IN THE IOWA SUPREME COURT

SUPREME COURT NO.
20-0972

BORST BROS. CONST., INC.,
Plaintiff-Appellee
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellant/Cross-Appellee
v.
THOMAS DOSTAL DEVELOPERS, INC. and **RANDY T. DOSTAL**
Appellees/Cross-Appellants.

and

KELLY CONCRETE COMPANY, INC., AFFORDABLE HEATING AND COOLING, INC., 5 STAR PLUMBING, INC., and **BORST BROTHERS CONSTRUCTION, INC.,**
Defendants-Appellees.

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Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT FOR LINN COUNTY
THE HONORABLE MARY E. CHICCHELLY

REPLY BRIEF OF FINANCE OF AMERICA COMMERCIAL, LLC

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Comes Now, Finance of America Commercial, LLC ("FACo") pursuant to Iowa R. App. P. 6.903(5) and makes a single reply brief to the arguments of all the Appellees/Cross-Appellant.

ROUTING STATEMENT REPLY

FACo maintained that the case should be retained by the Iowa Supreme Court. FACo Brief, p. 10. Borst Bros. Const. Inc. ("Borst") does not deny the factors articulated by FACo for the Iowa Supreme Court to retain the case but, instead, contends the case should be transferred to the Court of Appeals for resolution based upon "existing legal principles." Brief of Borst, p. 10. Although, Kelly Concrete Company, Inc. ("Kelly") concedes the case is "potentially important to that narrow class of litigants" like "mortgage lenders and real estate subcontractors." Brief of Kelly, p. 10. Consequently, for the reasons articulated by FACo, the case should be retained by the Iowa Supreme Court.

STATEMENT OF THE CASE

In its version of the Statement of the Case, Kelly recites the procedural history that Borst filed suit and "the bank" moved to dismiss. Brief of Kelly, p. 12. Kelly further states "[n]o party now assigns error to the District Court's rulings on these motions." Brief of Kelly, p. 12. While literally true, as reflected by its Division I, Error Preservation statement, the arguments

advanced by FACo were advanced at earlier stages of the proceeding. In any event, the denial of these motions would not form the basis for an appeal from a final judgment. Iowa R. App. P. 6.104 (review of interlocutory rulings).

STATEMENT OF FACTS

In Case No. LACV091167 (the mechanic's lien action), Borst concedes, as it must, that FACo's mortgages were, in fact, recorded before Borst's liens. Brief of Borst, p. 13 (referencing November 17, 2017 for Lots 5, 6, 7, and 9 and December 20, 2017 for Lot 10).

In Kelly's Statement of the Facts, it omits that a FACo mortgage lien was recorded on Lot 10 on December 20, 2017. Brief of Kelly, p. 15. However, the district court found the posting for Lot 10 was defective and it could not recover on the lien. Brief of Kelly, p. 15 n.3. Kelly does not challenge the ruling. *Id*.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT FOUND THE MECHANIC'S LIENS OF BORST AND KELLY WERE VALID AND ENTITLED TO PRIORITY OVER FACO'S MORTGAGE LIENS.

A. Preservation of Issue for Appeal.

All the parties agree that error was preserved. FACo Brief, p. 24; Brief of Borst, p. 15; Brief of Kelly, p. 18.

B. Standard of Review.

FACo, Borst, and Kelly agree on the Standard of Review: correction of legal error. FACo Brief, p. 24; Brief of Borst, p. 15; Brief of Kelly, p. 18.

C. Discussion.

At the outset, the Court should observe one argument that Borst and Kelly *did not make* and it is conspicuous by its absence. Neither Borst nor Kelly address the issue that Iowa Code section 572.13A(1) (2017)[1] states: "[a] notice of commencement of work is effective only as to any labor, service, equipment, or material furnished to the property subsequent to the posting of the notice of commencement of work." The statute continues: "[a] notice of commencement must be posted before a preliminary notice can be posted." Iowa Code § 572.13A(2). It follows, therefore, that whatever relation back of the lien exists under section 13B, the lien cannot exist for work performed or services provided prior to the posting of the Notice of Commencement to the MNLR. The district court erred in finding to the contrary.

At the end of the day, both Borst and Kelly concede that a subcontractor must post both a Notice of Commencement of Work and a Preliminary Notice

[1] Given the year in which the work was performed, all references will be to the 2017 Iowa Code.

(if the owner-builder fails to do so). Brief of Borst, p. 39; Brief of Kelly, p. 27.

In that same vein, Borst and Kelly do not respond to the argument that sections 13A and 13B of Chapter 572 must be read in concert to determine the legislature's intent. FACo Brief, p. 28 n.10. To that end, while Borst isolates the narrow language of section 13B(3)(a) ("lien perfected before balance due is paid"), Brief of Borst, pp. 35-36, Borst never effectively demonstrates how the *amount* of its perfected lien can predate the posting of the Notice of Commencement. Accordingly, Borst's arguments must fail because it never harmonizes these two statutes—basic statutory construction. Similarly, when construed together, this construction deals a fatal blow to Borst's priority argument as well (which will be discussed below).

Both Borst and Kelly further challenge the argument that their liens are invalid because they failed to post the Notice of Commencement within 10 days of the commencement of its own work. FACo Brief, pp. 30-31. Brief of Borst, pp. 17-20; Brief of Kelly, pp. 22-25.

Borst and Kelly repeatedly refer to the "plain language" of the statute with regard to section 572.13A(2), and argue that the 10-day limitation in that section only applies to the general contractor. But in addition to the legal, policy, factual and practical reasons to hold that the 10-day limitation applies

to subcontractors, the only reasonable reading of section 572.13A(2) from a grammatical perspective is that the 10-day limitation applies to subcontractors. FACo raised this issue below. (*See* Amended and Substituted Memorandum of Authorities in Support of Motion for Summary Judgment, p. 6; App. 286) (arguing that 10-day limitation applies to subcontractors); (FACo Trial Brief, p. 4; FACo Post-Trail Brief, p. 8; FACo's Rule 1.904 Motion, pp. 4-6; App. 310; 770; 831-833.) To aid the district court, FACo directed the court's attention to how the statute would read if the subcontractor's construction of the statute were adopted. "Otherwise, the statute would have read: If a general contractor or owner-builder fails to post the required notice of commencement of work to the mechanics' notice and lien registry internet site pursuant to subsection 1, a subcontractor may post the notice in conjunction with the posting of the required preliminary notice pursuant to section 572.13B." *Id.* The subcontractor's construction of the statute leaves the following clause as mere surplusage: "within ten days of commencement of the work on the property…" *Id.*

Courts and grammarians refer to this type of sentence as an "if/then" sentence and refer to the opening phrase as the dependent or subordinate clause with the main clause following the comma. *State v. Wilson,* 573 N.W.2d 248, 252 (Iowa 1998) (referring to a phrase starting with "if" as the

opening dependent clause); *Keith v. J.D. Byrider Systems, LLC,* 2014 WL 5148124, *4 (N.D. Tex. 2014) (holding that comma should have been added after dependent clause to make contractual language more clear that time restriction applied to following language and not to dependent clause); Chicago Manual of Style Online, § 6.24 (17th ed. 2021) ("When a dependent clause precedes the main, independent clause, it should be followed by a comma. A dependent clause is generally introduced by a subordinating conjunction such as if, because, or when").[2] The comma denotes the "then" portion of the sentence, making the first portion a subordinate introduction and the portion following the introduction comprising the main clause. Chicago Manual of Style Online, § 6.24 (17th ed. 2021). A reading of the statute which reads the word "if" as being the same as "in the event that…" is consistent with the rules of statutory construction in Iowa. *Wilson,* 573 N.W.2d at 252. Thus, in section 572.13A(2), the phrase "if a general contractor or owner-builder fails to post the required notice of commencement …" is the subordinate introduction followed by the main (or "then") clause, "within ten days of commencement of the work on the property, a

[2] Iowa courts rely on the Chicago Manual of Style to interpret the grammatical meaning of statutes. *See State v. Downey,* 893 N.W.2d 603, 607 (Iowa 2017) (relying upon *The Chicago Manual of Style)*.

subcontractor may post the notice ….” Grammatically then, section 572.13A(2) means that, in the event that the general contractor does not file its Notice of Commencement, *then* within 10 days of starting work, the subcontractor may do so.

