter, establishing the charging order as a lien on Murante's transferable interest in York Properties, LLC and requiring York Properties, LLC to pay over to Mutual of Omaha Bank any distribution that would otherwise be paid to Murante.


Mutual of Omaha Bank will submit a brief in support of this Application prior to the hearing date.

WHEREFORE, Mutual of Omaha Bank respectfully requests this Court enter an order charging the interest of Murante in York Properties, LLC in the unsatisfied amount of the judgment debt owing to Mutual of Omaha, together with interest accruing thereon in the amount of \$2,152,385.46, plus interest accruing at a rate of \$1,305.27 per day from and after November 23, 2011.



Dated this \_\_\_\_ day of September, 2013.

MUTUAL OF OMAHA BANK,  
Plaintiff/Judgment Creditor

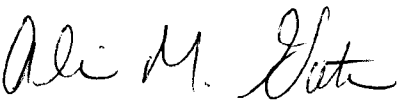
By: 

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#### CERTIFICATE OF SERVICE

This certifies the undersigned attorney has caused service of the foregoing **APPLICATION FOR CHARGING ORDER AGAINST SAM MURANTE'S INTEREST IN YORK PROPERTIES, LLC** to be made pursuant to NEB. REV. STAT. § 25-534 (Reissue 1995) by mailing by ordinary first-class mail, postage prepaid, to the last known address of the following attorneys representing parties to this action, on this \_\_\_\_ day of September, 2013:

Michael J. O'Bradovich  
7701 Pacific Street, Suite 205  
Omaha, NE 68114

  
Alison M. Gutierrez

#### NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED, pursuant to Neb. Rev. Stat § 25-910 (Reissue 1995), that the foregoing **APPLICATION FOR CHARGING ORDER AGAINST SAM MURANTE'S INTEREST IN YORK PROPERTIES, LLC** will be heard in the District Court of Douglas County, Nebraska, 1701 Farnam Street, Omaha, Nebraska 68183, before The Honorable Gary B. Randall, in Courtroom Number 16, at 9:00 a.m. on October 31, 2013.