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.

BORST BROS. CONST., INC.,
Plaintiff-Appellee**,**
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
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v.
THOMAS DOSTAL DEVELOPERS, INC. and **RANDY T. DOSTAL**
Defendants-Appellants,

and

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

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

BRIEF OF FINANCE OF AMERICA COMMERCIAL, LLC

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because the case involves important legal principles and the interplay between the mechanic's lien statute (Iowa Code Chapter 572) and the rights of mortgagees who are strangers to the underlying mechanic's lien dispute. To that end, because the case involves substantial issues of first impression following the recent amendments to Iowa Code chapter 572 and impacts the rights of mortgagees, the case is of broad public importance and should be retained by the Court. Iowa Rule of Appellate Procedure 6.1101(2)(c), (d).

STATEMENT OF THE CASE

A. Nature of the Case

From Linn County Case No. LACV091167, Finance of America Commercial, LLC ("FACo") appeals the determination of the district court that mechanic's liens posted to the Iowa Secretary of State's Mechanic's Notice and Lien Registry ("MNLR") after the recording of FACo's mortgages are valid and entitled to priority. In addition, from Linn County Case No. EQCV0914888, FACo appeals the district court's ruling that personal guarantees it received from Randy Dostal, individually, in conjunction with certain notes and mortgages are unenforceable. Thereafter, the district court, then entered an award of attorney's fees in favor of

Borst Bros. Const. Inc. ("Borst") and Kelly Concrete Company, Inc. ("Kelly") from which FACo timely filed a Notice of Appeal.

B. Course of Proceedings

The case started in September, 2018 when Borst Bros. Constr., Inc. ("Borst") commenced a mechanic's lien foreclosure action in the Iowa District Court for Linn County (Case No. LACV091167). (Petition; App. 12-44); (Tr. Ruling, p. 3; App. 806). FACo filed a motion to dismiss[1] (Motion; App. 75-111), which the district court denied. (Ruling on Motion; App. 185-190).

FACo answered and counterclaimed against Borst that Borst's liens were unenforceable and FACo was entitled to attorney fees for defending against invalid lien claims. *See* Iowa Code § 572.32(2). FACo further counterclaimed against all of the lien claimants that: (1) the lien claims were unenforceable, (2) or to the extent enforceable, the liens were junior and inferior to the liens of FACo, and (3) also prayed for an award attorney fees to FACo pursuant to Iowa Code Section 572.32(2). FACo pled similar claims with respect to Kelly's counterclaim/cross-claim.

[1] A separate motion to dismiss was filed with respect to a cross-claim filed by Kelly Concrete Company, Inc. ("Kelly"). (Motion to Dismiss Kelly; App. 112-148). Both matters were heard and resolved by the district court which culminated in its Ruling on Motion (App. 185-190). Both motions to dismiss addressed the same deficiency but were styled slightly differently given the procedural posture of Borst's and Kelly's respective claims.

Despite being captioned as a "law" case, the case proceeded in equity. (Order 11/15/18; App. 151-152). Subsequently, both the mechanic's lien foreclosure action (Case No. LACV091167) and the separate mortgage foreclosure/personal guarantee enforcement action (Case No. EQCV0914888) were consolidated. (Order Granting Motion to Consolidate; App. 234-237).

Following limited "paper" discovery, FACo moved for summary judgment based upon the priority issue concerning FACo's recorded mortgages and the liens subsequently posted to the MNLR. (FACo's Motion for Summary Judgment; App. 238-295). The district court overruled the motion. (Ruling on Finance of America Commercial, LLC's Motion for Summary Judgment; App. 715-734).

The consolidated case was tried to the Court on February 3, 2020 in a 1 day bench trial. (Tr. Ruling, p. 2; App. 805). Thereafter, the district court ruled that Kelly had established mechanic's liens on Lots 5, 6, 7, and 8 and Borst had established mechanic's liens on Lots 5, 6, 7, 8, and 10. (Tr. Ruling, p. 21; App. 824). Further, the district court ruled that Kelly's liens were entitled to priority over Borst's liens and both Kelly's and Borst's liens had priority over FACo's previously recorded mortgages.[2] (Tr. Ruling, p. 22; App. 825).

[2] The district court found that 5 Star and AHC were not entitled to enforcement of their mechanic's liens because of the failure to post a notice of commencement which was fatal to their lien claims. (Tr. Ruling, p. 22; App. 825).

In turn, FACo timely filed a 1.904 Motion. (Finance of America Commercial LLC's Rule 1.904 Motion; App. 828-836). The district court denied the motion. (Ruling; App. 907-912). FACo filed a Notice of Appeal. (Notice; App. 913-919).

The district court then took up the issue of attorney fees for the lien claimants following its ruling on the 1.904 motion. The district court granted the attorney fee claims of the prevailing lien claimants. (Ruling on Attorney Fee Claims; App. 974-980). A second Notice of Appeal was filed (Notice of Appeal-September 2, 2020; App. 985-988). The appeals have now been consolidated by Order of this Court. *See* Iowa R. App. P. 6.103(2).

STATEMENT OF FACTS

In Case No. LACV091167 (the mechanic's lien action), Plaintiff filed suit under chapter 572 to foreclose its mechanic's lien on certain parcels of real property located in Linn County, Iowa. FACo holds certain mortgages on the same real property. Thomas Dostal Developers Inc. ("Dostal Developers" or "Borrower") is the developer of the subject parcels, and is operated by its principal, Randy T. Dostal ("Randy Dostal"). The balance of the parties are lien claimants. In EQCV91488 (the "EQCV Claim"), FACo filed suit to foreclose its mortgages and enforce its personal guarantees.

Prior to trial the parties stipulated to a number of facts. Those facts are set forth here to which FACo, Borst, Kelly and the Dostal Defendants agreed. (Tr. Trans. pp. 12-13).

The land at issue had its final plat issued in 2016 for construction of residential property which final plat was to be known as "Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa." (Parties' Stipulated Facts, ¶ 2; App. 736)[3]; (Tr. Ruling, p. 9; App. 812).[4] The parties stipulated facts and like findings of the district court are set out below.

The Loans

On November 10, 2017 Thomas Dostal Developers, Inc. entered into a commercial loan transaction pursuant to which Borrower [5] obtained five loans. (Parties' Stipulated Facts, ¶ 3; App. 737); (Tr. Ruling, p. 9; App. 812).

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[3] The legal descriptions for the lots at issue and their local addresses are as follows:
5118 Dostal Drive=Lot 5, Hawks Point Seventh Addition;
5124 Dostal Drive=Lot 6, Hawks Point Seventh Addition;
5130 Dostal Drive=Lot 7, Hawks Point Seventh Addition;
5136 Dostal Drive=Lot 8, Hawks Point Seventh Addition; and
5221 Dostal Drive=Lot 10, Hawks Point Seventh Addition.
(Parties' Stipulated Facts, ¶ 1; App. 736). *See also* (Tr. Ruling, pp. 3 and 9; App. 806, 812). The subdivision had a total of 32 lots, all owned by Dostal Developers, and which were approved for residential construction. (Tr. Ruling, p. 9; App. 812).

[4] The district court concluded that whether occupancy permits were actually issued was irrelevant to the question of whether "Borst's work was necessary for those lots to be eligible for such permits." (Tr. Ruling, p. 10; App. 813).

[5] The stipulated facts reflect the terms actually employed by the parties in the stipulation to avoid confusion.

The 5118 Loan was for the purpose of residential construction on the real property at 5118 Dostal Drive Southwest in Cedar Rapids to sell to third parties. (Parties' Stipulated Facts, ¶ 4; App. 737). Borrower executed the 5118 Note dated November 10, 2017 in the original principal amount of $153,000.00. (Parties' Stipulated Facts, ¶ 5; App. 737); (Tr. Ruling, p. 9; App. 812).

Borrower executed the 5118 Mortgage, Assignment of Rents and Security Agreement dated November 10, 2017, encumbering Lot 5, Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa, which Mortgage was dated November 10, 2017, and filed with the Linn County, Iowa Recorder on November 13, 2017, in Volume 9975, Page 212 securing an obligation in the original principal amount of $153,000.00. (Parties' Stipulated Facts, ¶ 6; App. 737); (Tr. Ruling, p. 9; App. 812).

The 5124 Loan was for the purpose of residential construction on the real property at 5124 Dostal Drive Southwest in Cedar Rapids to sell to third parties. (Parties' Stipulated Facts, ¶ 7; App. 737).

Borrower executed the 5124 Note dated November 10, 2017 in the original principal amount of $141,750.00. (Parties' Stipulated Facts, ¶ 8; App. 737); (Tr. Ruling, p. 9; App. 812). Borrower executed the Mortgage, Assignment of Rents and Security Agreement encumbering Lot 6, Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa, which Mortgage was dated November 10,

2017, and filed with the Linn County, Iowa Recorder on November 13, 2017, in Volume 9975, Page 3 securing an obligation in the original principal amount of $141,750.00. (Parties' Stipulated Facts, ¶ 9; App. 737-738); (Tr. Ruling, p. 9; App. 812).

The 5130 Loan was for the purpose of residential construction on the real property at 5130 Dostal Drive Southwest in Cedar Rapids to sell to third parties. (Parties' Stipulated Facts, ¶ 10; App. 738); (Tr. Ruling, p. 9; App. 812).

