IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

NORTHERN MARIANAS HOUSING CORPORATION,
Plaintiff-Appellee,

v.

BANKPACIFIC, LTD.,
Defendant-Appellant.

Supreme Court No. 2018-SCC-0008-CIV

OPINION

Cite as: 2021 MP 7

Decided April 2, 2021

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE PERRY B. INOS
JUSTICE PRO TEMPORE KATHERINE A. MARAMAN

Superior Court Civil Action No. 11-0324
Associate Judge Teresa K. Kim-Tenorio, Presiding

INOS, J.:

¶ 1 Defendant-Appellant BankPacific, Ltd., ("BPL") appeals the trial court's judgment in favor of Plaintiff-Appellee Northern Marianas Housing Corporation ("NMHC") in a contract dispute regarding housing loans. We AFFIRM the exclusion of witness testimony because the court correctly concluded that the contract terms are unambiguous and the parties' intent can be inferred from the plain language in the contract. However, we find the court misconstrued the plain language as to the treatment of foreclosure proceeds. We also find the court applied the incorrect remedy for BPL's breach of contract and order that the damages be returned to the guarantee account. Finally, we AFFIRM the denial of the counterclaim for replenishment, but on a different ground. Namely, because the proper remedy is to return the money to the guarantee account, BPL's counterclaim for replenishment is moot as there is nothing more to replenish. We REMAND for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Mariana Islands Housing Authority (now NMHC) sought to increase its financing to help low- and moderate-income families obtain affordable housing. To that end, it sold eighty-nine high risk mortgage-backed loans to Guam Savings and Loan Association (now BPL) for over $10 million. The parties entered into a Loan Purchase Agreement ("Agreement") in which NMHC partially guaranteed each loan and funded an account to secure the guarantee.

¶ 3 Over the years, BPL foreclosed on thirteen defaulting loans. BPL was the sole bidder at every foreclosure and purchased every property. After applying the foreclosure proceeds to the respective judgments, BPL collected the guarantee. The guarantee account was depleted after the eighth foreclosure and never replenished.

¶ 4 NMHC sued alleging BPL breached Section 8.a of the Agreement by withdrawing funds from the guarantee account when the foreclosure proceeds had paid off the balance of eight loans. It sought the return of those funds. BPL counterclaimed that NMHC breached Section 9 by failing to replenish the guarantee account. It sued for specific performance for NMHC to replenish the account to secure the guarantees on five other foreclosed loans, four of which are at issue on appeal, and thirty-eight other loans still subject to the Agreement.

¶ 5 At the center of the dispute is the intent of Section 8.a and Section 9. Section 8.a states in relevant part:

> Seller [i.e., NMHC] agrees that it is selling Loans to Buyer [i.e., BPL] under the terms of this Agreement with limited recourse as provided in this Section 8.a. Seller hereby unconditionally guarantees the prompt and full repayment to Buyer of the first twenty-five percent (25%) of the total initial outstanding principal amount of each and every Loan which is sold by Seller to Buyer, plus all interest thereon. Therefore, each principal payment made by a Borrower on the Borrower's Loan shall serve to reduce the

> amount of the obligation of Seller as a guarantor of such Loan. When a Borrower has paid in full an amount equal to twenty-five percent (25%) of the total initial principal amount of the Borrower's Loan, plus all interest thereon, Seller shall have no further obligation as a guarantor of such Loan.
> Appellant's Appendix ("App.") C at 8.

Section 9 states, in relevant part:

> In order to secure Seller's [i.e., NMHC's] limited recourse and indemnification obligations under Section 8 above, Seller agrees that upon the execution of this Agreement it shall open a blocked deposit account with Buyer [i.e., BPL], which account shall bear interest at market rates . . . . Buyer shall be entitled to debit the Guarantee Account without notice to Seller in order to pay any amount which Buyer is entitled to receive from Seller under the provisions of Section 8 above. Buyer shall thereafter provide Seller with written notice of the amount debited from the Guarantee Account, and within five (5) days of receipt of such written notice Seller shall replenish the Guarantee Account by depositing an amount equal to the amount debited by Buyer.
> App. C at 11-12.

