IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

MARVIN L. FREUND AND EVELYN FREUND, CO-TRUSTEES OF THE EVELYN FREUND TRUST u/t/a/ DATED 1/29/98, Plaintiffs, v. **ALMANDO L. LIBURD a/k/a ALMANDO LIBURD,** Defendant.	) **CASE NO.: ST-11-CV-730**) **ACTION FOR BREACH OF CONTRACT, DEBT, FORECLOSURE OF MORTGAGE LIEN & ENFORCEMENT OF GUARANTY**
ALMANDO L. LIBURD, Counter-Plaintiff/Third-Party Plaintiff, v. **MARVIN L. FREUND AND EVELYN FREUND CO-TRUSTEES OF THE EVELYN FREUND TRUST u/t/a/ DATED 1/29/98, GLENN ELSKOE, AND DOROTHY ELSKOE,** Counter-Defendants/Third-Party Defendants.	) **ACTION FOR CONTRIBUTION AND INDEMNITY, MARSHALING OF ASSETS, AND OTHER RELIEF**

MEMORANDUM OPINION

THIS MATTER came before the Court on February 2, 2015 for a hearing on Plaintiffs Marvin L. Freund and Evelyn Freund, co-trustees of the Evelyn Freund Trust u/t/a/ dated 1/29/98 (the "Trust")'s Motion for Summary Judgment, filed on September 20, 2013.[1] Defendant Almando L. Liburd a/k/a Almando Liburd ("Liburd") filed an Opposition on October 21, 2013. The Trust filed a Reply on November 18, 2013.[2]

The Trust argues that Liburd has failed to meet his obligation under the Unlimited Guaranty Agreement to pay the debt of Wintdots Development, LLC pursuant to the terms of Wintdots' Promissory Note. Liburd argues that he is only obligated to pay Wintdots' debt pursuant to the terms of a Consent Judgment that was entered by the District Court of the Virgin Islands. Because Liburd refused to pay the debt pursuant to the Promissory Note, the Trust initiated this action on December 13, 2011.

---

[1] Plaintiffs are represented by A. J. Stone III, Esquire, of BoltNagi, P.C. Defendant Almando L. Liburd is represented by Carol Ann Rich, Esquire, of Dudley Rich Davis LLP. Third-Party Defendants Glenn Elskoe and Dorothy Elskoe are represented by Rosh D. Alger, Esquire, of the Alger Law Office.

[2] On February 2, 2015, the Trust filed a Supplement to Plaintiff's Motion for Summary Judgment. On February 19, 2015, the Trust filed a Second Supplement to Plaintiff's Motion for Summary Judgment.

The Trust now moves for summary judgment on its breach of contract, debt, foreclosure of mortgage lien, and enforcement of guaranty claims.

First, this Court finds that summary judgment is appropriate on the breach of contract claim. It is undisputed that Liburd breached his obligation to pay Wintdots' debt, and is liable for the same. Although the parties dispute the amount of damages owed, the Court finds that their dispute does not present a genuine issue of material fact because the Unlimited Guaranty Agreement clearly establishes that Liburd has a continuing obligation to pay Wintdots' debt pursuant to *all* Loan Documents—including the Consent Judgment. Because the Consent Judgment sets forth Wintdots' obligations, the Court is able to determine the amount of damages owed based on the Loan Documents, as a matter of law.

Second, this Court will also grant summary judgment on the debt, and foreclosure of mortgage.

Third, this Court will deny summary judgment on the enforcement of guaranty claim because the Virgin Islands does not recognize an "enforcement of guaranty" cause of action, and this Court find that this cause of action—as established by the United States District Court for the District of New Jersey—is not the soundest rule for the Virgin Islands.

FACTUAL AND PROCEDURAL BACKGROUND

Wintdots Development, LLC ("Wintdots") is a United States Virgin Islands Limited Liability Company jointly owned by Dorothy Elskoe and Glenn Elskoe. On April 16, 2008, Wintdots borrowed Six Million Five Hundred Thousand Dollars ($6,500,000.00) from Kennedy Funding, Inc., a corporate lending agent.[3] Windots secured the repayment of the Kennedy loan by executing a Promissory Note (the "Kennedy Note"), and First Priority Mortgage on two of its real properties in favor of Kennedy.[4] Dorothy and Glenn Elskoe executed a personal guaranty to secure repayment of the loan under the Kennedy Note.[5]

On August 12, 2009, Wintdots borrowed Two Hundred Twenty-Five Thousand Dollars ($225,000.00) from Plaintiffs Marvin L. Freund and Evelyn Freund, co-trustees of the Evelyn Freund Trust u/t/a/ dated 1/29/98, as a bridge loan. To secure repayment of the Trust loan, Wintdots executed a Promissory Note (the "Trust Note"), and a Second Priority Mortgage in favor of the Trust over the same two properties that Kennedy held as First Priority Mortgagee. As additional security, Defendant Almando L. Liburd a/k/a Almando Liburd executed a First Priority Mortgage on two of his real properties in favor of the Trust. Liburd and Glenn Elskoe also executed personal guaranties to further secure repayment of the loan due under the Trust Note.

Liburd's Unlimited Guaranty Agreement ("Guaranty") assured the full and prompt payment of all obligations of every kind and character of Wintdots arising out of or resulting from any Loan

[3] (Def. Almando L. Liburd's Opp'n to Pl.'s Mot. for Summ. J., 2, Oct. 21, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, ¶ 1, Oct. 21, 2013).
[4] (Def. Almando L. Liburd's Opp'n to Pl.'s Mot. for Summ. J., 2, Oct. 21, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, ¶ 9, Oct. 21, 2013).
[5] (Def. Almando L. Liburd's Opp'n to Pl.'s Mot. for Summ. J., 2, Oct. 21, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, ¶ 10, Oct. 21, 2013).