Borrower executed the 5130 Note dated November 10, 2017 in the original principal amount of $149,250.00. (Parties' Stipulated Facts, ¶ 11; App. 738); (Tr. Ruling, p. 9; App. 812).

Borrower executed the 5130 Mortgage, Assignment of Rents and Security Agreement encumbering Lot 7, Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa, which Mortgage was dated November 10, 2017, and filed with the Linn County, Iowa Recorder on November 13, 2017, in Volume 9975, Page 195 securing an obligation in the original principal amount of $149,250.00. (Parties' Stipulated Facts, ¶ 12; App. 738); (Tr. Ruling, p. 9; App. 812).

The 5136 Loan was for the purpose of residential construction on the real property at 5136 Dostal Drive Southwest in Cedar Rapids to sell to third parties. (Parties' Stipulated Facts, ¶ 13; App. 738).

Borrower executed the 5136 Note dated November 10, 2017 in the original principal amount of $170,250.00. (Parties' Stipulated Facts, ¶ 14; App. 738); (Tr. Ruling, p. 9; App. 812).

Borrower executed the 5136 Mortgage, Assignment of Rents and Security Agreement encumbering Lot 8, Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa, which Mortgage was dated November 10, 2017, and filed with the Linn County, Iowa Recorder on November 13, 2017, in Volume 9975, Page 229 securing an obligation in the original principal amount of $170,250.00. (Parties' Stipulated Facts, ¶ 15; App. 738-739); (Tr. Ruling, p. 9; App. 812).

The 5221 Loan was for the purpose of residential construction on the real property at 5221 Dostal Drive Southwest in Cedar Rapids to sell to third parties. (Parties' Stipulated Facts, ¶ 16; App. 739).

Borrower executed the 5221 Note dated December 20, 2017 in the original principal amount of $153,000.00. (Parties' Stipulated Facts, ¶ 17; App. 739).

Borrower executed the 5221 Mortgage, Assignment of Rents and Security Agreement encumbering Lot 10, Hawks Point Seventh Addition in the City of Cedar Rapids, Linn County, Iowa, which Mortgage was dated December 20, 2017, and filed with the Linn County, Iowa Recorder on December 20, 2017, in Volume 10003, Page 296 securing an obligation in the original principal amount of $153,000.00. (Parties' Stipulated Facts, ¶ 18; App. 739); (Tr. Ruling, p. 9; App. 812).

Further, FACo, Borst, Kelly, and the Dostal Defendants agreed to further facts (which facts were not agreed to by certain parties which are no longer prosecuting the case on appeal).

Borst Facts

The lien holder for MNLR # 014681-1 is Borst Brothers Construction Inc. (Borst Stipulated Facts, ¶ 1; App. 739).[6]

On June 15, 2017, Borst entered into a contract with Thomas Dostal Developers, Inc. for Borst to furnish labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 2; App. 739).

July 3, 2017, was the first day Borst furnished labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 3; App. 739); (Tr. Ruling, p. 11; App. 814).

December 19, 2017, was the last day Borst furnished labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 4; App. 739); (Tr. Ruling, p. 11; App. 814).

On February 2, 2018, Borst posted its Mechanic's Lien on the Mechanic's Notice and Lien Registry, as defined in Iowa Code Section 572.1(6). (Borst

[6] Borst's actual lien filings are in the record attached to Tr. Exhs. F.7.1 and F.7.2 (App. 354-480).

Stipulated Facts, ¶ 5; App. 740). This lien was MNLR #04681-1. (Tr. Ruling, p. 11; App. 814).

On February 2, 2018, Borst posted its Notice of Commencement of Work on the Mechanic's Notice and Lien Registry. (Borst Stipulated Facts, ¶ 7; App. 740); (Tr. Ruling, p. 11; App. 814).

On November 8, 2018, Borst posted its Preliminary Notice on the Mechanic's Notice and Lien Registry. (Borst Stipulated Facts, ¶ 8; App. 740); (Tr. Ruling, p. 11; App. 814).

Borst posted its Notice of Commencement of Work before it posted its Preliminary Notice. (Borst Stipulated Facts, ¶ 9; App. 740); (Tr. Ruling, p. 11; App. 814).

Borst posted its Mechanic's Lien within ninety days of the last day it furnished labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 10; App. 740).

Borst sought to foreclose its Mechanic's Lien for Lots 5, 6, 7, 8, and 10 of Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 11; App. 740); (Tr. Ruling, p. 11; App. 814).

While Borst's Petition originally sought $198,316.59 for labor and materials provided to Hawks Point, on December 3, 2019, Borst filed an Amended Petition to reduce its Mechanic's Lien amount to $143,316.59. (Borst Stipulated Facts, ¶¶ 12-

13; App. 740); (Tr. Ruling, p. 11; App. 814). The district court concluded that the value of Borst's work and materials provided to the five lots was $53,064.59. (Tr. Ruling, p. 11; App. 814).

Kelly Facts

Kelly and FACo stipulated to the following facts prior to trial:

Kelly was the holder of Lien No. MNLR #014663-2 which applied to Lot 8 of Hawks Point Seventh Addition. (Kelly Stipulated Facts, p. 7; App. 741).[7] The work that was the subject of this lien was commenced on September 11, 2017. (Kelly Stipulated Facts, p. 7; App. 741). The Notice of Commencement of Work, the Preliminary Notice, and the Mechanic's lien were all posted on February 1, 2018. (Kelly Stipulated Facts, pp. 7-8; App. 741-742). While the parties disputed the last day work was performed in relation to this lien, the parties stipulated that the amount claimed in the lien was $2,653.05 plus any statutorily allowed fees and interest. (Kelly Stipulated Facts, p. 8; App. 742); (Tr. Ruling, p. 12; App. 815).

Kelly was the holder of Lien No. MNLR #014664-2 which applied to Lot 7 of Hawks Point Seventh Addition. (Kelly Stipulated Facts, p. 8; App. 742). The work that was the subject of this lien was commenced on September 11, 2017. (Kelly Stipulated Facts, p. 8; App. 742). The Notice of Commencement of Work,

[7] Kelly's mechanic's lien filings are in the record at Tr. Exhs. F.11.1 and F.11.2. (App. 409-454).

Preliminary Notice, and Mechanic's lien were all posted on February 1, 2018. (Kelly Stipulated Facts, p. 8; App. 742). While the parties disputed the last day work was performed in relation to this lien, the parties stipulated that the amount claimed in the lien was $2,716.45 plus any statutorily allowed fees and interest. (Kelly Stipulated Facts, p. 8; App. 742); (Tr. Ruling, p. 12; App. 815).

Kelly was the holder of Lien No. MNLR #014665-2 which applied to Lot 6 of Hawks Point Seventh Addition. (Kelly Stipulated Facts, p. 9; App. 743). The work that was the subject of this lien was commenced on September 14, 2017. (Kelly Stipulated Facts, p. 9; App. 743). However, the Notice of Commencement of Work, Preliminary Notice, and Mechanic's lien were all posted on February 1, 2018. (Kelly Stipulated Facts, p. 9; App. 743). While the parties disputed the last date work was performed in relation to this lien, the parties stipulated that the amount claimed in the lien was $2,757.20 plus any statutorily allowed fees and interest. (Kelly Stipulated Facts, p. 9; App. 743); (Tr. Ruling, p. 12; App. 815).

Kelly was the holder of Lien No. MNLR #014666-2 which applied to Lot 5 of Hawks Point Seventh Addition. (Kelly Stipulated Facts, p. 9; App. 743). The work that was the subject of this lien commenced on October 25, 2017. (Kelly Stipulated Facts, p. 9; App. 743). However, the Notice of Commencement of Work, Preliminary Notice, and Mechanic's Lien were all posted on February 1, 2018. (Kelly Stipulated Facts, p. 10; App. 744). The last date work was performed in

relation to this lien was on December 18, 2017. (Kelly Stipulated Facts, p. 10; App. 744). The parties stipulated that the amount claimed in the lien was $8,176.99 plus any statutorily allowed fees and interest. (Kelly Stipulated Facts, p. 10; App. 744); (Tr. Ruling, p. 12; App. 815).

Supplemental Findings by the Court

The district court found that the last dates labor was provided to Lots 6, 7, and 8, by Kelly, was January 15, 2018. (Tr. Ruling, p. 13; App. 816).

While the district court's ruling does not identify the *amount* awarded in favor of Kelly, the lien claims were as follows: Lot 8 $2,653.05 (Kelly Exhibit A), Lot 7 $2,716.45 (Kelly Exhibit B), Lot 6 $2,757.20 (Kelly Exhibit C), and Lot 5 $8,176.99 (Kelly Exhibit D), (App. 689-705). (Tr. Trans. pp. 139-40).

None of the lien claimants had been paid by Dostal Developers. (Tr. Ruling, p. 13; App. 816).

Developer Randy Dostal testified that the development was to be a housing development wherein he intended to build houses on the lots. (Tr. Ruling, p. 15; App. 818); (Tr. Trans. p. 185). Water and sewer were to be provided to each lot. (Tr. Ruling, p. 15; App. 818); (Tr. Trans. pp. 185-87). Streets, street lighting, and storm sewers were to be installed as well. (Tr. Ruling, p. 15; App. 818); (Tr. Trans. p. 185). Foundation permits were issued for the five lots at issue. (Tr. Ruling, p.

15; App. 818); (Tr. Trans. p. 185). *See also* Tr. Exhs. F.27.1, F.27.2, F.27.3, F.27.4, and F.27.5. (App. 460-506) and (Tr. Trans. pp. 189-92).