¶ 6 In interpreting Section 8.a, BPL takes the position that the foreclosure proceeds are credited against the judgment and NMHC is liable for any deficiency up to "25% of the total outstanding princip[al] plus interest thereon after foreclosure." Opening Br. 10. It emphasizes that foreclosure proceeds are not equivalent to borrowers' payments for purposes of extinguishing the guarantee. Reply Br. 5. BPL asserts it can collect the 25% guarantee on the loan even if it paid the full judgment price because no actual proceeds were recovered. Opening Br. 3.

¶ 7 By contrast, NMHC insists that foreclosure proceeds do draw down the guarantee. It maintains that if the proceeds add up to at least 25% of the initial loan principal, the guarantee is extinguished. As to the eight loans in the complaint, it claims that BPL bid the entire judgment amount, therefore, discharging their guarantees. Response ("Resp.") Br. 11. As to the loans in the counterclaim, NMHC argues the foreclosure proceeds exceeded their guarantees. Resp. Br. 20. Therefore, BPL breached Section 8.a when it collected the guarantees on the complaint loans and it will violate the same provision if permitted to collect on the counterclaim loans.

¶ 8 BPL claims the terms in Section 8.a contain latent ambiguity because the parties have a different understanding as to how the guarantee works. To provide context on how to properly apply the guarantee, BPL offered the testimony of a banking expert and a former NMHC board member at trial.

¶ 9 The court made three main determinations. First, the Agreement was

unambiguous and extrinsic evidence bearing on the interpretation of the contract terms was inadmissible. The court, therefore, struck and excluded the witnesses' testimony. It agreed with NMHC that foreclosure proceeds are applied first to the guarantee. Second, BPL breached Section 8.a as to each of the eight loans in the complaint by withdrawing a total of $121,226.44 from the guarantee account. The court found that the foreclosure proceeds paid off the loans and, therefore, extinguished the guarantees. As a result, the court awarded NMHC $121,226.44 in expectation damages. BPL has remitted the damages to NMHC.[1] Third, BPL's breach of contract excused NMHC's obligation to replenish the guarantee account.

¶ 10 BPL moved for reconsideration. Though it did not contest liability with respect to the complaint loans,[2] it argued the court erred in awarding $121,226.44 directly to NMHC. It contended the money should be returned to the guarantee account to secure the guarantee on the deficient counterclaim loans and the thirty-eight loans under the Agreement. NMHC argues that BPL is not damaged by not returning the money to the guarantee account. The court denied the motion to reconsider, finding that the existence of the remaining loans has no bearing upon this case. BPL appeals.

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[1] BPL informed the court at oral argument that it remitted $121,226.44 to NMHC.

[2] BPL did not contest liability for the eight loans in the complaint, thinking it purchased the homes at the full judgment price so there was no deficiency. Opening Br. 3. NMHC makes the same assertion. Resp. Br. 11. However, the court's findings show that the purchase price exceeded the judgment in only four of the complaint loans and one of the counterclaim loans. The rest were purchased for less than the judgment amounts. *Northern Marianas Hous. Corp. v. BankPacific, Ltd*., Civ. No. 11-0324 (NMI Super. Ct. Jan. 10, 2018) (Findings of Fact and Conclusions of Law at 8-13) ("FFCL"). The court found the following:

> 1. Iglecias Loan: Judgment: $88,443.87; Bid Price: $68,372.99.
> 2. Mecham Loan: Judgment: $96,445.47; Bid Price: $94,277.43.
> 3. Neldic Loan: Judgment: $76,970.29; Bid Price: $68,920.00.
> 4. Kukkun Loan: Judgment: $72,088.06; Bid Price: $78,600.73.
> 5. Sablan Loan: Judgment: $60,198.81; Bid Price: $69,024.30.
> 6. Torres Loan: Judgment: $80,175.50; Bid Price: $98,142.63.
> 7. Chargualaf Loan: Judgment: $63,901.30; Bid Price: $62,319.87.
> 8. Mesngon Loan: Judgment: $61,550.94; Bid Price: $70,585.89.
> 9. Ooka Loan: Judgment: $75,178.61; Bid Price: $66,491.66.
> 10. Chargualaf Loan: Judgment: $107,821.82; Bid Price: $87,779.20.
> 11. Yarofalpiy Loan: Judgment: $86,764.90; Bid Price: $74,910.51.
> 12. Taimanao Loan: Judgment: $50,849.04; Bid Price: $58,396.09.
> 13. Cruz Loan: Judgment: $73,297.73; Bid Price: $64,922.76.
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> FFCL at 5 n.5, 6 n.9, 7 n.13, 8 n.17, 8 n.21, 9 n.25, 10 n.29, 10 n.33, 11 n.37, 11 n.40, 12 n.43, 13 n.46, 13 n.49.