Documents.[6] Loan Documents are defined as including the Promissory Note, Liburd's First Priority Mortgage, Liburd's Unlimited Guaranty Agreement, the Elskoe Guarantee, and "all other documents evidencing, securing, guaranteeing or otherwise signed in connection with the Note."[7]

Soon after receiving the bridge loan, Wintdots defaulted on its payments due under the Kennedy and Trust Notes. On March 25, 2010, Kennedy commenced an action to recover debt in the District Court of the Virgin Islands against Wintdots, Dorothy Elskoe, Glenn Elskoe, and the Trust (the "Kennedy Lawsuit"). Liburd was not named as a party in the Kennedy Lawsuit.

On May 9, 2011, the parties in the Kennedy Lawsuit executed a Settlement Agreement, and Consent Judgment.[8] The Consent Judgment provided that, as of February 12, 2011, Wintdots owed the Trust a total of $241,344.69, including the principal balance of $225,000.00, and accrued interest in the amount of $16,344.69.[9] The Consent Judgment also stated that interest would accrue on the unpaid balance at 14% per annum, compounded monthly.[10] The Consent Judgment provided that Wintdots, Glenn Elskoe, and Dorothy Elskoe owed the Trust reasonable costs and attorneys' fees in the amount of $28,849.06, as of February 23, 2011.[11] The District Court of the Virgin Islands entered the Consent Judgment and Order of Foreclosure on September 6, 2011.[12]

Prior to execution of the Consent Judgment, Wintdots filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code. When Wintdots' Plan of Reorganization failed to materialize, the bankruptcy case was converted to a chapter 7 bankruptcy, and later dismissed. Unable to recover the outstanding debt from Wintdots, the Trust demanded Liburd to immediately pay Wintdots' debt in the amount of $304,790.71.[13] Liburd refused to pay the demanded amount, arguing that the demand is inconsistent with damages awarded in the Consent Judgment.

In response to Liburd's refusal to pay, the Trust commenced this action on December 13, 2011.[14] On September 20, 2013, the Trust filed the instant Motion for Summary Judgment, requesting damages

---

[6] (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013).
[7] (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013).
[8] *See* (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, Oct. 21, 2013).
[9] *See* (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, at 10, 18, Oct. 21, 2013).
[10] *See* (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, at 10, 18, Oct. 21, 2013).
[11] *See* (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, Oct. 21, 2013). Both parties contend that Kennedy filed the Consent Judgment on May 9, 2011. However, the date-stamp on the Consent Judgment shows that the Consent Judgment and Order of Foreclosure (Case No.: 3:10-cv-00032-CVG-RM) was filed on September 6, 2011.
[12] (Stmt. of Undisputed Facts, 4, ¶ 20, Sept. 20, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, 8, ¶ 20, Oct. 21, 2013). Both parties contend that Kennedy filed the Consent Judgment on May 9, 2011. However, the date-stamp on the Consent Judgment shows that the Consent Judgment and Order of Foreclosure (Case No.: 3:10-cv-00032-CVG-RM) was filed on September 6, 2011.
[13] (Freund Aff. of Indebtedness, Ex. 4, Sept. 20, 2013) ("The amount due and payable to the Lender is the unpaid principal balance of $225,000.00, together with interest accruing from August 12, 2010 at the rate of fourteen percent (14%) per annum, which interest was in the amount of $36,757.92 as of September 12, 2011, plus unpaid attorney's fees and costs of collection through September 1, 2011 in the amount of $43,032.79. Interest and attorneys' fees continue to accrue.").
[14] The Trust filed a First Amended Complaint on December 21, 2011.

in the amount of $381,443.19,[15] and attorneys' fees and costs in the amount of $99,808.77.[16] Liburd filed an Opposition to the Motion for Summary Judgment, contesting the amount owed. The Court held a motion hearing on February 2, 2015. On February 19, 2015, the Trust filed a Second Supplement to Plaintiff's Motion for Summary Judgment, claiming damages in the amount of $509,485.04.[17]

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Federal Rule of Civil Procedure 56[18] "is a drastic remedy, [that] should be granted only when 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'"[19] The moving party must demonstrate "an absence of evidence to support the non-moving party's case."[20] Thereafter, the non-moving party must show specific facts to establish a genuine issue for trial.[21] The "[c]ourt must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and [] must take the non-moving party's conflicting allegations as true if 'supported by proper proofs.'"[22] "Th[e] [c]ourt may not itself weigh the evidence and determine the truth; rather, we decide only whether there is a genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party."[23]

DISCUSSION

I. BREACH OF CONTRACT

The Trust first moves for summary judgment on its breach of contract claim. In the Virgin Islands, to prevail on a breach of contract claim, a party must prove a contract existed, that there was a duty created by that contract, that such duty was breached, and that the party suffered damages as a result.[24]

---

[15] This amount includes a principal balance of $225,000.00, and interest of $156,443.19, as of September 11, 2013.

[16] This amount includes $45,964.72 in attorneys' fees and costs charged by the Trust's predecessor counsel, and $53,844.05 in attorneys' fees and costs charged by the Trust's present counsel, as of September 16, 2013.

[17] This amount includes $381,443.19 for the principal balance and interest under the Note, and $128,041.85 in attorneys' fees and costs, as of February 18, 2015.

[18] Federal Rules of Civil Procedure 56 is applicable to this matter by virtue of Superior Court Rule 7.

[19] FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Williams v. United Corp.*, 50 V.I. 191, 193-95 (V.I. 2008) (citing Fed. R. Civ. P. 56(c)).

[20] *Williams*, 50 V.I. at 194 (citing *Celotex Corp.*, 477 U.S. at 325).

[21] *Id.* (citing Fed. R. Civ. P. 56(e)).

[22] *Id.* (citations omitted).

[23] *Id.* at 195 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[24] The Supreme Court of the Virgin Islands has not formally adopted a common law standard for breach of contract claim pursuant to the three pronged analysis required in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 976-80 (V.I. 2011). The Court will adopt the *Banks* analysis performed in *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *8-9 (V.I. Super. Ct. Dec. 18, 2015) with respect to the elements of a breach of contract claim for the Virgin Islands.

a. The first three elements of the breach of contract claim are undisputed.

