

**AFFIRM; Opinion Filed August 24, 2012.**

**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-11-00012-CV**

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**SARVJEET S. TOOR, KANWAL JEET SINGH, TONY SANDHU, AND BALJINDER S. GILL, Appellants**

**V.**

**PNC BANK, NATIONAL ASSOCIATION, Appellee**

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**On Appeal from the 14<sup>th</sup> Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-09-10613**

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**MEMORANDUM OPINION**

Before Chief Justice Wright and Justices Bridges and Lang  
Opinion By Justice Lang

Guarantors Sarvjeet S. Toor, Kanwal Jeet Singh, Tony Sandhu, and Baljinder S. Gill appeal from a summary judgment rendered in favor of PNC Bank for the unpaid balance on four agreements that personally guarantee payment of a promissory note. In two issues, Guarantors argue the trial court erred in granting summary judgment because (1) the statutory protections in chapter 51 of the property code may not be waived as a matter of law and, (2) alternatively, if the statutory protections in chapter 51 can be waived, the language in the guaranty agreements in this case was not sufficiently specific to waive their rights to a fair-market-value reduction as to the deficiency claim. We decide

Guarantors' two issues against them and affirm the trial court's judgment. The background of the case is well known to the parties. Therefore, we limit the recitation of the facts. We issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.4.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

In order to finance the purchase of a hotel, DFW Syndication, LLC borrowed \$2,925,000.00 from BMC Capital, L.P. (BMC) by executing a promissory note payable to BMC and a deed of trust for the benefit of BMC, which granted BMC a secured interest in the hotel property. Guarantors each executed a guaranty agreement for DFW Syndication's payment and performance of the note, in which they unconditionally guaranteed and promised BMC "full and punctual payment and satisfaction of the Indebtedness." As part of the guaranty agreements, each of which contained identical terms, Guarantors agreed to waive

all rights of Guarantor[s] under Chapter 34 of the Texas Business and Commerce Code. Guarantor[s] also waive[] any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent lender from bringing any action, including a claim for deficiency against Guarantor[s], before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; . . . (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. . . .

Guarantor[s] further waive[] and agree[] not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor[s], or both.

BMC later assigned the note and guaranty agreements and transferred the deed of trust to Red Mortgage Capital, Inc (Red Mortgage). DFW Syndication subsequently defaulted on its obligations under the note. Suit was brought by Red Mortgage against DFW Syndication and Guarantors, where Red Mortgage sought recovery of the balance due on the promissory note after credit was given for

the foreclosure sale price. Red Mortgage expressly alleged that Guarantors were liable for the balance of the note and, pursuant to the terms of their guaranties, they waived any defense of offset to a deficiency claim. *See* TEX. PROP. CODE ANN. §§ 51.003(c), 51.005(c) (West 2007) (entitling a guarantor or debtor to an offset against a deficiency owed when the fair market value of the foreclosed property exceeds the property's sale price). Guarantors filed counterclaims, contending they were entitled to a fair-market-value determination of the value of the property and, although the hotel property had not yet been foreclosed upon, an "off-set of any deficiency alleged" under §§ 51.003 and 51.005 of the property code. Guarantors filed a second suit, raising similar issues to those in their counterclaims, and the two suits were consolidated. Ultimately, the hotel was foreclosed upon in a non-judicial foreclosure sale. The foreclosure sale price was \$2,407,500.00.

As assignee of Red Mortgage, PNC Bank was substituted in the place of Red Mortgage in the suit. Then, PNC moved for summary judgment on Guarantors' counterclaims, arguing Guarantors contractually waived their right to a fair-market-value reduction of the postforeclosure deficiency owed to PNC. In addition, PNC sought \$762,944.73 plus interest, the difference between (a) \$3,170,444.73 plus postjudgment interest, the payment balance of the note, and (b) \$2,407,500.00, the foreclosure price at which PNC purchased the hotel at foreclosure. Guarantors amended their answer, asserting that they were entitled to a \$119,193.78 credit unrelated to their fair-market-value counterclaims. PNC stipulated to this credit, leaving \$643,750.95 owed by Guarantors. The trial court granted summary judgment in favor of PNC concluding Guarantors had waived their ability to claim any setoff of the postjudgment foreclosure owed to PNC and awarded a final judgment to PNC of \$684,166.11 (\$643,750.95 plus \$40,415.16 in prejudgment interest). This appeal followed.