Randy Dostal further testified to the process of execution of certain Composite Mortgage Affidavits in conjunction with the loan closings. (Tr. Ruling, p. 15; App. 818). *See* Tr. Exhs. F.21.1, F.21.2, F.21.3, F.21.4, and F.21.5; App. 455-459); (Tr. Trans. pp. 195-96).

Mark Thomas, a FACo representative, testified that FACo does not close its loans but utilizes a local servicer. (Tr. Ruling, p. 15; App. 818). FACo lends exclusively on residential property. (Tr. Ruling, p. 16; App. 819).

The district court found that Dostal Developers was an "owner builder" as set forth in Iowa Code Chapter 572. (Tr. Ruling, p. 9; App. 812). Further, the district court found that all of the lien claimants were subcontractors. (Tr. Ruling, p. 9; App. 812). The work was done pursuant to an oral agreement with Dostal Developers. (Tr. Ruling, p. 10; App. 813).

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

The validity and priority of the subject mechanic's liens have been litigated since the inception of the case. (Motion, Motion to Dismiss Kelly, Ruling on Motion, Amended and Substituted Memorandum of Authorities in Support of Motion for Summary Judgment, pp. 5-11, Trial Brief, pp. 3 and 6, Trial Ruling, Post-Trial Brief, Rule 1.904 Motion, Ruling; App. 75-111, 112-148, 185-190, 285-291, 804-827, 763-776, 828-836, 907-913).

B. Standard of Review

The standard of review on a mechanic's lien action is ordinarily de novo. Iowa Code § 572.26 (2017)[8] (defining action as one in equity); *Ringland-Johnson-Crowly v. First Cent. Serv. Corp.*, 255 N.W.2d 149, 151 (Iowa 1977). However, when statutory interpretation and construction are involved, the standard of review is for legal error. *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 675 (Iowa Ct. App. 2016).

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

C. Discussion

This case boils down to issues of statutory interpretation. "[O]ur ultimate goal is to ascertain and give effect to the intention of the legislature." *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989). "We look first to the language of the statute itself, reading the statute as a whole. In doing so, we accord the language its plain and obvious meaning as well as its most sensible and logical construction. Additionally, we will not construe a statute in such a way that would produce impractical or absurd results." *State v. Meyer*, 705 N.W.2d 676, 677 (Iowa Ct. App. 2005) (internal citations omitted).

FACo's argument can be summarized as follows. Under the language of the "new" version of chapter 572, for a subcontractor's lien to attach to residential property both a notice of commencement and a preliminary notice must first be registered on the MNLR. In this case, no lien claimant timely posted a notice of commencement or preliminary notice.

Moreover even if valid mechanics' lien claims existed, which FACo denies, FACo is still entitled to priority because its mortgage liens were recorded before the parties Notices of Commencement and Preliminary Notices were posted. Finally, the district court ignored the policy determination made by the legislature which was expressed in the amendments to chapter 572 that public notice of the commencement of work be provided through the MNLR.

As FACo's summary judgment motion was pending on the eve of trial, FACo's Trial Brief reincorporated the briefing from FACo's summary judgment motion. (Trial Brief, pp. 3 and 6; App. 309, 312). Thus, the discussion will start there.

1. The New Terminology of Chapter 572.

In 2012, the Iowa Legislature rewrote the book on how a mechanic's lien is created on residential construction property[9] in Iowa by amending portions of Iowa Code chapter 572. That rewrite included the creation of an online registry (the MNLR) available to the public on which potential mechanic's lienholders must post both a notice of commencement *and* a preliminary notice (in the case of subcontractors) in order for a mechanic's lien to eventually attach to property. *See* generally, Iowa Code § 572.13A(5) (notice of commencement) and § 572.13B(5) (preliminary notice). The MNLR solves the problem of mechanics liens popping up unexpectedly by providing notice of work commencing on a given property before circumstances arise that lead to a mechanic's lien being recorded.

The statutory language is clear. First, in order to create a valid lien on residential construction property, "a general contractor, or builder-owner who has contracted with a subcontractor … shall post a notice of commencement of work to

[9] The district court below found the instant project concerned residential construction, (Tr. Ruling, p. 19; App. 822), and FACo does not dispute that finding.

the mechanics' notice and lien registry internet site no later than 10 days after commencement of work at the property." *Id.* § 572.13A(1). These public posting requirements ensure that any other party, including the owner of the property, or anyone who may have, or may later take, an interest in the property is aware that mechanics liens could encumber the property.

Section 572.13A(2) then gives subcontractors the opportunity to protect their interests in the property if the general contractor or owner-builder fails to do so. Id. § 572.13A(2). Under that Section, if the general contractor or owner-builder fails to post a notice of commencement, the subcontractor may post a notice of commencement within 10 days of the subcontractor commencing work on the property. Again, this ensures that property owners and third parties are aware of the subcontractor's work and the possibility of future mechanics liens the subcontractors may have.

Subcontractors also have a separate responsibility under the new chapter 572. Under section 572.13B(1), "[a] subcontractor shall post a preliminary notice to the mechanics' notice and lien registry internet site." Such a notice is effective as to all labor, service, equipment and material furnished to the property by the subcontractor if the preliminary notice is posted before the balance is due to be paid to the general contractor. *Id.* A subcontractor may post a notice of commencement "in conjunction with the posting of the required preliminary notice pursuant to section 572.13B," but

the notice of commencement still must be posted within 10 days of the subcontractor commencing work. *See* § 572.13A(2). Moreover, the notice of commencement must be posted before the subcontractor can post its preliminary notice. *Id.* A subcontractor who fails to post a preliminary notice pursuant to section 572.13B shall not be entitled to a lien and remedy. § 572.13B(4). In any event, a subcontractor may not lien for work which was performed prior to the posting of the notice of commencement to the MNLR. Iowa Code § 572.13A(1).

Sections 572.13A and 572.13B must be read together in order to determine the prerequisites to a subcontractor perfecting a mechanic's lien.[10] Nowhere is this made clearer than the "Explanation" for House File 675, which ultimately became the new chapter 572 (the "Explanation"). The Explanation provides: "A preliminary notice posted before the balance due is paid to the general contractor or owner-builder is effective as to all labor, service, equipment, or material furnished to the property *subsequent to the posting of the notice of commencement of work.*" Page 21/li 31-35 and page 22/li 1 (emphasis added) (Amended and Substituted Memorandum of Authorities, pp pp. 6-7; App. 286-287). Thus, work performed by

[10] The fact that sections 572.13A and 572.13B need to be read in conjunction (and therefore require both the notice of commencement and the preliminary notice be posted) is consistent with the maxims of statutory construction employed in Iowa. *In re Estate of Sampson*, 838 N.W.2d 663, 671 (Iowa 2013) ("we read a statute as a whole and attempt to harmonize all of its provisions"); *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017) (statute is read "in the context of the entire statute").

the subcontractor prior to the posting of the notice of commencement is not subject to any subsequent mechanic's lien even if the subcontractor later posts a preliminary notice.

The 10-day requirement in section 572.13A(2) makes perfect sense in light of the Explanation. Had the legislature intended to allow a subcontractor to recover under a mechanic's lien regardless of whether a notice of commencement was timely posted, Section 572.13A(2) would not include the 10-day time limit for a subcontractor to post a notice of commencement. The legislature could have given subcontractors unlimited time to post the notice of commencement had it not intended to ensure that the notice of commencement give meaningful notice to third parties. Indeed, if a subcontractor could stand on its preliminary notice alone, without regard to the timely filing of a notice of commencement, there would be no need to for section 13A(2) to allow a subcontractor to post a notice of commencement at all. Yet it is a maxim of statutory interpretation that statutory language shall not be interpreted to include superfluous language. *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017) ("we apply the fundamental rule of statutory construction that we should not construe a statute to make any part of it superfluous").

The 10-day requirement is not superfluous, and no doubt exemplifies the legislature's intent to ensure that neither homeowners nor third parties will be

surprised by mechanics' liens arising months or years after a subcontractor commences work. Thus, in order for a subcontractor to perfect a lien on residential construction property, it must (1) post a notice of commencement within 10 days of commencing work (unless the general contractor has already done so), (2) post that notice of commencement prior to posting a preliminary notice, and then (3) post a preliminary notice.

2. No Lien Claimant Timely Posted a Notice of Commencement or Preliminary Notice.

The record reflects that no lien claimant posted to the MNLR a notice of commencement, preliminary notice or lien within 10 days of commencement of the work on the properties. Likewise, no lien claimant posted to the MNLR a notice of commencement or preliminary notice within 10 days of the commencement of *its own work*. For instance, all of Kelly's Notices of Commencement were posted on February 1, 2018 (except MNLR No. 014670-2; Preliminary Notice posted February 1, 2018. F.11.1, Kelly 1, 3, 5, 7, and 9; App. 409-417, 418, 424, 429, 434, 439).[11] *See* also Tr. Exhs. F.11.2 (App. 446-454).[12] But the record reflects Kelly's work had started in September and October, 2017, well in excess of 10 days of the posting. Tr. Exhs. F.11.1, Kelly 2 (work commenced October 25, 2017; App. 409-417, 419-423), Kelly 4 (work commenced September 14, 2017; App. 425-428), Kelly 6 (work

[11] (Tr. Trans. pp. 153-61).
[12] (Tr. Trans. p. 154).

commenced September 11, 2017; App. 430-433), and Kelly 8 (work commenced September 11, 2017; App. 435-438).