II. JURISDICTION

¶ 11 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 12 We address three issues. First, we review the exclusion of testimony for an abuse of discretion. *Commonwealth v. Camacho*, 2009 MP 1 ¶ 26. Next, we review whether the court erred in awarding NMHC expectation damages directly rather than returning the funds to the guarantee account. This is a question of contract construction which we review de novo. *Fusco v. Matsumoto*, 2011 MP 17 ¶ 26. Finally, we review the denial of the counterclaim for replenishment de novo, as it turns on the construction of the contract's terms. *Id.*

IV. DISCUSSION

A. Contract Ambiguity

¶ 13 As a preliminary matter, we must establish whether the Agreement is ambiguous; if so, extrinsic evidence may be admitted to determine the parties' intent. If it is unambiguous, its construction is a question of law which we can determine de novo. *Nevets C.M., Inc. v. Nissho Iwai Am. Corp.*, 726 F. Supp. 525, 531 (D.N.J. 1989). In contrast, "[t]he interpretation of ambiguous terms in a contract is generally a question of fact" that might require factual findings by the court on remand. *Id.* Here, the court correctly found no ambiguity in the contract.

i. The Parties' Intent

¶ 14 When interpreting contract terms, we look to the parties' intent. *Commonwealth Ports Auth. v. Tinian Shipping Co., Inc*., 2007 MP 22 ¶ 17. To determine intent, we examine only the four corners of the contract and give the terms their plain grammatical meanings, unless there is ambiguity. *Id.* "An ambiguity arises from contract language if it is either facially inconsistent (i.e., patent ambiguity) *or* either disputed relevant extrinsic evidence or the contract language itself shows potential *reasonable* differing meanings of the terms (i.e., latent ambiguity)." *Riley v. Pub. Sch. Sys.*, 4 NMI 85, 89 (1994) (citation omitted) (emphases in original). A latent ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F. 3d 805, 812 (6th Cir. 2007) (citing *Black's Law Dictionary* (7th ed. 1999)).

¶ 15 We turn to Section 8.a to determine the parties' intent. First, it is understood that NMHC is selling loans with limited recourse. Second, NMHC unconditionally guarantees the repayment of the first twenty-five percent of the total initial outstanding principal of each loan, plus interest. Read together, and giving the terms their plain grammatical meaning, the parties intended that if a borrower defaults, BPL's recourse against NMHC is limited to the guarantee. Third, the parties describe the nature of the guarantee and agree that the borrower's payments on the loan principal will serve to reduce the guarantee. Fourth, when the borrower's total principal payment is equivalent to the

guarantee, plus interest thereon, NMHC shall have no further obligation as a guarantor on the loan. To illustrate their intent, they provide the following example:

> [I]f the total initial principal amount of a Loan was $100,000.00, [NMHC's] obligation as a guarantor of such Loan would be $25,000.00 plus interest. If the Borrower then made principal payments which totaled $5,000.00 (and paid all accrued interest) then [NMHC]'s obligations as a guarantor of such Loan would be reduced to $20,000.00. When the Borrower of such Loan had paid down the principal balance of such Loan to $75,000.00 (and had paid all accrued interest thereon) then [NMHC] would have no more obligations as a guarantor of such Loan.
> App. C at 8-9.

Clearly, it is understood that the parties intended the guarantee to decrease by the same amount that the borrower pays the principal, plus interest.

¶ 16 For BPL to avail of the guarantee, a borrower must default on the loan. Hence, they agree that in the event of a default, BPL shall first exercise its remedy under the mortgage that secures the loan in a foreclosure proceeding. In relevant part, Section 8.a states:

> After such foreclosure, in the event of any shortfall (that is, any deficiency remaining after Buyer has foreclosed the Mortgage and has applied the proceeds of sale to all allowable costs and fees including without limitation attorneys' fees and to all outstanding and unpaid principal and interest due on the Loan), then Seller shall immediately repay and reimburse Buyer for any such shortfall up to the 25% limitation of liability provided for above.
> App. C at 9.