Even if the district court did not apply the 10 day rule and the appellate court finds no obligation of a subcontractor to post within 10 days of commencement of its work, the district court should still have found the instant liens invalid because each and every subcontractor claimed a lien for work performed and materials provided prior to the posting of the Notice of Commencement to the MNLR, Iowa Code § 572.13A(1), and after FACo's mortgages were recorded. Neither Borst nor Kelly dispute the fact that there was no information posted on the MNLR on the days the mortgages were recorded. (FACo Post-Trial Brief, p. 12; App. 774.)

Moreover, this fatal flaw in Borst's argument becomes manifest when Borst posits the theory that it has no requirement to post a Notice of Commencement or a Preliminary Notice until it should choose to do so. Brief of Borst, pp. 21-22 ("a subcontractor…is under no obligation to post a Notice of Commencement of Work at all…and only must do so if it determines that it should post a Preliminary Notice of its Mechanics Liens"). Yet, later, Borst acknowledges that the Notice of Commencement "must be posted before a

Preliminary Notice can be posted." Brief of Borst, p. 30. *See* also Iowa Code § 572.13A(2).

Nonetheless, to hedge its bet, Borst takes a new tact before this Court and argues that it cannot, as a subcontractor, post a Notice of Commencement with the 10-day period. Brief of Borst, pp. 23-24. This argument is new and is not preserved in this record. (Plaintiff's Resistance to Motion to for Summary Judgment; Plaintiff's Post-Trial Brief) (App. 296-306; 777-792.) Consequently, it should be disregarded by the appellate court. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 679 (Iowa 2004) (argument on appeal not advanced below cannot be the basis for affirmation of the district court).

Kelly advances a similar argument. Brief of Kelly, p. 24. Nothing in the statute prohibits a subcontractor from posting a Notice of Commencement within the 10-day period. Further, as required by section 572.13A(2), a Notice of Commencement is required to be posted before the subcontractor can protect its interests by posting a Preliminary Notice. Thus, prudence dictates a subcontractor would post the Notice of Commencement as soon as possible to protect its own interests.

As predicted in its opening brief, FACo cautioned that the Court of Appeals in *Standard Water*, turned to the Statements of the Iowa Secretary of

State rather than the legislature itself. FACo Brief, p. 36 n.14 But see Brief of Borst, p. 33. As pointed out in the footnote, neither party in *Standard Water* advanced the position of the legislature.

Borst faults FACo for referencing the Explanation to the amendments to Chapter 572. Brief of Borst, pp. 27-28. However, the Iowa Supreme Court has stated that it gives "'weight to explanations attached to bills as indications of legislative intent.'" *Myria Holdings Inc. v. Iowa Depart. of Revenue,* 892 N.W.2d 343, 349 (Iowa 2017); *Young v. Healthport Technologies, Inc.*, 877 N.w.2d 124, 131 n.4 (Iowa 2016); *Star Equipment v. State,* 843 N.W.2d 446, 454 (Iowa 2014) (citations omitted).

Borst also advances the unpreserved argument concerning the potential for a multiplicity of Notice of Commencement filings and "confusion." Brief of Borst, pp. 28-29. This argument is new, unpreserved in this record, and should be disregarded. *Estate of Harris,* 679 N.W.2d at 679. At the very least, the district court made no such finding and certainly did not hold that more notice "would result in confusion." (Trial Ruling; App. 804-827.)

Perhaps most significant, Borst never addresses the fact that the Court of Appeals in *Standard Water*, at least in dicta, left open the issue for another day as to the impact of the posting requirements on third parties. Brief of Borst, pp. 32-34. But see FACo Brief, p. 34 (quoting *Standard Water*, 888

N.W.2d at 678 "no public policy interest in informing homeowners of general contractors who they themselves have hired"). It follows, therefore, that there must be a public interest in making sure that unknown subcontractors cannot show up later to enforce surprise mechanics' liens against third parties who are not in privity with the subcontractor. FACo Brief, p. 34 (citing *Standard Water v. Jones*, 888 N.W.2d 673, 678 (Iowa Ct. App. 2016)).

Similarly misplaced is Borst's argument regarding "the purpose and overall statutory scheme…" of the MNLR. Brief of Borst, p. 25. In Borst's view, the only purpose of the MNRL is to provide some sort of bilateral notice to "residential purchasers and owners…" *Id.* Absent from Borst's theory is any reference to the public or lenders. *See* FACo Brief, p. 37, n.5 (referencing the public notice aspect of the MNLR).

Borst steps way out of bounds when it asserts "this case highlights the problems for a third-party lender who fails to perform its due diligence prior to lending money…" Brief of Borst, p. 38. First, the argument was not advanced below and should be disregarded. *Estate of Harris,* 679 N.W.2d at 679. Borst's Brief is devoid of any reference to the record wherein this assertion was previously made by Borst. Second, the district court made no such finding. (Trial Ruling; App. 804-827.) Most important, the assertion runs contrary to the record evidence. FACo Brief, p. 23. The record reflects

Mr. Dostal's testimony regarding the process of execution of the Composite Mortgage Affidavits. (Tr. Trans. pp. 195-96.) The record also reflects the actual documents and the statements made in the Affidavits. (Tr. Exhs. F.21.1, F.21.2, F.21.3, F.21.4, and F.21.5; App. 455-459); (Tr. Ruling, p. 15; App. 818.) Likewise, Mark Thomas, a FACo representative, testified regarding FACo's use of a local servicer to close its loans. (Tr. Ruling, p. 15; App. 818.) Borst presented no evidence below of a failure to perform due diligence by FACo.

Kelly follows a similar path when it argues the "bank" "could easily" check the MNLR to determine whether a Notice of Commencement had been posted. Brief of Kelly, p. 25. Unfortunately, no information was available on the MNLR on the days in issue. (FACo Post-Trial Brief, p. 12; App. 774.)

But Kelly takes it one step further and asserts from whole cloth the following. "Banks contemplating loans of this size…routinely (universally?) look at the property prior to making the loan." Brief of Kelly, pp. 25-26. The argument is unpreserved and should be disregarded. *Estate of Harris*, 679 N.W.2d at 679. If Kelly thought this argument had support, it was duty bound to call an expert at trial which it failed to do. *See* Docket, generally. *See* also Iowa R. App. P. 6.904(3)(e) (burden of proof is on the party who would lose "if the issue were not established").

Based upon the testimony of both Mr. Dostal and Mr. Thomas, FACo strongly rejects the suggestion that there was some underwriting problem here. Instead, the problem is simple. Neither Borst nor Kelly posted their information within 10 days of the commencement of their work on the project, only posted to the MNLR after the mortgage liens were recorded, and then claimed for work and materials provided long before their postings to the MNLR.

Kelly makes much of the use of the word "may" and whether it provides a discretionary power to a subcontractor under section 13A(2). Brief of Kelly, pp. 26-27. While no published appellate decision has reached the issue in Iowa, it is entirely possible that "may" modifies "the notice in *conjunction* with the posting of the required preliminary notice…" Iowa Code § 572.13A(2). In short, the subcontractor "may" post the Notice of Commencement at the same time as the Preliminary Notice or may post the Preliminary Notice at some later point but, in any event, the work and materials cannot predate the Notice of Commencement. Iowa Code § 572.13A(1). Despite the discussion of a discretionary power, Kelly then asserts, without any citation to support the position, that the "legislature contemplated that the notice would be filed together (in conjunction) with the

preliminary lien notice of §572.13B." Brief of Kelly, p. 27. The use of the word "may" belies that position.