Borst's work commenced on July 3, 2017, but the Notice of Commencement was not posted until February 2, 2018. (Tr. Exhs. F.7.1, Borst Bros. 1 and 2, and F.7.2. (App. 354-358, 359, 360-372, 405-408).[13] Borst did not post its Preliminary Notice until November 8, *2018*. (Tr. Ruling, p. 11; App. 814) (emphasis added).

Previously, the FACo mortgages were recorded with the Linn County Recorder between November, 2017 and December, 2017. Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17, and F.29.22; App. 507-523, 542-558, 577-593, 612-628, 647-663); (Tr. Trans. pp. 18-20, 185).

Borst and Kelly's failures to file notices of commencement after Dostal Developers failed to do so makes recovery under their purported mechanics' liens impossible. Again, the 10-day requirement has a specific purpose of providing prior notice of the subcontractors' work. By filing their Notices of Commencement long after the 10-day period, Borst and Kelly failed to comply with section 572.13A, and prohibited any opportunity to perfect mechanics' liens.

[13] (Tr. Trans. pp. 128-29).

3. The District Court Ruling Ignored the Importance of Notices of Commencement and the Policy Determination Made by the Legislature Expressed in the Amendments to Chapter 572.

Borst and Kelly argued, and the district court held, that Borst and Kelly could enforce their purported mechanics' liens even though neither Borst nor Kelly filed their Notices of Commencement within 10 days of commencing work. (Tr. Ruling, p. 19 [Borst] and p. 21 [Kelly]) (Tr. Trans. p. 185; App. 822, 824). In other words, the district court held that there is no way to require a subcontractor to timely inform property owners and/or third parties that the subcontractor has commenced work and may eventually have a mechanic's lien. That holding is contrary to the statute's plain language and purpose.

The district court's ruling ignores the important component of notice which the legislature expressed in the language and design of a central registry system. (*See* H.F. 675 Explanation; App. 257-280). The district court ignored the importance of the MNLR and the information it conveys to third parties and, instead, relied upon distinguishable case law to reach its conclusion regarding lien validity. At pages 18-19 of its Trial Ruling, the district court reiterated the importance of the notice of commencement and the preliminary notice (App. 821-822). The district court then gutted the utility of those notices by relying upon the distinguishable *Standard Water v. Jones*¸ 888 N.W.2d 673, 677 (Iowa Ct. App. 2016) for the proposition subcontractors do not need to identify themselves. (Tr. Ruling, p. 19; App. 822);

(FACo Rule 1.904 motion, pp. 7-8; App. 834-835). The district court's reliance on *Standard Water* is curious because *Standard Water* did not concern subcontractors. Moreover, the district court's holding actually contradicts the *Standard Water* court's statements about the purposes of Section 572.13A.

In *Standard Water*, the owners of a house attempted to avoid a general contractor's mechanic's lien by arguing that the contractor failed to post a notice of commencement within 10 days of commencing work. *Standard Water*, 888 N.W.2d at 675. The homeowners relied on section 572.13A(4), which states: "A general contractor who fails to provide notice pursuant to this section is not entitled to a lien and remedy provided by this chapter." *Id.* The homeowners argued that this provision creates an absolute prohibition on enforcement of a mechanic's lien if the general contractor fails to post a notice of commencement within 10 days of commencing work. *Id.*

The court disagreed, holding that the homeowner was liable for the general contractor's charges. *Id.* at 677. The heart of the *Standard Water* decision is that the notice of commencement requirement does not apply to general contractors or owner-builders *who do not hire subcontractors*. *Id.* at 677 (holding that there is "persuasive force" that 572.13A "relates to general contractors who hire subcontractors"). Again, that section begins with "Either a general contractor, or an owner-builder who has contracted or will contract with a subcontractor to provide

labor or furnish material for the property, shall post a notice of commencement." § 572A(1). The court seized on that language, clearly concerned that a homeowner was attempting to avoid paying for work completed by a contractor the homeowner had had notice of. *Standard Water*, 888 N.W.2d at 677. That concern was clarified in dicta, where the court further stated that there is "no public policy interest in informing homeowners of general contractors whom they themselves have hired." *Id.* at 678. Notably, however, the court went on to state that the purpose of chapter 572 is to ensure that unknown subcontractors cannot show up later to enforce surprise mechanics' liens. *Id.*

This case is starkly different than *Standard Water*. Here, a general contractor lien is not even at issue. This case is solely about subcontractor liens, and thus *Standard Water* is not instructive in the first place. *Standard Water* applies where the owner-builder does not hire a subcontractor. Moreover, the *Standard Water* court's concern about hidden subcontractors would be thwarted here if the Court were to uphold the district court's ruling in this case.

The district court held that a subcontractor may, but is not required to, post a notice of commencement within 10 days of commencing work, thus allowing subcontractors to hide in the weeds until they later post a preliminary notice – after all of their (and the general contractor's) work is completed. (Tr. Ruling, p. 19 [Borst] and pp. 20-21 [Kelly]) (Tr. Trans. p. 185; App. 822-824). Under the district

court's holding, if the general contractor and the subcontractor both fail to file a notice of commencement, an unknown subcontractor could wrack up thousands of dollars in costs performing work about which homeowners and third parties are oblivious. Indeed, the subcontractor could be the party that provides most of the work, and the homeowner would never know it. Only once the general contractor is due to be paid—and the subcontractor files its preliminary notice—would anyone know that the subcontractor even existed. That result undermines the purpose of both sections 572.13A and 572.13B, which, as the *Standard Water* court noted, are to ensure that subcontractors do not show up with surprise mechanic's liens long after the work is done.

Moreover, this is not a case of a homeowner trying to avoid paying a general contractor hired by the homeowner. Unlike the *Standard Water* case, the instant case concerns the importance of the MNLR to third-parties who are strangers to the underlying construction contracts. The interests of third parties were not raised by the *Standard Water* decision, and thus that decision should not inform the Court on that issue.

This case highlights the problems that arise when both an owner-builder and subcontractors fail to meet their obligations to post a notice of commencement, and highlights the importance of the online registry. Although the *Standard Water* court

focused on notice to homeowners,[14] the Iowa Legislature clearly had concerns beyond that narrow focus. Had the legislature been concerned only with notice to homeowners, it easily could have adopted a process requiring written notice of subcontractors to be provided to homeowners (with protections in place, such as personal delivery or delivery by certified mail, to ensure that the notice is given). The legislature went further, though, and created a public registry so that the public—including other possible lienholders—would know about subcontractors. Indeed, the commentary to chapter 572 states:

> The bill provides for the creation of a state construction registry for residential construction property….The state construction registry, once created, shall be a *publicly accessible* centralized electronic database created and maintained by the administrator….The registry provides a *centralized resource of all persons or companies furnishing labor or materials* who may file a lien upon the improved property.

(H.F. 675 Explanation, Page 22/ li 18-29; App. 279) (emphasis added).

Here, the public aspects of the notice requirements and the MNLR are on full display, as the interests of lienholders affected by the subcontractors' liens have been affected. The record reflects the Composite Mortgage Affidavits given to obtain title guaranty certificates on FACo's loans. (Tr. Exhs. F.21.1, F.21.2, F.21.3, F21.4,

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[14] The *Standard Water* court relied on statements by the Secretary of State regarding the purpose of chapter 572, not statements by the legislature itself. *See Standard Water*, 888 N.W.2d at 676 (citing IAB Vol. XXXV, No. 11 (11/28/2012) p. 935, ARC 0464C). From the text of the case, neither party advanced the "Explanation" to H.F. 675 as the issue in the case turned on the authority to promulgate an administrative rule.

and F.21.5; App. 455-459); (Tr. Trans. pp. 195-96). Each and every Composite Mortgage Affidavit, at paragraph 1, reflects an affirmative statement that no labor or materials had been furnished to the property in the last 90 days prior to giving the affidavits (App. 455-459). Such information was *consistent* with the information available from the MNLR on the days the mortgages were recorded. (FACo Rule 1.904 motion, p. 7; App. 834). Indeed, no evidence was presented at trial to the contrary, and this fact was uncontested below. (FACo's Omnibus Reply in Support of its Rule 1.904 motion, p. 7; App. 862).

The district court's ruling therefore does violence to the import of the MNLR and the legislature's intent to create a *public* database that provides certainty in the residential construction market by requiring affirmative notice of potential subcontractor liens and the priority of those liens *vis a vis* any associated mortgage liens. (FACo Post-Trial Brief, p. 12; App. 774); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835). That is, nothing exists on the MNLR; a mortgage lender can proceed to closing.[15] The lien claimants 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 Post-Trial Brief, p.

[15] FACo did not argue below that notice should have been mailed to it (*See* Tr. Ruling, p. 5; App. 808). The district court's position is curious given that the central registry system was provided to the public as notice for action being taken with respect to a particular parcel of real property. The Court will observe that the "N" in MNLR stands for "Notice."

12; App. 774); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835). The legislature expected nothing less. Neither Borst nor Kelly responded to this argument below. (FACo's Omnibus Reply in Support of its Rule 1.904 motion, p. 6; App. 861). The district court only gave passing acknowledgment to this important argument. (Ruling, p. 5; App. 808).