## **II. STANDARD OF REVIEW**

A party moving for traditional summary judgment under Texas Rule of Civil Procedure

166a(c) must establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). If the movant discharges its burden, the burden shifts to the non-movant to present to the trial court any issue that would preclude summary judgment. *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 50 (Tex. App.—Dallas 2006, pet. denied). When, as here, both parties move for summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law. *Id.* On appeal, the reviewing court applies a de novo standard of review, determines all questions presented, and, if it determines error, renders the judgment the trial court should have rendered or reverses and remands if neither party has met its summary judgment burden. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Hackberry Creek Country Club*, 205 S.W.3d at 50. If the issue raised is based on undisputed and unambiguous facts, as in this case, the appellate court determines the question presented as a matter of law. *Johnston v. Crook*, 93 S.W.3d 263, 267 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (op. on reh'g).

### III. APPLICABLE LAW

Courts construe guaranty agreements as any other contract. *Mid-South Telecomms. Co. v. Best*, 184 S.W.3d 386, 390 (Tex. App.—Austin 2006, no pet.). The interpretation of an unambiguous contract is a question of law for the court. *MCI Telecomm. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999). When parties disagree over the meaning of an unambiguous contract, the court must determine the parties' mutual intent by examining the entire instrument. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P.*, 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied) (citing *Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983)). The court must favor an interpretation that harmonizes and gives effect to all the provisions of the contract so that none will be rendered meaningless and no single

provision taken alone will be given controlling effect. *Heritage Res.*, 939 S.W.2d at 121; *Wells Fargo*, 194 S.W.3d at 726. Unless the agreement shows the parties used a term in a technical or different sense, the terms are given their plain, ordinary, and generally accepted meaning. *Heritage Res.*, 939 S.W.2d at 121.

#### IV. APPLICATION OF LAW TO FACTS

In their first issue, Guarantors argue the trial court erred in granting summary judgment because the statutory protections in chapter 51 may not be waived as a matter of law. Guarantors raise their second issue in the alternative, contending if the statutory protections in chapter 51 can be waived, the language in the guaranty agreements in this case was not sufficiently specific to waive their rights to a fair-market-value reduction as to the deficiency claim.

As to the second issue, Guarantors make four subarguments as to why the purported waiver in the guaranty agreement is ineffective as to § 51.005: (1) the absence of the terms “section 51.005 of the property code” from the guaranty agreements means there was no waiver of that section; (2) § 51.005 is not implicated by the “anti-deficiency” language in subpart (A) of the waiver section, as it “only waives the Guarantors’ right to bring a claim or defense which prevents the Lender from bringing any action against a Guarantor”; (3) subpart (F) of the waiver section “fails to specifically waive the Guarantors’ right to a fair-market-value reduction in the deficiency judgment”; and (4) the so-called “blanket waiver” paragraph in the waiver section is insufficient to waive the Guarantors’ rights under § 51.005.

After this case was submitted, a panel of this Court issued *Interstate 35/Chisam Road, L.P. v. Moayedi*, No. 05-11-00209-CV, 2012 WL 3125148, at \*1 (Tex. App.—Dallas August 2, 2012, no pet. h.), deciding the question of whether the right of offset pursuant to § 51.003(c) could be waived by general terms in a guaranty agreement. *See also King v. Park Cities Bank*, No. 05-11-00593-CV,

