Circuit Court for Montgomery County
Case No. 404047-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0452

September Term, 2016

FRANK T. SURYAN, JR.,

v.

CSE MORTGAGE, L.L.C. *et al*

Eyler, Deborah S.,
Arthur,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: August 25, 2017

In the Circuit Court for Montgomery County, CSE Mortgage, LLC, and Capital Source Finance, LLC (collectively, "Capital Source"), the appellee, sued Frank Suryan, the appellant, on his written guaranty of the "Recourse Obligations" of four real estate special purpose limited liability companies (collectively, "the Villa Partners").[1],[2] Capital Source sought to recover payment of a judgment for attorneys' fees that it had obtained against the Villa Partners.

The circuit court granted summary judgment in favor of Capital Source, ruling that the judgment for attorneys' fees was a Recourse Obligation of the Villa Partners and therefore was covered by the guaranty. It entered a judgment for $3,142,359.03 against Suryan. This timely appeal followed, in which Suryan presents one question for review, which we have rephrased slightly:

> Did the circuit court err as a matter of law in ruling that the judgment for attorneys' fees against the Villa Partners is a recourse obligation for which Suryan is liable under the guaranty?

We shall reverse the judgment of the circuit court and remand the case for further proceedings not inconsistent with this opinion.

FACTS AND PROCEEDINGS

On May 25, 2004, Capital Source extended a $35 million loan to the Villa Partners to finance improvements to an apartment complex they owned in California ("the

[1] The limited liability companies are: Lyon Villa Venetia, LLC; Lyon Villa Venetia II, LLC; Wolff Villa Venetia 224, LLC; and Wolff Villa Venetia 224 II, LLC.

[2] As we shall discuss, a "Recourse Obligation" is a defined term under the controlling documents in this case.

Property"), which was security for the loan. The transaction was effectuated through a loan agreement, promissory note, deed of trust, financing statements, the guaranty by Suryan ("Guaranty"), and other documents, all collectively denominated the "Loan Documents" in the Loan Agreement.[3]

The promissory note, secured by the deed of trust, incorporated "Exhibit 'A' Addendum" ("the Addendum"), which states generally that the amounts due under the Loan Documents are "non-recourse," *i.e.,* "Borrower shall not be personally liable for amounts due under the 'Loan Documents[.]'"[4] The Addendum includes a number of exceptions from non-recourse liability that are designated "Recourse Obligations."

Of particular relevance here, the Villa Partners agreed in section 5.4 of the Loan Agreement to reimburse Capital Source for "expenses and reasonable attorneys' fees" incurred in, among other circumstances, "any effort to enforce, protect or collect payment of any obligations . . . secured by the Deed of Trust or . . . any Loan Document" and in "defending or prosecuting any actions, claims or proceedings arising out of or relating to Lender's transactions with Borrower[.]"

[3] There were multiples of many of the documents, because the $35 million was extended to the Villa Partners by seven loans of $5 million, with promissory notes for each.

[4] Generally, when a loan is "non-recourse," the borrower is "not personally liable for the debt upon default, but rather, [the lender's] recourse is solely to the property granted as security for the loan." Talcott J. Franklin & Thomas F. Nealon III, *Mortgage and Asset Backed Securities Litigation Handbook,* § 5:74 (2016) (footnote omitted).

In the Guaranty, at section 2.01, Suryan promised to "unconditionally guarantee[]" and "timely perform and comply with . . . the due and punctual payment of each and every 'Recourse Obligation' (as defined in the Note)" under the Loan Documents.

Over the years, Capital Source and the Villa Partners made modifications to the loan agreement. In 2010, they executed a Tenth Loan Modification Agreement (the "Tenth Modification"), by which, at section 2.1.20, the Villa Partners were given a right of first refusal in the event Capital Source decided to sell the loan to a third party and, at section 5.2, Capital Source was given a release of claims. In addition, the promise by the Villa Partners to reimburse Capital Source for attorneys' fees incurred was restated and updated.[5] Section 6.10 included the statement that this "reimbursement obligation shall be part of the indebtedness secured by the Existing Loan Documents."

[5] 6.10 Attorneys' Fees and Advances. *Borrower shall reimburse Lender for* all sums paid or advanced under or pursuant to this Agreement or the Existing Loan Documents (including, but not limited to, costs of appraisals, environmental investigations and reports, survey and other title costs), *reasonable attorneys' fees and expenses incurred by Lender in connection with the enforcement of Lender's rights under this Agreement and each of the other Existing Loan Documents,* including, without limitation, reasonable attorneys' fees and disbursements for trial, appellate proceedings, out-of-court workouts and settlements or for enforcement of rights under any state or federal statute, including, without limitation, reasonable attorneys' fees incurred in bankruptcy and insolvency proceedings such as in connection with seeking relief from stay in a bankruptcy proceeding. *Borrower's reimbursement obligation shall be part of the indebtedness secured by the Existing Loan Documents*. Borrower specifically acknowledges that, due to the complexity of the Loan, the real estate development sophistication of Borrower and the difficulties contemplated in enforcement of Lender's remedies, Lender, to protect its interests properly and completely in the event of Borrower's default, shall be entitled to retain attorneys of Lender's choice at such

(Continued…)

In August of 2011, the Villa Partners sold the Property to a third party for $44.75 million and paid off the balance of the loan to Capital Source, resulting in $14.6 million in proceeds. The Villa Partners distributed the proceeds to their investors, paid off expenses and disposition fees, and retained roughly $1 million in cash.

The same month, in the Circuit Court for Montgomery County, the Villa Partners filed suit against Capital Source alleging, among other claims, that it had breached the right of first refusal provision in the Tenth Modification ("the Underlying Case").[6] Capital Source filed a counterclaim for attorneys' fees under section 5.4 of the Loan Agreement and section 6.10 of the Tenth Modification ("sections 5.4 and 6.10").

The circuit court granted summary judgment in favor of Capital Source on all the Villa Partners' claims. It determined that several of the claims were barred by the release in the Tenth Modification. The court found in favor of Capital Source on the counterclaim and awarded it $2,561,541.40 in attorneys' fees under sections 5.4 and 6.10. A judgment was entered in that amount in favor of Capital Source and against the Villa Partners.

(…cont'd.)

> attorneys' customary fee rates *and that Lender shall be entitled to complete and full reimbursement for reasonable attorneys' fees*. . . .

(Emphasis added.)

[6] In 2007, Capital Source had securitized the loan into a collateralized debt obligation ("CDO") that included several other real estate loans. In July 2010, Capital Source sold the managing and servicing rights to the CDO to a third party. The Villa Partners' claimed that that sale, which took place several months after the Tenth Modification was executed, violated the right of first refusal provision.