This provision plainly means that NMHC will promptly pay the loan deficiency or shortfall, up to the remaining guarantee under the loan. In applying or executing the contract terms in the example above, if the borrower has paid down the initial principal loan by $5,000, or five percent, then NMHC's remaining guarantee would be $20,000, or twenty percent, to repay or reimburse BPL for the deficiency. If the borrower has paid down the initial principal by $25,000, which is equivalent to twenty-five percent of the guarantee, then the guarantee is fully extinguished and BPL has no recourse against NMHC.

¶ 17 We conclude that the parties' intent can be determined from the plain language in Section 8.a. We find neither conflicting nor reasonable differing meanings to the contract terms. Thus, the court did not err in holding that the contract terms are unambiguous. Next, we determine whether the court properly excluded the witnesses' testimony.

ii. Exclusion of Witnesses' Testimony

¶ 18 We review "trial court decisions excluding or admitting evidence for abuse of discretion." *Camacho*, 2009 MP 1 ¶ 26. "An abuse of discretion exists 'if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Commonwealth v. Taitano*, 2017 MP 19 ¶ 37.

¶ 19 BPL sought to enter the testimony of a former NMHC board member and a banking expert as extrinsic evidence to show the parties' intention at the time the guarantee provision was entered. But as we have concluded, the terms in Section 8.a neither conflict nor have the potential for reasonable differing meanings. Where no contract ambiguity exists, our courts do not permit extrinsic evidence. *See Commonwealth Ports Auth*., 2007 MP 22 ¶ 17 (adopting the stringent four corners rule for extrinsic evidence). The testimony was appropriately stricken as overstepping the four corners of the contract. We find the court did not abuse its discretion.

B. Plain Language

¶ 20 We next examine whether the court construed the Agreement correctly. Because Section 8.a is unambiguous, the court need only give legal effect to its plain grammatical meaning. *Riley*, 4 NMI 85, 88. Using the example of the Ooka loan, one of the loans in the counterclaim, we demonstrate the proper construction of the guarantee. This loan had an original principal balance of $79,181.03. Twenty-five percent of that amount puts the guarantee at $19,795.26, plus interest. Ooka defaulted and the court entered a foreclosure judgment of $75,178.61.[3] FFCL at 11. At the time of default, the loan principal was paid down to $60,128.23. *Id*. The borrower made roughly $19,052.80[4] in principal payments, which reduced the guarantee to $742.46. BPL purchased the property at foreclosure for $66,491.66. Applying the purchase price against the judgment, the loan resulted in a deficiency or shortfall of $8,686.95.[5] Giving legal effect to the Agreement, BPL's only recourse against NMHC is the remaining guarantee of $742.46.[6] This guarantee is NMHC's sole obligation which BPL can withdraw and apply towards the deficiency; beyond that, the risk falls squarely on BPL.

¶ 21 Courts should not interpret contracts in a way that "will defy common sense or lead to absurd results." *Manglona v. Baza*, 2012 MP 4 ¶ 36. However,

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[3] The judgment accounted for $60,128.23 in principal amount; $11,341.99 in interest from May 27, 2012 to date of judgment; $100.38 in late charges; less $696.90 for funds held in escrow, $3,756.41 in attorney fees; and $548.50 in costs. FFCL at 11 n.37.

[4] The amount of borrower payments is approximated by subtracting the principal of $60,128.23 at foreclosure from the original loan principal of $79,181.03.

[5] The allowable deductions for interest, late charges, attorney fees, and costs were calculated in the judgment.

[6] The parties do not dispute that a full credit bid, i.e., a purchase price that pays off the judgment, allowable deductions, and interest, extinguishes the guarantee.

this is the exact result of NMHC's interpretation. The Agreement clearly states that the borrowers' payments reduce the guarantee. Section 8.a does not say that foreclosure proceeds will extinguish the guarantee, only that foreclosure is BPL's first remedy. To say that foreclosure proceeds are no different from borrowers' payments defies common sense. If the foreclosure proceeds were treated identically to borrowers' payments, then BPL would not have negotiated for the guarantee in the first place. It would be absurd for BPL to give the loan, take all the risk, have no recourse, and be unable to collect on the guarantee even with a shortfall.