2012 WL 3144881, at \*3 (Tex. App.—Dallas Aug. 3, 2012, no pet. h.). In *Moayedi*, the guarantor executed a guaranty agreement, which stated his liability for indebtedness would not be discharged or affected by “any defense” other than full payment of the indebtedness, and he waived “each and every such defense” he might have as to his liabilities and obligations under the agreement. 2012 WL 3125148, at \*1. After examining the parties’ intent as expressed in the guaranty, we concluded the waiver language of “any defense” and “each and every defense” encompassed *all* possible defenses, statutory or otherwise, that might be available to a guarantor. *Id.* at \*8 (noting this broad language conveyed intent “that the guaranty would not be subject to any defense other than payment”). Those statutory defenses included the right of offset as provided in § 51.003(c). *Id.*

We also addressed the guarantor’s contention that Texas public policy “prohibits waiver of section 51.003 rights.” *Id.*; *see also King*, 2012 WL 3144881, at \*2–3. In rejecting the guarantor’s contention, we observed that various courts have concluded chapter 51 rights of offset may be contractually waived. *Moayedi*, 2012 WL 3125148, at \*15 (citing *LaSalle Bank Nat’l Ass’n v. Sleutel*, 289 F.3d 837, 841 (5th Cir. 2002), *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 279 (Tex. App.—Houston [1st Dist.] 2004, pet. dismiss’d) (op. on reh’g); *Kelly v. First State Bank Cent. Tex.*, No. 03-10-00460-CV, 2011 WL 6938522, at \*9 (Tex. App.—Austin Dec. 30, 2011, pet. dismiss’d) (mem. op.)). Those courts chronicled legislative acts providing for non-waivable rights in other sections of the property code as contrasted with the lack of such a designation for § 51.003 rights. We agreed with the reasoning of those courts and concluded the waiver language at issue was enforceable as a matter of law to the offset rights identified in § 51.003 of the property code. *See id.* at \*9; *see also Haggard v. Bank of the Ozarks, Inc.*, 668 F.3d 196, 202 (5th Cir. 2012) (per curiam) (noting prior holding under Texas law, that a guarantor of debt “could waive the statutory right to offset against his liability for deficiency”); *Tran v. Compass Bank*, No. 02-11-00189-CV, 2012 WL

117859, at \*3 (Tex. App.—Fort Worth Jan. 12, 2012, no pet.) (mem. op.) (concluding language in a guaranty agreement was sufficient to waive guarantor’s right to determination of fair market value of foreclosed property for purposes of obtaining an offset against deficiency owed).

Although this case involves § 51.005 of the property code and *Moayedi* addressed § 51.003, the two sections are substantially similar, in form and in substance. *See Segal*, 155 S.W.3d at 278–80.<sup>1</sup> Accordingly, we apply our conclusions as to waiver of § 51.003 to § 51.005.

In their first issue, Guarantors contend the statutory protections in chapter 51 may not be waived as a matter of law based on public policy grounds. Following our decision in *Moayedi* as to § 51.003, we reject Guarantors’ contention as to the virtually identical § 51.005 that it cannot be waived. *See Moayedi*, 2012 WL 3125148, at \*8 (agreeing with reasoning from other courts that concluded § 51.003 rights may be contractually waived); *see also Roe v. Ladymon*, 318 S.W.3d 502, 510 n.5 (Tex. App.—Dallas 2010, no pet.) (intermediate courts in Texas are bound by United States Supreme Court, Texas Supreme Court, and prior decisions of this Court); *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. Of N. Tex., L.P.*, 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.) “We must not overrule a prior panel decision of this Court absent an intervening change in the law by the legislature, a higher court, or this Court sitting en banc.”). We therefore conclude a guarantor may waive his right to an offset under property code 51.005 through the terms of the guaranty. We decide Guarantors’ first issue against them.