Neither Borst nor Kelly responded to the argument that that the district court's ruling and the positions asserted by Borst and Kelly would "take us back to the confusion and uncertainty that reigned prior to the adoption of the new statute, which created the publicly available MNLR and the requirement of public notice." FACo Brief, pp. 37-38. *See* also (FACo Post-Trial Brief, p. 12; App.774); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835); (FACo's Omnibus Reply in Support of its Rule 1.904 motion, p. 6; App. 861); (Ruling, p. 5; App. 808.)

As it did before the district court, Borst parades the same old cases about relation back of its lien. Brief of Borst, at pp. 40-41. Kelly does not appear to make a similar argument.

As argued below, those cases have been superseded by the statutory change. FACo Brief, p. 40. Based upon the plain language of the statute, a party cannot lien for work performed prior to the posting of the Notice of Commencement. Iowa Code section 572.13A(1).

Turning to the priority argument, Borst again fails to address the interplay of the mandate of section 13A(1) with section 572.18. Borst seizes upon the language of 572.18 ("claimants who commenced their particular

work") to demonstrate that it is entitled to priority. However, the language needs to be read in concert with section 13A(1) so only lien claimants who have properly posted their Notice of Commencement and the Preliminary Notice and commenced their work prior to the recording of the mortgage lien are entitled to priority. Iowa Code § 572.18(1).

Kelly blazes a different trail when it maintains that its liens were posted within 90 days of the of the day it last provided material or labor. Brief of Kelly, p. 29. Its lien claims are for materials and services ALL of which were provided prior to the posting of the Notices of Commencement to the MNRL. Iowa Code section 572.13A(1).

The district court erred when it gave priority to the liens of Kelly and Borst. Further, it was error for the district court to give retroactive enforcement to the mechanics liens.

II. THE DISTRICT COURT ERRED IN RULING THAT RANDY T. DOSTAL EXECUTED THE GUARANTYS OF FACO's MORTGAGE LOANS TO DOSTAL DEVELOPERS ONLY IN HIS CAPACITY ON BEHALF OF DOSTAL DEVELOPERS.

FACo[3] established in its opening brief that there is no evidence in the record to support the district court's finding that Randy Dostal acted in a

[3] Capitalized terms are defined as set forth in FACo's opening Brief unless otherwise noted in this Reply.

representative capacity when executing the Guarantys. The district court did not analyze any of the language in the Guarantys, and Dostal Developers and Randy Dostal (together, the "Dostal Parties") likewise try to avoid that language in their Response Brief. Indeed, the Dostal Parties do not address the specific language in the Guarantys at all. Instead, they rely on extrinsic evidence to try to bend the meaning of "Guarantor" to be something other than the express definition of "Guarantor" in the Guarantys. And even then, the testimony on which they rely is not what they claim it to be. No one, including Randy Dostal, testified that Randy Dostal signed the Guarantys in a representative capacity. With exactly zero evidence supporting a finding that Randy Dostal signed the Guarantys in a representative capacity, the Court should reverse the district court's ruling.

A. The Dostal Parties do Not Contest Preservation of Error.

The Dostal parties do not contest that error was preserved. Accordingly, the Court should find that FACo preserved for appeal all issues discussed in its opening brief and below.

B. Whether the Court Applies the *De Novo* Standard of Review or Reviews the Case for Errors at Law, the District Court's Holding on the Guarantys Must be Reversed.

This case was part foreclosure and part enforcement of five Guarantys, and therefore was tried in equity. It is true, however, that courts in Iowa will apply a different standard of review to guaranty claims and foreclosure claims in the same case where both issues are before the court. *See Beal Bank v. Siems*, 670 N.W.2d 119, 123, 125 (Iowa 2003) (applying *de novo* standard of review to foreclosure count and errors at law standard to guaranty count). Iowa's appellate courts and this Court often review a ruling on the enforcement of a guaranty for errors at law. *Id.* at 125. Under such review, the Court is not bound by the district court's legal conclusions and is not bound by the district court's factual conclusions unless those conclusions are supported by substantial evidence. *Id.* This standard is only slightly more deferential than *de novo* review, which does not require the Court to accept the district court's factual findings but would still require the court to be deferential to those findings. *First State Bank, Belmond v. Kalkwarf*, 495 N.W.2d 708, 711 (Iowa 1993).

As set forth below, the district court's ruling on the Guarantys is not supported by any evidence, much less substantial evidence. The Guarantys expressly define Randy Dostal as the "Guarantor," and thus any finding

inconsistent with that definition is not supported by the factual record. The district court made two important errors in its findings of fact that demonstrate its misunderstanding of the Loan Documents. The district court found that Thomas T. Dostal signed some of the Mortgages, but there is no evidence in the record to support that finding. (Tr. Ruling at 9; App. 812.) The district court also found that there was no evidence that Randy Dostal acted in his individual capacity with regard to the Guarantys. (Tr. Ruling at 16, 18; App. 804.) To the contrary, there is no documentary evidence and no testimony that Randy Dostal did act in a representative capacity. Accordingly, under either standard of review, the Court should disregard any of the district court's factual findings that are inconsistent with the plain language of the Guarantys.

C. Discussion.

1. Randy Dostal Signed the Guarantys in His Individual Capacity.

The district court's treatment of Randy Dostal's liability under the Guarantys is superficial and conclusory, and takes place almost solely in its discussion of "Additional Findings of Fact." The court did not cite or even reference any language in the Guarantys, and incorrectly states without discussing the Guarantys' signature blocks that each of the five Guarantys was signed by Dostal Developers. (Tr. Ruling at 16; App. 804.) That is a clear

misstatement of fact, as none of the signature blocks on the Guarantys even mentions Dostal Developers. The district court also failed to make an explicit ruling on the enforceability of the Guarantys in the "Ruling" section of its Judgment.

Randy Dostal's treatment of this issue is likewise superficial and conclusory. Indeed, he does not attempt to explain the language in the Guarantys under which he expressly and unequivocally agreed to be personally liable. Instead, he would have the Court rely solely on extrinsic evidence in the form of his own testimony.[4] Despite the Guarantys themselves being the best evidence of what they mean, Randy Dostal completely avoids discussing their terms because they so clearly establish his personal liability. In fact, the only way to find in his favor is to disregard the plain language of the Guarantys completely. That would be improper, and thus the Court should enforce the Guarantys as written.

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[4] Randy Dostal states that Dostal Developers "in fact expressly signed one of the *notes* singularly ... and the *note* was made out by FAC for this to occur." (Randy Dostal. Appellee Br. at 23 (emphasis added).) Giving Randy Dostal the benefit of the doubt, it appears he meant to refer to one of the five *Guarantys* at issue, rather than *notes*, which has a signature block that varies from the other four.

a. Regardless of Whether Delaware or Iowa Law Applies, the Guarantys are Clear that Randy Dostal is the Only Guarantor in this Case.

Randy Dostal begins his argument with a passing suggestion that Delaware law does not apply because FACo did not seek to invoke Delaware law in the district court. That argument is unfounded and irrelevant for three reasons. First, the Guarantys clearly and unambiguously state that Delaware law applies. (Guarantys at § 17, Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) Choice of law provisions are prima facie valid and should be enforced unless unreasonable under the circumstances. *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 315 (Iowa Ct. App. 2007). Here, FACo is a Delaware limited liability company, and thus has a significant connection to Delaware. Delaware law therefore applies as set forth in the Guarantys. Second, there is nothing in the record to suggest that Delaware law was not applied by the district court or that anyone, including the Dostal Parties, objected to the application of Delaware law. Unfortunately, the district court did not analyze any of the language in the Guarantys, including the choice of law clause. Nor did the district court explicitly apply any law to its ruling on the Guarantys. It merely made a finding of fact. But none of the parties below disputed what law applies, and thus there is no reason not to enforce the Guarantys as written. Third, whether

the Court applies Delaware or Iowa law, the result is the same: A personal guaranty signed by the principal of the borrower is enforceable against the principal. FACo cited both Delaware and Iowa law in its opening brief to highlight that consistency. The distinction therefore does not create a difference.

b. Randy Dostal is the Only Guarantor Under all of the Guarantys.