¶ 22 Also, interpreting a contract in a way that "render[s] at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible." *LaSalle Bank Nat. Ass'n v. Nomura Asset Capital Corp*., 424 F.3d 195, 206 (2d Cir. 2005) (quoting *Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124 (2d Cir. 2003)). In the first instance, NMHC unconditionally guarantees the first twenty-five percent of the initial loan. However, when it is time to call on the guarantee, it construes the Agreement such that the proceeds wipe out the guarantee first. This interpretation makes the guarantee meaningless because it leaves BPL with no real recourse. Similarly, an interpretation of a contract provision is commercially unreasonable if no reasonable person would have accepted it when entering into the contract. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). On NMHC's view of the contract, BPL could never avail of the guarantee. And NMHC, as the guarantor, has not provided an instance where BPL could. If both borrowers' payments and foreclosure proceeds extinguished the guarantee, then BPL would shoulder 100% of the risk, rendering the guarantee commercially unreasonable. A reasonable financial institution would not have entered into the Agreement under such terms.

¶ 23 Likewise, BPL misconstrues the plain terms in the Agreement. First, it computes the guarantee on the total outstanding principal after foreclosure when the contract terms clearly instruct to compute the guarantee on the initial outstanding principal amount. Opening Br. 10. Second, it seeks to avail of the guarantee, up to 25% of the outstanding principal, to satisfy the deficiency because it was itself the sole bidder and no actual proceeds were recovered at foreclosure. This interpretation, however, ignores the parties' intent that the borrower's principal payments reduce the guarantee.[7] Furthermore, the payment type transacted at foreclosure is immaterial. The court ultimately acknowledged the bid purchase, whether it was in cash, check or credit bid.

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[7] BPL does not appear in its accounting to have tracked the aggregate amount of borrowers' payments, as opposed to the overall balance of the loan. This is relevant because it is only borrowers' payments that reduce the guarantee, whereas other transactions also change the balance of the loans. This is information BPL should track to meet its contractual obligations.

¶ 24 We find the court erred in its construction of the plain language. It misconstrued the plain terms by treating foreclosure proceeds as though they were borrower payments in drawing down the guarantee.

C. Remedy

¶ 25 We turn now to the contention that the court applied the wrong remedy. BPL argues that expectation damages were the incorrect remedy and that NMHC should return the $121,226.44 to the guarantee account to secure the remaining loans, including the four loans in the counterclaim. We conclude that the money should be returned to the guarantee account under the terms of Section 9.

¶ 26 In its findings, the court reasoned that NMHC suffered a loss because BPL breached the Agreement by collecting the guarantees when the foreclosure proceeds had extinguished its obligations. As a result, it awarded the withdrawn funds directly to NMHC as expectation damages. These are damages "based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981). The court reached this conclusion even though NMHC's complaint sought "[a]n award of economic damages *to replenish the Guarantee Account* . . . ." *Northern Marianas Hous. Corp. v. BankPacific, Ltd.*, Civ. No. 11-0324 (NMI Super. Ct. Dec. 13, 2011) (Complaint at 15) (emphasis added). BPL's counterclaim similarly sought "*specific performance* to make the necessary deposit to the Guarantee Account . . . ." *Northern Marianas Hous. Corp. v. BankPacific, Ltd.*, Civ. No. 11-0324 (NMI Super. Ct. June 29, 2015) (Second Amended Counterclaim at 9) (emphasis added). Returning the $121,226.44 to the guarantee account would put NMHC in the same economic position it would have been in but for the wrongful act.