In the instant case, the first three elements of the breach of contract claim are undisputed. The parties agree that Liburd executed and delivered to the Trust an Unlimited Guaranty Agreement ("Guaranty") on August 12, 2009.[25] Pursuant to the Guaranty, the parties agree that Liburd assumed the obligation to pay Wintdots' debt pursuant to the terms of the Loan Documents.[26] The parties also agree that Liburd breached his duty by failing to pay Wintdots' debt after the Trust notified Liburd of the default.[27] These uncontested facts establish Liburd is liable for the payment of Wintdots' debt pursuant to the Guaranty.

b. There is no genuine issue of material fact regarding the damages element.

i. <u>Outstanding Principal and Interest</u>

The parties dispute the amount of damages that Liburd owes to the Trust. Pursuant to the Guaranty, the Trust contends that Liburd has an absolute and irrevocable obligation to pay Wintdots' debt pursuant to the terms of the Trust Note, which totals $588,272.15,[28] as of February 18, 2015. Liburd argues that he is only obligated to pay Wintdots' debt pursuant to the Consent Judgment that the District Court of the Virgin Islands entered on September 6, 2011. Liburd argues that his liability under the Guaranty "cannot exceed that of Wintdots as principal obligor under the Wintdots Note."[29] In response to Liburd's position, the Trust argues that the Consent Judgment is irrelevant to this Court's determination of damages because Liburd was not involved in the Kennedy Lawsuit that resulted in the Consent Judgment,[30] and because Liburd waived his right to raise defenses, such as settlement, modification, or other changes affecting Wintdots' obligations.[31]

The issue before this Court is whether a guarantor is bound by the principal obligor's future obligations created after the guarantor has executed the guaranty agreement. To resolve this issue, the court first looks to the express terms of the Guaranty to determine the parties' intent.[32] If the court finds that the contract terms are unambiguous, then the court will interpret the contract as a matter of law.[33]

---

[25] (Stmt. of Undisputed Facts, 3, ¶ 11, Sept. 20, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, 5, ¶ 11, Oct. 21, 2013); (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013).
[26] (Stmt. of Undisputed Facts, 3, ¶ 12, Sept. 20, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, 5, ¶ 13, Oct. 21, 2013); (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013).
[27] (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013); (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, 10-12, ¶¶ 24-30, Oct. 21, 2013).
[28] (Supplement to Pl.'s Mot. for Summ. J., 8, Feb. 2, 2015); (Second Supplement to Pl.'s Mot. for Summ. J., 5, Feb. 19, 2015). This amount includes principal and interest in the amount of $460,230.30, and attorneys' fees and costs in the amount of $128,041.85, as of February 18, 2015.
[29] (Def.'s Almando L. Liburd's Opp'n to Pl.'s Mot. for Summ. J., 8-9, Oct. 21, 2013).
[30] (Reply to Opp'n to Mot. for Summ. J., 11, Nov. 18, 2013) ("The fact that Defendant [Liburd] was not a party to the Consent Judgment and Order of Foreclosure entered into by Kennedy Funding, Inc., Wintdots Development LLC, and Plaintiffs is irrelevant to this Court's determination of Plaintiffs' Motion for Summary Judgment.").
[31] (Reply to Opp'n to Mot. for Summ. J., 8-10, Nov. 18, 2013); *see* (Freund Aff. of Indebtedness, Ex. 3, Sept. 20, 2013).
[32] *See United Corp.*, 55 V.I. at 719 n.14 (citations omitted) ("It is also important to emphasize . . . that '[w]hen [a] [c]ourt interprets [a] contract, its task is not to reveal the subjective intentions of the parties, but what their words would mean in the mouth of a normal speaker of English, *using them in the circumstances in which they were used*.").
[33] *Id.* at 707-08.

However, if the court determines that the contract terms are ambiguous, then the question of meaning becomes an issue for the trier-in-fact.[34]

> [T]o decide whether a contract is ambiguous, [the court] does not simply determine whether, from [its] point of view, the language is clear . . . . Before making a finding concerning the existence or absence of an ambiguity, we consider the contract language . . . and the extrinsic evidence offered in support of each interpretation. Extrinsic evidence may include . . . the conduct of the parties that reflects their understanding of the contract's meaning. Nevertheless, a finding that extrinsic evidence renders a contract latently ambiguous will typically defeat a motion for summary judgment and necessitate that the trier of fact resolve the ambiguity in light of the extrinsic evidence. Appellate courts, however, have held that, notwithstanding a latent ambiguity, "if the court finds that a contract is ambiguous *and* that the extrinsic evidence is undisputed, then the interpretation of the contract remains a question of law for the court to decide" at the summary judgment stage.[35]

After review of the Guaranty, and all extrinsic evidence submitted by the parties—including the Promissory Note, and Consent Judgment—this Court finds that the Guaranty is unambiguous and, therefore, will interpret it as a matter of law.

Section 1 of Liburd's Guaranty sets forth the scope of Liburd's "Guaranteed Obligations." In pertinent part, section 1 reads:

> 1. **The Guaranty**. Guarantor hereby absolutely, unconditionally and irrevocably guarantees, jointly and severally with Borrower and all other Guarantors, the punctual payment, whether at stated maturity, by acceleration or otherwise, of *all obligations of every kind and character now or hereafter existing (whether mature or unmatured, contingent or liquidated) of Borrower under, arising out of or resulting from the Loan Documents*, as they may hereafter be amended, supplemented or otherwise modified from time to time, whether for principal, interest, charges, fees, expenses, reimbursement, indemnification or otherwise and the full and timely performance and observance of all the covenants, terms or conditions of the Loan Documents to be performed, caused and observed by Borrower, its successors and assigns (all obligations being guaranteed are hereinafter collectively referred to as the "**Guaranteed Obligations**"). Guarantor hereby guarantees that the Guaranteed Obligations will be paid and performed strictly in accordance with the terms and conditions of the Loan Documents, regardless of any law, regulation or order, now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of the Lender with respect thereto.[36]

[34] *Id.* (citing *CAT Aircraft Leasing, Inc., v. Cessna Aircraft Co.*, 22 V.I. 442, 445 (D.V.I. 1986).
[35] *White v. Spenceley Realty, LLC*, 53 V.I. 666, 678-79 (V.I. 2011) (internal citations omitted).
[36] (Freund Aff. of Indebtedness, Ex. 3, at 1-2, Sept. 20, 2013) (emphasis added).