Randy Dostal relies almost entirely on extrinsic evidence in the form of his own testimony in an attempt to avoid the plain language of the Guarantys. As an initial matter, Randy Dostal cannot rely on such testimony because it is extrinsic (or parol) evidence. Contracting parties cannot rely on extrinsic evidence to contradict or supplement a fully integrated contract. *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa. 1996). When a contract is unambiguous, there is no reason for a court to rely on evidence not within the contract itself. *Batterton Waterproofing, Inc. v. RKC Realty, L.L.C.*, 669 N.W.2d 262 (Table), 2003 WL 21543479, at *2 (Iowa Ct. App. 2003). Although extrinsic evidence may be admitted to aid in interpreting the terms of a contract, unambiguous terms that do not require interpretation cannot be changed with extrinsic evidence. *Id.*; *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011) ("extrinsic evidence cannot alter the legal effect of the

unambiguous contract language ..."); *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 856 (Iowa 1990) (extrinsic evidence not admissible to alter unambiguous terms making guaranty a continuing guaranty).[5]

In the case at bar, the Guarantys' terms regarding the Guarantor's identity are clear and unambiguous, and are therefore not subject to interpretation by extrinsic evidence.[6] As set out more fully in FACo's opening brief, the Guarantys all explicitly define the Guarantor only as Randy Dostal, and distinguish the Guarantor from the "Borrower," which is explicitly defined as Dostal Developers. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) All of the Guarantys also were notarized, and the notary identified Randy Dostal as the Guarantor without reference to any affiliation he

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[5] Not surprisingly, Delaware courts apply the parol evidence rule in the same manner, and are even more explicit that parol evidence is inadmissible where a contract is not ambiguous. *See Western Natural Gas Co., v. Cities Serv. Gas Co.*, 223 A.2d 379, 383-84 (Del. 1966) (where contract is open to only one interpretation, any other evidence is unnecessary and inadmissible); *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Only where the contract's language is susceptible of more than one reasonable interpretation may a court look to parol evidence").

[6] The parties' disagreement over who the guarantor is does not make the Guarantys ambiguous. *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 758 (Iowa App. 1994) ("An ambiguity does not exist simply because the parties disagree on the meaning of a phrase"); *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction").

has with Dostal Developers. (*Id.*) In addition, Randy Dostal executed four of the five Guarantys by signing his name and providing his social security number without any accompanying language to suggest that he was signing for anyone other than himself. (*Id.*) As to the fifth Guaranty, although the signature block contains a typo naming *Thomas* T. Dostal rather than Randy T. Dostal, the Guaranty and the notary block still clearly identify Randy Dostal as the Guarantor. (Tr. Exh. 29.23; App. 664.) Likewise, the signature block includes Randy Dostal's social security number and lists his home address. (*Id.*) The face of the Guarantys thus all unambiguously define Randy Dostal as the Guarantor, and they cannot be altered by extrinsic evidence.

Even if this Court or the district court were to consider Randy Dostal's testimony at trial, that testimony does not alter the definition of Guarantor to be anyone other than Randy Dostal.[7] Randy Dostal never actually testified

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[7] Nor does the supposed lack of personal knowledge by Mark Thomas affect the unambiguous meaning of the Guarantys. Mr. Thomas does not need to have been present for the signing of the Guarantys when the Guarantys themselves have all the necessary information. Moreover, the signatures on the Guarantys are accompanied by a notarization and are presumptively valid, and the person challenging the signature bears the burden of establishing its purported lack of authenticity. Iowa Code 622.26 ("every private writing, ... after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgement of conveyances of real property, may be read in evidence without further proof"); *Waitt Bros. Land, Inc. v. Montange*, 257 N.W.2d 516, 520 (Iowa 1977). Randy Dostal did not introduce, or even attempt to introduce, any evidence at trial to

that he signed the Guarantys on behalf of Dostal Developers or that he intended to do so. Instead, his testimony actually further clarifies that he and Dostal Developers are separate entities, and that his signature on the Guarantys, without any reference to Dostal Developers, could only have been meant to create personal liability for Randy Dostal.

When questioned by his attorney, Randy Dostal carefully distinguished between himself and Dostal Developers:

> Q. Mr. Dostal, FAC's lawyer was questioning you, and he used that term purposely. He kept phrasing his questions you signed this, you signed this. And let me give you an example. On Exhibit 21.1 and candidly all the way through .5, the composite mortgage affidavit. In fact, let's just go to 21.1. That shows that you were signing on behalf of Thomas Dostal Developers; is that correct?
>
> A. Correct.
>
> Q. And in fact the notary is put out for Thomas Dostal Developers; is that correct?
>
> A. Correct.

(Tr. Trans. at 199:11–19.)

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suggest that he was not the person that signed all five Guarantys. The Dostal Parties' arguments regarding Mr. Thomas's lack of personal knowledge therefore are miss the mark.

> Q. So let's get specific. Instead of using the legal term you, who was the owner of the lots at Hawks Points in question, specifically those 5 lots that bring us all in here today, lots 5 through 8 and 10?
>
> A. Thomas Dostal Developers owned those properties.
>
> Q. And who was the contractor with respect -- well I should say, do you contend that Thomas Dostal Developers, Inc. had any kind of contracting role as it respects these 5 lots?
>
> A. Thomas Dostal Developers ordered all work, anything that went with those lots and those homes would go through Thomas Dostal Developers.
>
> Q. And is that why we see other documents that we've gone through today through many witnesses that indicated on some of them the general contractor is developers Dostal Developers?
>
> A. Correct.
>
> Q. And that Dostal Developers was the borrower, owner and general contractor, correct?
>
> A. Yes, sir, correct.
>
> Q. Was not you individually?
>
> A. No, it was Thomas Dostal Developers.

(*Id.* at 200:6 – 201:2.) Thus, Randy Dostal distinguished himself from his company, and testified that Dostal Developers was the Borrower. And again, Randy Dostal never testified that Dostal Developers was the Guarantor or that he intended to sign the Guarantys on behalf of Dostal Developers. His only

testimony regarding signing documents on behalf of Dostal Developers related to the composite mortgage affidavits.

Randy Dostal's testimony is completely consistent with him personally guaranteeing the five Loans in this case. The Guarantys' written terms all distinguish between the "Guarantor" and the "Borrower," defining Randy Dostal alone as the "Guarantor" and Dostal Developers as the "Borrower." (Tr. Exhs. F.29.3, F.29.8, F.29.12, F.29.13 and F.29.23; App. 524, 559, 594, 629, 664.) Randy Dostal then confirmed that distinction at trial. The Guarantys' separate use of the terms "Guarantor" and "Borrower" thus are consistent with Randy Dostal's own statements that the Borrower—Dostal Developers—has separate obligations from him. And the fact that Randy Dostal explicitly signed other documents on behalf of Dostal Developers, such as the composite mortgage affidavits, the Notes and the Mortgages, provides further evidence that, had he intended to do so for the Guarantys, he certainly could and would have. But he did not, and he is therefore solely liable under the Guarantys.