4. Even if Valid Lien Claims Exist, Which FACo Denies, FACo is Still Entitled to Priority.

Furthermore, the district court erred when it did not, independently, conclude that the intervening recording of the FACo mortgages made the mechanics' liens junior and inferior to the FACo mortgage liens (assuming for the sake of argument the mechanics' liens were valid in the first instance). In addition to the plain language of section 572.13A(1), it is undisputed that FACo recorded mortgages on the subject real estate between November 10, 2017, and December 20, 2017 (App. 507-523, 542-558, 577-593, 612-628, 647-663). Yet each and every Notice of Commencement was posted to the MNLR after December 20, 2017. As a result, even if valid mechanics' lien claims exist (which FACo denies), the resultant liens would be junior and inferior to the mortgage liens of FACo.

This position is supported by the language of chapter 572. Iowa Code section 572.18(1) provides:

> Mechanics' liens posted by a general contractor or subcontractor within ninety days after the date on which the last of the material was furnished or the last of the claimant's labor was performed *and for which notices*

> *were properly posted* to the mechanics' notice and lien registry internet site pursuant to sections 572.13A and 572.13B shall be superior to all other liens which may attach to or upon a building or improvement and to the land upon which it is situated, except liens of record prior to the time of the original commencement of the claimant's work or the claimant's improvements, except as provided in subsection 2.

(emphasis added).

Note that the statute re-incorporates the requirement of posting of the notice of commencement and preliminary notice. *See* Iowa Code section 572.18(1) ("for which notices were properly posted to the mechanics' notice and lien registry internet site pursuant to sections 572.13A and 572.13B"). *See also* Iowa Code section 572.18(2) (construction mortgage lien preferred over parties who performed work subsequent to recording). Recall further that the notice of commencement is to be place of record within 10 days of the provision of labor or materials on the work. Iowa Code § 572.13A(2).

Using the dates found by the district court, no party served a notice of commencement prior to the recording of FACo's mortgage liens. (Tr. Ruling, p. 11 [Borst] and 12 [Kelly]; App. 814 and 815). The same result follows with respect to those parties who did provide preliminary notices. *Id.* Specifically, the Code contemplates that the perfection of the lien is an additional required step in addition to the notice of commencement and the preliminary notice. Under chapter 572, a mechanic's lien is now perfected by posting a verified statement of account on the MNLR. Iowa Code § 572.8(1). Only once a lien is perfected is entitled to

enforcement. *Id.* at § 572.13B(3)(a) ("once perfected under this chapter is enforceable only to the extent of the balance due"). Under this calculus, if valid, the mechanic's liens would be junior to the mortgage liens. Again, no language in the Code provides for the relation back of the subcontractor's claim prior to the filing of the notice of commencement or preliminary notice. Iowa Code §§ 572.13A.1; 572.13A.2.

Further, the district court erred when it found that the liens of Kelly and Borst relate back. (Tr. Ruling, p. 21; App. 824). As argued below, there was nothing for the liens to "relate back to" because all of the work was performed prior to the postings to the MNLR. (FACo Rule 1.904 motion, p. 7; App. 834). The district court relied upon case law which was clearly superseded by the legislative changes to chapter 572 in 2012. (FACo Rule 1.904 motion, p. 6; App. 833); (FACo's Omnibus Reply in Support of its Rule 1.904 motion, p. 7; App. 834). Thus, 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.

A. Preservation of Issue for Appeal

The enforceability of the Guarantys against Randy T. Dostal personally has been litigated since the filing of the foreclosure action by FACo on October 18,

2018. (Petition; First Amended Foreclosure Petition; Trial Ruling, Post-Trial Brief, Rule 1.904 Motion, Ruling; App. 12, 153, 715).

B. Standard of Review

The standard of review in a mortgage foreclosure action is de novo. Foreclosure proceedings are equitable in nature, appellate review of which is de novo. Iowa Code § 654.1; Iowa R. App. P. 6.907; *First State Bank, Belmond v. Kalkwarf*, 495 N.W.2d 708, 711 (Iowa 1993). The Court, especially when considering the credibility of witnesses, will give weight to the fact findings of the district court but is not bound by them. Iowa R. App. P. 6.904(3)(g). Under this standard of review, the district court clearly erred in holding that personal guarantys *personally* executed by Randy Dostal were not enforceable against him.

Randy Dostal personally guaranteed five commercial mortgage loans (the "Loans") FACo made to Dostal Developers by signing five guarantys (the "Guarantys") associated with the Loans. Yet rather than holding that Randy Dostal personally guaranteed the Loans, the district court held that Randy Dostal signed the Guarantys only on behalf of Dostal Developers. (Tr. Ruling at 16; App. 804.) That, of course, would be redundant because Dostal Developers was already obligated under the five promissory notes and five mortgages it signed in connection with the Loans. In addition to the fact that the Guarantys all name Randy Dostal as the Guarantor, they all specifically differentiate Randy Dostal from Dostal Developers,

and the signature blocks (except for one of the Guarantys) all name only Randy Dostal individually. (Tr. Exhs. F29.3, F29.8, F29.13, F29.18 and F29.23; App. 524, 559, 594, 629, 664). The district court's conclusion that there was "no evidence in the record to support that Randy Dostal took any actions herein as an individual" (Tr. Ruling at 16; App. 804) is not supported by the evidence and is clearly contrary to the specific terms of the Guarantys. The district court thus erred in holding that Randy Dostal is not personally liable under the Guarantys. The documentary evidence and witness testimony establish that the parties—including Randy Dostal—intended for him to be personally liable under the Guarantys. This Court therefore should reverse the district court's ruling that Randy Dostal signed the Guarantys on Dostal Developers' behalf.

C. Factual Background of Randy Dostal Personal Guarantys

The facts relating to this issue are sufficiently distinct from the lien priority issue that reiterating certain of those facts, and highlighting certain additional facts, will be helpful. On November 10, 2017, Dostal Developers entered into a commercial real estate transaction, pursuant to which Dostal Developers obtained the five Loans from FACo. (Tr. Ruling at 9; Stip. Facts ¶ 3; App. 804, 735). The Loans were to be used to purchase five properties (collectively, the "Properties") in Cedar Rapids, Iowa and to build one single family home on each property. (Tr.

Ruling at 9; Stip Facts ¶¶ 4, 7, 10, 13, 16; App. 804, 735.) The address of each property, and the corresponding loan amounts are as follows:

Address	Loan Amount
5118 Dostal Drive	$153,000.00
5124 Dostal Drive	$141,750.00
5130 Dostal Drive	$149,250.00
5136 Dostal Drive	$170,250.00
5221 Dostal Drive	$153,000.00

(Tr. Ruling at 9; Stip. Facts¶ 1; Tr. Trans. 16 – 18; Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16 and F.29.21; App. 804, 735, 500, 535, 570, 605, 640.) In connection with each of the Loans, Dostal Developers executed a Note in the original principal amount of the individual loan (collectively, the "Notes"). (Tr. Ruling at 9; Stip. Facts ¶¶ 5, 8, 11, 14, 17; Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16 and F.29.21; App. 804, 735, 500, 535, 570, 605, 640.) Each of the Notes was executed by Dostal Developers in a signature block that appears as follows:

> IN WITNESS WHEREOF, the undersigned have caused this Note to be executed as of the day and year first above written.
>
> **Thomas Dostal Developers Inc., an Iowa Corporation**
> By: [Written Signature of Randy Dostal]
> Name: Randy T. Dostal
> Its: President

(Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16 and F.29.21; App. 500, 535, 570, 605, 640.) The written signature of Randy Dostal appeared on the "By" line of each of the Notes. (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 order to secure the indebtedness of Dostal Developers evidenced by the Notes, Dostal Developers signed and delivered to FACo a Mortgage, Assignment of Rents and Security Agreement, dated November 10, 2017, for the Loans with respect to 5118 Dostal Drive, 5124 Dostal Drive, 5130 Dostal Drive and 5136 Dostal Drive, and a Mortgage, Assignment of Rents and Security Agreement dated December 20, 2017, for the Loan with respect to 5221 Dostal Drive, (collectively, the "Mortgages"). (Tr. Ruling at 9; Stip. Facts ¶¶ 6, 9, 12, 15, 18; Tr. Trans. 18 – 20; Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 804, 735, 507, 542, 577, 612, 647.) Each of the Mortgages granted a mortgage lien in favor of FACo on each of the respective Properties. (Tr. Ruling at 17; Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 804, 507, 542, 577, 612, 647.) Each of the Mortgages was executed by Dostal Developers in a signature block that appears as follows:

> IN WITNESS WHEREOF, the Mortgagor hereto has executed this Mortgage all on and as of the day, month and year first written above.
>
> Thomas Dostal Developers Inc., an
> Iowa Corporation
> By: [Written Signature of Randy Dostal]
> Name: Randy T. Dostal
> Its: President

(Tr. Exhs. 29.2, 29.7, 29.12, 29.17 and 29.22; App. 507, 542, 577, 612, 647). Randy Dostal's written signature appeared on the "By" line of each of the Mortgages, and his title as President was provided below. (Tr. Exhs. 29.2, 29.7, 29.12, 29.17 and 29.22; App. 507, 542, 577, 612, 647.)