The Villa Partners appealed to this Court. We affirmed the grant of summary judgment in favor of Capital Source on the Villa Partners' claims and the court's decision on the counterclaim that Capital Source was entitled to attorneys' fees. We vacated the fee award, however, because the court had not properly analyzed the reasonableness of the amount of fees sought.[7] On remand, the court performed that analysis and awarded Capital Source $2,781,961.13, which was the original fee award supplemented by fees incurred on appeal. The court entered a judgment in that amount, again against the Villa Partners ("the Judgment"). The Villa Partners again appealed to this Court. We affirmed the Judgment.[8]

In the meantime, on March 25, 2015, Capital Source made written demand on the Villa Partners and Suryan for payment of the Judgment, which was refused. On April 20, 2015, Capital Source sued Suryan on the Guaranty. Suryan filed an answer and discovery ensued.

Capital Source moved for summary judgment. It argued that as a matter of law the Judgment was a Recourse Obligation under either of two particular exceptions to non-recourse liability in the Addendum. Ultimately, the circuit court granted summary judgment in favor of Capital Source, concluding that the Judgment was a Recourse Obligation under both exceptions. On that basis, on April 21, 2016, the court ruled that

[7] *Lyon Villa Venetia LLC v. CSE Mortgage LLC,* No. 1860 Sept. Term 2012 (filed Mar. 11, 2014).

[8] *Lyon Village Venetia, LLC v. CSE Mortg., LLC,* No. 31, Sept. Term 2015 (filed Feb. 4, 2016), *cert. denied*, 448 Md. 31 (2016).

the Guaranty covered the Judgment and $506,552.46 in attorneys' fees incurred by Capital Source in this lawsuit and entered judgment for $3,142,359.03.[9] Suryan noted a timely appeal.

STANDARD OF REVIEW

Summary judgment may be entered when "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Md. Rule 2-501(f). In reviewing a circuit court's grant of summary judgment, we determine whether that decision was legally correct. *Laing v. Volkswagen of America, Inc.,* 180 Md. App. 136, 152-53 (2008) (citations omitted).

> Because the decision to grant summary judgment is purely legal, we review it *de novo,* determining for ourselves whether the record on summary judgment presented a genuine dispute of material fact, and if not, whether the moving party was entitled to summary judgment as a matter of law.

Dett v. State, 161 Md. App. 429, 441 (2005) (citations omitted). In reviewing the summary judgment record, "if the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party." *Laing,* 180 Md. App. at 153 (citing *Wood v. Toyota Motor Corp.,* 134 Md. App. 512, 516 (2000)). Accordingly, we shall review *de novo* the circuit court's grant of summary judgment in Capital Source's favor.

DISCUSSION

As noted, the Addendum states that Borrower's liability to Lender under the loan agreement shall be non-recourse, with exceptions. So, ordinarily, amounts due under the

[9] Suryan had filed a motion for summary judgment, which the court denied.

Loan Documents are non-recourse obligations, only collectible against collateral. If an exception applies to an amount due, however, the obligation is with recourse, *i.e*., is a "Recourse Obligation," and therefore is a personal liability of Borrower, here the Villa Partners. The Guaranty makes Suryan responsible for these Recourse Obligations.

Two exceptions are in play in this appeal. Suryan contends that neither exception applies to make the Judgment a Recourse Obligation and that the court therefore erred in granting summary judgment to Capital Source on the Guaranty claim. Capital Source counters that both exceptions apply and that the court's ruling was legally correct and summary judgment properly was granted.[10] Whether one, both, or neither of the exceptions apply is a question of contract interpretation. The interpretation of contract language is a purely legal issue, which means we review the circuit court's decision *de novo*. *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 7 (2014).

Capital Source also argues for the first time on appeal that because the Judgment in the Underlying Case was entered against the Villa Partners, it is a personal liability of theirs, and Suryan is precluded from taking the position in this case that the Judgment is *not* a Recourse Obligation.

A.

Exception in Subsection 1.A.2 of the Addendum

The first exception at issue states that Borrower (the Villa Partners) shall have personal liability

[10] Neither party contends that there was any genuine dispute of material fact.

> for any deficiency, loss or damage suffered by Lender [Capital Source] because of . . . any collusive or voluntary bankruptcy, insolvency, liquidation, reorganization, creditor assignment or similar relief or proceeding relating to Borrower [the Villa Partners] or any "Additional Essential Party" (as defined in the Deed of Trust)[.]

Subsection 1.A.2.

Capital Source's theory on summary judgment regarding this exception was that "insolvency" means being unable to pay one's debts, and here the Villa Partners voluntarily rendered themselves insolvent by distributing the proceeds of the sale of the Property to their investors and immediately pursuing the Underlying Case without leaving sufficient assets to cover the expenses of that litigation. As a consequence of their voluntary insolvency, the Judgment remains unpaid, and that is a loss to Capital Source. Thus, the exception applies to the unpaid Judgment because it is a loss Capital Source suffered due to the Villa Partners' voluntary insolvency. The exception makes the unpaid Judgment a Recourse Obligation of the Villa Partners, which Suryan agreed to pay in the Guaranty. The circuit court agreed with this theory of recovery.

Before this Court, Suryan contends the language of this exception is clear and does not make the unpaid Judgment a Recourse Obligation of the Villa Partners. He advances three arguments in support. We shall focus on one argument because, as we shall explain, we conclude that it has merit and is dispositive of whether this exception applies.

Suryan maintains that the word "insolvency" in this exception does not mean being in a state of insolvency. Rather, it describes a type of proceeding or relief. Emphasizing that "insolvency" is one word in the phrase "bankruptcy, insolvency, liquidation, reorganization, creditor assignment or similar relief or proceeding," he argues

that if "insolvency" were read to mean a state of insolvency, rather than an insolvency proceeding or vehicle for relief, the phrase "or similar relief or proceeding" would be meaningless. He also points out that the interpretation of "insolvency" Capital Source advocates and the circuit court adopted is inconsistent with subsection C of the Addendum, which makes clear that there are but three circumstances under which any and all amounts owed under the Loan Agreement would become recourse, "none of which includes Borrowers' mere failure or inability to pay." Accordingly, because the Villa Partners did not voluntarily (or collusively) initiate an insolvency proceeding or pursue a similar vehicle for relief, and were not affected by any such proceeding or vehicle, the exception does not apply, as a matter of law.