Section 2 of the Guaranty provides that Liburd's obligation of payment and performance will not be abrogated by any subsequent agreements or events that may affect Wintdots' obligations. In relevant part, section 2 reads:

> 2. **Obligations Absolute.** This Guaranty is a continuing guaranty of payment and performance. The obligations of Guarantor hereunder are independent of the Guaranteed Obligations and/or any other obligation of Borrower . . . . The obligations of Guarantor hereunder shall be irrevocable, absolute and unconditional irrespective of, and Guarantor hereby waives to the maximum extent permitted by law, any defenses it many now or hereafter have in any way relating to any or all of the foregoing:
>
> . . . .
>
> (f) any modification, compromise, settlement or release by the Lender, or, by operation of law or otherwise . . . ; or
>
> . . . .
>
> Guarantor's obligations shall remain in full force and effect until all Guaranteed Obligations shall have been paid in full and the commitments under the Loan Documents shall have terminated or expired. If at any time any payment of the principal of or interest on the Note or any other amount payable by the Borrower under any of the Loan Documents is rescinded or must be otherwise restored or returned upon the insolvency, bankruptcy or reorganization of the Borrower or otherwise, Guarantor's obligations hereunder with respect to such payment shall continue to be effective or reinstated as though such payment had been due but not made at such time.[37]

Pursuant to the Restatement (Third) of Suretyship and Guaranty § 16, "[a] continuing guaranty is a contract pursuant to which a person agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee."[38]

---

[37] (Freund Aff. of Indebtedness, Ex. 3, at 2-3, Sept. 20, 2013).

[38] "[W]hen the Superior Court confronts an issue of common law that [the Supreme Court of the Virgin Islands] has yet to address—or has only addressed through erroneous reliance on former 1 V.I.C. § 4 (repealed 2004)—it must conduct a three-factor *Banks* analysis" to determine the soundest rule of law for the Virgin Islands. *Malloy v. Reyes*, 61 V.I. 163, 176-177 (V.I. 2014); *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014) (citing *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014)); *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013); *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 976-80 (V.I. 2011). The Court must (1) consider which common law rules have been previously applied by Virgin Islands' courts; (2) identify the rule adopted by a majority of courts of other jurisdictions, and (3) most importantly, identify the soundest rule of law for the Virgin Islands. *Id.*

1. <u>Courts in the Virgin Islands</u>

Here, although Title 11A, §§ 9-101-9-709 of the Virgin Islands Code governs the relationship between a secondary and a primary obligor, there are no local statutes or cases that address the legal effect that a continuing guaranty has on a guarantor's obligations. Therefore, the Court must look to other jurisdictions for guidance.

2. <u>Majority of Courts in Other Jurisdictions</u>

A majority of other courts in other jurisdictions have determined that the legal effect of a continuing guaranty is based on the rule of law set forth in the Restatement (Third) of Suretyship and Guaranty § 16. *See, e.g.*, *Choiniere v. Marshall*, 112 A.3d 723, 731 (Vt. 2014); *Davidson & Co. v. Eidola Concrete, LLC*, 972 N.E.2d 823, 825 (Ill. App. Ct. 2012); *Jae Co. v. Heitmeyer Builders, Inc.*, 2009 Ohio App. LEXIS 2412, at *7 (Ohio Ct. App. June 16, 2009) (unpublished); *Filmcraft Labs, Inc. v. 5200 Keystone Ltd. Realty, LLC*, 969 N.E.2d 632 (Ind. Ct. App. 2012); *Tesoro Ref. & Mktg. Co. v. Lyle Tucker Distrib.*, Case No.1:06CV116DAK, 2007 U.S. Dist. LEXIS 84267, at *7-8 (D. Utah Nov. 14, 2007) (unpublished); *WXI/Z Sw. Malls Real Estate Liab. Co. v. Mueller*, 110 P.3d 1080, 1085 (N.M. Ct. App. 2005); *Still v. Cunningham*, 94 P.3d 1104, 1112 n.17

Here, the parties' agreement expressly states that Liburd's Guaranty is a continuing guaranty. This means that Liburd is responsible for the prompt payment of *all* of Wintdots' obligations, *including future obligations* contained in any Loan Document.[39] The Guaranty defines "Loan Documents" as including, *inter alia*, "all other loan documents evidencing, securing, guaranteeing or otherwise signed in connection with the Note."[40] As evidenced by the language of the Consent Judgment, Wintdots and the Trust executed this document in connection with the Trust Note. In pertinent part, the Consent Judgment reads,—

> Wintdots . . . [is] liable and indebted to the Trust on the Trust Note, . . . in the amount of Two Hundred Forty One Thousand Three Hundred Forty Four and 69/100 ($241,344.69) Dollars as of February 12, 2011, representing Two Hundred Twenty Five Thousand and 00/100 ($225,000.00) Dollars in outstanding principal[,] and Sixteen Thousand Three Hundred Forty Four Dollars and 69/100 ($16,344.69) [Cents] in accrued interest, exclusive of costs and attorneys' fees. Interest on all outstanding loan principal and interest continues to accrue at the rate of 14% per annum