Randy Dostal's final argument is that the cases cited by FACo in its opening brief are distinguishable from this case. But he then goes on to make the contradictory argument that, although distinguishable, the cases actually support his position. Regardless of that apparent contradiction, neither

assertion is true. Although no two cases are exactly alike, the cases FACo cites are instructive, and support FACo's uncontroversial position that the principal of a business can (and often does) personally guaranty repayment of the loans their businesses receive. Not surprisingly, the cases are clear that, when the face of the document shows that the individual signs it in their individual capacity, the guaranty is enforced against that individual alone. *See e.g.*, *Falco v. Alpha Affiliates*, No. Civ.A. 97-4941997, 1997 WL 782001, at *7 (D. Del. Dec. 10, 1997).

The cases also provide examples of individuals executing such Guarantys in situations that were not even as clear cut as this situation. As in *City of Davenport v. Shewry Corp.*, principals sometimes execute Guarantys on behalf of themselves and separately on behalf of their companies at the same time. 674 N.W.2d 79, 86 (Iowa 2004). Such Guarantys are still enforceable against the individuals. *Id.* As in *Bayless v. Pearson*, individuals sometimes obligate themselves on a debt being incurred for a third party even when the instrument specifically states that the loan is being made to the third party. 15 Iowa 279, 279 (Iowa 1863). The individual still is responsible for repaying the debt. *Id.* As in *Builders Kitchen & Supply Co. v. Moyer*, a principal might even state his or her position with the borrower in the signature block of a guaranty but still be held personally liable because the guaranty names the

principal alone as the guarantor. 776 N.W.2d 112 (Table), 2009 WL 2951295, at *1 (Iowa Ct. App. 2009).

This case is more obvious than most of the cases FACo cited, including those above. There are no ambiguities, double signatures or references to Randy Dostal's position with Dostal Developers. There is only Randy Dostal signing Guarantys that explicitly name him as the "Guarantor." And although, as Randy Dostal argues, the cases hold that a court should seek to uphold the parties' intentions, those intentions can be set forth solely in the guaranty itself if the guaranty is clear and unambiguous. *Shoppes of Mt. Pleasant,* LLC v. J.M.L, Inc., No. CPU4-14-001415, 2015 WL 3824118, at *5 (Del. Ct. Comm. Pl. May 11, 2015) ("In its interpretation of a guaranty, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement"); *Bank of the West v. Michel R. Myers Revocable Trust,* 776 N.W.2d 112 (Table), 2009 WL 2960404, at *3 (Iowa Ct. App. Sept. 2, 2009) ("The extent of a guarantor's obligation must be determined from the parties' written contract"). That is the case here, and Randy Dostal's testimony does not cloud the clear language of the Guarantys.

Finally, even if every guaranty case published by an Iowa or Delaware court could be meaningfully distinguished from this case, it would not matter. The plain language of the Guarantys is so precise and explicit in defining

Randy Dostal as the Guarantor that references to case law are not necessary to bind Randy Dostal to the Guarantys. (*See* Tr. Exhs. F.29.3, F.29.8, F.29.12, F.29.13 and F.29.23; App. 524, 559, 594, 629, 664.) Randy Dostal and the district court both seem to have tried to avoid that language to support their conclusions. This Court should not allow Randy Dostal to avoid the obligations so clearly set forth in the written Guarantys he signed.

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT BORST AND KELLY WERE PREVAILING PARTIES AND ENTITLED TO RECOVER ATTORNEY FEES AND THE APPELLATE COURT SHOULD VACATE THE ATTORNEY FEE AWARD.

A. Preservation of Issue for Appeal.

Borst and Kelly agree the attorney fee issue is preserved for appeal. FACo Brief, pp. 63-64; Brief of Borst, p. 43; Brief of Kelly, p. 31.

B. Standard of Review.

While the parties dispute the correct Standard of Review, FACo Brief, p. 64 (de novo); Brief of Borst, p. 43 (legal error); Brief of Kelly, p. 32 (legal error on statutory construction), both FACo and Borst apparently agree that the Court is not bound by the district court's findings.

Kelly, on the other hand, suggests an abuse of discretion standard on the balance of the attorney fee issues. Brief of Kelly, pp. 32-33. The suggestion is inapplicable as the parties are not arguing about the *amount* of

attorney fees. FACo Brief, p. 64 n.17. The award of attorney fees turns on the issue of who is a prevailing party following the appeal. *Id.* at pp. 64-65.

C. Discussion.

The parties agree that the outcome of the appellate case governs the outcome of the issue on the attorney fees. FACo Brief, p 65; Brief of Borst, p. 44; Brief of Kelly, p. 34.

One final comment is in order. Kelly argues the "bank is wrong in arguing that the priority of the liens affects an award of attorney fees." Brief of Kelly, p. 34. It appears from the record that Kelly did not advance some theory that it would be entitled to attorney fees if the priority of FACo's mortgages were established. (Kelly Concrete's Trial Brief; Kelly Concrete's Supplemental Trial Brief; Kelly Concrete's Application to Tax Fees; App. 865-902.) *Estate of Harris v. Papa John's Pizza,* 679 N.W.2d 673, 679 (Iowa 2004). Instead, Kelly now appears to posit that it would not be entitled to attorney fees only if its liens are unenforceable. Brief of Kelly, p. 34. Of course, even if Kelly's liens were enforceable but junior to FACo's liens, it would be immaterial whether fees were awarded because Kelly would have to outbid FACo's credit bid at the Sheriff's sale. Iowa Code § 626.80(2) (2017) (procedure for Sheriff's execution on real property).

IV. RESPONSE TO DOSTAL DEVELOPERS AND RANDY DOSTAL'S CROSS-APPEAL.

FACo provided both documentary and testimonial evidence demonstrating the amounts the Dostal Parties owe FACo. Rather than present any evidence to contradict those amounts or to suggest that the amounts are unreliable, the Dostal Parties attempt to exclude the evidence of amounts based on unfounded hearsay objections. Yet the evidence FACo relied upon is the very type of evidence lenders rely on all over the country to prove amounts due and owing under loans. Payoff statements prepared by a lender's servicer are common and reliable, and the Court should uphold the district court's allowance of those statements as evidence.

The Court should likewise affirm the award of attorneys' fees to FACo. FACo succeeded in its foreclosure claim under notes and mortgages that expressly entitle FACo to its fees and costs. Any work related solely to the Guarantys was de minimis, as the evidence needed to prove liability under the Guarantys is almost identical to the evidence needed to prove FACo's foreclosure claim.

A. The Evidence Submitted by FACo Regarding the Amounts Due and Dostal Developer's Defaults Was Proper and Sufficient.

At trial, FACo relied on testimony and payoff statements to establish the amount that remains due and owing on the Loans. Dostal Developers never provided any evidence that it made the missed monthly payments under the Loan Documents or that it paid—or even attempted to pay—the accelerated indebtedness. Instead, Dostal Developers attempts to avoid the consequences of its defaults by arguing that FACo's evidence regarding the amounts due is hearsay and by misquoting the Mortgages to suggest that FACo had an obligation to provide Dostal Developers more time to cure its defaults. Both arguments fail.