In connection with each of the Loans, Randy Dostal executed and delivered to FACo a Guaranty. (Tr. Trans. 20 – 25; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) The Guarantys for the Loans with respect to 5118 Dostal Drive, 5124 Dostal Drive, 5130 Dostal Drive and 5136 Dostal Drive are dated as of November 10, 2017, and the Guaranty for the loan with respect to 5221 Dostal Drive is dated as of December 20, 2017. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) Each of the Guarantys is in substantially the same form and states:

> WHEREAS, the undersigned, **Randy T. Dostal** called "Guarantor" is substantially financially or otherwise interested in **Thomas Dostal Developers, Inc., an Iowa Corporation** (herein called "Borrower"), the maker of the Borrower's Note in the principal amount of $ _____ payable to **Finance of America Commercial LLC** and its successors and assigns (herein called the "Note"), and it will be of substantial economic benefit to the Guarantors, and each of them, for the Borrower to execute and deliver the Note and borrow the principal sum evidenced thereby and secured by the Mortgage therein described (herein called the "Mortgage").
>
> NOW, THEREFORE, in consideration of the premises and of Ten Dollars ($10.00) in hand paid by the Borrower to the Guarantors, and each of them, and for other good and valuable considerations, the receipt and sufficiency of all of which are hereby acknowledged, and in order to induce any person or persons who may be and become the

> holder of the Note to accept the same, the Guarantors, and each of them, hereby jointly and severally agree as follows:
>
> 1. The Guarantors, and each of them, hereby jointly and severally, unconditionally, absolutely and irrevocably guarantee, for the benefit of each and every present and future holder or holders of the Note (all herein called the "Obligees"), the full and prompt payment to the Obligees at maturity (whether at the stated maturities thereof, or by acceleration or otherwise) of the indebtedness of the Borrower evidenced by the Note, together with all other obligations and liabilities of the Borrower under and pursuant to the Mortgage and secured thereby, as the same or any part thereof may from time to time be amended and modified (all of which indebtedness, obligations and liabilities being herein called the "Indebtedness Hereby Guaranteed").

(Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.)

In connection with the Loans for the properties located at 5118 Dostal Drive, 5124 Dostal Drive, 5130 Dostal Drive and 5136 Dostal Drive, each of the Guarantys includes the following signature block:

> IN WITNESS WHEREOF, the Guarantors have signed and sealed this Guaranty as of the day and year first above written.
>
> [Written Signature of Randy Dostal]
> Randy T. Dostal

(Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; App. 524, 559, 594, 629.) Randy Dostal's written signature appeared on each of the signature lines for each of those four Guarantys. (Tr. Trans. 20 – 22; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; App. 524, 559, 594, 629.) The signature of Randy Dostal on each of the preceding Guarantys was notarized by Peg Rahe. (Tr. Trans. 20 – 22; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; App. 524, 559, 594, 629.)

In connection with the Loan for the property located at 5221 Dostal Drive, the signature block on the corresponding Guaranty (the "5221 Guaranty") appears as follows:

> IN WITNESS WHEREOF, the Guarantors have signed and sealed this Guaranty as of the day and year first above written.
>
> [Written Signature of Thomas T. Dostal Dev.]
> Thomas T. Dostal

(Tr. Trans. 22 – 23; Tr. Exh. 29.23; App. 664.) Above "Thomas T. Dostal," the written signature of Thomas T. Dostal Dev." appears. (Tr. Trans. 22 – 23; Tr. Exh. 29.23; App. 664.) But again, the opening paragraph of the 5221 Guaranty states that Randy T. Dostal is the individual guaranteeing Dostal Developers' obligations under the Note in the amount of $153,000.00. (Tr. Trans. 24 – 24.) Moreover, there is no evidence in the record of the existence of a company named "Thomas T. Dev." or even "Thomas T. Developers." The 5221 Guaranty then was duly notarized by Peg Rahe. (Tr. Trans. 24 – 25.) The notary block for all five of the Guarantys, including the 5221 Guaranty, states:

> I, the undersigned, a Notary Public for the county and state aforesaid, do certify that Randy T. Dostal as Guarantor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me in person and acknowledged that he signed and sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

(Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; F.29.23; App. 524, 559, 594, 629, 664.) Thus, Randy Dostal is defined as the Guarantor in each of the notary blocks as well.

None of the Guarantys has a signature block naming Dostal Developers as a signatory to a Guaranty. None of the Guarantys' signature blocks even mention Dostal Developers. The 5221 Guaranty does contain a typo, with the signature block showing "*Thomas* T. Dostal" rather than "*Randy* T. Dostal." But it does not indicate that Dostal Developers was to sign the document. Moreover, none of the Guarantys includes a designation in the signature block or elsewhere of Randy Dostal's position at Dostal Developers and there is no language in any of the Guarantys indicating that Randy Dostal signed the Guarantys as the president (or any other representative capacity) on behalf of Dostal Developers. Indeed, they all specifically state that Randy Dostal was himself the Guarantor. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; F.29.23; App. 524, 559, 594, 629, 664.)

Under each of the Notes and Mortgages, Dostal Developers was required to make monthly payments to FACo (the "Monthly Payments"). (Tr. Ruling at 9, 17; Tr. Trans. 25 – 25; Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 804, 507, 542, 577, 612, 647.) Dostal Developers failed to make the monthly payments on each of the Loans beginning with the payments due for February 2018, and has

not made any Monthly Payments since that time. (Tr. Ruling at 9, 17; Tr. Trans. 25 – 26; App. 804.)

Dostal Developers' failure to make the required Monthly payments was a default under the Notes and the Mortgages. (Tr. Ruling at 17; Tr. Trans. 26 – 26; Tr. Exhs. Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22 at § 19.A; App. 804, 507, 542, 577, 612, 647.) The evidence established at trial showed that FACo was not required to send written notice of any default or written notice of acceleration with respect to the Notes. (Tr. Ruling at 17; App. 804.) Nevertheless, on August 16, 2018, counsel for FACo transmitted letters to Dostal Developers, with a copy to Randy Dostal, informing both parties that Dostal Developers was in default under the loan documents applicable to the Loans. (Tr. Ruling at 10, 17; Tr. Trans. 26 - 28; Tr. Exhs. F.29.4, F.29.9, F.29.14, 29.19; 29.24; App. 804, 529, 564, 599, 634, 669.) Further, on August 27, 2018, counsel for FACo transmitted letters to Dostal Developers, with a copy to Randy Dostal, informing those parties that FACo had accelerated each of the Loans, and that the full amount of the Loans had therefore become due and payable. (Tr. Ruling at 10, 17; Tr. Trans. 29 - 31; Tr. Exhs. F.29.5, F.29.10, F.29.15, F.29.20, F.29.25; App. 804, 532, 567, 602, 637, 672.)

Under the express terms of the Guarantys, Randy Dostal, as Guarantor, is personally liable for all amounts due and owing under the Notes and the Mortgages (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23 § 1; App. 524, 559, 594, 629,

664.) The district court held that, although the Loans were in default, and that Randy Dostal executed the Guarantys, he did so only in his capacity on behalf of Dostal Developers or in furtherance of Dostal Developers, and thus is not personally liable under any of the Guarantys. (Tr. Ruling at 18; App. 804.) There is no evidence in the record to support such a conclusion. In fact, all of the evidence proves that Randy Dostal executed the Guarantys in his personal capacity and that he is personally liable under the Guarantys.

D. Argument

Each Guaranty provides that it shall be interpreted under and governed by the laws of the State of Delaware. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23 § 1; App. 524, 559, 594, 629, 664.) Guarantys are contracts, and thus the rules concerning contract interpretation and construction apply to guarantys. *Falco v. Alfa Affiliates, Inc.*, No. Civ.A. 97 – 494, 2000 WL 727116, at *6 (D. Del. Feb. 9, 2000) ("Whether the guaranty is a continuing guaranty is a matter of contract interpretation"); *Millcreek Shopping Ctr., LLC v. Jenner Enter., Inc.*, No. N13C–11–145, 2016 WL 3652382, at *5 (Del. Super. June 30, 2016) ("Guaranty obligations are interpreted according to the same standards as general contracts"); *Bank of the West v. Michael R. Myers Revocable Trust*, 776 N.W.2d 112 (Table), 2009 WL 2960404, at *3 (Iowa Ct. App. 2009) ("the rules concerning the interpretation and construction

of contracts are applicable to guaranties").[16] Courts therefore must determine a guarantor's obligations based on the parties' written contract. *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 Delaware, guaranty contracts should be governed by the basic consideration that the intent of the parties must prevail"); *Bank of the West*, 2009 WL 2960404, at *3.

As with any contract, the court should endeavor to determine the parties' intentions, and those intentions may be determined by examining the language in the guaranty and the circumstances in which the guaranty is given. *Shoppes of Mt. Pleasant*, 2015 WL 3824118, at *5 ("In its interpretation of a guaranty, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement"); *Williams v. Clark*, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987) ("intention may be ascertained by examining the language employed and the circumstances under which the guaranty is given"); *Bank of the West, 2009 WL 2960404, at *3.* Moreover, the interpretation of a contract that gives a reasonable, lawful and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect. *In re IAC/InterActive Corp.*, 948 A.2d 471, 497 (Del. Ch. 2008) ("Delaware courts do prefer to interpret contracts to give

[16] FACo has provided parallel citations of Iowa law to demonstrate that it is consistent with Delaware law.

effect to each term rather than to construe them in a way that renders some terms repetitive or mere surplusage"); *Alta Berkley VI. C. V. v. Omneon*, No. N10C– 11–102, 2011 WL 2923884 at *5 n.25 ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect") (quoting *Restatement Second Contracts* § 203(a) (1981)); *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 26 (Iowa 1978).