---

(Alaska 2004); *Falco v. Alpha Affiliates, Inc.*, Civ. No. 97-494 MMS, 2000 U.S. Dist. LEXIS 7480, at *16-17 (D. Del. Feb. 9, 2000) (unpublished); *Rheem Mfg. Co. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333, 339-40 (Mo. Ct. App. 2000); *Hotel Corp. of Miss. v. Days Inn of Am., Inc.*, 1999 U.S. App. LEXIS 40677, at *3 (5th Cir. 1999). A few courts have crafted their own definition of a continuing guaranty to establish its legal effect, by relying on local statutes or by adopting various sections of 38 AM. JUR. 2D *Guaranty*. *See, e.g.*, *Sheth v. C.C. Altamonte J.V.*, 976 So. 2d 85, 88 (Fla. Dist. Ct. App. 2008) (citations omitted) (explaining that a guaranty is continuing in nature "if it contemplates a future course of dealing during an indefinite period, or if it is intended to cover a series of transactions or succession of credits, or if its purpose is to give to the principal-debtor a standing credit to be used by it from time to time."); *Barnett Millworks, Inc. v. Guthrie*, 974 So.2d 952, 955 (Ala. 2007) ("Conceptually, a continuing guaranty agreement that contemplates a future course of dealings is itself viewed only as an offer to guarantee payment for future specified acts, such as future extensions of credit, and this offer is not accepted until such extensions of credit are made."); *Cent. Bldg., LLC v. Cooper*, 26 Cal. Rptr. 3d 212, 216-17 (Cal. Ct. App. 2005) ("A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty. (Civ. Code, § 2814)."); *Hudson v. Game World*, 484 S.E.2d 435, 440 (N.C. Ct. App. 1997) (citations omitted) ("A continuing guaranty is defined to be a guaranty the object of which is to enable the principal debtor to have credit over an extended time and to cover successive transactions."); *Delro Indus., Inc. v. Evans*, 514 So. 2d 976, 979 (Ala. 1987) (explaining that a continuing guaranty as a guaranty of future indebtedness uncertain as to amount or time); *Chem. Bank v. Sepler*, 457 N.E.2d 714, 715 (N.Y. 1983) (stating that a continuing guaranty remains in full force and effect irrespective of any interruptions in the underlying obligations of the borrower and lender, unless the guarantor terminates the guaranty in writing); *Robert Mallery Lumber Corp. v. B. & F. Assocs., Inc.*, 440 A.2d 579, 581 (Pa. Super. Ct. 1982) (relying on 38 AM. JUR. 2D *Guaranty* § 63 in adopting the principle that "[a] continuing guaranty contemplates a future course of dealings between the creditor and the principal debtor, usually extending over an indefinite period of time" and the "offer for a continuing guaranty is ordinarily effective until revoked by the guarantor or extinguished by some rule of law."); *Liberty Bank v. Shimokawa*, 632 P.2d 289, 291 (Haw. Ct. App. 1981) (citing to 38 AM. JUR. 2D *Guaranty* §§ 1, 43, 63); *Bonura v. Christiana Bros. Poultry Co.*, 336 So. 2d 881, 892 (La. Ct. App. 1976) (defining a continuing guaranty as an offer to guarantee repayment of a loan or payment for goods sold).

In determine the rule of law that is the soundest for the Virgin Islands, it is important for the adopted rule of law to be read in harmony with the parties' intent. When parties enter into a continuing guaranty, the parties are seeking to address a future course of dealings relating to the primary obligors' obligations. This intention is sufficiently articulated in the RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 16, and can help courts in this jurisdiction interpret the effect of a continuing guaranty. Therefore, this Court finds that the RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 16 provides the soundest rule of law for the Virgin Islands.

[39] *See* RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 16 cmt. a (1996) ("A person can agree to become a secondary obligor for subsequent obligations of another person. While in some cases, such an agreement is for specific, identifiable obligations that are planned for the future, it is also possible for a person to agree to a more open-ended obligation pursuant to which unspecified future obligations are covered.").

[40] (Freund Aff. of Indebtedness, Ex. 3, at 1, Sept. 20, 2013).

> compounded monthly. Wintdots, . . . [is] liable and indebted to the Trust on the Trust Note, . . . in the amount of $28,849.06 as of February 23, 2011, representing reasonable costs and attorneys' fees.[41]

Because the Consent Judgment was signed in connection with the Trust Note, it falls squarely within the definition of "Loan Documents." Although Liburd was not a party in the Kennedy Lawsuit,[42] the continuing guaranty makes him responsible for fulfilling any obligations that Wintdots gained by virtue of the Trust Note. Because the Consent Judgment established the amount that Wintdots owes, the parties' dispute concerning damages does not present a genuine issue of material fact. Thus, based on the terms of the Consent Judgment, the Trust is entitled to recover $241,344.69 for outstanding principal and interest, as a matter of law.

ii. <u>The applicable post-judgment interest rate is 14%.</u>

The Trust is also entitled to receive post-judgment interest on the amount awarded under the Consent Judgment. In the Consent Judgment, Wintdots and the Trust agreed that interest would accrue on the awarded amount at a rate of 14% per annum, compounded monthly. Notwithstanding, Liburd contends that the applicable post-judgment interest rate is 0.10% pursuant to 28 U.S.C. 1961.[43] To support his argument, Liburd cites to the Third Circuit Court of Appeals decision in *Alkon v. United States*, which held that the federal post-judgment interest rate set forth in 28 U.S.C. § 1961[44] applies to judgments entered in the District Court of the Virgin Islands.[45] Liburd's argument, however, is unpersuasive. First, *Alkon* is not binding on this Court because the Third Circuit's decision is based on interpretation of federal law.[46] Second, *Alkon* does not address the more specific issue of whether the parties may contract out of the federal post-judgment interest rate.

---

[41] (Def. Almando L. Liburd's Resp. to Pl.'s Stmt. of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, at 18, Oct. 21, 2013).