1. FACo Submitted Valid and Competent Evidence to Establish the Amounts Dostal Developer Owes.

Randy Dostal objects to using the payoff statements describing Dostal Developers' debt on the grounds that they are hearsay and not subject to the business records hearsay exception. Hearsay is an out of court statement offered by someone other than the declarant to prove the truth of the matter asserted. *State Farm Ins. V. Warth*, 924 N.W.2d 537 (Table), 2018 WL 4635692, at *3 (Iowa Ct. App. 2018). The purpose of the hearsay rule is to ensure the reliability of out-of-court statements. *Al-Jurf v. Scott-Conner*, 801 N.W.2d 33 (Table), 2011 WL 1584366, at *5 (Iowa Ct. App. 2011). Accordingly, where documents

or statements can be shown as reliable, there are many exceptions to the hearsay rule that allow such documents or statements to be admitted. One such exception is the business records exception. *See* Iowa Code § 622.28; *See also* Iowa R. Evid. 5.803(6). Under that exception, any writing or record, including electronic records, offered to prove the truth therein shall be admissible as evidence if they are made in the regular course of business at or about the time of the act or condition recorded, the sources of information and the method and circumstances of their preparation indicate their trustworthiness and if they are not otherwise excludable for a non-hearsay reason. Iowa Code § 622.28; *See also* Iowa R. Evid. 5.803(6). The business records exception is to be construed liberally. *Graen's Mens Wear, Inc. v. Stille-Pierce Agency*, 329 N.W.2d 295, 298 (Iowa 1983). And a "trial court is accorded broad discretion to determine whether the [business records] statute's requirements are met." *Id.*

The Dostal Parties argue that any document created in anticipation of litigation cannot fit within the business records rule. But neither the Iowa Code nor the Iowa Rules of Evidence make that generalization. Iowa Code § 622.28; *See also* Iowa R. Evid. 5.803(6). Furthermore, the cases they cite do not in any way support the assertion that documents created for litigation fall outside the business records exception. The *Musser* court held that an out of court

statement that is testimonial is barred by the Confrontation Clause. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). But the Confrontation Clause only applies in criminal cases. U.S. Const. amend. VI (in all criminal prosecutions, the accused shall enjoy the right to ... to be confronted with the witnesses against him"). And contrary to the Dostal Parties' assertion, the *Musser* court found that lab reports did fit within the business records exception to the hearsay rule. *Id.* at 752. The *Norwood* court, in noting several exceptions to the Confrontation Clause, recognized that business records typically are non-testimonial for Confrontation Clause purposes. *U.S. v. Norwood*, 982 F.3d 1032, 1043 (7th Cir. 2020). But the court never considered whether document prepared in anticipation of litigation could fit within the business records exception. The same is true of the *Miller* decision. *U.S. v. Miller*, 982 F.3d 412, 435 (6th Cir. 2020). None of the cases cited by the Dostal Parties actually support their argument that documents prepared in anticipation of litigation cannot be business records.

The precise issue here—the admission of a payoff statement relied upon by a witness to calculate a lender's damages—does not appear to have been considered by Iowa courts. But multiple courts across many different jurisdictions have relied upon similar payoff statements to determine amounts

due under promissory notes and Guarantys at the summary judgment stage and at trial. *See e.g.*, *Uddin v. Cunningham*, No. 01-18-2, 2019 WL 065273, at *7 (Tex. Ct. App. Aug. 29, 2019) (relying on payoff statement used in support of summary judgment to establish default and amounts due); *HSBC Bank USA, NA v. Gill*, 139 N.E.3d 1277, 1282 (Ohio Ct. App. 2019) (payoff statement relied upon by witness to establish damages at trial based on unpaid loan amounts admitted as business record); *Patch of Land Lending, LLC v. Realty Capital Ventures, LLC*, No. 17-80450-CIV, 2018 WL 3899388, at *6 (S.D. Fla. July 12, 2018) (loan history and payoff statement created by third-party loan servicer to prove damages admitted in support of summary judgment); *IndyMac Bank, F.S.B. v. Aryana/Olive Grove Land Dev. LLC*, 636 Fed.Appx. 704, 707 (9th Cir. 2016) (payoff statement relied upon by declarant to prove lender's damages admitted); *RREF II BHB-IL MPP, LLC v. Edrei*, No. 1-15-1793, 2016 WL 7638292, at *10 (Ill. Ct. App. Dec. 30, 2016) (admitting payoff statements prepared by third-party loan servicer and relied upon by witness to prove amounts due and owing); *New England Sav. Bank v. Bedford Realty Corp.*, 717 A.2d 713, 605-06 (Conn. 1998) (payoff statement meets business records exception to hearsay statement and is sufficient to prove amounts due). As noted in the preceding parentheticals, the payoff statements in all of these cases were

created to prove the damages the lenders sought to recover, thus undercutting the Dostal Parties' assertion that such statements cannot fit within the business records exception.

The circumstances under which courts have accepted such payoff statements into evidence are similar to those here. In *New England Savings*, for example, the court held that payoff statements are admissible as exceptions to the hearsay rule where the witness testifies that "the proffered documents appeared to be records generated by New England in the regular course of its business" and that "it was the practice at New England to record charges and interest at or near the time they accrued." *New England Sav.*, 717 A.2d at 719. In *HSBC*, the court noted that the witness relying on the statement to prove damages at trial worked at the lender's parent company, knew which department generated it, and relied on its contents in her role as the administrator of the loan. *HSBC Bank*, 139 N.E.3d at 1282. The court also noted that the defendant had "done nothing to cast doubt on the trustworthiness of this document." *Id.* at 1283. And in *Patch of Land*, the court relied on the witness's statement describing who the third-party loan servicer was, how the statement was generated and establishing that the document was created at or

near the time of the transactions discussed in the statement. *Patch of Land*, 2018 WL 3899388, at *6.

As in the cases above, FACo established that, even if the payoff statements in this case are hearsay, they are business records and are therefore admissible. FACo presented Mark Thomas as a witness, who testified that he is the Vice President of Credit and Implementation and Underwriting at FACo. (Tr. Trans. 14:22–15:2.) Mr. Thomas testified that he is intimately familiar with the Loans at issue. (*Id.* at 16:12-15.) After establishing his position with FACo and his familiarity with the Loans, Mr. Thomas testified that FACo's subservicer, BSI, prepares statements like those at issue here, that FACo requests such statements in the ordinary course of its business and keeps such statements in the ordinary course of its business. (*Id.* at 33:1 –34:5; 37:1-7.) Mr. Thomas also testified that FACo orders payoff statements like those here for customers when the amount of the loan is in question. (*Id.* at 39:10-12.) Mr. Thomas also was able to explain the line items on the statements, providing an explanation of the principal amount owed, the negative escrow balances, the amount of interest and the interest rates used, and other line items such as

escrow hold backs and lien release fees. (*Id.* at 34:20 – 36:25.)[8] Mr. Thomas also testified that it is the standard practice for FACo to request these types of payoffs from BSI when they need to determine the amount due and owing on a loan. (*Id.* at 45:19-21.) Mr. Thomas likewise testified that such payoff statements also are sent to borrowers to inform them of amounts due on their loans. (*Id.* at 45:6-10.) Finally, the payoff statements are dated as of January 23, 2020, and provide payoff calculations as of February 3, 2020, which was the date of trial. (Tr. Exhs. F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5; App. 678-87.) They therefore were created at or about the time of the matters set forth in the statements.

Mr. Thomas clearly established that he is familiar with the nature and format of the payoff statements and how they are created. He also established that FACo regularly uses such payoffs to determine amounts due and owing under loans not only for its own purposes, but also to inform borrowers of those amounts. He also testified that the statements are requested, used and kept in the course of FACo's ordinary business activities. FACo therefore has established that the payoff statements are reliable business records.

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[8] Mr. Thomas provided these explanations and explained that such records are requested and kept in the ordinary course of business for each loan. (Tr. Trans. 40:24 – 50:14.)

Moreover, like the objecting party in *HSBC*, the Dostal Parties did not offer any evidence suggesting that the payoff statements are not reliable. *HSBC Bank*, 139 N.E.3d at 1283. Neither defendant has, for example, provided alternative payoff figures or provided any evidence that the payoff statements are inaccurate. The payoff statements at issue are the very kind of documents lenders the world over use to determine amounts due, and they have therefore been admitted as evidence in cases across this country. Indeed, if lenders were not allowed to rely on payoff statements created to prove their damages at trial, they would never be able to prove their damages at trial. Particularly in the absence of any challenge to the reliability or accuracy of the payoffs, the Court should uphold the district court's ruling that the payoff statements are business records and thus admissible.