¶ 27 To determine whether the court erred in awarding expectation damages, we examine the parties' intent in Section 9. This provision clearly provides that its purpose is to secure NMHC's guarantee and indemnification obligations in Section 8.[8] NMHC owes an "absolute continuing guarantee . . . as to each individual Loan . . . so long as any portion of such Loan remains unpaid." App. C at 9. The term "guarantee" means "[t]he assurance that a contract or legal act will be duly carried out." *Black's Law Dictionary* (9th ed. 2009). Here, the parties argue whether specific performance or expectation damages is the appropriate remedy. "[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty." *Century Ins. Co. v. Guerrero Bros.*, 2010 MP 13 ¶ 12 (citing the RESTATEMENT (SECOND) OF CONTRACTS § 357(1) (1981)). However, "[u]nder Restatement § 359, specific performance will not be granted if damages would adequately compensate a party for the breach." *Id*. A remedy

[8] Section 9 also secures NMHC's obligation to indemnify BPL from any losses arising from an Article XII violation. App. C at 10-11.

enforcing the terms of a contract is specific performance rather than expectation damages. "An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced." RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (1981).

¶ 28 Here, the court awarded NMHC expectation damages. However, expectation damage is "[c]ompensation awarded for the loss of what a person reasonably anticipated from a transaction not completed." *Black's Law Dictionary* (9th ed. 2009). The overall purpose of the Agreement is to make these high-risk loans feasible by securing partial payment in the event that the borrowers default. That is, the money needed to secure future defaults must remain in the account and NMHC must replenish it after withdrawals. Thus, the plain language requires that there must always be funds in the account to assure the obligation will be fulfilled. Here, that means funds must remain in the account at a balance of up to 25% of the remaining loans' balance. Thirty-eight separate loans remain under the contract. Money damages are accordingly inadequate, and the funds must be returned to the account to secure the ongoing obligations.

¶ 29 We find the court erred by applying the incorrect contract remedy. The $121,226.44 should be returned to the guarantee account as the proper remedy for BPL's conceded breach.

D. Counterclaim

¶ 30 The counterclaim asks NMHC to replenish the guarantee account. *Northern Marianas Hous. Corp. v. BankPacific, Ltd.*, Civ. No. 11-0324 (NMI Super. Ct. June 29, 2015) (Second Amended Counterclaim at 9). It also seeks to collect the guarantee on the four counterclaim loans in this appeal. As to replenishing the account, BPL agreed to return the $121,226.44 and we have concluded that those funds should be returned to the guarantee account. Thus, there is nothing more to replenish because BPL itself has returned the withdrawn funds. The counterclaim for specific performance is moot. As to the treatment of the guarantee, we find that both NMHC and BPL misconstrued the plain meaning of Section 8.a. The court need only apply it consistent with this opinion.

¶ 31 We also address the denial of the counterclaim on the ground that NMHC's failure to replenish was justified by BPL's breach. FFCL at 20. Generally, in contract law, there is no breach if non-performance is justifiable. *Manglona*, 2012 MP 4 ¶ 16. There is, however, the important exception in "divisible" or "severable" contracts. Section 240 of the Restatement (Second) of Contracts describes this exception:

> If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

RESTATEMENT (SECOND) OF CONTRACTS § 240 (1981).

¶ 32 Here, the contract is severable, because the parties' contractual duties with respect to each loan can be apportioned into corresponding pairs of part performances. Section 8.a reads, in pertinent part, "each and every Loan shall for all purposes be considered a *separate obligation and [NMHC]'s guarantee obligation shall apply to each and every Loan separately*." App. C at 9 (emphasis added). As to each loan individually, NMHC promises to make the guaranteed amount available in the account. BPL's breach with respect to the loans in the complaint did not excuse NMHC from its duty to replenish the guarantee account to maintain the security on the other outstanding loans.

V. CONCLUSION

¶ 33 For the foregoing reasons, we AFFIRM the exclusion of witness testimony because the court correctly concluded that the contract terms are unambiguous and the parties' intent can be construed from the plain language in the contract. However, we find the court erred in treating foreclosure proceeds like borrower payments in drawing down the guarantee. Foreclosure proceeds shall be applied to the counterclaim loans as explained above. We also find the court erred in applying the incorrect remedy for BPL's breach of contract and order that the money damages be returned to the guarantee account. Finally, because the $121,226.44 will be returned to the guarantee account, BPL's counterclaim for specific performance of replenishment is moot. The court may supervise the computation of the guarantee as appropriate. We REMAND this case for further proceedings consistent with this opinion.

SO ORDERED this 2nd day of April, 2021.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
PERRY B. INOS
Associate Justice

/s/
KATHERINE A. MARAMAN
Justice Pro Tempore

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