Capital Source counters that the circuit court properly read the language of the exception to mean that an obligation becomes a Recourse Obligation when Borrower voluntarily enters into a state of insolvency, *i.e.*, "ha[s] nothing left to pay [its] . . . debts." It argues, in essence, that it is impossible for the language of the exception to mean that Borrower must have instituted or been a party to or been affected by an "insolvency . . . relief or proceeding" because there is no such thing. It notes that even if Borrower's mere inability to pay its debts would make all its obligations under the Loan Documents Recourse Obligations, that would "just mean that . . . all [Section 1 of the Addendum] does is instruct the [L]ender to recover from the collateral *first* and from the [B]orrower *second*." (Emphasis in Appellee's Brief.) And regardless, Capital Source continues, that does not generate a policy concern because the exception only applies to "collusive or voluntary" insolvencies.

Capital Source is correct that under Maryland law one can be in a state of "insolvency" by being unable to pay one's debts, without instituting a proceeding or seeking relief. For example, a corporation is "insolvent" when it is "unable to pay its debts with all available assets as they become due in the ordinary course of business." *Storetrax.com, Inc. v. Gurland,* 397 Md. 37, 62, n. 12 (2007) (additional citations omitted).[11] Capital Source is incorrect, however, that the word "insolvency" in this exception must mean, and can only mean, being unable to pay one's debts. The premise for this position is that there is no proceeding or vehicle for relief for insolvency (or for creditor assignment) in Maryland, other than bankruptcy (of which liquidation and reorganization are parts), and therefore "insolvency" as used in the phrase "bankruptcy, insolvency, liquidation, reorganization, creditor assignment," cannot mean a type of proceeding or relief.

This premise is flawed. Maryland recognizes "insolvency proceedings" and vehicles for "relief" from insolvency apart from bankruptcy. Although the State's comprehensive insolvency laws were repealed in 1975, as they had been preempted by federal law, several processes relating to insolvency, and for assignment for the benefit of

[11] Section 1-201(b)(23) of the Commercial Law Article broadly defines "insolvent" to mean:

> (i) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;
> (ii) Being unable to pay debts as they become due; or
> (iii) Being insolvent within the meaning of federal bankruptcy law.

Md. Code (1975, 2013 Repl. Vol.), §1-201(b)(23) of the Commercial Law Article.

creditors, remain. *See Ali v. CIT Tech. Fin. Servs., Inc.,* 188 Md. App. 269, 284–85 (2009). For example, for purposes of Md. Code (1975, 2013 Repl. Vol.), §1-201(b)(23) of the Commercial Law Article ("CL"), an "insolvency proceeding" "includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved." CL §1-201(22). A "receivership proceeding" is another type of insolvency proceeding, in which the insolvent "has his property taken by a receiver under a decree of court[.]" CL § 15-101; § 15-102(b). CL section 15-101 provides that an "order for relief" may be sought in either an assignment for the benefit of creditors or a receivership proceeding. CL § 15-101(8) (defining "Order for relief" as "the order appointing the assignee for the benefit of creditors or the receiver of the assets of an insolvent"). Other examples of proceedings "intended to liquidate or rehabilitate" the estate of the insolvent are found in the Corporations and Associations Article. *See* Md. Code (1975, 2014 Repl. Vol.), §4A-606(3)(iii) of the Corporations and Associations Article ("CA") (noting a partner in a limited partnership may be "adjudged . . . insolvent"); CA §3-415(a) ("In a proceeding for involuntary dissolution . . . on grounds of insolvency, the court may declare the corporation dissolved if the corporation is proved or has been determined by judicial proceedings to be unable to meet its debts as they mature in the usual course of its business."); Md. Rules, Title 13 (Receivers and Assignees).

Given that it is not impossible for the word "insolvency" as used in this exception to mean a type of proceeding or vehicle for relief, the question becomes whether that is

its meaning or whether it means being unable to pay one's debts, as Capital Source maintains.

Maryland follows the objective theory of contract interpretation, "according to which, unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Ocean Petroleum, Co., Inc., v. Yanek,* 416 Md. 74, 86 (2010) (citing *Cochran v. Norkunas,* 398 Md. 1, 16 (2007)). In doing so, we "restrict our inquiry to 'the four corners of the agreement,'" *id.* (quoting *Cochran,* 398 Md. at 17), and "ascribe to the contract's language its 'customary, ordinary, and accepted meaning.'" *Id.* (quoting *Fister v. Allstate Life Ins. Co.,* 366 Md. 201, 210 (2001)). We consider "what a reasonably prudent person in the same position would have understood as to the meaning of the agreement." *Cochran,* 398 Md. at 17 (citing *Walton v. Mariner Health,* 391 Md. 643, 660 (2006). If a reasonable person would find the contract language to be "susceptible of more than one meaning[,]" the language is ambiguous, and its meaning will depend upon extrinsic evidence. *Calomiris v. Woods,* 353 Md. 425, 436–37 (1999). Whether contract language is ambiguous is a question of law. *Baker v. Baker,* 221 Md. App. 399, 409 (2015).

The well-established canons of contract interpretation direct us to consider the entire text of the contract, and the words of the contract in context, in determining their meaning. We "seek to determine the parties' intentions by construing the contract as a whole, 'giving effect to every clause and phrase, so as not to omit an important part of the agreement.'" *Under Armour, Inc, v. Ziger/Snead,* LLP, 232 Md. App. 548, 555 (2017)

(quoting *Owens-Illinois v. Cook*, 386 Md. 468, 497 (2005)). *See also DirecTV, Inc. v. Mattingly,* 376 Md. 302, 320 (2003) (stating "'effect must be given to each clause'" of a contract where "'reasonably possible'") (quoting *Sagner v. Glenangus Farms, Inc.,* 234 Md. 156, 167 (1964)); *Igwalo v. Property & Casualty Ins. Guar. Corp.,* 131 Md. App. 629, 641 (2000) (stating that "'particular provisions of a contract are not to be read in isolation but rather the document is to be read as a whole to discover its true import'") (quoting *Simkins Indus., Inc. v. Lexington Ins. Co.*, 42 Md. App. 396, 404 (1979)).