2. Dostal Developers was not entitled to any notice of its defaults or of FACo's acceleration of the Loans.

Last, Dostal Developers miscites the Mortgages to suggest that FACo was required to provide Dostal Developers with 15 days, rather than 11 days, to cure its payment defaults. A plain reading of the Mortgages belies Dostal Developer's argument and establishes that FACo was not required to provide any notice or grace period.

Notably, the Loans at issue are commercial loans entered into between business entities for the purposes of building homes for sale rather than to occupy by the builder. (*See* Notes executed by Thomas Dostal Development, Inc., Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, and F.29.21; Mortgages at § 27, Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; Tr. Trans. 185:4-22; App. 500, 507, 535, 542, 570, 577, 605, 612, 640, 647.) There are therefore no consumer protection concerns. As Dostal Developers correctly asserts, the Notes and Mortgages must be interpreted under typical contract interpretation rules. Thus, the parties were free to enter into contracts with whatever terms they chose, and those terms cannot be varied by courts after the fact. *Zaber v. City of Dubuque*, 902 N.W.2d 282, 289 (Iowa Ct. App. 2017). Each term of a contract must be given meaning, and should not be interpreted to be superfluous. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Where an agreement exists providing that a debt shall or may become due upon default at the mortgagee's election, foreclosure is an appropriate remedy. *Collin v. Nagle*, 203 N.W. 702, 703 (Iowa 1925). Notices of contractual defaults are not required unless the contract specifically provides for such notice. *Id.* ("A previous notice of the election to declare the principal and interest due under such circumstances is not required, nor is a prior demand of payment...."); *Moore v. Crandall*, 124 N.W. 812, 814 (Iowa

1910) (mortgagee not required to give notice of default or acceleration prior to foreclosure action for default resulting from failure of mortgagor to insure property). And courts routinely have found that borrowers are in default under loan documents where there are no notice requirements and thus no notice of the defaults were given. *See e.g.*, *Sorenson v. First Wisconsin Nat. Bank, N.A.*, 931 F.2d 19, 20-21 (8th Cir. 1991) (lender not required to give prior notice of specific default at issue because mortgage had no notice provisions for default at issue while notice requirements applied to other defaults); *Moore*, 124 N.W. at 814 (mortgagee not required to give notice of default or acceleration).

Here, none of the Loan Documents requires FACo to give any notice regarding Dostal Developers' defaults. Nor are there any requirements that FACo provide prior notice of its acceleration of the indebtedness or a right to cure. Each of the Mortgages is identical, and provides a separate provision at Section 19.A., describing how the borrower automatically defaults for missing a monthly payment and defines such missed payment as an "Event of Default":

> If default is made in the due and punctual payment of the Note or any installment thereof, either principal or interest, as and when the same is due and payable, or if default is made in the making of any payment or other monies required to made hereunder or under the Note, and any applicable period of grace specified in the Note shall have elapsed.

(Mortgages at § 19.A, Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 507, 542, 577, 612, 647.) Thus, Section 19.A. describes a default occurring immediately and automatically, and without notice, upon missing a payment or after any applicable grace period has ended.

Nor do the Notes include any grace periods for missed payments. Instead, the Notes all state that an "Event of Default" occurs "in the event that there shall occur any monetary default hereunder that shall continue after such payment is due hereunder ...." (Notes at § 4.A, Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, and F.29.21; App. 500, 535, 570, 605, 640.)[9] As the district court correctly concluded, the Notes plainly state that FACo is not required to provide any notice to Dostal Developers before accelerating. (Tr. Ruling at 17; App. 804.) Section 11 of the Notes states:

> At the election of Lender and without notice, the principal sum remaining unpaid hereon, tougher with accrued interest, shall become at once due and payable at the place herein provided for payment upon the occurrence of a default hereunder, any Event

[9] Section 5 of the Notes also specify that a late charge begins to accrue when a payment is not made within 5 days of the due date. So, although there is a grace period before a late charge is levied, there is no language creating a grace period before an Event of Default occurs. Even if the 5-day grace period in Section 5 applied to the occurrence of an Event of Default, which it does not, there still are no notice requirements, and there is no dispute that Dostal Developers was more than 5 days late on payments when FACo filed its Petition and on the day of trial.

> of Default under the Mortgage/Deed of Trust, or a default under any of the Loan Documents."

(Notes at § 4.A, Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, and F.29.21; App. 500, 535, 570, 605, 640 (emphasis added).)

The absence of any notice provisions clearly was intentional because other types of defaults described in the Mortgages do require notice. For example, Section 19.D. separately states that an Event of Default occurs "[i]f default shall continue for 15 days after notice thereof by Mortgagee to Mortgagor in the due and punctual performance of any *other* agreement or condition herein or in the Note contained ...." (Mortgages at § 19.A, Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 507, 535, 577, 612, 647 (emphasis added).) Thus, if a default occurs of a type *other* than those described in Sections 19.A through 19.C., 19.E. and 19.F., notice and a 15-day cure period would be required. This separate provision for "other" defaults clarifies that a default under Section 19.A. is treated differently, and the language specific to defaults under that section does not require notice or a chance to cure.

Dostal Developers focusses solely on Section 19.D. to argue that notice and a 15-day grace period was required for the monthly payment defaults by Dostal Developers. But reliance on Section 19.D. alone would render Section

19.A. superfluous, a result not supported in the law. Moreover, there is no language suggesting that Section 19.A and 19.D. must be read together. In fact, Section 19.D. specifically refers to "other" defaults not included in the specific defaults listed in the remainder of Section 19. Thus, the notice provision in Section 14 of the Notes (also cited by the Dostal Parties), which merely describes *how* notices are to be given, and not *when* they must be given, also does not apply.

Although nothing in the Loan Documents required FACo to provide notices of default or acceleration, FACo nevertheless provided notice of both in a showing of good will. FACo could have simply filed its petition without any notice or warning. Instead, on August 16, 2018, FACo sent a separate letter for each loan providing notice of the then-existing payment defaults and providing Dostal Developers seven days to cure the defaults. (Tr. Exhs. F.29.4, F.29.9, F.29.14, F.29.19 and F.29.24; App. 529, 564, 599, 634, 669.) On the 11th day, after the defaults had not been cured, FACo provided separate notice for each loan that FACo had accelerated the Loans. (Tr. Exhs. F.29.5, F.29.10, F.29.15, F.29.20 and F.29.26; App. 532, 567, 602, 637, 675.) Although FACo was not required to provide any of those notices, they further

support FACo's claims that defaults had occurred, and that the indebtedness owed under each of the Loans had been accelerated.

Dostal Developers did not introduce any evidence purporting to establish that it was not in default or that the Loans had not been accelerated. Dostal Developers' arguments attempting to avoid their defaults and the acceleration of the Loans therefore fail. The Court should affirm the district court's ruling that Dostal Developers defaulted under the Loan Documents and that FACo therefore has the right to foreclose its Mortgages.

3. FACo is Entitled to the Fees Award Granted by the District Court.

The Dostal Parties' argument regarding FACo's attorneys' fees award fails for at least two reasons. First, FACo has a contractual right to recover its attorneys' fees incurred in the enforcement of its rights under the Mortgages. All but a miniscule amount of the actions FACo took in this matter relate to enforcement of the Notes and Mortgages even if they also relate to FACo's enforcement of the Guarantys. FACo succeeded in establishing its right to enforce the Mortgages even without the evidence the Dostal Parties challenge. Second, FACo has provided ample reason for this Court to enforce the Guarantys and to affirm FACo's damages award, and thus FACo will

ultimately be the prevailing party on all of its claims against the Dostal Parties anyway.