In determining the parties' intentions in a guaranty, courts should adhere to the basic precept that a guaranty is an obligation by one party to answer for the debts of *another* party – not for its own debts. *See Falco v. Alpha Affiliates*, No. Civ.A. 97–4941997, 1997 WL 782001, at *5 (D. Del. Dec. 10, 1997) ("Under Delaware law, a contract of guaranty is the promise to answer for the payment of some debt or for the performance of some obligation *by another* on the default of that third person who is liable in the first instance") (emphasis added); *Millcreek Shopping*, 2016 WL 2752382, at *5 ("A guaranty is an agreement to pay the debt of another in the event that the primary debtor defaults"); *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 86 (Iowa 2004) ("a guaranty is a contract by one person to another for the fulfillment of a promise of a *third person")* (emphasis in original)*; Bank of the West*, 2009 WL 2960404, at *3 (quoting *City of Davenport*). Thus, the primary obligor, not being a third person, cannot be a guarantor. *See Falco*,1997 WL 782001, at *5; *Millcreek*

Shopping, 2016 WL 2752382, at *5; *City of Davenport*, 674 N.W.2d at 86*; Bank of the West*, 2009 WL 2960404, at *3. Rather, the primary obligor is already obligated under its separate agreement with its lender, and the separate guarantor owes an obligation distinct from that of the primary obligor. *See Falco*, 1997 WL 782001, at *5; *Millcreek Shopping*, 2016 WL 2752382, at *5; *City of Davenport*, *674 N.W.2d at 86*; *Bank of the West*, 2009 WL 2960404, at *3.

Under Delaware law, where the dispute centers on whether an individual signs a guaranty in their individual capacity as opposed to their corporate capacity, the signature of a company's representative is made in that person's personal capacity unless the language of the agreement states otherwise. In *Falco*, 1997 WL 782001, at *1, for example, two individuals signed a lease both in their representative capacity as the principals of the tenant and personally as guarantors. As guarantors, the two individuals' names were accompanied by the term "individually" and their social security numbers were included. *Id.* The court rejected the two individuals' arguments that they were not personally liable under their guarantys even though they had also signed the lease in their corporate capacity. *Id.* at *7. The court held that by signing the lease in two different contexts, there could be an intent to guaranty the lease in their individual capacities. *Id.*

Similarly, in *TMC Consulting Services, L.L.C. v. Wright*, No. N15C–11–132, 2017 WL 374750, at *1 (Del. Super. Jan. 26, 2017), two individuals signed a tri-

party agreement in which the two individuals, Wright and Kennedy, a fund they helped liquidate, and a consulting company all signed the agreement. Wright and Kennedy terminated the agreement, and the consultant sued them individually. *Id.* Wright and Kennedy argued that as liquidators, they were signing only on behalf of the fund, and not in their individual capacities. *Id.* at *7. The court held that it must look at the entire contract to determine the parties' intentions. *Id.* The court found that the body of the contract clearly identified Wright and Kennedy as parties separate from the fund. *Id.* Moreover, the court held that, because they had signed the agreement twice, once as liquidators, and once on behalf of the fund, they were personally liable as the liquidators. *Id.*

Iowa law is the same. In *Builders Kitchen & Supply Co. v. Moyer*, 776 N.W.2d 112 (Table), 2009 WL 2951295, at *1 (Iowa Ct. App. 2009), for example, the president of a corporation, Moyer, executed a guaranty, and noted his title as "President" near his signature. In adhering to Iowa's rule of examining the intentions of the parties, the court turned to the language of the document, which read: "In consideration of extension of credit by Builders Kitchen & Supply Co., I hereby personally guarantee to pay on demand any and all sums due that my/our company shall fail to pay." *Id.* at *3-4. Even though Moyer signed the document as "President" of the company, the court held the "term [of the agreement] clearly states that Moyer agrees to be personally liable if Crystal Creek fails to pay." *Id.*

Similarly, in *City of Davenport*, both the primary obligor—a corporation—and its president executed guarantys on the same debt. Both guarantys were signed by the president, one personally and one in his representative capacity as president. *City of Davenport*, 674 N.W.2d at 86. Although the debt was $150,000, each of the guarantys was for $75,000. The court held that the corporation was liable for the entire $150,000 because it was the original obligor and the president was personally liable for $75,000 on his separate guaranty. *Id.* In so holding, the court noted that it was "unclear why the company would guarantee its own performance." *Id.* at 87. Indeed, the court did not even consider the language in the company's guaranty, holding that it was not at issue in light of the company's primary obligations under the note. *Id.*

The holdings in *Falco, TMC Consulting, Builders Kitchen*, and *City of Davenport* follow the long-established principle that corporate representatives are personally liable for their company's debts when the parties make that intention clear. In *Bayless v. Pearson*, 15 Iowa 279, 279 (Iowa 1863), for example, the court held that a note signed by school district personnel, without any language to suggest that the signatures were on behalf of school district, created personal liability for the signers. The court reached that conclusion despite the fact that the note specifically stated the money was being used for the benefit of the school district. *Id.* Likewise, in *Kuehl v. Freeman Bros. Agency*, 521 N.W.2d 714, 719 (Iowa 1994), the court

held that a corporation's president and sole owner who signed a contract both in his corporate capacity and in his individual capacity was personally liable under the contract.

Under both Delaware and Iowa law, the five Guarantys at issue in this proceeding clearly were signed by Randy Dostal in his individual capacity, and not on behalf of Dostal Developers. Indeed, the Guarantys at issue in this case are even more clearly meant to make Randy Dostal personally liable than any of the guarantys discussed in the cases above. Four of the Guarantys here are only signed by Randy Dostal without reference to any other person or entity, and the fifth has language throughout expressly stating that Randy Dostal is the guarantor.

The district court begins its misunderstanding of the transaction with a misstatement regarding the Mortgages at page 9 of its Trial Ruling. The district court stated that "[e]ach of the five Mortgages were signed by either Randy T. Dostal or Thomas T. Dostal for Dostal Developers." Such a finding is not supported by the four corners of the Mortgages or the testimony of Mark Thomas. There is no evidence that anyone named Thomas Dostal signed any of the Mortgages. All of the Mortgages bear Randy Dostal's written signature in his representative capacity as President of Dostal Developers. (*See* Tr. Exh. F.29.2, F29.7, F29.12, F29.17 and F29.22; App. 507, 542, 577, 612, 647.)

The district court was correct, however, that each of the Mortgages was signed by Dostal Developers. Each Mortgage bears the following signature block:

> IN WITNESS WHEREOF, the Mortgagor hereto has executed this Mortgage all on and as of the day, month and year first written.
>
> Thomas Dostal Developers, Inc.,
> an Iowa Corporation
>
> By: [Written Signature of Randy T. Dostal]
> Name: Randy T. Dostal
> Its: President

(*See* Tr. Exh. F.29.2, F29.7, F29.12, F29.17 and F.29.22; App. 524, 559, 594, 629, 664.) Thus, Dostal Developers is expressly named as the signatory, and Randy Dostal is merely the human being / officer signing on its behalf. The same signature block appears on the Notes. (*See* Tr. Exh. F.29.1, F.29.6, F.29.11, F.29.16 and F.29.21; App. 500, 535, 570, 605, 640.) Thus, the parties made sure that both the Notes and the Mortgages clearly identified Dostal Developers as the obligor under those documents.

Despite the signature blocks on the Guarantys being completely different from those on the Mortgages or the Notes, the district court went on to find that "Dostal Developers also signed five Guarantys relative to each of the five loans," and ruled that Randy Dostal signed the Guarantys in his representative capacity on behalf of Dostal Developers. (Tr. Ruling at 9, 16, 18; App. 804.) That conclusion is not supported by the four corners of the Guarantys. Indeed, the language of the

Guarantys, and the differences between the signature blocks on the Guarantys and the Mortgages/Notes, are dead giveaways that the Guarantys were always meant to be the personal obligations of Randy Dostal, and not obligations of Dostal Developers.

As explained above, the very definition of the term "guaranty" under both Delaware and Iowa law encompasses only contracts in which one obligor guarantees the obligations of a third party. The *Falco, City of Davenport,* and *Bank of the West* cases could not be clearer on this point. The *City of Davenport* court even went so far as to express confusion as to why a company liable under promissory notes would sign a guaranty, and correctly refused to consider that guaranty in its analysis. *City of Davenport*, 674 N.W.2d at 87. Thus the definition of "guaranty" proscribes an interpretation of any of the Guarantys in this case as a duplicate obligation undertaken by the very entity that undertook the primary obligation under the Notes. Under both Delaware and Iowa law, the parties could not have intended Dostal Developers to redundantly guaranty its existing obligations under the Notes and Mortgages.

Even if such a duplicative obligation was possible, the language of the Guarantys clearly identifies Randy Dostal individually as the guarantor. Applying rules of contract interpretation to determine the parties' intent, a plain reading of the Guarantys—indeed the only possible reading—is that the parties intended for Randy Dostal to personally and separately guaranty repayment of each of the Loans. The

Guarantys do not merely allude to Randy Dostal as the guarantor, ambiguously suggest he is the guarantor or state that he is one of several guarantors. They precisely *define* the term "Guarantor" *as Randy Dostal*. (*See* Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23 at First Sentence; App. 524, 559, 594, 629, 664.) And lest there be any doubt, the first sentence of the Guarantys also *distinguishes* Randy Dostal from Dostal Developers by stating that he "is substantially financially or otherwise interested in" Dostal Developers. *Id.* The first sentence of the Guarantys thus specifically defines who is guaranteeing each of the Loans, and distinguishes that person—Randy Dostal—from the separate company in which he has an interest.