Several specific canons of construction guide us in our interpretation of the language of this exception and especially the word "insolvency" and the phrase in which it appears. The principle, still known by its Latin name, "*noscitur a sociis*," but also commonly called the "associated-words" or "words of a feather" canon, is as follows:

> When several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (Thomson/West 2012) (hereinafter "*Reading Law*"). Put more succinctly, "Associated words bear on one another's meaning[.]" *Id*. *See also Third National Bank v. Impac, Ltd*., 432 U.S. 312, 322 (1977) (stating "words grouped in a list should be given related meanings"); *Emmert v. Hearn*, 309 Md. 19, 25 (1987) (applying this canon to interpret

the language of a will); *State Dept. of Health & Mental Hygiene v. Congoleum Corp.*, 51 Md. App. 257, 263 (1982) (referring to this canon as the "words of a feather" doctrine). [12]

The word "insolvency" appears in the phrase "any collusive or voluntary bankruptcy, insolvency, liquidation, reorganization, creditor assignment or similar relief or proceeding. . . ." Subsection 1.A.2. Even ignoring the "similar relief or proceeding" language, it is evident that the words "bankruptcy, insolvency, liquidation, reorganization, creditor assignment" are a list that must share some common features. "Bankruptcy" is "[a] statutory procedure by which a (usually insolvent) debtor obtains financial relief[.]" *Blacks Law Dictionary* 175 (10th ed. 2014) ("Blacks"). That definition goes on to describe "liquidation" as a type of bankruptcy proceeding. *Id.* A "reorganization" is a "financial restructuring of a corporation, especially in the repayment of debts[.]" *Id.* at 1490. In other words, it is a process or means by which a corporation is restructured, not a state of being of the corporation. (It also is a type of bankruptcy proceeding.) And *Blacks* defines an "assignment for the benefit of creditors" as follows: "This *procedure* serves as a state-law substitute for federal bankruptcy proceedings." *Id.* at 144 (emphasis added).

"Insolvency" is defined as "[t]he condition of being unable to pay debts as they fall due" *and* as an "insolvency proceeding," which means "[a] bankruptcy proceeding to liquidate or rehabilitate an estate." *Id.* at 916. "For the associated-words canon to apply,

[12]As Scalia and Garner explain, some canons of interpretation apply generally to the construction of any legal document, including statutes, contracts, and wills, while others apply specifically to statutes. *Reading Law* at 51. The canons we discuss are of the general sort.

the terms must be conjoined in such a way as to indicate that they have some quality in common." *Reading Law*, at 196. Here, all the other words in the phrase in which "insolvency" is included are proceedings or relief concerning debt, not states of being. The words take the form of a list, and under the "words of a feather" principle the word "insolvency" in this list should be ascribed its procedural meaning, not its "state of being" meaning. Otherwise, "insolvency" would be differentiated from the other words in the series in which it is grouped, with no logical reason for doing so.

In addition, the words at the close of the list effectively direct us to interpret each word enumerated as a type of proceeding or means to obtain relief. The words "or similar relief or proceeding" characterize the list as a general classification of proceedings and avenues for relief. And as Suryan argues, if the word "insolvency" is taken to mean being in a state of insolvency, the phrase "or similar relief or proceeding" at the end of the same sentence loses meaning. As already noted, the canons of contract construction call upon us to give meaning to all the words of a contract, whenever possible, so that no words are made surplusage. *Direct TV, Inc.*, 376 Md. at 320.

Another canon of contract construction that assists us is the presumption of consistent usage. *Reading Law*, at 170. That canon embodies the principle that a word or phrase is presumed to bear the same meaning throughout the legal document in which it appears. *Id.* *See also* 11 Williston on Contracts §32:6 (4th ed. 2012) ("Generally, a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons.") (footnote omitted).

In this case, elsewhere in the Loan Documents the parties used words other than "insolvency" when referring to the state of being unable to pay one's debts. Specifically, in subsection 6.26(i) of the Deed of Trust, the parties state as follows the requirement that the Villa Partners remain solvent: "Without limitation, [the Villa Partners] ha[ve] not and shall not . . . *become insolvent* or fail to pay its debts and liabilities from its assets as the same shall become due[.]"

By contrast, the language of subsection 6.26(gg)(i) of the Deed of Trust, in which the Villa Partners promised not to institute debt relief proceedings, nearly mirrors the wording of the exception we are addressing:

> Without limitation, [the Villa Partners] ha[ve] not and shall not . . . (i) file or consent to the filing of *any bankruptcy, insolvency or reorganization case or proceeding*, institute any proceedings under any applicable *insolvency law* or otherwise seek any relief under any laws relating to the relief from debts or the protection of debtors generally, (ii) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for itself or any other entity, (iii) make an assignment of its assets for the benefit of its creditors or an assignment of the assets of another entity for the benefit of such entity's creditors, or (iv) take any action in furtherance of the foregoing.

(Emphasis added.) Likewise, Section C of the Addendum states, in relevant part,

> [T]he agreement of Lender not to pursue recourse liability . . . SHALL BECOME NULL AND VOID and shall be of no further force and effect in the event . . . . the Property or any part thereof shall become an asset *in a voluntary bankruptcy or voluntary insolvency proceeding* initiated by the Borrower.

(Italicized emphasis added.) The distinction between subsections 6.26(i) of the Deed of Trust, on the one hand, and subsections (gg)(i) of the Deed of Trust and Section C of the Addendum, on the other hand, shows that the parties did not use the word "insolvency" to

interchangeably refer to a state of being insolvent *and* to proceedings in insolvency. Moreover, the similarity between subsection 6.26(gg) of the Deed of Trust and the exception we are discussing elucidates that in the exception we are examining, the parties intended to refer to proceedings in insolvency and relief from insolvency—not a state of being insolvent—in both.

In sum, this exception is not ambiguous; it means that the Villa Partners have personal liability for a loss to Capital Source resulting from: (1) a bankruptcy proceeding, insolvency proceeding, liquidation proceeding, reorganization proceeding, or creditor assignment voluntarily or collusively instituted by the Villa Partners, or relating to or having an effect on them; or (2) any other similar proceeding or vehicle for relief voluntarily or collusively instituted by the Villa Partners, or relating to or having an effect on them. Because it is undisputed that there was no such insolvency or other proceeding instituted or sought, the exception does not apply to make the Judgment a Recourse Obligation. [13]

[13] Suryan's two other arguments regarding this exception are not meritorious. He argues that any Recourse Obligation under this exception expired in 2011 when the Property was sold and the loan to Capital Source was paid off. On the contrary, under subsection 5.17 of the Loan Agreement, the Recourse Obligation created by this exception survived repayment of the loan. Subsection 5.17 states:

> All of the representations, warranties, covenants, and indemnities hereunder, *shall survive the repayment in full of the Loan* and the release of the liens evidencing or securing the Loan, and shall survive the transfer (by sale, foreclosure, conveyance in lieu of foreclosure or otherwise) of any or all right, title and interest in and to the Project to any party, whether or not an Affiliate of Borrower.

(Continued…)

Even if we were to accept Capital Source's interpretation of this exception, under which the Villa Partners would be personally liable for any "deficiency, loss or damage" to Capital Source caused by their voluntarily making themselves insolvent, the Judgment still would not be a Recourse Obligation on this summary judgment record.