Iowa courts engage in a two-part analysis when determining whether to award attorneys' fees. *Smith v. Iowa State University of Science and Technology*, 885 N.W.2d 620, 625 (Iowa 2016). Courts first examine whether the claim is one for which attorney fees are recoverable. *Id.* If the claim is not one for which attorney fees are recoverable in the first place, no attorney fees should be awarded. *Id.* Second, courts consider whether the party seeking recovery of its attorney fees and expenses achieved success on the claim for which such fees and expenses are recoverable. *Id.*

Regarding the first inquiry, attorneys' fees are generally not recoverable in Iowa in the absence of a statute or a contractual provision that permits their recovery. *Kinzler v. Pope*, 791 N.W.2d 427 (Table), 2010 WL 3503453, at *2 (Iowa Ct. App. 2010) (enforcing attorneys' fees provision in sales contract). Courts do, however, enforce contractual provisions under which parties agree to be responsible for the other party's attorneys' fees. *Id.*

In this case, the Mortgages and Notes all clearly permit FACo to recover its attorney fees and expenses in enforcing its rights under those documents. Under Section 20.A. of the Mortgages, Dostal Developers agreed that:

> In any suit or proceeding to foreclose hereof, there shall be allowed and included as additional indebtedness in the decree for sale, all expenditures and expenses which may be paid by or on behalf of the Mortgagee for attorneys' fees, appraisers' fees, outlays for the documentary and expert evidence" and several other categories of costs and expenses.

(Tr. Exhs. Tr. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 507, 535, 577, 612, 647.) Under Section 13 of the Notes, Dostal Developers agreed to pay all reasonable costs of collecting or attempting to collect on the Notes in the event that the Notes are placed in the hands of an attorney for collection after maturity. (Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, and F.29.21; App. 500, 535, 570, 605, 640.) In addition, Mark Thomas testified that Dostal Developers failed to make required monthly payments under the Notes and Mortgages and that Dostal Developers remains in default. (Tr. Trans. at 25:20 – 26:3.) Mr. Thomas also testified that Dostal Developers' defaults have never been cured. (*Id.* at 29:12-14.) Based on the foregoing evidence, the district court entered judgment in FACo's favor on its foreclosure claim.

Thus, even without prevailing on the guaranty claims (yet), FACo's attorney fees and expenses are recoverable under these other contracts because FACo was successful in enforcing its rights under those agreements. Although the Dostal Parties challenge the amount of FACo's damages, they have never challenged the fact that Dostal Developers is in default under the

Notes and Mortgages, and FACo provided unassailable evidence that Dostal Developers indeed is in default. FACo therefore is entitled to recover its attorneys' fees and costs related to its enforcement of the Notes and Mortgages.

The Dostal Parties focus primarily on the second inquiry, and argue that because FACo has not yet succeeded on its Guaranty claims, and because the Dostal Parties have challenged some of FACo's evidence, FACo is not entitled to all of its fees and costs. The Dostal Parties rely heavily on this Court's *Smith* decision. *See Smith*, 885 N.W.2d 620. Although the *Smith* Court held that attorneys' fees may be reduced when a party is only partially successful in a lawsuit, the reasoning for the reduction of fees in that case does not apply here.

In *Smith*, the plaintiff brought a whistleblower claim against the defendant, and in addition brought a breach of contract claim, a tort claim for emotional distress and had proceeded with administrative claims prior to bringing suit. 885 N.W.2d at 622. The contract claim had been dismissed. *Id.* Smith prevailed at trial on his whistleblower and emotional distress claims and was awarded damages. *Id.* at 623. On appeal, Smith's whistleblower damages were reduced from $784,027 to $150,000 because Smith failed to prove an essential element of his whistleblower claim. *Id.* The Court awarded

the $150,000 based on harm to Smith's reputation only because the defendant had failed to preserve error on that issue. *Id.* Thereafter, the case was remanded, and Smith was awarded all of his attorneys' fees under the whistleblower statute because the district court found that all of Smith's claims were related to the same core facts that supported his whistleblower claim. *Id.*

The *Smith* court reversed in part, and held that Smith was entitled to only a portion of his fees and costs. *Id.* at 624. Although the Court discussed the differences between his whistleblower and tort claims, and ruled partially on those differences, the Court focused primarily on the fact that Smith was only partially successful on his whistleblower claim (i.e., the claim that allowed for recovery of fees and costs), failed to satisfy a necessary element of that claim, and most of his damages related to the tort claim (for which fees and costs were not recoverable). *Id.* at 624-25.

The Court noted that the primary reason for determining whether multiple claims have a core set of facts is to determine "whether the work for which recovery is sought can be deemed to have been expended in pursuit of a claim for which attorney fees *are* recoverable." *Id.* at 624 (emphasis in original) (citations omitted). The Court held that "a defendant should not be immunized against paying for the attorney's fees that the plaintiff reasonably incurred in

remedying the violation for which attorney fees were recoverable." *Id.* (citations omitted). But "when a plaintiff achieves only partial or limited success o*n the claim for which attorney fees are recoverable,* a reduction in the fee award may be appropriate even if the entire lawsuit flows from a common core of facts." *Id.* (emphasis added). Based on that analysis, the Court held that, because there was no evidence that Smith had suffered retaliation necessary to support his whistleblower claims, and was far more successful on his claim that did not allow for an award of fees and costs, his attorneys' fee award should be reduced. *Id.* at 625.

The case at bar differs materially from the *Smith* case. FACo already prevailed on its foreclosure claim, which is based on two sets of contracts that allow for the recovery of attorneys' fees. Thus, unlike Smith, FACo was fully successful on its claim that allows recovery of attorneys' fees. Moreover, in order for FACo to prevail on its Guaranty claims, the only *extra* piece of evidence needed was that of Randy Dostal's execution of the Guarantys in his individual capacity. All of the other evidence needed to prove the Guarantys claims (i.e., the enforceability of the Notes and Mortgages, the defaults under those documents, the acceleration of the indebtedness and the amounts due) was needed to prove the foreclosure claim on which FACo prevailed. The research, factual investigation, briefing and trial preparation likewise was the

same for both claims. Thus, any extra work related to the Guarantys prior to and during trial was *de minimis*. Unlike Smith, FACo's claims truly are based on a common core of facts, and more importantly, FACo was fully successful on the claims for which fees and costs are recoverable.

In addition, FACo has provided more than sufficient support for this Court to reverse the district court's ruling on the Guaranty claims. Section 16 of the Guarantys also allows for an award of attorney fees. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) And FACo did not seek to recover its fees and costs related to the lien priority issues decided in favor of other parties. Thus, if the Court reverses the district court's decision on the enforcement of the Guarantys, the Dostal Parties' challenge to the fees award becomes moot anyway.

WHEREFORE, FACo respectfully requests that the Court: (1) reverse the district court's ruling that the Guarantys are not enforceable against Randy Dostal individually; (2) affirm the district court's ruling that FACo is entitled to foreclose its Mortgages; (3) affirm the district court's ruling regarding the amount of the debt owed by Dostal Developers to FACo; and (4) affirm the district court's award of FACo's attorneys' fees and costs.

CONCLUSION

Finance of America Commercial LLC prays that the Court reverse the decision of the district court in Case No. LACV091167, and find that the instant mechanic's liens are unenforceable, or to the extent enforceable, junior and inferior to liens of Finance of America Commercial LLC, remand the case for an award attorney fees to Finance of America Commercial LLC pursuant to Iowa Code section 572.32(2), reverse the decision of the district court and find that the personal guarantees of Randy Dostal are enforceable, remand for entry of judgment against Randy Dostal, individually, and further for an award of costs and fees in this appeal regarding Case No. EQCV091488.

Respectfully submitted,

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Appellant's Reply Brief is $ 0.00

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Reply Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on February 18, 2021, pursuant to Iowa R. App. P. 6.901(1), (8) (2017) and Iowa R. Elec. P. 16.315(1)(*b*) (2017).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Appellant's Reply Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt and contains 11,480 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

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