[42] The Trust's argument that the Consent Judgment is irrelevant to this matter is unpersuasive. Although section 2 of the Guaranty provides that Liburd waived his right to raise defenses such as modification, compromise, and settlement, a reasonable reading of sections 1 and 2 of the Guaranty shows that the waiver was intended to foreclose the possibility that Liburd would escape liability in the event of a modification, compromise, settlement, or other changes to Wintdots' obligations. In fact, following the extensive list of waived defenses, section 2 states that, "[g]uarantor's obligations hereunder shall remain in full force and effect until all Guaranteed Obligations shall have been paid in full and the commitments under the Loan Documents shall have terminated or expired." (Freund Aff. of Indebtedness, Ex. 3, at 3, Sept. 20, 2013). This language does not suggest that Liburd is prohibited from satisfying his obligation based on the settled amount. Instead, it expresses the parties' intent for Liburd to remain liable for any amount that Wintdots owes throughout the life of the loan.

[43] (Mem. in Opp'n to Pl.'s Mot. for Summ. J., 9-10, Oct. 21, 2013); (Def. Almando L. Liburd's Response to Pl.'s Statement of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, at 11-12, Oct. 21, 2013).

[44] Section 1961 provides that "interest *shall* be allowed on any money judgment in a civil case recovered in a district court" and that "[s]uch interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."

[45] 239 F.3d 565, 568 n.3, 43 V.I. 325, 329 (3d. Cir. 2001) ("Instead of continuing the practice of calculating interest on civil judgments in accordance with varying state formulae, Congress intended . . . to 'set[] a realistic and [uniform] rate of interest on judgments' which would be 'applicable to *all litigation in the Federal courts*.'" (citing S. Rep. No. 97-275, at 30 (1981), reprinted in 1982 U.S.C.C.A.N. p. 11, 40)); *see Allstate Ins. Co. v. Clymer*, 1994 U.S. Dist. LEXIS 11319, 6 (E.D. Pa. 1994) ("As a general rule, in federal cases where jurisdiction is based on diversity of citizenship, federal courts have held that post-judgment interest is governed by the federal post-judgment interest statute rather than by state law.").

[46] *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755-56 (V.I. 2014) (emphasis added) ("[T]he Superior Court is only required to follow cases the Third Circuit decided while serving in its capacity as the *de facto* court of last resort in the Virgin

Presently, there are no cases in the Virgin Islands that address this issue. But there are several courts from other jurisdictions that have held that parties may freely contract for the application of a post-judgment interest rate that varies from 28 U.S.C. § 1961.[47] In those cases, the parties' agreement must contain "clear, unambiguous, and unequivocal" language showing the parties' intent to impose a different post-judgment interest rate.[48] If this standard is met, the parties have been given the freedom to set their own interest rate. Given that this principle of law allows the parties' intent to be a controlling factor in the Court's interpretation, this Court finds that the practice of allowing parties to freely contract out of the federal post-judgment interest rate, so long as their contract clearly, unambiguously, and unequivocally establishes their intent to do so, is the soundest rule of law for the Virgin Islands.

In this case, the Consent Judgment clearly, unambiguously, and unequivocally provides that, "[i]nterest on all outstanding loan principal and interest continues to accrue at the rate of 14% per annum compounded monthly."[49] Despite Liburd's argument, the Trust and Wintdots intentionally executed the Consent Judgment, which provides for a modified post-judgment interest rate. Thus, there is due and owing to the Trust from Liburd the principal sum of $225,000.00; plus accrued interest from August 12, 2009 to March 25, 2010, at the rate of 12% per annum, in the amount of $16,792.00; plus accrued interest from March 16, 2010 to February 2, 2015, at the rate of 14% per annum compounded monthly, in the amount of $224,587.50; plus interest at the rate of 14% per annum compounded monthly, for a total amount of due of $460,230.30, exclusive of attorney's fees and costs.

iii. <u>The Trust's claim for attorney's fees and costs as an element of damages</u>

In its Motion for Summary Judgment, the Trust also seeks to recover costs and attorneys' fees as an element of damages,[50] pursuant to the Trust Note, Mortgage, and Unlimited Guaranty Agreement.[51] Each document provides that Liburd must pay the Trust's costs and attorneys' fees incurred in any legal action taken to enforce the agreements.[52] The Consent Judgment also provides that Wintdots owes the Trust $28,849.06 in attorneys' fees and costs, as of February 23, 2011. As of February 19, 2015, the Trust represents that it "has incurred $128,041.85 [] in compensable costs and recoverable attorney's

---

Islands, **as opposed to those cases decided in its capacity as a federal court exercising jurisdiction in federal question or diversity cases.'").**

[47] *See Whitney Bank v. Point Clear Dev., LLC*, Civ. No. 11-0657-WS-M, 2012 U.S. Dist. LEXIS 83869, at *42 (S.D. Ala. June 18, 2012) ("Where, as here, the applicable contracts do not contain express provision for post-judgment interest to accrue at a rate different than that set forth in § 1961(a), the statutory rate governs, as a matter of law."); *Vision Bank v. Garrett Invs., LLC*, Civ. No. 11-00169-CB-B, 2012 U.S. Dist. LEXIS 24572, at *9-10 (S.D. Ala. Feb. 27, 2012) (collecting cases) ("[T]he consensus among courts [] is that parties may agree to a different post-judgment interest rate."); *CS Capital Corp. v. Local Senior Servs.*, Civ. No. 11-cv-02357-WYD-MEH, 2012 U.S. Dist. LEXIS 176020, at *26-27 (D. Colo. Aug. 15, 2012) (citation omitted) ("Although interest would typically accrue at the federal rate, parties may set their own rate of post-judgment interest by contract."); *Jack Henry & Assocs. v. BSC, Inc.*, 753 F. Supp. 2d 665, 669 (E.D. Ky. 2010) ("[P]arties may contract around § 1961 and agree to a different post judgment interest rate. This holding accords with the decisions of every circuit court that has addressed the question.").

[48] *See id.*

[49] (Def. Almando L. Liburd's Response to Pl.'s Statement of Undisputed Facts & Counter-Stmt. of Undisputed Facts, Ex. 1, at 18, Oct. 21, 2013).