A debt is a "[l]iability on a claim; a specific sum of money due by agreement or otherwise[.]" *Blacks*, at 488. There was no evidence on the summary judgment record that when the Villa Partners distributed their assets upon the sale of the Property, any existing liability of theirs remained outstanding and surpassed the value of their assets. As recited above, when the Villa Partners sold the Property and distributed the proceeds to their investors, they paid off the loan to Capital Source and other debts and reserved $1

(…cont'd.)
(Emphasis added.) The Addendum was incorporated in its entirety into the Loan Agreement by section 14 of the first Loan Modification. None of the subsequent modifications to the Loan Agreement edited, deleted, or superseded the survival clause. Accordingly, by the express language of the contract, all of the sections of the Addendum survived repayment of the loan.

Suryan also argues that the Judgment is not a "deficiency, loss or damage" suffered by Capital Source. A money judgment signifies the right of the judgment creditor to satisfaction by the judgment debtor of the amount of the judgment. Md. Rule 1-202(q) ("'Money judgment' means a judgment determining that a specified amount of money is immediately payable to the judgment creditor"). *See also* Md. Code (1974, 2013 Repl. Vol.), section 11-401(c) of the Courts and Judicial Proceedings Article (same). When the judgment debtor fails to pay, the judgment creditor suffers a "loss" of the use of the money owed and its right to payment. It does not matter that other provisions of the Loan Documents do not define "attorneys' fees" as a type of damage. Absent language in the Loan Documents excluding unsatisfied attorneys' fees judgments from the meaning of "deficiency, loss or damage" suffered by Lender, the Judgment, being unpaid, is a "loss" to Capital Source.

million. They had no outstanding liabilities at that time, including any liability to Capital Source for attorneys' fees.

The Villa Partners then brought the Underlying Case, in which Capital Source ultimately prevailed and obtained the Judgment. The evidence in the summary judgment record, viewed in a light most favorable to Suryan as the non-moving party, cannot support a finding that the Villa Partners voluntarily took on the Judgment as a liability. To have done so, they would have had to have knowingly pursued a nonmeritorious claim against Capital Source expecting to lose and to be found liable for contractual attorneys' fees. Nothing in the vigorous litigation of the Underlying Case, as depicted in the summary judgment record and in our opinions in the two appeals the case generated, could support such a finding. Without evidence that the Villa Partners voluntarily acquired a contingent liability upon filing suit in the Underlying Case, this exception does not apply.

B.

Exception in Subsection 1.B.D of the Addendum

Subsection 1.B.D of the Addendum states:

> Notwithstanding anything to the contrary contained in any Loan Document, nothing shall be deemed in any way to impair, limit or prejudice the rights of Lender [Capital Source]…to recover from Borrower [the Villa Partners] all legal fees and other expenses incurred by Lender *in enforcing any rights it may have under the Loan Documents following a default.*

(Emphasis added.)

Although the Loan Documents do not define "default," the Deed of Trust identifies 16 circumstances that constitute "Events of Default" under those documents.

(The Loan Agreement provides that "Events of Default" has the meaning provided in the Deed of Trust). As pertinent, they include the failure to pay amounts due under the loan agreement within three days after written demand (section 1.1); the entry of a final judgment for payment of money that is not satisfied within 90 days (section 1.8); and a "default in the performance" of a term or covenant in the Loan Documents that is not cured within 30 days of written notice of default (section 1.16). Section 6.21 of the Deed of Trust, entitled "Default Provisions," provides at subsection 1 "Rights and Remedies" of the parties "[a]t any time after the occurrence and during the continuation of an Event of Default[.]"[14] Thus, when a party commits an act that is a default, and while the default continues, the other party acquires rights for which it may seek a remedy, or remedies. Subsection 2 of section 6.21, entitled "Payment of Costs, Expenses and Attorneys' Fees," allows all costs and expenses incurred pursuant to section 1, including reasonable attorneys' fees, to be secured by the Deed of Trust and bear interest as specified.[15]

Suryan contends the circuit court erred as a matter of law in ruling that this exception applies to the Judgment. As we did in addressing the first exception, we shall

[14] The "Rights and Remedies" are acceleration of payment obligations, cure of default, judicial proceedings, manage and operate property, elect to sell property, resort to security, appointment of a receiver, and exercise any other right or remedy available at law or in equity.

[15] Obviously, that particular right and remedy only is of value to Lender, and only before the collateral has been sold.

focus our attention on one argument he advances that we find meritorious and dispositive.[16]

According to Suryan, the only default by the Villa Partners was their failure to pay the Judgment within three days of demand; and "[b]y definition, the attorneys' fees in the [Judgment] were incurred *before* the [Judgment] was entered, *before* [Capital Source] demanded payment, and *before* [the Villa Partners] defaulted by not paying it." (Emphasis in brief.) Thus, the attorneys' fees, not having been "incurred [by Capital Source] *following a default*" by the Villa Partners, are not a Recourse Obligation under this exception. (Emphasis added.)

Capital Source offers two responses. First, the Villa Partners defaulted under section 1.16 of the Deed of Trust by filing suit in the Underlying Case. Specifically, bringing that lawsuit was a "default in the performance of" the "release of Capital Source's liability" contained in the Tenth Modification. Capital Source incurred the attorneys' fees awarded in the Judgment after, *i.e.*, "following," the "default," so this

[16] Like the first exception issue, this issue is one of contract interpretation. In addition to arguing that the language of the exception makes clear that it does not apply to the Judgment, Suryan argues that the circuit court effectively "invalidated" the language of the exception by imposing a "commercial reasonab[ility]" standard of interpretation that is antithetical to the Maryland law of objective interpretation of contracts. As explained above, we follow the objective law of contract interpretation, looking to the language of the contract itself and determining what reasonable parties to the contract meant the language to signify. Suryan is correct that, if contract language is unambiguous, we do not impose a standard of commercial reasonableness to determine its meaning; however, we can take into account that the parties to this contract were operating in a commercial setting. *Seigneur v. Nat'l Fitness Inst., Inc.*, 132 Md. App. 271, 278 (2000) ("[W]hen interpreting a contract, the court 'places itself in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them[.]'") (quoting *Canaras v. Lift Truck Servs.*, 272 Md. 337, 352 (1974)).

exception covers them. Second, and alternatively, this exception makes Borrower personally liable for attorneys' fees Lender "incur[s] . . . enforcing any rights it may have under the Loan Documents" once Borrower commits a default—but the default need not be committed *before* the attorneys' fees are incurred. Any other interpretation would render the exception superfluous because section 5.4 of the Loan Agreement and section 6.10 of the Tenth Modification entitle Lender to attorneys' fees incurred before *and* after a default by borrower.