We also reject the contentions raised in Guarantors’ second issue. Guarantors argue that even if the statutory protections in chapter 51 can be waived, the language in the guaranty agreements in

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<sup>1</sup> Both §§ 51.003 and 51.005 “permit a person obligated for indebtedness, and against whom a postforeclosure deficiency is sought, to offset the fair market value of the property foreclosed upon against the amount owed if the fair market value is greater than the actual foreclosure proceedings.” *Comiskey v. FH Partners, LLC*, No. 14-10-01001-CV, 2012 WL 1231958, at \*16 (Tex. App.—Houston [14th Dist.] Apr. 12, 2012, no pet. h.). In both sections, the person against whom recovery of the deficiency is sought is entitled to a set-off against the deficiency. *See* TEX. PROP. CODE ANN. §§ 51.003(c), 51.005(c). However, there are a few distinctions between §§ 51.003 and 51.005. “Section 51.005 of the property code provides that a guarantor may bring an action for a determination of the fair market value of property after a foreclosure sale and seek an offset against a deficiency claim. Once a lender brings suit pursuant to section 51.003, [section 51.005] does not apply.” *Kelly*, 2011 WL 6938522, at \*8 n.6 (internal citations omitted). Whereas § 51.003 applies only to deficiency judgments against debtors in non-judicial foreclosures sales, § 51.005 applies to deficiency judgments against either debtors or guarantors in non-judicial or judicial foreclosures. *Compare* TEX. PROP. CODE ANN. § 51.003(c), *with* TEX. PROP. CODE ANN. § 51.005(c); *see also* Greg Weselka, *Real Property Deficiency Judgments—Texas enacts Fair Market Value Statutes—Tex. Prop. Code Ann. §§ 51.003–.005 (Vernon Supp. 1992)*, 23 TEX. TECH L. REV. 871, 871–75 (1992).

this case was not sufficiently specific to waive their rights to a fair-market-value reduction as to the deficiency claim because the guaranty agreements' language only waives "any claim of setoff." However, in addition to the "any claim of setoff" language referenced by Guarantors, the language in each of the guaranty agreements also states that Guarantors relinquished any rights or defenses that may prevent the creditor from bringing a claim for deficiency as well as "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." We conclude this language is sufficient to waive Guarantors' right to a determination under § 51.005(b) of the fair market value of the foreclosed property for purposes of obtaining an offset against the deficiency owed under property code § 51.005(c). *See Moayedi*, 2012 WL 3125148, at \*8 (concluding broad waiver language encompassed all possible defenses available to a guarantor, including § 51.003's right of offset); *see also Capital One, N.A. v. Jolly*, Civil Action No. H-11-1113, 2011 WL 5290623, at \*4 (S.D. Tex. Nov. 2, 2011) (holding guarantor waived right to offset under terms of guaranty, which included "any defense, right of set-off or counterclaim which any Obligor may have or assert" language).

In our review of traditional summary judgments, we determine whether PNC, as movant, met its summary-judgment burden by establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Beesley v. Hydrocarbon Separation, Inc.*, 358 S.W.3d 415, 418 (Tex. App.—Dallas 2012, no pet.). We review the trial court's summary judgment de novo to determine whether PNC's right to prevail is established as a matter of law. *Beesley*, 358 S.W.3d at 418.

Here, no material fact exists with respect to Guarantors' liability to PNC under the



promissory note. We conclude the trial court properly granted summary judgment in favor of PNC. We decide Guarantors' second issue against them and affirm the trial court's judgment.

## V. CONCLUSION

On this record, we conclude as a matter of law the language in the guaranty agreements at issue in this case is sufficient to waive Guarantors' rights under § 51.005 of the property code. Accordingly, we affirm the judgment of the trial court and decide Guarantors' two issues against them.

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DOUGLAS S. LANG  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

Sarvjeet S. Toor, Kanwal Jeet Singh, Tony  
SANDHU, AND BALJINDER S. GILL,  
Appellants

No. 05-11-00012-CV            V.

PNC BANK, NATIONAL ASSOCIATION,  
Appellee

Appeal from the 14<sup>th</sup> Judicial District Court  
of Dallas County, Texas. (Tr.Ct.No. DC-09-  
10613).

Opinion delivered by Justice Lang, Chief  
Justice Wright and Justice Bridges  
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee PNC Bank, National Association recover its costs of this appeal from appellants Sarvjeet S. Toor, Kanwal Jeet Singh, Tony Sandhu, and Baljinder S. Gill.

Judgment entered August 24, 2012.

/Douglas S. Lang/  
DOUGLAS S. LANG  
JUSTICE