[50] Fed. R. Civ. P. 54(d)(2)(A) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion *unless* the substantive law requires those fees to be proved at trial as an element of damages."

[51] Fed. R. Civ. P. 54(d)(2) advisory committee's note (1993) (The requirement for a separate motion "does not . . . apply to fees recoverable as an element of damages, as when sought under the terms of a contract.").

[52] (Freund Aff. of Indebtedness, Ex. 1, at 1, Sept. 20, 2013); (Freund Aff. of Indebtedness, Ex. 2, at 11, Sept. 20, 2013); (Freund Aff. of Indebtedness, Ex. 3, at 5, Sept. 20, 2013).

fees as the result of litigation in this suit, the Kennedy Foreclosure Action, the Wintdots Bankruptcy, and the Liburd Adversarial Proceeding."[53] This claim for 100% of all attorney's fees and costs as an item of damages is at odds with Virgin Islands law that an award of attorneys' fees and costs are within the sound discretion of the Court.[54] The Court will address this claimed item of damages in a separate order.

II. DEBT AND FORECLOSURE OF MORTGAGE LIEN

There is no genuine issue as to any material fact that the Trust is also entitled to foreclose on its mortgage on Parcel No. 14B-2 Estate Thomas, No. 6E New Quarter, St. Thomas, VI ("St. Thomas property") and Parcel No. 14-1 Estate Fortsberg, Nos. 14A and 17B Coral Bay Quarter, St. John, VI (St. John property") to satisfy the debt due under the Note, Mortgage and Unlimited Guaranty Agreement.[55] The Guaranty executed by Liburd meets the requirement of "personal obligation for the payment of the debt." Liburd also executed a First Priority Mortgage on his St. Thomas and St. John properties.

III. ENFORCEMENT OF GUARANTY

a. The Trust is not entitled to summary judgment on its enforcement of guaranty claim because the Virgin Islands does not recognize an "enforcement of guaranty" cause of action, and this Court finds that it is not the soundest rule of law for the Virgin Islands.

Lastly, the Trust moves for summary judgment on its enforcement of guaranty cause of action. To support its claim, the Trust cites to a rule of law established by the U.S. District Court for the District of New Jersey,[56] to support its argument that it is entitled to summary judgment on this claim. However, the rule of law established by the New Jersey court is not binding in this jurisdiction. To determine whether it should adopt the enforcement of guaranty cause of action, this Court conducts a three-part *Banks* analysis.

First, the Court notes that there are no Virgin Islands' courts that have recognized a cause of action for the enforcement of guaranty. Courts in this jurisdiction have generally interpreted and

---

[53] (Second Supplement to Pl.'s Mot. for Summ. J., 4, 7, Feb. 19, 2015); (Stone Decl. of Counsel in Supp. of Costs & Att's' Fees, 3, Feb. 19, 2015).

[54] *See* 5 V.I.C. § 541(b); *see also Hodge v. Bluebeard's Castle, Inc.*, S. Ct. Civ. No. 2012-0123, ___V.I. ___, 2015 V.I. Supreme LEXIS 15, at *43-45 (V.I. June 10, 2015) (citations omitted); *Rainey*, 55 V.I. at 880-81 (V.I. 2011) (citations omitted) ("[A]lthough a fee arrangement for legal services is a matter of contract between the client and the attorney, courts will enforce only reasonable attorneys' fees even if the contract itself is otherwise enforceable.").

[55] 28 V.I.C. § 531. See *Thompson v. Florida Wood Treaters, Inc.*, 2009 WL 4730784, at *3 (D.V.I. Dec. 6, 2009), aff'd 505 F. App'x 610 (3d Cir. 2010).

[56] *Ramada Worldwide Inc. v. Southport, LLC*, Civ. No. 11-cv-03676, 2013 U.S. Dist. LEXIS 91719, at *16-17 (D.N.J. June 27, 2013) (unpublished) (citing *U.S. ex rel. Small Bus. Admin. v. DelGuercio*, 818 F. Supp. 725, 727-28 (D.N.J. 1993) (citing 38 C.J.S. Guaranty §§ 8-14 and 38 AM. JUR. 2D *Guaranty* § 119) ("To be entitled to a judgment on a guaranty, a plaintiff must show; '(1) execution of the guarantee by the guarantor (i.e. that it was the defendant who signed the guarantee); (2) the principal obligation and terms of the guaranty; (3) the lender's reliance on the guaranty in extending monies to the borrower; (4) default by principal obligator; (5) written demand for payment on the guarantee; (6) failure of the guarantor to pay upon written demand.").

enforced guaranty agreements through the application of contract principles.[57] A majority of courts in other jurisdictions have also enforced guaranty agreements according to contract principles.[58] The few courts that have applied the enforcement of guaranty cause of action have done so while applying New Jersey law pursuant to a choice of law provision.[59] In fact, the only courts that have mechanically applied the enforcement of guaranty cause of action are those located in New Jersey.[60] Based on these considerations, this Court does not find a valid reason to deviate from the Territory's established practice of applying contract principles to enforce guaranty agreements. However, similar to other jurisdictions, this Court will recognize New Jersey's enforcement of guaranty cause of action when the parties have contracted for New Jersey law to govern their agreement. Beyond those rare instances, this Court finds that the enforcement of guaranty cause of action is not the soundest rule for the Virgin Islands.

Upon looking to Liburd's Guaranty, paragraph 14 unambiguously states that, "[the] Guaranty shall be governed by and construed in accordance with the laws of the United States Virgin Islands."[61] Because the Virgin Islands does not recognize an enforcement of guaranty cause of action, the Guaranty

---

[57] *See, e.g., Citibank, N.A. v. Chammah*, 44 V.I. 85, 92 (V.I. Super. Ct. 2001) ("As in the Virgin Islands, . . ., a court may not go outside the written language of a guaranty agreement to vary the terms of the agreement if said language is clear and unambiguous on its face."); *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 36 V.I. 295, 323-24 (D.V.I. 1997) (applying contract law derived from the Restatement (Second) of Contracts, § 338(1)); *Quiros v. Birch*, 19 V.I. 418, 421-22 (V.I. Super. Ct. 1983) (applying the Restatement (Second) of Contracts § 74 (1981) to interpret the parties intent in a guaranty agreement).

