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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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SE Property Holdings, LLC, successor by merger to Vision Bank

v.

Bama Bayou, LLC, f/k/a Riverwalk, LLC, et al.

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FNB Bank

v.

Marine Park, LLC, et al.

**Appeals from Mobile Circuit Court
(CV-09-900085)**

BOLIN, Justice.

SE Property Holdings, LLC ("SEPH"), the successor by merger to Vision Bank, and FNB Bank ("FNB") separately appeal from the Mobile Circuit Court's judgments on their breach-of-contract claims against Bama Bayou, LLC, formerly known as Riverwalk, LLC ("Bama Bayou"), and Marine Park, LLC ("Marine Park"),¹ and the individuals and entities guaranteeing Bama Bayou's and Marine Park's contract obligations, challenging the trial court's damages awards. See Ex parte Weyerhaeuser Co., 702 So. 2d 1227, 1228 (Ala. 1996) ("Alabama caselaw is clear that a party who prevailed in the trial court can appeal only on the issue of adequacy of damages awarded.").

Facts

¹Marine Park is a wholly owned subsidiary of Bama Bayou.

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Bama Bayou and Marine Park were the developers of a planned mixed-use development in Orange Beach consisting of a marine park, residential condominiums, retail shops, hotels, and commercial entertainment venues. Marine Park specifically intended to develop a special-use facility for the exhibition of marine animals. Vision Bank made four loans to Bama Bayou and Marine Park related to the development project:

(1) The "West loan" is a loan in the amount of \$6,000,000 made on March 24, 2005, evidenced by a promissory note and a loan agreement and secured by a mortgage and security agreement encumbering real property referred to by the parties as the "West parcel";

(2) The "East loan" is a loan in the amount of \$5,000,000 made on June 12, 2006, evidenced by a promissory note and a loan agreement and secured by a mortgage and security agreement encumbering real property referred to by the parties as the "East parcel";

(3) The "North loan" is a loan in the amount of \$5,000,000 made on September 27, 2007, evidenced by a promissory note and a loan agreement

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and secured by a mortgage and security agreement encumbering real property referred to by the parties as the "North parcel"; and

(4) The "Marine Park loan" is a loan in the amount of \$5,000,000 made on March 2, 2007, evidenced by a promissory note and a loan agreement and secured by a mortgage and security agreement encumbering real property referred to by the parties as the "Marine Park parcel." The Marine Park loan was fully funded by FNB pursuant to a participation agreement with Vision Bank.² The participation agreement provided that the Marine Park parcel would be owned by FNB in the event it was acquired by foreclosure.

The promissory notes executed in relation to each of the loans made to Bama Bayou and Marine Park required Bama Bayou and Marine Park to pay to Vision Bank the principal amount of the loans plus interest as calculated in the manner provided in the promissory notes. The promissory notes also provided that Bama Bayou and Marine Park were

²A number of banks participated in making these loans to Bama Bayou and Marine Park pursuant to participation agreements with Vision Bank. FNB participated in only the Marine Park loan.

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obligated to pay reasonable attorney's fees and costs incurred by Vision Bank in collecting on the promissory notes in the event of a default. The promissory notes stated that they were being guaranteed by certain guarantors and that the indebtedness described in the notes was secured by the mortgages and security agreements executed in conjunction with the promissory notes.

The mortgages and security agreements executed by the parties also required Bama Bayou and Marine Park to pay to Vision Bank the principal amount of the loans, plus interest, and all reasonable attorney's fees and costs incurred by Vision Bank in the event of the foreclosure of any of the mortgages. The mortgages also provided that Bama Bayou and Marine Park were responsible for the payment of all property-preservation costs, including taxes, insurance premiums, the costs of maintenance and repairs, the costs of security and protection, liens, utility charges, and assessments. In the event of a default by Bama Bayou and Marine Park, the mortgages allowed Vision Bank to pay the property-preservation costs and to obtain reimbursement of those costs from Bama Bayou and Marine Park, plus interest at a rate of 10%.

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Section 2.14 of the mortgages provides the following remedy in case of a wrongful foreclosure:

"Discontinuance of Proceedings - Position of parties, Restored. In case the Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Lender, then and in every such case the Borrower and the Lender shall be restored to their former positions and rights hereunder, and all rights powers and remedies of the Lender shall continue as if no such proceeding had been taken."

(Emphasis added.) Section 2.15 of the mortgages provides:

"Remedies Cumulative. No right, power, or remedy conferred upon or reserved to the Lender by this Mortgage is intended to be exclusive of any other right, power, or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power, and remedy given hereunder, or under the Note, or under the Loan Documents, or now or hereafter existing at law or in equity or by statute."

Each of the four loans to Bama Bayou and Marine Park were guaranteed by a number of individuals and entities that were investors in the project. Pursuant to the guaranty agreements, the guarantors, among other things, waived any rights they had regarding the collateral, i.e., the West parcel, the East parcel, the North parcel, and the Marine Park

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parcel; waived any defenses Bama Bayou and Marine Park may have had; and agreed to be unconditionally liable for the debts until they were paid in full. The guaranty agreements provide, in part:

"1. Guaranty. ... [T]he undersigned ... jointly and severally unconditionally guarantees and promises to pay Vision Bank (hereinafter called 'Bank') ... any and all indebtedness, as hereinafter defined, of [Bama Bayou and Marine Park] The word 'indebtedness' is used herein in its most comprehensive sense and includes a loan to be made by Bank to Borrower ... (the 'Loan') and any and all advances, debts, obligations and liabilities of Borrower to Bank heretofore, now, or hereafter existing, made, incurred, or created, whether voluntary or involuntary, and whether or not arising under, pursuant to or in connection with the Loan Agreement (as hereinafter defined) the Note (as hereinafter defined) and/or any and all other Loan Documents (as hereinafter defined), whether due or not due ... not limited to but including principal, interest, costs of collection, attorney's fees and all other lawful charges

"....

"3. Guarantor's Obligations Independent: Statute of Limitations. The obligations of the Guarantor hereunder are independent of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against the Guarantor ... and the Guarantor waives the benefit of any statute of limitations or other defenses affecting its liability hereunder or the enforcement thereof.

"....

"6. Waivers. Guarantor waives any right to require Bank to (A) proceed against Borrower or any other Guarantor; (B) proceed against or exhaust any security held from Borrower; or (C) pursue any other remedy in Bank's power whatsoever. Guarantor waives any defense arising by reason or any disability or other defense of Borrower Until the Indebtedness of Borrower to Bank shall have been paid in full, even though such Indebtedness is in excess of Guarantor's liability hereunder, Guarantor ... waives any benefit of, and any right to participate in any security now or hereafter held by Bank

"....

"10. Expenses of Collection: Waiver of Right of Exemption. Guarantor agrees to pay reasonable actual attorney's fees and all other costs and expenses which may be incurred by Bank in the enforcement of this Guaranty

"....