We agree with Suryan that the Judgment is not a Recourse Obligation under this exception. The plain language of the exception makes clear that for it to apply Capital Source must have incurred attorneys' fees in the course of enforcing a right it has under the Loan Documents following a default. Thus, there must have been 1) a default by the Villa Partners; 2) that prompted Capital Source to pursue a right it acquired under the Loan Documents due to the default; and 3) attorneys' fees incurred by Capital Source in pursuing that right.

As noted, the failure to perform a term, covenant, or condition in the Loan Documents is an "Event of Default" under section 1.16 of the Deed of Trust. In the Tenth Modification, the Villa Partners "fully and forever release[d], discharge[d] and acquit[ed]" Capital Source "of and from and against any and all claims," known or unknown, relating to "the Loan or the [P]roperty" that arose "out of or [were] based upon conduct, events or occurrences on or before the Recordation [of the Tenth Modification][.]" This is a typical release in that it operated to immediately discharge an existing obligation, so its performance was complete at the time of effectuation. *Kaye v.*

Wilson-Gaskins, 227 Md. App. 660, 680 (2016). It was not a covenant not to sue, which is a "promise to forbear from litigating with respect to an obligation" that can be breached by instituting litigation. *Id.* at 681–82.

Because a covenant not to sue is an executory promise by the maker to undertake the future performance of forbearing to sue, *see id.* at 682, it is breached by one party bringing suit against the other party. A release, by contrast, is not an executory promise and the releasing party does not breach it by later filing suit against the released party on the obligation that was discharged. *Id.* at 680–82. Release will be an affirmative defense to the claim, as it was discharged, but the act of filing suit is not a breach of the release as it would be in a breach of a covenant not to sue.

The Villa Partners did not breach the release in the Tenth Amendment by filing the Underlying Case against Capital Source because the release was just that, and not a covenant not to sue. Thus, it cannot be said that by filing suit in the Underlying Case the Villa Partners defaulted, under section 1.16 of the Deed of Trust, by failing to perform a term or covenant in the Loan Documents.

Whether the Villa Partners defaulted by not paying the Judgment within three days of demand or within 90 days of the Judgment being entered, under sections 1.1 or 1.8 of the Deed of Trust respectively, does not matter because any such default could not have given rise to a Recourse Obligation under this exception. The attorneys' fees awarded in the Judgment necessarily were incurred before the Judgment was entered and before demand was made for its payment. If the Villa Partners defaulted by not paying the Judgment within three days of the demand for payment or within 90 days of its entry, the

default happened after the fees were incurred, and the fees were not incurred by Capital Source in pursuing any right under section 6.21 of the Deed of Trust, or "following a default." Capital Source seems to misread the language of the exception to mean that any attorneys' fees incurred by it at any time become personal liabilities of the Villa Partners once the Villa Partners commit an act of default. The plain language of the exception is otherwise; it covers fees incurred in enforcing the rights specifically granted by the Loan Documents *after* a default (not any rights) and the fees must be incurred following the default. In short, for the exception to apply, a default must have been committed before the attorneys' fees were incurred, because the exception only implicates the rights available to Capital Source after the Villa Partners have committed an act of default. Moreover, this interpretation is not inconsistent with the right to attorneys' fees under sections 5.4 and 6.10. Those sections entitle Capital Source to attorneys' fees but do not address whether an obligation to pay fees is recourse or non-recourse. [17]

[17] We do not find merit in Suryan's other argument pertaining to this exception. He maintains that subsection 1.B of the Addendum does not create any exception to non-recourse liability because the only such exceptions are listed in subsection 1.A. In support, he cites the introductory language in subsection 1.A, which specifically refers to personal liability of Borrower, and points out that subsection 1.B does not use the words "personal liability." He also argues that subsection 1.D of the Addendum, which describes Borrower's Recourse Obligations as being "[t]he obligations under the Loan for which Borrower has personal liability under the terms of this Addendum (including under subsections (A), (B) and (C))[,]" does not mean that subsection 1.B includes additional Recourse Obligations.

We disagree. Although subsection 1.B does not use the words "personal liability," it specifies that "nothing [in the Loan Documents] shall be deemed in any way to impair, limit or prejudice the rights of Lender [Capital Source] . . . to *recover from Borrower* [the Villa Partners] all legal fees and other expenses," etc. (Emphasis added.) Recovery from

(Continued…)

As a matter of law, the Recourse Obligation exception in subsection 1.B.D of the Addendum did not apply to the Judgment in this case, and the circuit court erred in granting Capital Source summary judgment on its claim against Suryan based on that exception.

C.

Preclusion

Capital Source offers a back-up argument that only comes into play if we hold, as we have, that the circuit court erred in granting summary judgment. The argument, which was not made below, goes as follows:

- Suryan "agreed to pay for 'each and every "Recourse Obligation" of the Villa Partners, (E. 408 § 2.01),'" which are all "'obligations under the Loan for which [the Villa Partners have] personal liability,' E. 406" (citations and alterations in Capital Source's Brief). [18]
- Suryan's "personal liability under the Guaranty tracks the Villa Partners' personal liability under the Loan Documents."
- Suryan takes the position that the contractual obligations to pay attorneys' fees (now embodied in the Judgment) "are non-recourse obligations" and therefore Capital Source only can collect against the collateral.
- The Judgment, being *in personam*, is contrary to that position. The Villa Partners should have taken that position as a defense to the counterclaim for attorneys' fees in the Underlying Case.

(…cont'd.)
the Borrower is recovery from the Villa Partners, which, absent evidence to the contrary in the record, that is, in the summary judgment record, means recovery from the Villa Partners personally. The summarizing language in section D of the Addendum supports that interpretation, as it expressly refers to "personal liability" under the Addendum, and expressly includes section 1.B.

[18] E. 408 § 201 is page two of the Guaranty. E. 406 is the second page of the Addendum.

- Because the Villa Partners did not defend the counterclaim for fees on that ground, Suryan, as their Guarantor, is bound by the *in personam* Judgment and is precluded from defending this case on the ground that the Judgment is *not* for a "Recourse Obligation."

Necessarily, Suryan's sole response appears in its reply brief. He takes the position that Capital Source waived this argument by not raising it below, and cannot raise it for the first time on appeal, and that it lacks merit in any event.