[58] *See, e.g., R.L.R. Invs., LLC v. Wilmington Horsemens Group, LLC*, 22 N.E.3d 233, 240 (Ohio Ct. App. 2014) ("Courts construe guaranty agreements in the same manner as they interpret contracts."); *Myers v. Hall Columbus Lender, LLC*, 437 S.W.3d 632, 636 (Tex. App. 2014) ("If a guaranty agreement is unambiguous, the court construes it under the usual rules of contract interpretation."); *Bobron v. Bunch*, 215 P.3d 35, 37 (Nev. 2009) ("[G]eneral contract interpretation principles apply to interpret guaranty agreements."); *Cent. Bldg., LLC v. Cooper*, 26 Cal. Rptr. 3d 212, 216 (Cal. Ct. App. 2005) ("We independently review a lease and a guaranty agreement subject to the usual rules of contract interpretation."); *Cont'l Airlines v. Lelakis*, 943 F. Supp. 300, 304 (S.D.N.Y. 1996) ("Guaranty agreements are to be construed under ordinary principles of contract construction."); *W. Bank-Downtown v. Carline*, 757 S.W.2d 111, 114 (Tex. App. 1988) (citation omitted) ("If the guaranty instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous and the court will construe the contract as a matter of law.").

[59] *See, e.g., Century 21 Real Estate LLC v. Ed/Var Inc.*, Case No. 5:13-cv-00887 EJD, 2014 U.S. Dist. LEXIS 94672, at *9 (N.D. Cal. July 10, 2014) (unpublished) (citing to New Jersey's enforcement of guaranty cause of action pursuant to an choice of forum provision); *Century 21 Real Estate LLC v. Perfect Gulf Props., Inc.*, Case No. 6:08-cv-1890-Orl-28KRS, 2010 U.S. Dist. LEXIS 78512, at *9 (M.D. Fla. July 1, 2010) (unpublished) (recognizing that the franchises' guaranty agreements are expressly governed by New Jersey law); *Prestige Capital Corp. v. Michigan Gage & Mfg.*, LLC, 772 F. Supp. 2d 837, 844 (E.D. Mich. 2010) (applying New Jersey law pursuant to a choice of law provision); *Midlantic Bank, N.A. v. Strong*, Civ. No. 94 CV 4901, 1996 U.S. Dist. LEXIS 22384, at *8 (E.D.N.Y. Dec. 3, 1996) (unpublished) ("The parties agree, pursuant to paragraph 15 of the Guarantee, that the rights and obligations under the Guarantee are to be "construed and enforced in accordance with the laws of the state of New Jersey."); *Howard Johnson Int'l., Inc. v. Inn Dev., Inc.*, Civ. No. 07-1024-KES, 2008 U.S. Dist. LEXIS 103369, at *14 (D.S.D. Dec. 22, 2008) (unpublished) ("According to the explicit terms of the License Agreement, New Jersey law is to be utilized to interpret the contract.").

[60] *See, e.g., Ramada Worldwide Inc. v. Southport, LLC*, Civ. No. 11-cv-03676(DMC)(JAD), 2013 U.S. Dist. LEXIS 91719, at *16, (D.N.J. June 27, 2013) (unpublished); *Ramada Worldwide, Inc. v. Petersburg Regency, LLC*, Civ. No. 10-cv-4092 (DMC) (JAD), 2012 U.S. Dist. LEXIS 142172, at *14 (D.N.J. Oct. 1, 2012) (unpublished); *Ramada Worldwide, Inc. v. Hotel of Grayling, Inc.*, Civ. No. 08-3845 (KSH), 2010 U.S. Dist. LEXIS 65186, at *26 (D.N.J. June 30, 2010) (unpublished); *Meecorp Capital Mkts., LLC v. Brauser*, Civ. No. 06-1816 (SDW), 2009 U.S. Dist. LEXIS 66949, at *10-11 (D.N.J. Aug. 3, 2009) (unpublished); *Brauser Real Estate, LLC v. Meecorp Capital Mkts., LLC*, Civ. No. 06-cv-01816 (SDW), 2008 U.S. Dist. LEXIS 71234, at *9 (D.N.J. Sept. 18, 2008) (unpublished); *Merrill Lynch Bus. Fin. Servs. Inc. v. Comtel Tech., Inc.*, Ci.v No. 06-4247 (DRD), 2006 U.S. Dist. LEXIS 83091, at *7 (D.N.J. Nov. 14, 2006) (unpublished).

[61] (Freund Aff. of Indebtedness, Ex. 3, at 7, Sept. 20, 2013).

will be enforced pursuant to general contract principles. Therefore, as a matter of law, this Court will deny summary judgment on the enforcement of guaranty claim.

CONCLUSION

Having considered the Motion for Summary Judgment, this Court will grant summary judgment on the breach of contract claim because there are no genuine issues of material fact, and as a matter of law, the Trust is entitled to summary judgment. Further, this Court will deny summary judgment on the foreclosure of mortgage lien claim because 28 V.I.C. § 536 prohibits the Trust from bringing an action to foreclose on a mortgage lien during the pendency of an action to also recover the debt secured by the lien. Lastly, this Court will deny summary judgment on the enforcement of guaranty cause of action because the Virgin Islands does not recognize an "enforcement of guaranty" cause of action, and it is not the soundest rule for the Virgin Islands.

A judgment consistent with this Memorandum Opinion will issue separately.

Dated: July 7, 2016

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: Donna D. Donovan
DONNA D. DONOVAN
Court Clerk Supervisor 7/08/2016

CERTIFIED A TRUE COPY
DATE: 7/8/2016
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: [signature]
Cameil A. Clarke
Court Clerk II