The Guarantys contain additional language differentiating Randy Dostal as Guarantor from Dostal Developers. Dostal Developers is defined as the "Borrower" in all five Guarantys. (*See* Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23 at First Sentence; App. 524, 559, 594, 629, 664.) Throughout the Guarantys, Randy Dostal, as the defined Guarantor, agrees to guaranty the obligations of the "Borrower," a separately defined entity. Paragraph 1 of the Guarantys is noteworthy in this respect:

> The Guarantors, and each of them, hereby jointly and severally, unconditionally, absolutely and irrevocably guarantee, for the benefit of each and every present and future holder or holders of the Note (all herein called the "Obligees"), the full and prompt payment to the Obligees at maturity (whether at the stated maturities thereof, or by acceleration or otherwise) of the indebtedness of the Borrower evidenced by the Note, together with all other obligations and liabilities of the Borrower under and pursuant to the Mortgage and secured thereby, as the same or any part thereof may from time to time be

> amended and modified (all of which indebtedness, obligations and liabilities being herein called the "Indebtedness Hereby Guaranteed").

(*See* Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23 at ¶ 1; App. 524, 559, 594, 629, 664.) This paragraph leaves no doubt that the parties distinguished between Randy Dostal and Dostal Developers, and that Randy Dostal was separately guaranteeing the "Borrower's" obligations.

The Court also can determine the parties' intentions from the signature blocks on the Guarantys. As discussed above, each of the signature blocks in the Guarantys (other than the Guaranty for the 5221 Dostal Loan, discussed below), name only Randy Dostal as the Guarantor. (*See* Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; App. 524, 559, 594, 629, 664.) None of the signature blocks even mention Dostal Developers. That is a stark contrast to the Notes and the Mortgages, which expressly state that they were being signed by Dostal Developers and that Randy Dostal was signing on the company's behalf as President. That distinguishing characteristic is unequivocal evidence that the parties intended for Randy Dostal, and not Dostal Developers, to be liable under the Guarantys. Had the parties desired to have Dostal Developers guaranty its own debts, they could have used the same signature blocks as those in the Notes and Mortgages.

The Guarantys' signature blocks thus are even clearer than the blocks in the *Bayless* and *Kuehl* cases in which the individual guarantors' signature blocks also referenced the primary obligor companies or the signatory's position with the

company. Here there is no reference to Dostal Developers, and there is no reference to Randy Dostal's position as President of that company. There is only Randy Dostal's signature, address and social security number. *See, e.g.*, *Falco*, 1997 WL 782001, at *7 (holding that guarantor's signature and inclusion of social security number indicated guarantor's personal liability). Furthermore, the notary who notarized each of the Guarantys affirmed that Randy Dostal signed them in his personal capacity "as Guarantor." (*See* Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23; App. 524, 559, 594, 629, 664.) Thus, there is no reasonable way to interpret the Guarantys as having been executed by Dostal Developers.

A source of confusion for the trial court may have been Trial Exhibit F.29.23, which is the Guaranty with respect to the property at 5221 Dostal Drive SW. Like the other Guarantys, that Guaranty identifies Randy Dostal in the opening paragraph as the Guarantor. (Tr. Exh. F.29.23; App. 664.) Like the other Guarantys, the 5221 Dostal Guaranty differentiates between Randy Dostal and Dostal Developers in the first paragraph, differentiates between the "Guarantor and the "Borrower" throughout. *Id.* Likewise, the notary block states that Randy Dostal signed the Guaranty as "Guarantor." However, the name "Thomas T. Dostal" is typed below the signature line, and Randy Dostal wrote "Thomas T. Dostal Dev." above that name. Despite the parties' mistake in the signature line of the 5221 Dostal Guaranty, the parties' intention as to that Guaranty is still clear. Randy Dostal was personally guarantying the Loan

received by Dostal Developers. The body of the document and the notary block confirm that intention. Moreover, as noted above, there is no company named Thomas T. Dostal Developers and no one named Thomas T. Dostal appears in any other document related to the Loans. There is no evidence in the record that anyone named Thomas T. Dostal participated in any of the Loan transactions.

The only conclusion that makes sense is that the parties intended for Randy Dostal to personally guaranty the Loans. Any other reading would render the Guarantys superfluous. Dostal Developers was already obligated to FACo under the terms of the Notes and Mortgages. That issue is not in doubt, as the trial court correctly ruled that Dostal Developers is liable under both sets of documents, and Dostal Developers stipulated that it signed both sets of documents. (Tr. Ruling at 17; Stip. Facts at ¶¶ 3-18; App. 804, 735.) There was therefore no legal or practical reason for Dostal Developers to duplicate its obligations by executing the Guarantys. Upholding the district court's ruling thus would be tantamount to holding that the terms of the Guarantys were superfluous. Such a holding would violate both Delaware and Iowa law prohibiting such interpretations.

Finally, confirming the district court's ruling would throw commercial (and likely personal) lending in Iowa into chaos. In one of the only studies of personal guarantys in commercial lending transactions, Raphael Bostic and Katherine Samolyk found that at least 45.7 percent of small business loan transactions included personal

guarantys and that personal guarantys are important for small businesses to obtain commercial credit. *See The Role of Personal Wealth in Small Business Finance*, 22 J. Banking & Fin. 1019, 1052 (1998). Although there is no way to know the number of commercial real estate loans in Iowa that include personal guarantys, they are no doubt ubiquitous, and an important part of the commercial lending process.

If these five Guarantys, which so clearly evidence the parties' intentions that Randy Dostal personally guaranteed the Loans, are found not to obligate Randy Dostal, then Iowa lenders, and those making loans to Iowa businesses, will lose confidence in the enforceability of personal guarantys in Iowa. That loss of confidence will, in turn, chill commercial lending in Iowa, which is a major driver of business and real estate development. The Court should not allow personal guarantys to become virtually meaningless in Iowa by holding that a company's officer is not personally liable on a guaranty where, as in this case, the guaranty clearly expresses that the officer be personally liable. The Court should enforce the Guarantys as written, and reverse the trial court's ruling that Dostal Developers signed the Guarantys.

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

The validity and priority of the subject mechanic's liens have been litigated since the inception of the case. (Motion, Motion to Dismiss Kelly, Ruling on Motion, Amended and Substituted Memorandum of Authorities in Support of Motion for Summary Judgment, pp. 5-11, Trial Brief, pp. 3 and 6, Trial Ruling, Post-Trial Brief, Rule 1.904 Motion, Ruling; App. 75-111, 112-148, 185-190, 285-291, 804-827, 763-776, 828-836, 907-913). This appeal followed to preserve appellate jurisdiction over the attorney fee claims. (Notice of Appeal—20-1136; App. 981-984).

Further, with respect to the attorney fee claims, FACo consistently argued below that it was the only party entitled to attorney fees. (Motion for Summary Judgment, pp. 11-14, Trial Brief, pp. 7-9, and Rule 1.904 Motion [claimants entitled to no relief]; App. 253-255, 828-836).

B. Standard of Review

The standard of review on a mechanic's lien action is ordinarily de novo. Iowa Code § 572.26 (2017) (defining action as one in equity); *Ringland-Johnson-Crowly v. First Cent. Serv. Corp.*, 255 N.W.2d 149, 151 (Iowa 1977).[17]

C. Discussion

FACo has appealed based upon FACo's position in appellate Case No. 20-0972 that Borst and Kelly's liens are invalid or, if they are proper at all, are junior to FACo's liens. Under Iowa law, only a prevailing lien claimant is entitled to attorney fees. Iowa Code section 572.32(1) (2017). *See also Standard Water Control Systems, Inc.*, 888 N.W.2d at 679. Should this Court vacate the lien positions of Borst and Kelly (or find their liens are inferior to the mortgage liens of FACo) the underlying award of attorney fees to Borst and Kelly should be vacated as well. At that point, neither Borst nor Kelly would be prevailing lien claimants. Iowa Code section 572.32(1). Consequently, once Borst and Kelly's lien positions are reversed by the appellate court, the attorney fee awards should be vacated as well. *First Midwest Corp. v. Corporate Finance Services,* 663 N.W.2d 888 (Iowa 2003) (attorney fee award vacated when underlying summary judgment grant

[17] Only if the question were the *amount* of attorney fees would an abuse of discretion standard be employed. *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 679 (Iowa Ct. App. 2016).

reversed); *In re Marriage of Nelson*, 666 N.W.2d 620 (table), 2003 WL 1970399, *3 (Iowa Ct. App. 2003) (in reversing decision of district court, appellate court vacates attorney fee award as party in whose favor fees were awarded below is no longer prevailing party); *In re Marriage of Bechert*, 662 N.W.2d 371 (table); 2003 WL 118480, *3 (Iowa Ct. App. 2003) (same).

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.

Finance of America Commercial LLC also prays that the Court reverse the decision of the district court in Case No. LACV091167, vacate the attorney fees awarded in Case No. LACV091167, and remand the case for an award attorney fees to Finance of America Commercial LLC pursuant to Iowa Code section 572.32(2).

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests to be heard at oral argument regarding the issues set forth above.

Respectfully submitted,

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The undersigned hereby certifies that the foregoing Appellant's 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 Ct. R. 16.1221(2) (2017).

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