There are two major problems with Capital Source's preclusion argument. First, it is based on an incomplete recitation of the critical language of the Guaranty and the Addendum that suggests that Suryan agreed to pay any personal liability of the Villa Partners incurred under the loan documents. He did not. The controlling language of the Guaranty provides, at section 2.01:

> **Guaranty**. Guarantor hereby unconditionally guarantees and agrees to timely perform and comply with the following obligations (collectively "Guaranteed Obligations"): (i) the due and punctual payment of each and every **"Recourse Obligation" (as defined in the Note) . . .** This is a guaranty of payment and performance, not of collectability.[19]

(Emphasis added.) Thus, the Guaranty only covers those obligations of Borrower that are defined as "Recourse Obligations" in the Addendum to the note.

Subsection 1.A of the Addendum states:

> Non-Recourse.
>
> Except as provided below, Borrower shall not be personally liable for amounts due under the "Loan Documents" (as defined in the Deed of Trust), other than that under [the environmental indemnity clause not at issue here] for which Borrower shall be personally liable. **Borrower shall**

[19] Subsection (ii), which guarantees Borrower's payment obligation under an environmental indemnity clause, has no relevance to this case.

> **be personally liable to Lender for any deficiency, loss or damage suffered by Lender because of: [followed by nine specific exceptions, including the ones we have addressed *supra*]**.

(Emphasis added.) Subsection 1.B addresses the right of Lender to recover from Borrower all legal fees and other expenses incurred by Lender in enforcing its rights under the Loan Documents after a default; and Subsection 1.C sets forth circumstances in which Lender's agreement not to pursue recourse liability will be null and void. Finally, and importantly, Subsection 1.D of the Addendum states in pertinent part:

> The obligations under the Loan, for which Borrower has personal liability under the terms of this Addendum (including under subsections (A), (B), and (C)) are collectively referred to as the "Recourse Obligations."

The preceding language of the Guaranty and of the Addendum make clear that the only obligations of the Villa Partners that Suryan has guaranteed are those obligations that are defined as "Recourse Obligations" in the Addendum. If the Judgment is for a Recourse Obligation under the Addendum, *i.e.*, it is within an exception to non-recourse liability set forth in the Addendum, Capital Source may recover the amount of the Judgment in an action on the Guaranty. If it is not, Capital Source may not recover it on the Guaranty. Capital Source's argument that the mere fact that the Judgment was entered against the Villa Partners *in personam* makes it an obligation covered by the Guaranty simply is incorrect.

Second, Capital Source also incorrectly proceeds on the assumption that it is Suryan's burden to prove, as a defense to the claim on the Guaranty, that the Judgment is *not* for a "Recourse Obligation." On the contrary, Capital Source bears the burden to prove that the Judgment *is* for a "Recourse Obligation," as defined in the Addendum.

That is an element of its claim against the Guaranty. The scope of the Guaranty is defined by its language (and the language of the Addendum to which it refers). *See Mercy Medical Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md. App. 336, 361–62 (2003) ("Because '[t]he liability of a . . . guarantor is created entirely by his contract,' it is 'strictly confined and limited to'" the guaranty contract.) (quoting *Phankett v. Davis Sewing-Mach. Co*., 84 Md. 529, 533 (1897)). The "Guaranteed Obligations" are expressly defined in the Guaranty and are limited to the "Recourse Obligations" defined in the Addendum. Therefore, to recover on the Guaranty, Capital Source must prove that the Judgment is for such a "Recourse Obligation." Capital Source's argument that because the Villa Partners did not raise non-recourse liability as a defense to the counterclaim for fees in the Underlying Case, Suryan cannot raise the defense of non-recourse liability in the action on the Guaranty misperceives this point.

In advancing its preclusion argument, Capital Source relies primarily on the doctrine of *res judicata* and mentions, in passing, the rule against collateral attacks on judgments. We shall assume, without deciding, that these arguments are properly before this Court, even though they were not made below, because it is clear that if they had been made, the circuit court could not have granted summary judgment on either basis, as a matter of law.[20]

[20] As noted, this case was decided below on summary judgment, not on the merits. Summary judgment was granted for Capital Source, as the plaintiff, on the sole ground that Capital Source raised in its motion for summary judgment: that the Judgment is for a "Recourse Obligation" under the Addendum, and therefore Suryan was liable to pay it under the Guaranty. The back-up preclusion argument Capital Source now makes could

(Continued…)

Res judicata, or "claim preclusion,"

> bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.

Anne Arundel County Bd. of Ed. v. Norville, 390 Md. 93, 106-07 (2005). *See also Comptroller of Treasury v. Science Applications*, 405 Md. 185, 195 (2008) (same). Parties are substantially identical when they are in privity, which "in the res judicata sense generally involves a person so identified in interest with another that he represents the same legal right.'" *FWB Bank v. Richman*, 354 Md. 472, 498 (1999) (quoting *Williams v. Stefan*, 133 B.R. 119, 121 (N.D. Ill. 1991) (in turn quoting *In re Matter of Wilcher*, 56 B.R. 428, 438 (N.D. Ill. 1985))). Whether causes of action are identical is determined by the "transaction" test in section 24 of the *Restatement (Second) of Judgments* (1982). *Kent County Bd. Of Educ. v. Bilbrough*, 309 Md. 487 (1987). Under that test "all rights of the plaintiff to remedies against the defendant are extinguished with

(…cont'd.)
have been made as an alternative argument on summary judgment, but was not. If the alternative ground for summary judgment had been advanced by Capital Source in its summary judgment motion but had not been relied upon by the circuit court in granting summary judgment, we only would uphold the grant of summary judgment on that ground if the circuit court would have had no discretion but to grant summary judgment on that ground. *Cf. PaineWebber Inc. v. East*, 363 Md. 408, 422–23 (2001); *Geisz v. Greater Baltimore Medical Center,* 313 Md. 301, 314 n. 5 (1988); *Washington Mutual Bank v. Homan*, 186 Md. App. 372, 388 (2009). Because we are reversing the grant of summary judgment, the case will return to the circuit court for further proceedings. Conceivably, Capital Source could raise this same alternative argument in a new summary judgment motion. We are convinced, however, that the alternative argument has no merit, and therefore it serves judicial economy to address it now.

respect to all or any part of a transaction, series of connected transactions, out of which the action arose." *Rowland v. Harrison*, 320 Md. 223, 230 n. 2 (1990).[21]