"14. Limitations of Liability. The limitations of liability under this Guaranty set forth in this Section 14 do not apply to the Borrower or to any other guarantor of Borrower's Indebtedness to the Bank. Guarantor shall be liable for ... (i) an amount equal to Guarantor's Specified Portion of the principal of the Note ... (ii) 100% of all interest on the Loan accrued or accruing at any time ... (iii) 100% of all costs and expenses (including reasonable actual attorney's fees) of collection related or attributable, directly or indirectly, to the enforcement of Guarantor's obligations under this Guaranty, and (iv) 100% of all other costs and expenses (including reasonable actual attorney's fees) of collection relating to all principal, interest, and other charges under the Note and/or relating to any other Indebtedness."

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Bama Bayou and Marine Park were having financial problems with regard to the project by August 2007. The maturity dates of the promissory notes were extended several times to give Bama Bayou and Marine Park time to secure other financing. The notes finally matured in late 2008, and Vision Bank refused to further extend their maturity dates. Vision Bank demanded payment at that time, and Bama Bayou, Marine Park, and the guarantors failed and/or refused to pay the indebtedness owed on the loans. On March 20, 2009, Vision Bank conducted a public auction to separately foreclose the mortgages on the West parcel, the East parcel, the North parcel, and the Marine Park parcel. There were no bids submitted at the public auction. Thus, Vision Bank purchased the properties through the following individual credit bids:

- (A) \$2,000,000 for the West parcel;
- (B) \$5,181,682.48 for the East parcel;
- (C) \$383,500 for the North parcel; and
- (D) \$2,750,000 for the Marine Park parcel.

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Neither Bama Bayou, nor Marine Park, nor the guarantors exercised their rights to redeem the properties.

Procedural History³

On January 16, 2009, Vision Bank sued Bama Bayou and its guarantors ("the Bama Bayou guarantors"), alleging that Bama Bayou was indebted to Vision Bank on the loan for the West parcel, the loan for the East parcel, and the loan for the North parcel, as evidenced by the respective promissory note and loan agreement for each parcel. Vision Bank further alleged that the Bama Bayou guarantors had guaranteed payment of each of those loans, as evidenced by their guaranty agreements. Vision Bank sought a judgment against Bama Bayou for all amounts owed under those loans, including all principal, accrued interest, late charges, attorney's fees, and collection costs. Vision Bank further sought a judgment against each of the Bama Bayou guarantors, jointly

³The underlying litigation involved numerous parties in addition to the parties involved in these appeals, lasted over 10 years, and amassed a record of over 26,000 pages. This Court has tailored its statement regarding the procedural history of the litigation to address only the procedural history relevant to the issues and the parties before this Court in these appeals.

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and severally, for all sums owed under their guaranty agreements, including all principal, accrued interest, late charges, attorney's fees, and collection costs.

Also on January 16, 2009, Vision Bank separately sued Marine Park and its guarantors ("the Marine Park guarantors"), alleging that Marine Park was indebted to Vision Bank on the loan for the Marine Park parcel, as evidenced by the Marine Park promissory note and loan agreement for that parcel. Vision Bank further alleged that the Marine Park guarantors had guaranteed payment of that loan, as evidenced by their guaranty agreements. Vision Bank sought a judgment against Marine Park for all amounts owed under the Marine Park loan, including all principal, accrued interest, late charges, attorney's fees, and collection costs. Vision Bank further sought a judgment against each of the Marine Park guarantors, jointly and severally, for all sums owed under their guarantee agreements, including all principal, accrued interest, late charges, attorney's fees, and collection costs. The two cases were later consolidated by the trial court.

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Bama Bayou, Marine Park, and their guarantors (hereinafter referred to collectively as "the borrowers and the guarantors") answered the complaints, generally denying the allegations and asserting a number of affirmative defenses. The borrowers and the guarantors also asserted counterclaims against Vision Bank, alleging, among other things, that Vision Bank had breached a promise to provide additional financing for the project; that Vision Bank had assumed a duty to provide the financing required to develop the project; that certain female guarantors had been required to sign guaranty agreements, based solely on their status as spouses of other guarantors, in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691; and that Vision Bank had wrongfully foreclosed on the four parcels by bidding a grossly inadequate amount at the foreclosure sales.

On October 15, 2010, the Federal Deposit Insurance Corporation ("FDIC"), a counterclaim defendant based on its status as receiver for two of the participating banks that had advanced funds to Bama Bayou pursuant to participating agreements with Vision Bank, see note 2, supra, removed the consolidated cases to the United States District Court for the

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Southern District of Alabama. On February 11, 2011, the federal district court remanded the consolidated cases back to the trial court.

On August 30, 2011, the trial court, in an effort to move the litigation along, scheduled for October 5, 2011, an evidentiary hearing on the issues of (1) wrongful foreclosure and (2) whether the guarantors had "standing" to challenge the foreclosure process.⁴ The parties had identified those issues to the trial court as being "potentially dispositive or particularly helpful in refining the causes of action" in the consolidated cases. However, the FDIC, on October 5, 2011, again removed the cases to the federal district court. On August 21, 2013, the consolidated cases were once again remanded back to the trial court.

⁴Although the trial court and the parties referred to this issue as an issue of "standing," this Court has explained that "the concept [of standing] appears to have no necessary role to play in respect to private-law actions." Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 41 (Ala. 2013). "We have observed that in such actions 'our courts too often have fallen into the trap of treating as an issue of "standing" that which is merely a failure to state a cognizable cause of action or legal theory'" Ex parte State Farm Fire & Cas. Co., 300 So. 3d 562, 568 (Ala. 2020)(quoting Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216, 1219 (Ala. 2010)).

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On December 19, 2013, the trial court entered an order setting for an evidentiary hearing on June 16, 2014, the counterclaim asserted by the borrowers and the guarantors alleging wrongful foreclosure. The trial court expressly limited the scope of the hearing to the "very narrow issue of the unconscionability of the foreclosure bid figures" made by Vision Bank. On June 5, 2014, the trial court amended its December 19, 2013, order, stating:

"The parties in these actions have divergent views as to what remedies are available should the Court determine the bid prices to be unconscionable. After consulting with the Special Master, who has been supervising discovery leading to the June 16th hearing, the Court is of the opinion that it would be in the best interests of judicial economy and efficiency for the Court to first determine the extent of any remedies available to the Counterclaim Plaintiffs should they meet their burden of proof on the unconscionability issue and whether all Counterclaim Plaintiffs have standing to contest the foreclosure bid prices."

Thus, the trial court continued the evidentiary hearing scheduled for June 16, 2014, and ordered all parties to submit briefs on the issues of what remedies would be available should the trial court determine that the foreclosures were, in fact, wrongful and of whether the guarantors had "standing" to assert a wrongful-foreclosure counterclaim by June 16, 2014.

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On June 16, 2014, SEPH⁵ and FNB submitted motions "for partial summary judgment" as to the issues of what remedies should be available upon a finding of wrongful foreclosure and of whether the guarantors had "standing" to assert a wrongful-foreclosure counterclaim contesting the foreclosure bid prices. SEPH and FNB argued in their motions that, under Alabama law, the only remedy available in a wrongful-foreclosure proceeding based on the inadequacy of bid prices is to set aside the foreclosure. SEPH and FNB further argued that not only is setting aside

⁵Vision Bank became known as SEPH when the two entities merged. On June 10, 2014, SEPH was substituted for Vision Bank as the real party in interest. Subsequently, SEPH assigned to FNB the promissory note and loan agreement associated with the Marine Park loan and the various guaranty agreements associated with that loan. The trial court granted leave to SEPH and FNB to file an amended complaint in order to substitute FNB for SEPH on the counts specifically related to the Marine Park loan. Thus, on March 12, 2015, SEPH and FNB filed a third amended complaint substituting FNB for SEPH on the counts contained in the complaint specifically relating to the Marine Park loan and guaranty agreements. In sum, after the merger of Vision Bank and SEPH and the subsequent assignments by SEPH to FNB, SEPH holds all the promissory notes, loan agreements, mortgages, and guaranty agreements associated with the West parcel, the East parcel, and the North parcel. SEPH also is the current holder of the mortgage on the Marine Park parcel. FNB is the current holder of the promissory note, the loan agreement, and the guaranty agreements associated with the Marine Park parcel.

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the foreclosure the only remedy available under Alabama law, but that Bama Bayou and Marine Park expressly agreed in their mortgage documents that the sole remedy available to them in the event of a wrongful foreclosure was to have the foreclosures set aside and the parties returned to their former positions "as if no such [foreclosure] proceeding had been taken." As for the issue whether the guarantors had "standing" to contest the foreclosures based on the alleged inadequacy of the bid prices, SEPH and FNB argued that, under Alabama law, only Bama Bayou and Marine Park had "standing" to contest the bid prices because, in the guaranty agreements, the guarantors had expressly waived all defenses available to Bama Bayou and Marine Park and all claims regarding the collateral.

On June 16, 2014, the borrowers and the guarantors submitted their brief on the issues of what remedies should be available upon a finding of wrongful foreclosure and of whether the guarantors had "standing" to contest the foreclosures. The borrowers and the guarantors argued that the parcels were not stand-alone, independent parcels but, rather, were inextricably intertwined and interlocked by infrastructure consisting of

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underground water, sewer, power, and gas lines and aboveground streets, bridges, and parking lots, all of which were designed to operate as a single unit. The borrowers and the guarantors contended that each parcel needed access to all the infrastructure -- both above and below ground -- and that no parcel could support development without physically accessing the infrastructure on the other parcels that would have been available to each parcel had Vision Bank not shattered the integrity of the whole unit. The borrowers and the guarantors further argued that Vision Bank's decision to foreclose and bid on the interdependent parcels separately essentially broke up the unit and drove the fair market value of the parcels down because the individual parcels were not as valuable as the whole unit. The borrowers and the guarantors argued that the trial court had the authority to determine whether the method of the foreclosures and the amounts of the bids were unconscionable and then to fashion its own equitable remedy upon a finding of wrongful foreclosure. As for the "standing" issue, the borrowers and the guarantors argued that the guarantors had "standing" to sue Vision Bank alleging wrongful foreclosure because, they said, the guarantors had been injured as the

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result of Vision Bank's tortious misconduct surrounding the foreclosure sale.

On October 5, 2015, the trial court entered an order finding (1) that under both Alabama law and the agreements between the parties the appropriate remedies in these cases would be to judicially set aside the foreclosures and to return the parties to their original positions and rights, as if the foreclosure proceedings had not taken place, and (2) that the guarantors did not have "standing" to assert a counterclaim alleging wrongful foreclosure against Vision Bank because, the court determined, they had no legally protected interest in the properties foreclosed upon by Vision Bank.

Having determined the remedy available upon a finding of wrongful foreclosure, the trial court, on January 6, 2016, entered an order setting the date for an evidentiary hearing on the adequacy of the credit bids made by Vision Bank -- i.e., to determine whether, in fact, the foreclosures had been wrongful. The trial court expressly limited the scope of that hearing "to the very narrow issue of the unconscionability of the foreclosure bid figures, where the [trial court] will be focusing on the

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stated bid amounts and evidence of the values of the properties in question."

Following that evidentiary hearing, the trial court, on October 26, 2016, entered an order that provides, in part:

"After seven years of litigation, extensive briefing, arguments of counsel, and a thorough evidentiary hearing, the Court holds as follows:

"The seminal case setting forth the general rule applicable in this case states:

" 'Where the price realized at the [foreclosure] sale is so inadequate as to shock the conscience, it may itself raise a presumption of fraud, trickery, unfairness, or culpable mismanagement, and therefore be sufficient ground for setting the sale aside.'

"Hayden v. Smith, 216 Ala. 428, [430,] 113 So. 293[, 295] (1927).

"Although both the Lenders and the Borrowers rely on Hayden, each point to a different aspect of the holding, which admittedly appear contradictory. As the Lenders contend, Hayden appears to state that inadequacy of price is not sufficient to set aside the sale unless 'coupled with any other circumstances showing unfairness, misconduct, fraud, or even stupid management, resulting in the sacrifice of the property.' See also CS Assets, LLC v. West Beach LLC, 370 Fed. Appx. 45 (11th Cir. March 16, 2010).

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"However, as the Borrowers assert, the Hayden Court stated it found the foreclosure price 'upon its face so grossly inadequate as to shock the judicial conscience and justify[d] the setting aside of the sale,' giving rise to the assumption that in certain cases the inadequate price itself can be sufficient. Hayden[, 216 Ala. at 430, 113 So.] at 295.

"The Borrowers have the burden of proving by substantial evidence the elements of their [counterclaim].

"In view of the evidence presented, the Court finds the bids on their face so grossly inadequate as to shock the judicial conscience. Further, the Court finds the Borrowers have met any additional burden of showing unfairness, misconduct, fraud, or even 'stupid management.' Lenders contend that they want the opportunity to show there was no misconduct. The burden is on the Borrowers, however, to present substantial evidence of misconduct, not on the Lenders to show there is no misconduct. The record is replete with evidence that would meet the burden of 'any other circumstance' of misconduct coupled with the inadequate foreclosure prices.

"For these reasons, the Court finds the extremely low bids at the foreclosure sale raise the presumption of unconscionableness and the grossly inadequate prices coupled with substantial evidence of misconduct justifies setting aside the foreclosure sale. The Court hereby sets aside the foreclosure sale and declares the foreclosure deeds null, void and of no force and effect."

On March 7, 2017, FNB moved the trial court for a partial summary judgment against some of the Marine Park guarantors on its claim asserted in the third amended complaint alleging breach of the promissory

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note and the guaranty agreements associated with the Marine Park loan, see note 5, supra, seeking an award of principal, interest, late charges, attorney's fees, and collection costs accrued up to the date of any order granting the motion.

On July 10, 2017, the borrowers and the guarantors moved the trial court to enter a partial summary judgment in their favor on SEPH's and FNB's breach-of-contract claims seeking the payment of interest, attorney's fees, and expenses incurred after the foreclosures on March 20, 2009. The borrowers and the guarantors conceded that Bama Bayou and Marine Park were liable for the principal amount of each loan as of March 20, 2009. However, the borrowers and the guarantors contended that, because the trial court's October 26, 2016, order found the foreclosures to be wrongful and set aside the foreclosure deeds as "null, void and of no force and effect," Bama Bayou's and Marine Park's liability should be limited to principal amounts owed on the loans as of March 20, 2009, and that they should not be held liable for any interest, late charges, attorney's fees, or collection costs incurred after that date. The borrowers and the guarantors argued that "[p]rinciples of equity underlie the [trial

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court's] order that set aside the foreclosures [and that] those same principles must now operate to shield the borrowers and guarantors from having [SEPH's and FNB's] post foreclosure interest, costs, and expenses visited upon them as a consequence of the wrongful foreclosures." The borrowers and the guarantors specifically sought a judgment dismissing all claims against the guarantors and limiting the liability of Bama Bayou and Marine Park to the principal amounts owed on the loans as of March 20, 2009. Further, the borrowers and the guarantors moved the trial court for a judgment requiring SEPH and FNB to pay their attorney's fees and litigation expenses incurred after the March 20, 2009, foreclosures.

On August 15, 2017, SEPH moved the trial court for a partial summary judgment as to its claims against Bama Bayou and the Bama Bayou guarantors alleging a breach of the promissory notes and the guaranty agreements associated with the West loan, the East loan, and the North loan, see note 5, supra, and seeking an award of principal, interest, late charges, attorney's fees, and collection costs accrued up to the date of any order granting the motion. SEPH also sought a summary judgment as to all of the borrowers' and the guarantors' counterclaims

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against it, including the claims alleging breach of a promise to provide additional financing for the project and the violation of the Equal Credit Opportunity Act.

On September 1, 2017, SEPH filed its opposition to the borrowers' and the guarantors' motion for a partial summary judgment seeking relief from liability for interest and litigation expenses incurred following the wrongful foreclosures and seeking reimbursement for their attorney's fees and litigation expenses. SEPH noted that the trial court had already determined in its October 5, 2015, order that the sole remedy available for a wrongful foreclosure was to set the foreclosure aside. SEPH argued that Vision Bank, its predecessor, and Bama Bayou and Marine Park had agreed in the mortgages associated with the loans that if a foreclosure was set aside, the parties would be restored to their former positions under the mortgages as if the foreclosure had not occurred. SEPH further argued that the mortgages also clarified that all rights, powers, and remedies of the lender would continue if a foreclosure was set aside "as if no such proceeding had been taken." SEPH also argued that the law in Alabama is consistent with the parties' agreements contained in the mortgage

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documents, asserting that Alabama law provides that setting aside a foreclosure -- not the release from, or reduction of, any indebtedness on the loans -- is the single appropriate remedy in a wrongful-foreclosure proceeding.

Regarding the guarantors' claim that they were free from liability, SEPH argued that the guarantors had agreed in their guaranty agreements that they had no interest in the collateral; that foreclosure was not a condition of recovery against them; that they had waived all defenses available to Bama Bayou and Marine Park; and that they had agreed to be liable for the debts until they were paid.

On August 31, 2018, the trial court entered an order granting in part FNB's motion for a partial summary judgment against some of the Marine Park guarantors on its claim asserting a breach of the promissory note and guaranty agreements; granting in part the borrowers' and guarantors' motion for a partial summary judgment in their favor as to SEPH's and FNB's breach-of-contract claims seeking the payment of interest, late charges, attorney's fees, and collection costs incurred after the foreclosures on March 20, 2009; denying the borrowers' and the

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guarantors' motion seeking payment of their own attorney's fees and litigation expenses; granting in part SEPH's motion for a partial summary judgment as to its claims against Bama Bayou and the Bama Bayou guarantors alleging a breach of the promissory notes and guaranty agreements associated with the West loan, the East loan, and the North loan; granting SEPH's motion for a summary judgment as to the counterclaim asserted against SEPH alleging that it had agreed to provide further financing for the Bama Bayou project; and denying SEPH's motion for a summary judgment as to the counterclaims asserting against SEPH a violation of the Equal Credit Opportunity Act.⁶

Regarding the wrongful-foreclosure issue, the trial court stated:

"On October 5, 2015, this Court addressed the remedies available to the parties, noting each of the mortgages executed by the Borrowers contains the following language in the following provision concerning the parties' agreement in the event a foreclosure is 'determined adversely to Lender':

" 'Discontinuance of Proceedings - Position of Parties, Restored. In case the Lender shall have

⁶The trial court also disposed of a number of the other counterclaims, third-party claims, affirmative defenses, and motions not directly relevant to these appeals.

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proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Lender, then and in every such case the Borrower and the Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of the Lender shall continue as if no such proceeding had been taken.'

"The Court held then that the only remedy available to the Borrowers and the Guarantors was for the Court to judicially set aside the foreclosure if the Court should determine a wrongful foreclosure had occurred. The Court also held the Guarantors did not have standing to assert an affirmative cause of action for wrongful foreclosure, although the Court did recognize the Guarantors could raise affirmative defenses.

"On October 26, 2016, the Court ruled on the issue of wrongful foreclosure, holding as follows:

" '[T]he Court finds the extremely low bids at the foreclosure sale raise the presumption of unconscionableness and the grossly inadequate prices coupled with substantial evidence of misconduct justifies setting aside the foreclosure sale.'

"Because the foreclosure was 'determined adversely to the Lender,' the parties' contracts provide the Borrower and Lender 'shall be restored to their former positions and rights ... as if no such proceeding had been taken.'

"....

"Turning to the issue of the affirmative defense based on wrongful foreclosure, the Court invokes its equity powers in determining the appropriate remedy. When a foreclosure is set aside, the mortgagor's equity of redemption is restored. See, e.g., Cotton v. First Nat. Bank, [228 Ala. 311,] 153 So. 225 (Ala. 1934); Murphy v. May, [243 Ala. 94,] 8 So. 2d 442 (Ala. 1942). During the period after the voided foreclosure sale, the mortgagee is regarded as a mortgagee in possession before foreclosure, and an accounting is to be performed for this period to determine the amount of the debt. See Smith v. Stringer, [220 Ala. 353,] 125 So. 226 (Ala. 1929); and De Merville v. Merchants & Farmers Bank of Greene County, [233 Ala. 204,] 170 So. 756 (Ala. 1936). During this period, interest continues to accrue on the debt. See, e.g., Smith v. Stringer, [228 Ala. 630,] 155 So. 85 (Ala. 1934); De Merville v. Merchants & Farmers Bank of Greene County, [237 Ala. 347,] 186 So. 704 (Ala. 1939). The purpose of the accounting is to determine the amount of the debt so the mortgagor can exercise its equity of redemption and re-acquire title to its property. De Merville, [233 Ala. 204,] 170 So. 756. This is the remedy afforded the mortgagor on a voided foreclosure sale even when there has been a finding of misconduct by the mortgagee in connection with the foreclosure. See, e.g., De Merville, [233 Ala. 204,] 170 So. 756; and De Merville, [237 Ala. 347,] 186 So. 704.

"Under this body of law, interest ordinarily would accrue on the debt from the time of the wrongful foreclosure to date because there is no doubt the borrowers had the use of the money at issue. If the bids, however, on the foreclosed property had been reasonable but still created a deficiency owed by the borrowers, then the interest the borrowers would have paid on any deficiency amount would be substantially reduced. Moreover, much of the delay in this litigation may be laid at

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the feet of the Lenders and their respective backing entities. Therefore, based upon consideration and balancing of the relative equities involved, the Court orders an accounting of the debt for purposes of the equitable right of redemption in the amount consisting of:

"(1) principal amounts on each loan due on the date of foreclosure, March 20, 2009;

"(2) interest and late charges on the principal amount from the date the notes were last timely paid through March 20, 2009;

"(3) interest only on the amount determined in (2) above from March 20, 2009 until the date of the remand from the ... removal to federal court, August 21, 2013.

"Judgment is entered for the Borrowers and the Guarantors on the Plaintiff's claims for late charges after the date of foreclosure, interest after August 21, 2013, attorneys' fees, litigation expenses, collection expenses, property preservation expenses, and other costs otherwise claimed.

"Judgment is entered against the Borrowers and the Guarantors on their claims for attorneys' fees and expenses.

"The Plaintiffs' requests for summary judgment as to the Guarantors is premature in the face of the equities employed by the Court in this case and so is denied."

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The trial court further ordered the parties to confer with each other and to file a joint status report as to any outstanding issues that would prevent the order from being a final judgment in the cases.

On September 27, 2018, the parties submitted the joint status report indicating, among other things, that FNB's breach-of-contract claim against Marine Park was still outstanding, because FNB had not moved the trial court for a summary judgment as to that claim; that FNB's breach-of-contract claim against the Marine Park guarantors was still outstanding, because FNB had moved the trial court for a summary judgment as to only some of the Marine Park guarantors; that SEPH's breach-of-contract claims against Bama Bayou were still outstanding, because there was no monetary value attached to the judgment in favor of SEPH on those claims; that SEPH's breach-of-contract claims against the Bama Bayou guarantors was still outstanding;⁷ that SEPH's claim for

⁷In its August 31, 2018, order, the trial court initially granted SEPH's motion for a partial summary judgment as to its breach-of-contract claims against the Bama Bayou guarantors. However, the order also states that the "requests for summary judgment as to the Guarantors [was] premature in the face of the equities employed by the Court in this case and so is denied." SEPH contends that, because there was no

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an inspection and accounting of records and payments made by the borrowers and the guarantors remained outstanding, because SEPH had not sought a summary judgment as to that claim; that SEPH's fraud claims remained outstanding, because SEPH had not sought a summary judgment as to those claims; and that the counterclaim asserting against SEPH a violation of the Equal Credit Opportunity Act remained outstanding.

On April 23, 2019, the trial court entered an order empowering a special master with the authority to retain an expert to prepare an accounting within the parameters set forth by the trial court in its August 31, 2018, order to establish debt figures for equitable-right-of-redemption purposes. On May 29, 2019, the special master submitted its recommendation as to the calculation of Bama Bayou's and Marine Park's

monetary judgment entered against the guarantors, its breach-of-contract claims against the Bama Bayou guarantors remain outstanding. The guarantors contend that the trial court denied the motions against them as being premature. It is clear that, regardless of the reason, those claims remained outstanding.

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equitable rights of redemption based on the ordered accounting. The special master's recommendation provided as follows:

"1. A listing of the subject 4 loans with the principal balances as of the last time a principal payment was made is: [West loan] - \$6,000,000.00; [East loan] - \$5,000,000.00; [North loan] - \$3,950,495.29; and [Marine Park loan] - \$4,976,422.62.

"2. Interest and Late Charges accrued from the date of last payment through March 20, 2009 for each of the loans in the order set out above is: \$140,933.34; \$144,544.45; \$115,332.41; and \$178,806.33.

"3. The Special Master directed Mr. Hall [the retained expert] to determine what the default interest rate on each of the 4 loans was and to then use that rate to come up with a daily interest amount for each loan. Further, the Special Master directed Mr. Hall to apply that daily rate to principal balances and to calculate it for the time from March 20, 2009 through August 21, 2013 as previously directed by this Court in the order of August 31, 2018.

"4. The additional interest amounts for each of the loans in the order set out above is: \$1,725,611.35; \$1,769,862.35; \$1,398,363.90; and \$2,201,891.00. See, Hall affidavit.

"5. Accordingly, the equitable right of redemption figure for each of said loans is: [West loan] - \$7,866,544.69; [East loan] - \$6,914,406.80; [North loan] - \$5,464,191.60; and [Marine Park loan] - \$7,357,119.95."

On July 8, 2019, the trial court entered an order adopting the special master's recommendation adjudging the equitable-right-of-redemption

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figure for each loan to be: \$7,866,544.69 for the West loan; \$6,914,406.80 for the East loan; \$5,464,191.60 for the North loan; and \$7,357,119.95 for the Marine Park loan. The trial court further ordered the parties to file dispositive motions as to the remaining issues in the action, as identified in the joint status report.

On August 6, 2019, SEPH, in separate motions, (1) moved the trial court for a summary judgment as to all of its remaining claims -- except its fraud and accounting-and-inspection claims -- asserted against the borrowers and the guarantors and as to all remaining counterclaims asserted against it by the borrowers and the guarantors and (2) moved the trial court to dismiss its accounting-and-inspection claim asserted against the borrowers and the guarantors. On October 29, 2019, SEPH moved the trial court to dismiss its fraud claims asserted against the borrowers and the guarantors.

On August 13, 2019, FNB moved the trial court for a summary judgment on its claims asserting a breach of the promissory note and guaranty agreements against Marine Park and the remaining Marine Park guarantors. FNB also moved the trial court for a summary judgment

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as to any remaining counterclaims asserted against it by Marine Park and the Marine Park guarantors.

On November 20, 2019, the trial court entered a final judgment disposing of all remaining motions and claims pending in SEPH's case.⁸ The trial court's judgment dismissed SEPH's claim for an inspection and accounting of records; dismissed SEPH's fraud claims; and entered a summary judgment in favor of SEPH on the counterclaim asserting a violation of the Equal Credit Opportunity Act. The trial court further entered a judgment in favor of SEPH on its breach-of-contract claims against Bama Bayou in the following amounts: \$7,866,544.69 on the West loan; \$6,914,406.80 on the East loan; and \$5,464,191.60 on the North loan. The trial court also entered a judgment in favor of SEPH on its breach-of-contract claims against the Bama Bayou guarantors, in certain specified

⁸On October 1, 2019, SEPH moved the trial court, pursuant to Rule 21, Ala. R. Civ. P., to sever, as a separate action, all claims brought by SEPH and the Bank of Franklin against each other. The trial court granted the motion to sever those claims as a separate action. The trial court also disposed of all remaining claims as they pertained to other parties not specifically discussed in this opinion, because they have no direct relevance to the issues raised in these appeals.

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amounts, holding each Bama Bayou guarantor jointly and severally liable with Bama Bayou and each other Bama Bayou guarantor, up to the specified amount of principal and interest owed on each note.⁹ Significant for purposes of these appeals, the amounts awarded SEPH on its breach-of-contract claims were consistent with the trial court's August 31, 2018, order and, thus, included interest only up to August 21, 2013, and did not include any late charges after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses.

On November 20, 2019, the trial court also entered a final judgment in favor of FNB on its breach-of-contract claims against Marine Park and the Marine Park guarantors. The trial court awarded FNB \$7,357,119.95 on its breach-of-contract claim against Marine Park. The trial court also awarded FNB certain specified amounts against each of the 16 Marine Park guarantors on its breach-of-contract claim against the Marine Park guarantors, holding each Marine Park guarantor jointly and severally

⁹There are 23 Bama Bayou guarantors. This Court has not set forth the specific dollar amount of the monetary award entered against each guarantor. Suffice it to say, the awards were substantial, ranging from \$1,793,596.31 to \$14,544,347.80.

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liable with Marine Park, and each other, up to the specified amount of principal and interest owed under the note on the Marine Park loan. As was the case with the awards in SEPH's favor, the amounts awarded FNB on its breach-of-contract claims were consistent with the trial court's August 31, 2018, order and, thus, included interest only up to August 21, 2013, and did not include any late charges after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses.

SEPH and FNB each timely appealed, challenging the trial court's damages awards on their breach-of-contract claims. See Ex parte Weyerhaeuser, 702 So. 2d at 1228. The appeals were consolidated by this Court.

Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004).

Discussion

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SEPH and FNB appeal from the trial court's final judgments of November 20, 2019, awarding them damages on their breach-of-contract claims against the borrowers and the guarantors that, pursuant to the trial court's August 31, 2018, order, did not include interest accrued after August 21, 2013, late charges accrued after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses.¹⁰

On October 5, 2015, the trial court entered an order initially finding that, under both Alabama law and the agreements between the parties in these cases, the appropriate remedy upon a finding of wrongful foreclosure was to judicially set aside the foreclosures and to return the parties to their original positions and rights, as if the foreclosure proceedings had not taken place. Following an evidentiary hearing, the trial court, on October 26, 2016, entered an order finding that the foreclosures were wrongful and setting them aside.

¹⁰The trial court gave no explanation as to why it determined that SEPH and FNB could not recover interest accrued after August 21, 2013, other than to note that that date was the date the cases were remanded to the trial court following their removal to federal court.

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On August 31, 2018, the trial court entered an order expressly invoking its equitable powers to fashion a remedy in favor of the borrowers and the guarantors that prohibited SEPH and FNB from recovering interest accrued after August 21, 2013, late charges accrued after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses. That order is inconsistent with the trial court's October 5, 2015, order, in which it determined that the sole remedy available upon the finding of wrongful foreclosure was to judicially set aside the foreclosures and to return the parties to their original positions and rights, as if the foreclosure proceedings had not taken place.

SEPH and FNB argue that, in its October 5, 2015, order, the trial court determined the sole remedy available pursuant to both the parties' agreements and Alabama law and that the trial court erred in ignoring the parties' unambiguous agreements and the law of this state to fashion its own equitable remedy to relieve the borrowers and the guarantors of their obligations to pay interest accrued after August 21, 2013, late charges accrued after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses. SEPH and FNB expressly

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state that they are not seeking to reinstate the foreclosures by having the trial court's order setting aside the foreclosures reversed.

The borrowers and the guarantors argue on appeal that it would be inequitable for them to pay interest accrued after August 21, 2013, late charges accrued after the date of foreclosure, collection costs, and property-preservation expenses after Vision Bank had wrongfully foreclosed on the loans by submitting unconscionably low credit bids. The borrowers and the guarantors further argue that, because equitable principles provided the basis for setting aside of the wrongful foreclosures, the trial court had the authority to fashion whatever additional equitable relief it deemed necessary.

I. The Loan Documents

The promissory notes executed in relation to each of the loans made to Bama Bayou and Marine Park required Bama Bayou and Marine Park to repay the principal amount of the loans with interest. The promissory notes also provided that Bama Bayou and Marine Park were obligated to pay reasonable attorney's fee and costs incurred by the lender in collecting on the promissory notes in the event of a default. The promissory notes

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were secured both by the guaranty agreements and by the mortgages executed in conjunction with the promissory notes.

The mortgages also required Bama Bayou and Marine Park to repay the principal amount of the loans with interest and all reasonable attorney's fees and costs incurred by the lender in the event of a foreclosure of any of the mortgages. The mortgages further provided that Bama Bayou and Marine Park were responsible for the payment of all property-preservation expenses, including taxes, insurance premiums, the costs of maintenance and repairs, the costs of security and protection, liens, utility charges, and assessments.

Section 2.14 of the mortgages expressly sets forth the remedy to be applied if a foreclosure is found to be wrongful:

"Discontinuance of Proceedings - Position of parties, Restored.
In case the Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Lender, then and in every such case the Borrower and the Lender shall be restored to their former positions and rights hereunder, and all rights powers and remedies of the Lender shall continue as if no such proceeding had been taken."

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(Emphasis added.)

Section 2.15 of the mortgages further emphasizes that each of the lender's rights, powers, and remedies under the promissory notes, mortgages, and loan documents are cumulative to each other and that the lender is entitled to pursue all of its available remedies under the promissory notes, mortgages, and loan documents. Section 2.15 of the mortgage provides:

"Remedies Cumulative. No right, power, or remedy conferred upon or reserved to the Lender by this Mortgage is intended to be exclusive of any other right, power, or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power, and remedy given hereunder, or under the Note, or under the Loan Documents, or now or hereafter existing at law or in equity or by statute."

(Emphasis added.)

This Court has stated:

" A promissory note is a form of contract; therefore, it must be construed under general contract principles. See 11 Am. Jur. 2d Bills and Notes § 2 (1997) ('Bills and notes ... are contracts; accordingly, the fundamental rules governing contract law are applicable to the determination of the legal questions which arise over such instruments.' (footnotes omitted)) "General contract law requires a court to enforce an unambiguous, lawful contract, as it is written. ... "'

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Dawkins v. Walker, 794 So. 2d 333, 339 (Ala. 2001) (quoting Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 35-36 (Ala. 1998))."

Bockman v. WCH, L.L.C., 943 So. 2d 789, 795 (Ala. 2006). Further, "[a] mortgage agreement is construed like any other contract." Tennant v. Chase Home Fin., LLC, 187 So. 3d 117, 1181 (Ala. Civ. App. 2015). "Where a contract, by its terms, is plain and free from ambiguity, there is no room for construction and the contract must be enforced as written." Austin Apparel, Inc. v. Bank of Prattville, 872 So. 2d 158, 165 (Ala. Civ. App. 2003).

Section 2.14 of the mortgages operates to govern the rights and responsibilities of the parties if a wrongful foreclosure is set aside, and it requires that, in every such case determined adversely to the lender (i.e., SEPH and FNB), both the borrower (i.e., Bama Bayou and Marine Park) and the lender "shall be restored to their former positions and rights" under the mortgages and "all rights, powers, and remedies of the Lender shall continue as if no such proceeding had been taken." Section 2.14 is unambiguous and leaves no room for the application of other remedies, whether equitable or not, in the case of a wrongful foreclosure. The

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"rights, powers, remedies" of the lender include its right to accrued interest, late charges, attorney's fees, collection costs, and property-preservation expenses as allowed by the promissory notes, the mortgages, and other loan documents. As stated above, the trial court expressly recognized in its October 5, 2015, order that the mortgages at issue "expressly require" that the foreclosures be set aside as the sole remedy for a wrongful foreclosure.

Vision Bank and Bama Bayou and Marine Park decided in the mortgages that the sole remedy for a wrongful foreclosure was to set aside the foreclosure and to return the parties to their former positions and rights under the mortgages and that all rights, powers, and remedies of Vision Bank would continue as if no foreclosure proceeding had taken place, including the right to recover accrued interest, late charges, attorney's fees, collection costs, and property-preservation expenses. Those provisions are clear and unambiguous. Thus, the mortgages must be enforced as written. Bockman, supra, Austin Apparel, supra. The plain language of the mortgages and the promissory notes prohibit the trial court's ruling limiting the amount of interest and late charges SEPH and

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FNB could recover and disallowing the recovery of attorney's fees, collection costs, and property-preservation expenses. Accordingly, we conclude that the trial court erred in refusing to enforce the unambiguous provisions of the promissory notes and mortgages by entering an award in favor of SEPH and FNB on their breach-of-contract claims that limited their damages awards by including interest accruing only up to August 21, 2013, by including late charges accruing only up to the date of foreclosure, and by not including attorney's fees, collection costs, and property-preservation expenses.

II. Alabama Law

SEPH and FNB contend that the trial court's ruling that a wrongful foreclosure justifies a release from part of the indebtedness incurred by Bama Bayou and Marine Park is also inconsistent with the law of this state. They contend that the law of this state is in fact consistent with the contractual provisions contained in the mortgages and the promissory notes.

In Alabama, the appropriate remedy for a wrongful foreclosure, based upon a finding of an inadequate purchase price at the foreclosure

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sale, is to have the foreclosure set aside. Breen v. Baldwin Cnty. Fed. Sav. Bank, 567 So. 2d 1329, 1333 (Ala. 1990) (citing Hayden v. Smith, 216 Ala. 428, 113 So. 293 (1927)). When a claim for a wrongful foreclosure has been made, " "a court of equity will enjoin a sale or will set it aside if made." " "Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168, 171 (Ala. 2012) (quoting Paint Rock Props. v. Shewmake, 393 So. 2d 982, 984 (Ala. 1981), quoting in turn Abel v. Fricks, 219 Ala. 619, 621, 123 So. 17, 18 (1929))(emphasis added). See also First Nat'l Bank of Opp v. Wise, 235 Ala. 124, 126, 177 So. 636, 638 (1937) (holding that, in a wrongful-foreclosure case, the party contesting the foreclosure, if successful, is "entitled to have the sale set aside and annulled"); Ross v. Rogers, 25 So. 3d 1160, 1168 n. 9 (Ala. Civ. App. 2009) ("[W]e are not at all convinced that, even if the amount Ross paid for the Madison County property created 'a presumption of fraud, unfairness, or culpable mismanagement,' ... the appropriate remedy would have been to judicially declare both promissory notes satisfied. The proper remedy appears to be the setting aside of the foreclosure sale"), and Harmon v. Dothan Nat'l Bank, 186 Ala. 360, 378, 64 So. 621, 627 (1914) (Mayfield, J., dissenting) ("A mere pretext, a mere sham sale, where the

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mortgagee both sells and buys (even under his authority so to do) for a mere song, and for the sole and real purpose of depriving the mortgagor of his right to redeem, will not have the desired effect of a real and bona fide foreclosure sale. Courts of law, as well as courts of equity, will treat such pretended sales as they ought to be treated -- as if they had never occurred -- and treat the mortgagee as in possession without foreclosure."). The trial court initially recognized in its October 5, 2015, order that courts of this state have consistently held that setting aside the foreclosure sale was the single appropriate remedy in a wrongful-foreclosure proceeding.

Once a foreclosure has been set aside, the law in Alabama restores the parties to their former positions and rights under the mortgage. This Court has explained:

"Alabama classifies itself as a 'title' state with regard to mortgages. Execution of a mortgage passes legal title to the mortgagee. Lloyd's of London v. Fidelity Securities Corporation, 39 Ala. App. 596, 105 So. 2d 728 (1958); Moorer v. Tensaw Land & Timber Co., 246 Ala. 223, 20 So. 2d 105 (1944); Jones v. Butler, 286 Ala. 69, 237 So. 2d 460 (1970). The mortgagor is left with an equity of redemption, but upon payment of the debt, legal title reverts in the mortgagor. § 35-10-26, Code 1975. The equity of redemption may be conveyed by the mortgagor, and his grantee secures only an equity of redemption. McDuffie v. Faulk, 214 Ala. 221, 107 So.

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61 (1926). The payment of a mortgage debt by the purchaser of the equity of redemption invests such purchaser with the legal title. Denman v. Payne, 152 Ala. 342, 44 So. 635 (1907). The equity of redemption in either case, however, is extinguished by a valid foreclosure sale, and the mortgagor or his vendee is left only with the statutory right of redemption. ... McDuffie, supra."

Trauner v. Lowrey, 369 So. 2d 531, 534 (Ala. 1979)(emphasis added). The important distinction to be made is that, before a foreclosure, the mortgagor possesses the equity of redemption and that, after a foreclosure sale, the mortgagor has the statutory right of redemption. See also Chess v. Burt, 87 So. 3d 1201, 1207 (Ala. 2011) (holding that foreclosure extinguished the equity of redemption and actuated the statutory right of redemption); and Cotton v. First Nat'l Bank, 228 Ala. 311, 315, 153 So. 225, 229 (1934) (holding that the "foreclosure sale should be set aside and vacated and the foreclosure deed canceled, leaving the complainants the right to enforce the equity of redemption"). Thus, when the trial court set aside the foreclosures, Bama Bayou and Marine Park, as the mortgagors, had their equity of redemption restored, giving them the opportunity to satisfy the indebtedness and to have title to the properties vested in them. Trauner, 369 So. 2d at 534.

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As the law relates to a mortgagee's possession of property between the date of foreclosure and the date a trial court sets aside a foreclosure, the mortgagee may be liable to a mortgagor for income earned on, and waste to, the property during that period.

"It may be well at this point to say that the law is established that one in possession of land as a purchaser at a foreclosure sale, made in strict compliance with the terms of the mortgage, is not a mortgagee in possession, but the absolute owner not chargeable with rent or for waste; but a mortgagee in possession before foreclosure, or after an irregular foreclosure, may be liable for rent and waste, and the purchase by the mortgagee, unless authorized by the mortgage, is such an irregularity as to render him liable for rent and waste."

Hale v. Kinnaird, 200 Ala. 596, 600, 76 So. 954, 958 (1917)(emphasis added) . Although the mortgagee in possession of property following a wrongful foreclosure is liable for rents and waste, the mortgagee is also entitled to receive interest on the mortgage debt -- because the interest continues to accrue on the debt -- during the period between the foreclosure and the time when the mortgage debt is adjudicated. See Smith v. Stringer, 228 Ala. 630, 155 So. 85 (1934) ("Smith II"), De Menville

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v. Merchants & Farmers Bank of Greene Cnty., 237 Ala. 347, 186 So. 704 (1939).

In Smith v. Stringer, 220 Ala. 353, 355, 125 So. 226, 227 (1929) ("Smith I"), the plaintiff brought a claim seeking to have the foreclosure of certain real property set aside as invalid, to enforce her equity of redemption, and for an accounting. The trial court determined that the foreclosure, which occurred in August 1925, was invalid and set aside the foreclosure. This Court upheld the trial court's order setting aside the foreclosure. This Court further determined that the defendant mortgagee was considered merely a mortgagee in possession and, as such, was accountable to the plaintiff for certain rents or profits realized during his possession of the property after foreclosure, as well as for any waste or mismanagement of the property caused by his failure to use reasonable care and diligence in dealing with the property. This Court reversed the portion of the trial court's judgment basing its accounting on only rents and profits received by the defendant. Smith I.

On remand, the matter was retried, seeking a full accounting of the mortgage debt by including payments for taxes, repairs, and insurance for

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the property paid by the defendant while in possession of the property but deducting amounts for rents received and for and any waste on the part of the defendant while in possession of the property. In reaching its determination as to the amount of the mortgage debt, the trial court attributed \$375 to waste on the part of the defendant, and the defendant appealed. Smith II.

On appeal, this Court determined that the \$375 attributed by the trial court as waste was too high and lowered that amount to \$50. This Court then determined the mortgage debt by factoring in, among other things, the reduced amount for waste and also eight years of accrued interest from the time of the foreclosure in 1925.¹¹ This Court explained:

¹¹It is not entirely clear from the decisions in Smith I and Smith II as to the event that occurred in 1933 that prompted this Court to determine that date to be the cutoff point for the accrual of interest; however, it is safe to assume that the prompting event was the entry of the trial court's judgment from which the appeal was taken in Smith II. What is abundantly clear from Smith II is this Court's determination that interest continued to accrue on the mortgage debt through the entire period of time following the foreclosure of the mortgage up until when the mortgage debt was finally adjudicated.

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"Complainant purchased the property for \$325, \$25 cash and assumption of the mortgage \$300, prior to the entry of the mortgagee, or any disturbance of the grapevines. ...

"....

"... [U]pon a careful review and consideration of the evidence, taken before and after the former appeal, we conclude the court greatly erred in the allowance for waste. It should be and is here reduced to the sum of \$50, a sum ample, we think, to cover any influence this vineyard had on the real value of the property.

"This, with interest for eight years, \$32, added to the balance found on rent account, \$73.15, makes aggregate credits on the mortgage debt as of the date of the decree, July 31, 1933, the sum of \$155.15.

"The mortgage debt, with interest to same date [1925-1933] was \$486.

"A decree will be here rendered ascertaining and decreeing a balance due on the mortgage debt of \$330.85, with interest from July 31, 1933."

Smith II, 228 Ala. at 632, 155 So. at 86 (emphasis added). See also De Merville, 237 Ala. 347, 186 So. 704 (affirming the award of accrued interest from the time of foreclosure in January 1932 through the date of final adjudication of the mortgage debt in June 1937 and determining that a

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mortgagee in possession is entitled to property-preservation expenses such as taxes, insurance, and repairs).

Based on the foregoing, we conclude that the appropriate remedy to be applied upon the finding of a wrongful foreclosure is to set aside the foreclosure and that the trial court erred by limiting SEPH's and FNB's damages on their breach-of-contract claims by allowing postforeclosure interest only from March 20, 2009, until August 21, 2013, and by not allowing their recovery of property-preservation expenses.

III. The Guarantors

As stated above, the trial court awarded SEPH and FNB certain specified amounts against each of the Bama Bayou guarantors and the Marine Park guarantors on their breach-of-contract claims and held each Bama Bayou guarantor and Marine Park guarantor jointly and severally liable with either Bama Bayou or Marine Park, up to the specified amount of principal and interest owed under each of the promissory notes. The amounts awarded SEPH and FNB were consistent with the trial court's August 31, 2018, order and included interest only up to August 21, 2013,

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and did not include any late charges after the date of foreclosure, attorney's fees, collection costs, and property-preservation expenses.

Pursuant to Section 1 of the guaranty agreements, the guarantors "unconditionally guarantee[d] and promise[d] to pay" any and all indebtedness of Bama Bayou or Marine Park arising under the promissory notes and loan agreements, "including principal, interest, costs of collection, and attorney's fees." Section 14 of the guaranty agreements limits the guarantors' liability to (1) an amount equal to a specified portion of the principal; (2) 100% of all interest accrued or accruing on the loan; (3) 100% of all costs and expenses of collection, including a reasonable attorney's fees, relating to the enforcement of the guaranty agreements; and (4) 100% of all other costs and expenses of collection, including a reasonable attorney's fees, relating to all principal, interest, and other charges under the promissory notes and/or relating to any other indebtedness. Further, although the guaranty agreements obligate the guarantors to pay any and all indebtedness of Bama Bayou or Marine Park arising under the promissory notes and loan agreements, "including

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principal, interest, costs of collection, and attorney's fees," the guarantors are not obligated to pay property-preservation expenses.

" 'Rules governing the interpretation and construction of contracts are applicable in resolving a question as to the interpretation or construction of a guaranty contract.' Government Street Lumber Co. v. AmSouth Bank, N.A., 553 So. 2d 68, 75 (Ala. 1989)." Barnett Millworks, Inc. v. Guthrie, 974 So. 2d 952, 954 (Ala. 2007). " ' "General contract law requires a court to enforce an unambiguous, lawful contract, as it is written." ' " Bockman, 943 So. 2d at 795 (quoting other cases). The guaranty agreements are plain and unambiguous and must be enforced as written.

The guarantors have expressly "guaranteed and promised" to pay unconditionally any and all indebtedness of Bama Bayou or Marine Park arising under the promissory notes and loan agreements, "including principal, interest, costs of collection, and attorney's fees." Because we have determined that the trial court erred in entering awards in favor of SEPH and FNB that did not include interest accrued after August 21, 2013, late charges accrued after the date of foreclosure, attorney's fees,

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and collection costs, we also hold that the awards entered in favor of SEPH and FNB against the Bama Bayou guarantors and the Marine Park guarantors that likewise did not include interest accrued after August 21, 2013, and the aforementioned fees and expenses is in error.

Conclusion

We reverse the trial court's judgments entered in these consolidated cases and remand the cases for a determination consistent with this opinion regarding the appropriate damages awards on SEPH's and FNB's breach-of-contract claims. Such awards should account for all accrued interest, late charges, attorney's fees, collection costs, and property-preservation expenses owed to SEPH and FNB.¹²

1190205 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

1190251 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

¹²The borrowers and the guarantors ask this Court to remand the cases with instructions to the trial court to clarify or resolve the inconsistencies in its orders. "[T]he law of Alabama is well-settled on this point. In the absence of taking an appeal, an appellee may not cross-assign as error any ruling of the trial court adverse to appellee." McMillan, Ltd. v. Warrior Drilling & Eng'g Co., 512 So. 2d 14, 24 (Ala. 1986). The borrowers and the guarantors have not filed cross-appeals in these cases. Thus, this Court cannot consider this request.

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Shaw, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Parker, C.J., dissents.

Stewart, J., recuses herself.