IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 30, 1999

Cecil Crowson, Jr.
Appellate Court Clerk
AT KNOXVILLE

BEAL BANK, S.S.B.,) C/A NO. 03A01-9902-CH-00041
)
Plaintiff-Appellant,)
)
)
)
v.)
)
)
)
RBM COMPANY, a Tennessee)
general partnership, d/b/a) APPEAL AS OF RIGHT FROM THE
Webster Enterprises, H.A.) HAMILTON COUNTY CHANCERY COURT
(“BAM”) WEBSTER, W. MICHAEL)
WEBSTER and RICHARD J. WEBSTER,)
)
Defendants,)
)
and)
)
)
ROBERT F. HEFFERNAN AND J.)
ROGER HAMMOND,)
) HONORABLE W. FRANK
BROWN, III,
Defendants-Appellees.) CHANCELLOR

For Appellant

JAMES R. KELLEY
MARC T. McNAMEE
JOHN M. PRICE
Neal & Harwell, PLC
Napolitan
Nashville, Tennessee

For Appellee Heffernan

ALAN B. EASTERLY
F. SCOTT LEROY
GARY MASSEY, JR.
Leitner, Williams, Dooley &
Chattanooga, Tennessee

For Appellee Hammond

C. CREWS TOWNSEND
ALAN D. HALL
Miller & Martin
Chattanooga, Tennessee

PETER B. McGLYNN
Bernkopf, Goodman &
Baseman LLP
Boston, Massachusetts

OPINION

AFFIRMED AND REMANDED
Susano, J.

This case traces its roots to a 1989 bank loan made in the state of Georgia by The Citizens and Southern National Bank ("C&S Bank") to RBM Company ("RBM"). The loan was evidenced by a promissory note ("the 1989 note") and was accompanied by the guaranties of the defendants H.A. ("Bam") Webster, W. Michael Webster, Richard J. Webster (the three Websters being hereinafter collectively referred to as "the Websters"), Robert F. Heffernan ("Heffernan"), and J. Roger Hammond ("Hammond"). After defaulting on the note, RBM filed a petition in bankruptcy in 1992. As a part of RBM's court-approved reorganization plan, three new promissory notes ("the 1993 notes") were executed by RBM to replace the 1989 note. In 1997, RBM again defaulted, this time on the 1993 notes, and the plaintiff, Beal Bank, S.S.B. ("Beal Bank"), as successor in interest to the original lender, brought this action seeking to recover on these instruments. The trial court granted Beal Bank summary judgment as to the Websters in their capacities as general partners of RBM; but it determined that Heffernan and Hammond were entitled to summary judgment on their motion, and dismissed Beal Bank's complaint as to them. Beal Bank appeals, raising three issues for our consideration:

1. Did the trial court err in finding that the "bankruptcy" notes materially modified the debt

obligation, thereby discharging the guaranties of Heffernan and Hammond under Georgia law?

2. Did the trial court err in finding that, under Georgia law, the guaranties required the holder of the notes to notify Heffernan and Hammond of RBM's default?

3. Did the trial court err in finding that under Tennessee law the statute of limitations barred Beal Bank's claims against Heffernan and Hammond?

I.

RBM is a Tennessee general partnership that previously owned and operated eight motels in Tennessee and Alabama. Its principal place of business is in Maury County. The Websters are its partners. On March 30, 1989, Heffernan and Hammond sold RBM three motels: a Holiday Inn located in Hamilton County; a Holiday Inn located in Coffee County; and a Ramada Inn located in Cullman County, Alabama. RBM financed the purchase by way of a $6,300,000 loan from C&S Bank. The loan was secured by deeds of trust on the two Tennessee motels and a mortgage on the Alabama motel, together with a security interest in other assets of the partnership. In addition, the Websters, as well as the sellers, Heffernan and Hammond, each signed a separate guaranty agreement personally guaranteeing the loan. The guaranty signed by each guarantor is on a printed form. The printed portion states, in pertinent part, as follows:

> the undersigned hereby unconditionally guarantee(s) the full and prompt payment when due, whether by acceleration or otherwise, and at all times hereafter, of (a) all obligations, liabilities and indebtedness of the Debtor to the Lender, however and whenever incurred or evidenced, whether direct or indirect, absolute or contingent, or due or to become due; (b) *any and all extensions, renewals, modifications, or substitutions of the foregoing, and all expenses,* including without

> limitation attorneys' fees of 15% percent of the total amount sought to be collected if the Lender endeavors to collect from the Debtor by law or through an attorney at law....
>
> This guaranty shall be continuing, absolute and unconditional and shall remain in full force and effect as to the undersigned, subject to discontinuance of this guaranty as to any of the undersigned....
>
> The Lender may, from time to time, without notice to the undersigned...(c) extend or renew for any period (whether or not longer than the original period), alter or exchange any of the Liabilities or Obligations.... The undersigned hereby expressly waive(s): (a) notice of acceptance of this guaranty, (b) notice of the existence or creation of all or any of the Liabilities or Obligations, (c) *notice of default, non-payment or partial payment,* (d) *presentment, demand, notice of dishonor, protest, and all other notices whatsoever....*
>
> For the purpose of this guaranty, this guaranty shall be fully enforceable, notwithstanding any right or power of the Debtor or anyone else to assert any claim or defense, as to the validity or enforceability of the Liabilities or Obligations, and no such claim or defense shall impair or affect the obligations of the undersigned hereunder.

(Emphasis added). Significantly, the guaranties signed by Heffernan and Hammond contain a typewritten provision, immediately below their signatures,[1] which provides as follows:

> *Notwithstanding any provisions hereof to the contrary* guarantor's liability hereunder is limited to a guaranty of the indebtedness of the Debtor evidenced by the promissory note dated March 30, 1989 in the original principal amount of $6,300,000 and *any extensions, renewals, and charges*[2] *thereof and all charges and expenses above described related thereto.*

(Emphasis added).

RBM defaulted on the 1989 note on November 1, 1991. On January 1, 1992, NationsBank Corporation acquired C&S Bank and changed the name of the bank to NationsBank of Georgia, N.A. ("NationsBank"). Shortly thereafter, RBM filed for protection under Chapter 11 of the United States Bankruptcy Code. NationsBank filed a Proof of Claim, asserting that the total amount of the loan was due. Neither Heffernan nor Hammond received notice of RBM's default or of the bankruptcy proceedings. There is no evidence in the record that either of them had actual knowledge of either event.

On December 17, 1992, the Bankruptcy Court confirmed RBM's plan of reorganization -- a plan to which NationsBank had objected. As a part of the plan of reorganization, three new notes were executed to represent RBM's obligations to NationsBank. The largest note -- one for $6,104,744.82 -- represents the unpaid principal balance on the 1989 note; the next largest note -- one for $1,141,722.60 -- represents the accrued interest on the 1989 note; and the smallest note in the amount of $105,082.84 represents attorney's fees and other expenses incurred during the bankruptcy proceedings. The 1993 notes provide that they are

> renewals, *modifications* and extensions of the Promissory Note dated March 30, 1989, in the original principal amount of $6,300,000.00 made by Borrower to the order of Lender and are made and delivered pursuant to the bankruptcy plan of reorganization....

(Emphasis added). In accordance with the plan of reorganization, RBM

continued to operate the three motels purchased from Heffernan and Hammond and thereafter made payments on the three notes. NationsBank's successor subsequently assigned the 1993 notes to Beal Bank. On December 1, 1997, RBM defaulted on the 1993 notes; and, in February, 1998, Beal Bank accelerated the notes and demanded payment in full from RBM and the guarantors. When the 1993 notes were not paid, Beal Bank filed this action on February 25, 1998. In its complaint, Beal Bank asserts that as of February 18, 1998, the balance owed on the three notes was $7,090,161.48, together with interest thereafter accrued at the highest rate allowed under Georgia law and costs of collection, including attorney's fees. Beal Bank's brief indicates that, after deducting amounts recovered through the auction sales of the three motels, there remains a deficiency balance of $2,706,000 plus accrued interest.

Beal Bank filed multiple motions for summary judgment against the Websters, Heffernan, and Hammond. The latter two individuals filed cross-motions for summary judgment against Beal Bank. The trial court granted Beal Bank summary judgment as to the Websters, finding that the Websters, as the general partners of RBM, were liable on the 1993 notes. The trial court dismissed the action as to Heffernan and Hammond, finding that their guaranties as to the 1989 note did not extend to the obligations represented by the 1993 notes. The trial court determined that, under Georgia law, the 1993 notes significantly changed the guarantors ' obligations under the 1989 note; therefore, the trial court reasoned, Heffernan and Hammond are no longer liable as guarantors. The trial court also held that, based upon its reading of the guaranties, "if the bank wanted to enforce its guaranty it had to at a minimum notify Heffernan and Hammond that a default in payment had occurred [in 1991]." In addition,

the trial court found that Heffernan and Hammond were not responsible for attorney's fees because Georgia law required that guarantors be given notice of a debtor's default and be given ten days to pay the balance due *without incurring attorney's fees*. Applying Tennessee law, the trial court further held that Beal Bank's action was barred by the six-year statute of limitation. This appeal followed.

II.

We review the trial court's decision to grant summary judgment against the standard of Rule 56.04, Tenn.R.Civ.P., which provides in pertinent part as follows:

> the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

When reviewing a grant of summary judgment, an appellate court must decide anew if judgment in summary fashion is appropriate. ***Cowden v. Sovran Bank/Central South,*** 816 S.W.2d 741, 744 (Tenn. 1991); ***Gonzalez v. Alman Constr. Co.,*** 857 S.W.2d 42, 44-45 (Tenn.Ct.App. 1993). Since this determination involves a question of law, there is no presumption of correctness as to the trial court's judgment. ***Robinson v. Omer,*** 952 S.W.2d 423, 426 (Tenn. 1997); ***Hembree v. State,*** 925 S.W.2d 513, 515 (Tenn. 1996). Summary judgment is appropriate only if no genuine issues of material fact

exist and if the undisputed material facts entitle the moving party to a judgment as a matter of law. Rule 56.04, Tenn.R.Civ.P.; ***Byrd,*** 847 S.W.2d at 210. In the instant case, the parties agree that the material facts are not in dispute. Hence our inquiry involves a pure question of law: Do the undisputed material facts entitle Heffernan and Hammond to summary judgment?

III.

The parties agree that the guaranties executed by Heffernan and Hammond are governed by the substantive law of Georgia.

Our analysis on this appeal is guided by some of the most fundamental principles of contract law -- principles that are clearly embodied in Georgia law. Our task is to determine and give effect to the true intent of the contracting parties. ***Carsello v. Touchton,*** 204 S.E.2d 589, 591-92 (Ga. 1974); ***Peterson v. First Clayton Bank & Trust Co.,*** 447 S.E.2d 63, 65-66 (Ga.Ct.App. 1994). In Georgia, this approach is not only mandated by the common law, ***id.***, it is also required by legislative enactment:

> The cardinal rule of construction is to ascertain the intention of the parties. If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction.

Ga. Code Ann. § 13-2-3 (1982).

In ascertaining the parties' intent, the first source to which a court must resort is the language of the contract itself. If the terms of the contract are clear and unambiguous, a court must look to those terms alone to determine the parties' intent, ***Southern Fed. Savings and Loan Ass'n v. Lyle,*** 290 S.E.2d 455, 458 (Ga. 1982), and no construction is required or even permitted. ***Heyman v. Financial Properties Developers, Inc.,*** 332 S.E.2d 893, 895 (Ga.Ct.App. 1985). If the language of the contract is such as to require construction, a court should avoid an interpretation that would render portions of the contract meaningless. ***Kirves v. Juno Indus.,*** 487 S.E.2d 31, 32 (Ga.Ct.App. 1997). All manifestations of the parties' intent should be given a reasonable, lawful, and effective meaning. ***Rice v. Huff,*** 472 S.E.2d 140, 142 (Ga.Ct.App. 1996).

Under Georgia law, a guarantor[3] is jointly and severally liable with the principal debtor for the indebtedness which the guarantor agrees to pay; however, the terms of the guaranty may condition or limit the guarantor's liability. ***Holland v. Holland Heating & Air Conditioning, Inc.,*** 432 S.E.2d 238, 241 (Ga.Ct.App. 1993); Ga. Code Ann. § 10-7-1 (1994) (guarantors are jointly and severally liable with the principal debtor unless the contract provides otherwise). When the language of the contract is unambiguous, a guarantor's liability may not be extended by implication or construction beyond the contract's terms. ***Brock Constr. Co. v. Houston Gen. Ins. Co.,*** 243 S.E.2d 83, 86 (Ga.Ct.App. 1978); Ga. Code Ann. § 10-7-3 (1994)("a surety's liability will not be extended by implication or interpretation").

IV.

Keeping these general principles in mind, we turn to the language of the guaranties signed by Heffernan and Hammond. The *printed* guaranty form states that it is a "continuing, absolute and unconditional" guaranty to pay "all obligations, liabilities and indebtedness" of RBM and " any and all extensions, renewals, *modifications*, or substitutions of the foregoing...." (Emphasis added). However, as previously indicated, a typewritten addition to both guaranty forms limits the guaranties of Heffernan and Hammond to

> a guaranty of the indebtedness of the Debtor evidenced by the promissory note dated March 30, 1989 in the original principal amount of $6,300,000 and any extensions, renewals, and charges thereof and all charges and expenses above described related thereto.

We find the language of the typed material to be clear and unambiguous. By inserting this specific, typewritten provision, the parties intended that Heffernan and Hammond would not be liable for *all* of RBM's debts to the bank, but rather only to the limited extent indicated in the guaranties. The addendum specifically limits Heffernan's and Hammond's liability to the "indebtedness of [RBM] evidenced by the [1989 note]" in the original principal amount of $6,300,000 and "any extensions, renewals, and charges thereof...." Conspicuously absent from the addendum is the term " modifications," which term does appear in the printed form.

The typewritten addendum clearly conflicts with provisions

found within the printed language of the guaranty forms. Under Georgia law, if provisions of a contract appear to be in conflict, a more specific or limited provision prevails over a provision that is more broadly inclusive. ***Holtzclaw v. City of Dalton,*** 377 S.E.2d 196, 198 (Ga.Ct.App. 1988). Georgia law also recognizes that a typed provision in a contract governs over a conflicting printed provision. ***Grier v. Brogdon,*** 505 S.E.2d 512, 514-15 (Ga.Ct.App. 1998). Accordingly, we hold that the typed addendum to the guaranties signed by Heffernan and Hammond necessarily results in a limitation of their liability; their liability is limited to the 1989 note and any extensions, renewals, and charges of that instrument. Because they specifically limited their liability in a way that excludes " modifications," Heffernan and Hammond are not liable if the 1989 note has been modified.

Beal Bank argues that Heffernan and Hammond are liable as guarantors because, according to the bank, the 1993 notes did not change the terms or nature of the guarantors' obligations, and thus are merely " renewals" and not "modifications" of the 1989 note. We disagree with this position. A "renewal" of a promissory note means that the obligation remains the same and is merely reestablished for a period of time. ***American Surety Co. v. Garber,*** 151 S.E.2d 887, 888 (Ga.Ct.App. 1966). Furthermore, Beal Bank's argument flies in the face of the plain language of the 1993 notes themselves. Each of the 1993 notes explicitly states that the notes " are renewals, *modifications*, and extensions of the Promissory Note dated March 30, 1989...." (Emphasis added).

We find that the 1993 notes constitute and include several modifications of the original 1989 obligation guaranteed by Heffernan and

Hammond. While the 1989 note calls for interest on the principal balance, it does not provide for interest on interest; but this is precisely the effect of rolling accrued interest on the original note into a new note that itself accrues interest. The same comment applies to the guarantors' liability for attorney fees under the 1989 note. The 1993 note in the amount of $105,082.84 -- for attorney's fees allegedly due under the original note -- requires those who are obligated under the 1993 "attorney's fees" note to pay interest on the fees. The 1989 note, guaranteed by Heffernan and Hammond, does not call for such interest.

With respect to the 1993 "attorney's fees" note, there is an additional reason why the guarantors are not liable for the obligation represented by that note. This is because Heffernan and Hammond were not afforded the notice that was required under Georgia law to impose liability for attorney's fees on the earlier note. Ga. Code Ann. § 13-1-11 provides, in pertinent part, as follows:

> The holder of the note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the

> principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement.

Ga. Code Ann. § 13-1-11(a)(3) (1982). The purpose of this provision of the Georgia Code is to give a debtor the opportunity to pay the principal debt and interest without incurring attorney's fees. ***General Electric Credit Corp. v. Brooks,*** 249 S.E.2d 596, 600 (Ga. 1978)(interpreting Ga. Code Ann. § 20-506, now codified as § 13-1-11). The notification required by Ga. Code Ann. § 13-1-11, by operation of law, is incorporated into all contracts and promissory notes providing for the recovery of attorney's fees; hence, all such instruments and contracts "must be construed in the light of this particular section." ***Anderson v. Hendrix,*** 334 S.E.2d 697, 699 (Ga.Ct.App. 1985). To comply with the statute, a lender must specifically notify the debtor that he or she may avoid liability for attorney's fees by paying the principal and interest due under the note within ten days. ***Acuff v. Proctor,*** 475 S.E.2d 616, 617 (Ga. 1996). The failure to give such notice absolves the party entitled to such notice of that party's obligation to pay attorney's fees. ***Id.*** Only substantial compliance with the statute is required, so long as "the debtor has had the full opportunity to avoid attorney fees that [Ga. Code Ann. § 13-1-11] contemplates." ***General Electric Credit Corp.,*** 249 S.E.2d at 601.

In the instant case, neither Heffernan nor Hammond had an opportunity to avoid the attorney's fees to which Beal Bank claims it is entitled because neither guarantor was notified that he could pay the principal and interest due without incurring attorney's fees. In fact,

neither received notice of the default or the proceedings that ultimately led to the execution of the "attorney's fees" note. Thus, neither is obligated for the note that represents these fees.

Several other material terms of the 1989 note were modified by the 1993 notes. The 1989 note provides for a fixed rate of interest of 11.75%. The 1993 notes, on the other hand, provide that the interest rate from 1993 to 1995 will be 7.5% and thereafter, until maturity of the loan, the interest rate will be 9%. In case of default, the 1989 note provides that the specified interest rate will increase by fifty percent, not to exceed the maximum rate of interest provided by law. The 1993 notes eliminate the fixed default interest rate and instead provide that the default interest rate will be the highest lawful rate in effect at the time of default. In addition, the monthly payment with respect to the obligation was reduced from $68,292 to $54,327.31. The 1993 notes also provide for prepayment of the entire indebtedness, without penalty, a provision not included in the original note. The fact that some of these modifications may be favorable to the guarantors is immaterial. It has been held under Georgia law that a material change made without the guarantor's consent -- even if more favorable to the guarantor than the original terms of the contract -- will discharge the guaranty. ***Upshaw v. First State Bank,*** 260 S.E.2d 483, 485 (Ga. 1979). We find and hold that these changes are material modifications. As a result, Heffernan and Hammond were discharged from their obligations as guarantors.

Beal Bank argues that the 1993 notes did not operate as a discharge because the notes were issued pursuant to the RBM's bankruptcy reorganization plan and, so the argument goes, the changes were not

consented to by Beal Bank. It is true that the discharge of a principal debtor's debt in bankruptcy does not of itself discharge the obligation of a guarantor. *See* ***Growth Properties of Florida, Ltd. v. Wallace,*** 310 S.E.2d 715, 718 (Ga.Ct.App. 1983); 11 U.S.C. § 524(e) (1993) (discharge of a debt of a debtor in a bankruptcy plan does not discharge the liability of another for the debt). However, this does not mean, regardless of the circumstances, that a guarantor's obligation cannot be discharged by the execution of promissory notes issued in accordance with a bankruptcy plan.

In ***NCNB Texas National Bank v. Johnson,*** 11 F.3d 1260, 1266 (5th Cir. 1994), the Fifth Circuit was presented with the identical question now before us: whether modifications to a promissory note made during a bankruptcy reorganization discharges the guarantor of the original note under Georgia law. To resolve this issue, the court looked to the specific terms of the guaranty regarding modifications and subsequently concluded that the modifications did not relieve the guarantor under the language of the guaranty in that case. ***Id.*** at 1266. Looking to the specific terms of the guaranties in the instant case, however, we find that Heffernan and Hammond limited their liability to the 1989 note and any renewals, extensions and charges thereof. Heffernan and Hammond did not guarantee the 1989 note with modifications; thus, when the 1989 note was modified pursuant to the bankruptcy reorganization, Heffernan and Hammond were discharged. Moreover, the record indicates that while NationsBank did object to the debtor's reorganization plan, it did not object to the terms of the new notes. There is nothing about the circumstances under which the 1993 notes arose that militates against a finding that Heffernan and Hammond are not liable on their guaranties in view of the numerous modifications that were made to the obligation guaranteed by them.

Finally, Beal Bank claims that Heffernan and Hammond are not discharged because such a discharge requires a novation and a novation cannot occur without additional consideration. This assertion begs the question. Heffernan and Hammond, by the terms of their guaranties, were not liable for modifications of the 1989 note. The 1993 notes represent and incorporate modifications of the 1989 note. Accordingly, Heffernan and Hammond are not liable on the new notes. Thus, the issue of whether there was sufficient consideration for a novation is of no consequence. The real issue is whether the guaranteed obligation was modified; not whether there was a novation.

V.

Beal Bank contends that the trial court was in error when it held that the guaranties were not enforceable because Heffernan and Hammond were not notified of RBM's default in 1991 or the bankruptcy proceedings. By signing the guaranties, Heffernan and Hammond expressly waived "notice of default, non-payment or partial payment" by RBM. Thus, we agree with Beal Bank that the trial court erred in concluding that the guaranties required notice to the guarantors in order for the guaranties to be enforceable. However, having said all of this, we hasten to add that whether the guarantors were entitled to notice of the default or the bankruptcy proceedings is immaterial to a determination of the main issue before us: whether the guarantors are liable under the terms of their respective and identical guaranties.

As previously discussed, the trial court was correct in

holding that Ga. Code Ann. § 13-1-11 required NationsBank, as the holder of the note, to notify Heffernan and Hammond of their right to pay the principal and interest due on the 1989 note without incurring attorney's fees. We have already determined that such notice was not given after RBM's default in 1991, and therefore, the inclusion of the attorney's fees into the principal amount as evidenced by one of the 1993 notes was improper.

The parties do not agree as to whether Beal Bank complied with Ga. Code Ann. § 13-1-11 after RBM's second default in 1997. Because we have held that Heffernan and Hammond were discharged by the modifications to the original note, and therefore are no longer liable for the indebtedness, we need not reach the issue of whether the statutorily-required notice with respect to the issue of attorney's fees was provided to the guarantors after RBM's second default in 1997.

VI.

The parties do agree that Tennessee law controls as to the applicable statute of limitations in this case. *See* ***Sherwin-Williams Co. v. Morris,*** 156 S.W.2d 350, 352 (Tenn.Ct.App. 1941) (holding law of the forum governs procedural matters such as statutes of limitations). The parties also agree that the applicable statute of limitations is found at T.C.A. § 28-3-109, which requires that an action on a promissory note be commenced within six years after the accrual of the cause of action. *See* T.C.A. § 28-3-109(a)(3) (1980). In dealing with an installment note that contains an acceleration clause, the cause of action accrues when the creditor chooses to take advantage of the clause and accelerates the balance. ***Farmers & Merchants Bank v. Templeton,*** 646 S.W.2d 920, 923

(Tenn.Ct.App. 1982).

Beal Bank argues that the statute of limitations does not bar its claim against Heffernan and Hammond because the execution of the 1993 notes renewed the existing indebtedness. Thus, the argument goes, the limitations period was waived with respect to that indebtedness, so that a new period of limitations began to run from the time of the renewal of the indebtedness in 1993. *See* ***C.A. Hobbs, Jr., Inc.v. Brainard,*** 919 S.W.2d 337, 339 (Tenn.Ct.App. 1995).

It is clear that Beal Bank seeks to hold Heffernan and Hammond liable for RBM's indebtedness as evidenced by the 1993 notes. Indeed, Beal Bank could not sustain a cause of action based upon the 1989 note because that note no longer exists by virtue of its discharge in RBM's bankruptcy proceedings. Because this action on the 1993 notes was commenced on February 25, 1998 –- well within six years of the accrual of the cause of action on those instruments –- Beal Bank's cause of action is not barred. However, because we find that the 1993 notes represent modifications of the 1989 note such as to discharge Heffernan and Hammond as guarantors, we agree with the trial court's decision to dismiss Beal Bank 's action against them.

VII.

For all of the foregoing reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for such further proceedings, if any, as may be required and for collection of costs assessed below, all pursuant to

applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.