Capital Source's *res judicata* argument is based on the faulty premises we have identified: 1) that Suryan guaranteed any liability of the Villa Partners that is embodied in an *in personam* judgment; and 2) that in the action on the Guaranty, it is Suryan's burden to show that the Judgment *is not* for a "Recourse Obligation" as opposed to its being Capital Source's burden to show that the Judgment *is* for a "Recourse Obligation." And a *res judicata* argument based on a correct foundation would have no merit anyway. The argument, in essence, would be that because the Villa Partners did not defend the counterclaim on the ground that any judgment against it only could be satisfied against collateral, in this case Capital Source need only present the Judgment itself to prove that the liability it embodies is a Recourse Obligation covered by the Guaranty. Such an

[21] Capital Source does not mention the related doctrine of collateral estoppel ("issue preclusion"). Under that doctrine, "'[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Garrity v. Maryland State Board of Plumbing*, 447 Md. 359, 368 (2016) (quoting *Cosby v. Dep't of Human Res*., 435 Md. 629, 639 (2012) (alteration in *Garrity*). The doctrine applies when there are identical parties or parties in privity. *Welsh v. Gerber Prods., Inc.*, 315 Md. 510, 516 (1989). Capital Source implicitly acknowledges that the issue whether attorneys' fees awarded under sections 5.4 and 6.10 of the Loan Agreement are Recourse Obligations under the Addendum was not actually litigated in the Underlying Case. The parties both assume that. We note, however, that the record in the Underlying Case is not before us, that very few papers from that case were submitted in this case on the summary judgment record, and that we do not even have before us the Judgment in the Underlying Case.

argument would entail the offensive use of *res judicata*, *i.e.*, using the doctrine not as a means to bar a defense to its claim but as a means to prove an element of its claim.

Usually, *res judicata* "involves a situation in which a plaintiff seeks to bar a defendant from raising any new defenses . . . beyond those defenses he or his privy raised in the first action." *O'Nesti v. De Bartolo Realty Corp*., 113 Ohio St.3d 59, 63 (2007). Maryland has not recognized the offensive use of *res judicata*, and in those jurisdictions where its use has been attempted, it generally has been rejected. *Id.* (declining to apply *res judicata* offensively and stating that the use of offensive claim preclusion is generally disfavored). In *Stone v. Department of Aviation*, 296 F. Supp. 2d 1243, 1249 (D.Colo. 2003), *rev'd on other grounds*, 453 F.3d 1271 (10th Cir. 2006), the court explained that *res judicata* ordinarily is used to "bar" a second action and "[a]s a general rule, courts will not apply the doctrine . . . . offensively" (quoting *St. Paul Mercury Ins. Co. v. Williamson*, 224 F. 3d 425, 439 (5th Cir. 2000), for the proposition that "[r]es judicata [] is typically a defensive doctrine").[22]

[22] The only case we know of where a court stated that it was applying *res judicata* offensively has nothing in common with the case at bar. In a class action brought by veterans across the country who had or in the future might have their pension benefits reduced by the Veterans Administration ("VA"), a Maryland federal district court entered a judgment directing the VA to follow specified procedures to comport with due process. *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975). Subsequently, members of that same class brought a class action in a federal district court in Minnesota, seeking to force the VA to comply with the procedural safeguards it was ordered to follow in the Maryland case. *Bedgood v. Cleland*, 554 Fed. Supp. 513 (D. Minn. 1992). The Minnesota court ruled that federal law did not permit it to enforce the Maryland judgment in Minnesota, but it would apply *res judicata* offensively so the VA would be bound by the Maryland judgment and the Minnesota class members would not have to relitigate the same issues that already had been litigated in the Maryland case. In doing so, it

(Continued…)

Not only is the offensive use of *res judicata* not generally accepted, its use would make little sense here. Even if the Villa Partners and Suryan were in privity, a finding by the court in the Underlying Case that Capital Source was entitled to attorneys' fees under sections 5.4 and 6.10 could not expand the scope of the Guaranty to cover obligations that are not Recourse Obligations under the Addendum. Nor could the entry of an *in personam* Judgment against the Villa Partners based on that liability expand the scope of the Guaranty. The Guaranty only covers the Judgment if the Judgment is for a Recourse Obligation under the Addendum and, as noted, the obligations under a guaranty are strictly confined by the language of the instrument. We have held in Parts A and B of this opinion that the Judgment is not for a Recourse Obligation, for the reasons explained.

Capital Source's passing mention of the rule against collateral attacks on judgments is not fruitful either. In *Klein v. Whitehead*, 40 Md. App. 1, 20 (1978), we explained:

(…cont'd.)
considered the policy factors of judicial economy and fairness to the defendant that the Supreme Court considered in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), when it first recognized the offensive use of non-mutual collateral estoppel. (The Court of Appeals recently officially recognized that doctrine in *Garrity v. Maryland State Board of Pharmacy, supra*, although it had been implicitly recognized in Maryland for years.). The Minnesota court found that there was no unfairness to the VA, as it was the defendant in both cases and had vigorously defended itself in Maryland on all the same issues that were before the court in Minnesota. For the same reasons, judicial economy militated in favor of offensive use of *res judicata* to bind the VA to the judgment in *Plato*. The court made clear that it was applying *res judicata* offensively to put the members of the plaintiff class in the same position they would be in if they could enforce the Maryland judgment in the Minnesota court.

> A collateral attack is "an attempt to impeach the judgment by matters dehors the record, before a court other than the one in which it was rendered, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. . . ."

Id. at 20 (quoting 49 C.J.S. Judgments § 408). While the doctrines of *res judicata* and collateral estoppel "prevent a party from subsequently challenging the effect of a prior judgment[,]" "[c]ollateral attacks on judgments are prohibited in order to stop a challenge to the validity of a final judgment." *United Book Press, Inc. v. Maryland Composition Co., Inc*., 141 Md. App. 460, 476 (2001).

Klein exemplifies this distinction. There, after judgments were entered against a debtor and he filed for bankruptcy, the bankruptcy trustee sued the judgment creditors and their lawyers for damages, alleging that the judgments were wrongfully obtained. This Court affirmed the dismissal of the trustee's suit, holding that the grounds he was relying upon could have been raised as defenses to the actions against the debtor, but were not, and his suit simply was an attack, albeit an indirect one, on the validity of the judgments against the debtor. *See also Shepard v. Nabb*, 84 Md. App. 687 (1990) (holding suit by removed trustee of two trusts for malicious interference with her appointment and tenure as trustee and related claims were collateral attacks on the judgments removing her as trustee).

The Judgment at issue in this case is against the Villa Partners, and only the Villa Partners. There is no underlying judgment against Suryan. If the Villa Partners had assets, the Judgment would be collectable against them. The question is whether the Judgment is for a Recourse Obligation under the Addendum, in which case Suryan has

guaranteed its payment. The Judgment against the Villa Partners is not being attacked, directly or indirectly.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES.