NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

AMBOY BANK F/K/A AMBOY NATIONAL BANK, Plaintiff, v. LAWRENCE E. BATHGATE, II and OAKSHIRE GROUP, LTD., Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NUMBER: MON-L-2810-15 (CBLP) **OPINION**

Michael Kahme, Esq., and Eric Abraham, Esq., of Hill Wallack, LLP, on behalf of plaintiff Amboy Bank f/k/a Amboy National Bank.

Dominic Aprile, Esq., of Bathgate, Wegener & Wolfe, P.C., and Helen Chaitman, Esq., of Chaitman, L.L.P., on behalf of defendant Lawrence E. Bathgate, II.

ZAZZALI-HOGAN, J.S.C.

This matter arises out of a dispute concerning the financing of a condominium project known as the Monmouth located in Wall, New Jersey. Plaintiff Amboy Bank seeks a money judgment in the amount of $25,206,698.08 against Defendant Lawrence E. Bathgate, II, alleging that the Oakshire Group, LLC, which was owned by James R. Bell, defaulted on the loans as Borrower and that Bathgate owes the Bank the money as Guarantor. Bathgate filed a counterclaim, alleging that because the Bank and its agents breached a standard of care for administration of loans as well as the relevant loan documents, he should be excused from performing. He seeks $19,742,241.16 in damages. On October 2, 2015, default was entered against Oakshire.

The court held an in-person bench trial over thirteen (13) days in the Fall of 2021, and the parties filed their post-trial submissions in Spring 2022. More than 500 exhibits were entered into evidence and retained by counsel at the close of the evidence. During the trial, the court heard testimony from the following witnesses: Dominic Margiotta, Candida Hoard Pangaldi, Ernest C. Roenbeck, J.F. "Chip" Morrow, John S. Truhan, P.E., Robert Beni, Jan Wouters, Esq., Marc Perlerowitz, CPA, Peter W. Davis, Nicholas B. Jalowski and Lawrence E. Bathgate, II. A portion of George Scharpf's deposition testimony was read into the record because he passed away in 2019. The parties also provided the court with the transcripts for fourteen dates, although there are two transcripts for October 18, 2021. This court has reviewed the parties' respective post-trial submissions and now accordingly makes the following findings of fact and conclusions of law pursuant to Rule 1:7-4.

I. FACTS

A. Bathgate, Bell and the Property at Issue

On February 25, 2002, 3570 Group, LLC, which was owned by Bathgate and his family, entered into a contract with a third-party for land in Wall Township for $4 million P2. For some unexplained reason, Bell signed on behalf of the Buyer, although Bathgate claims he did not have authority to do so**.** The closing for the Wall real estate was subject to Bathgate securing rezoning and related approvals for the property for residential housing.

Eventually, on January 27, 2004, the 3570 Group assigned the property to Bell for $16 million for anticipated profits. P17. On January 30, 2004, Bathgate wrote a letter memorializing that Bell and Bathgate were 50/50 partners in the Monmouth and that the estimated gross profit was anticipated to be $36M, with $16M in future profits being allocated to Bathgate and $20M to Bell. Bathgate was not a member of Oakshire and had no involvement with its operations. In fact, Bathgate never received K1's or other tax documents from Oakshire. In a related forfeiture case, the court found that Bathgate was not an owner or member of Oakshire. Amboy Bank v. Oakshire Group, LLC, No. A-5971-12T, 2014 WL 795441, at *2 (App. Div. September 17, 2014); see also N.J.R.E. 201(b)(4) (stating that courts may judicially notice a fact, including records of the court in which the action is pending and of any other court of this state or federal court sitting for this state).[1]

According to the Bank, neither the Partner Letter nor Bathgate's investment contribution was disclosed prior to the closing of the any loan. 11T131-33. Bathgate did not deny that fact but made clear he was not attempting to hide that information from the Bank or anyone else. 11T132. Moreover, nowhere does the Bank cite to any authority stating that Bathgate was required to reveal that information.

B. Amboy Bank's Introduction to Bell

Meanwhile, Charles Avery, who is a former banker with expertise in construction financing, was referred to and met with Bell in 2003 to assist with arranging financing for the construction. Dominic Margiotta described him as the loan broker who helped with financials and cashflows as well as arranging meetings. 1T:43. On September 2, 2003, Bell and Avery met with Margiotta and Peter Davis, both of whom were Senior Vice Presidents at the Bank. P14.

On September 13, 2003, a second meeting took place among Bathgate, Bell, Avery, Davis, Margiotta and George Scharpf, who was Amboy's President and Chief

[1] Although R. 1:36-3 generally prohibits citing to unpublished opinions, a court may cite to unpublished opinions for consistency rather than precedent. See Cresskill Bd. Of Ed. V. Cresskill Ed. Ass'n, 362 N.J. Super. 7, 15 (App. Div. 2003) and R. 1:36-3, comment 2. The court is citing to the related opinion for consistency, not for any legal or binding effect.

Executive Officer. At trial, Margiotta testified that he understood Bathgate's role would be to serve as a guarantor and assist with sales by bringing in affluent buyers. 3T116. Bathgate was important to the Bank because of his financial records, liquidity, $3 million in income and his influence in the County. 1T51. Margiotta never heard of Bell or Oakshire before those meetings.

On February 24, 2004, Bathgate wrote Bell an email advising that they needed to discuss contracts with buyers as well as the Oakshire books, including monthly receipts. Bathgate testified that he never received any of the documents that he had requested in that e-mail. P49, 12T123. Nonetheless, on that same day, Bathgate and Bell executed the private loan agreement, which reflects that between February 2002 and August 2003, Bathgate as Lender advanced Oakshire and Bell, who was the "sole owner of Oakshire" approximately $822,241.16, although only $741,016.77 related to the Monmouth. P50. The Agreement required Oakshire to "retain the services of Smolin & Lupin Company, LLC, Certified Public Accountants, to record and reconcile the financial activities of Oakshire on a monthly basis. . .and provide a copy thereof to Bathgate." Oakshire never paid Bathgate any consideration for those monies. 11T:59. Although that document also gave Bathgate the right to inspect the books or request an accounting, he never did so. 11T154.

C. Financial Documents Provided to the Bank

The first section of the Bank's Loan Policy clearly states that: "All loans should be supported by financial statements signed by the borrower [Oakshire] if the statement is not prepared by a Certified Public Account to include fiscal year and interim reports, where possible. In addition, all loans made or guaranteed by individuals should be supported by 2-3 years of complete tax returns. . ." D1. Consistent with that requirement, Bathgate provided his 2000 and 2001 Federal Income Tax Returns and then-current Personal Financial Statement. P1, P11. Margiotta also received an individual financial statement from Bell and a cash flow analysis from Avery. 1T48. It is undisputed that the Bank never asked for, and that Oakshire never provided, any financial statements or tax returns during the course of the relevant loans, even though the Loan Policy required it.

Meanwhile, page 41 of the Policy identified concerns when the general contractor and borrower were one and the same and recommended how to allay that concern. Specifically, that provision stated that the Bank should "carefully" verify the "track record" of that general contractor/borrower. That provision is relevant because Bell acted in such a dual capacity.

At trial, Margiotta could not recall whether Bell submitted any proof of past successful development although he recalled that the broker Avery had given him some information about a successful project in Hawaii. Although the commitment letter refers to Bell having 30 years' experience as a builder/developer for projects consisting of between 14 and 650 units, Margiotta could not recall whether that information was in writing or verbal or what the source was. Likewise, while the document referred to Bell's and Bathgate's respective net worth, there was no authority cited. On October 14, 2003, the Loan and ALCO Committee, which consisted of Davis, Margiotta and Scharpf, approved the $25M request even though there was no independent proof of Bell's experience or Oakshire's finances. P13.

D. The 2003 Otteau Appraisal

On October 21, 2003, the Otteau Appraisal Group forwarded to Margiotta an appraisal for the Monmouth, which stated in relevant part as follows:

1) The ***as is*** value to a single purchaser, consisting of a 24.86-acre tract, conditionally approved for 96 age-restricted dwellings, assuming that site improvements have not yet been installed to property, which was valued at **$5,100,000**.

2) The ***as is*** value to a single purchaser of a 24.86-acre tract with approvals for 96 age-restricted residential condominium dwellings, assuming that site improvements had not yet been installed to the property, **but that a proposed clubhouse had been constructed,** which was valued at **$7,887,000**.

3) The **as if improved** value of 96 age-restricted condominium dwellings to a single purchaser conditioned upon all subdivision site improvements being installed to the Property, which was valued at **$11,000,000.**

4) The **gross sellout** value of 96 condominium dwelling units, which was valued at **$102,060,000.**

(Emphasis added).

E. The Engineering Report from Truhan

Prior to administering the loan, John Truhan, who was Amboy's Engineer and Consultant, reviewed the documentation submitted to the Bank by Oakshire and issued a report. D5. He advised that "[a]ll draw requests to be represented on AIA form G702 signed by owner general contractor and architect" were "required" and were "standard." In addition, Truhan advised that the Borrower should supply copies of <u>complete signed and dated contracts</u> for all major draw requests, signed and sealed by the project Architect and the General Contractor and Owner and that lien waivers should be submitted with every request. Lien waivers represent that the subcontractor has been paid for the work that has been performed to date, prior to any monies being released to the Borrower. Although the final sentence of his summary stated that "this is not meant for third parties," the disclaimer was not applicable to this lawsuit, despite plaintiff's suggestion that the document was inadmissible. 6T43. The intent was to preclude a third party outside of the transaction from relying on that document. The Bank never requested the AIA/G702 forms from Oakshire. 3T69

F. The 2003 Commitment Letter

In the October 23, 2003 Commitment Letter, Margiotta advised Oakshire that the Bank had approved the application for the $25,980,000 Construction Financing Loan and a $10,000,000 Letter of Credit (LOC). P14. In addition to condominium units, the project also planned for a clubhouse with a concierge service and a social and fitness center, pools, a library, billiards, social rooms and an eighteen (18) hole putting course. P13. The Bank recognized that "[e]ven though the aggregate of the Loan and LOC was $35,980,000, which exceeds the Bank's Legal Lending Limit, $5,000,000 of the LOC is secured with cash collateral, which reduces the aggregate to $30,980,000, which was well within the Bank Lending Limit." Bathgate testified that he relied on all of the provisions of the Commitment Letter when deciding whether to serve as Guarantor. Many of the crucial terms were embodied in the Loan Agreement. The Commitment Letter specified that it was "for the benefit of the Borrower and the Guarantors only."

G. The 2004 Loan Closing

On January 30, 2004, the Bank's outside counsel, Margiotta, Bell, Wouters and Bathgate attended the closing and executed the operative documents including, but not limited to, the $25M loan, the $10M LOC and the Bathgate Guaranty. The Loan Agreement itself was prepared by the Bank. 7T6. As conceded by Margiotta, the Loan

Agreement reflected policies and procedures that the loan needed to follow for items such as advances and releases. 1T82. P21.

Meanwhile, Jan E. Wouters, Esq, who was from the firm of Bathgate, Wegener and Wolf (BWW), was responsible for obtaining a Mortgage Title Insurance Policy and finalizing the Opinion Letter. P14. Although the opinion letters that Wouters drafted stated that Wouters was counsel for Bathgate, he claims that it was for the limited purpose of preparing those letters. 7T70. The opinion was then structured based on the Bank's template and what the Bank directed him to say although he did add facts related to these particular loans including the account number, amount of loan, date of closing, location of collateral and similar information. 7T65. He then would put it on his letterhead although he emphasized that "it is my opinion in their format."

H. The Guaranty

Although Bathgate admitted he signed the Guaranty, he claims he only skimmed it.11T127-28. Nonetheless, he understood that the personal guaranty put him at risk and that Amboy Bank would not loan the money absent that guaranty. The borrower risk rating was a "pass 1," meaning it had the least risk and was the best rating a loan could have. 1T59. The 2004 guaranty provided in relevant part as follows:

> The undersigned (if more than one, jointly and severally) hereby unconditionally and absolutely guarantee(s) to the Bank, irrespective of the validity, regularity or enforceability of any such instrument or writing or of the obligation evidenced thereby, that <u>the Borrower will promptly and punctually perform and observe each and every agreement, covenant and condition in any such instrument or writing or any such renewal, extension or other modification thereof</u>, . . . Liabilities of the Borrower shall not be required of the Bank which may, however, solely at its option, pursue any or all of its remedies at one time or at different times.
>
> The undersigned further agree(s) and consent(s) that <u>the Bank in its discretion may, without notice to or further assent by, and without affecting the liability of, the</u>

undersigned or any of them: accelerate, renew, extend or otherwise modify any obligation . . . (Emphasis added).

I. The Loan Agreement

Attached to the Loan Agreement dated January 28, 2004, were the following schedules: Schedule A (the item at issue); Schedule B (budgeted costs for site improvements and the advance or draw schedule); Schedule C (budgeted costs for clubhouse); and Schedule D (budgeted costs for eight buildings (1-6 and 12-13)), representing 48 units or 50% of the 96 units for the Monmouth. D8. Funds were to be allocated to site improvements in the amount of $3M; clubhouse construction in the amount of $3M; and construction/revolving line of credit in the amount of $19,980,000.

1. Financial Statement Requirement - Section 6.7

Section 6.7 of the Agreement required specific financial statements by June 30 of each calendar year from the obligors, including a copy of the obligors' federal and state tax schedules for the prior calendar year. That information would enable the Bank to assess if Oakshire was following the terms of the agreement.

2. Advance Requirements

The Loan Agreement defined "advance" as "any payment of money to or on behalf of the Borrower under the Loans at any time . . .and in any amount and whether or not in accordance with the terms of this Agreement." (Emphasis added). "Obligors" were defined as "[t]he Borrower, the Guarantors, and any and all other Persons liable, either absolutely or contingently in connection with this Agreement not named herein, including endorsers, sureties, guarantors and owners of any property securing any subs due in connection with this Agreement."

Despite his involvement in other aspects of the project, Wouters testified that he had no role in the construction advance process either, even though the law firm was the settlement agent on every advance. 6T189-90. As for Wouters' role as escrow agent, he claims that he had a minimal role, stating that he was the escrow agent "in name only." The account was established so that once a deposit was received by Amboy for one of the units, 50% was immediately transferred to Oakshire's account while the remaining 50% remained in the escrow account of the Bank. 7T44. Although the settlement statements provide language that they were prepared by the firm of BWW, Wouters testified that there was no signature or indicia to demonstrate that he, Bathgate or anyone else from the firm prepared them or any owner/contractor affidavit. 7T56, P106. He believed that the Bank prepared them. 7T76, 7T58, P105.

3. Conditions Precedent to Advances – Section 2.1

The relevant portion of Section 2.1 stated that advances "shall" be subject to the following limitations:

> (1) Advances shall be limited to $3,300,000 per six-unit building subject to [LTV Ratio] of seventy-five (75) percent;
>
> (2) As a condition precedent to the advances for any of the first six (6) buildings within the Project, Borrower shall deliver to the Bank certified true copies of contracts with third-party purchasers for eighteen (18) units located within the first six (6) buildings for which such Advances are sought, which contracts shall include proof of payment of the required deposits;
>
> (3) As a condition precedent to advances for any additional buildings constructed after the first six (6) buildings within the Project, Borrower shall deliver to the Bank certified true copies of contracts with third-party purchasers for at least three (3) condominium units locate within each additional building for which such Advances are sought, which contracts shall include proof of payment of the required deposits.

As set forth above, the Loan was set up as a revolving line of credit. In other words, the Bank would lend money to build a specific number of units; be repaid at each closing and then re-lend the same money to other units. The purpose of this mechanism was two-fold. First, it kept the loan smaller, instead of making a large commitment. Second, it helped the legal lending limit because if the Bank could make the mortgage amount smaller, it would help the Borrower with title insurance. 1T84. Bathgate believed that just as the Bank was limiting its risk by making that a requirement, he would be protected as well.

4. More Prerequisites for Advances – Work in Place – Section 4.3

Section 4.3 added more conditions precedent to advances for the $25.9 million, all of which were important to Bathgate as he understood those monies would be going to work in place, i.e., general construction, as identified in the Schedules. Bathgate did not review each contract for each unit because of the requirements that were in place as set forth below: Section 4.3 clearly states that the duty of the Bank to make advances is "conditioned" upon the following items:

> (a) <u>Requisitions. Applications for Advances shall be submitted in writing by Borrower to the Bank on a monthly basis for any improvements installed during the preceding month or part thereof</u>. Requisitions for Advances made by Borrower <u>shall be accompanied</u> by (i) a certification using from [sic] AIA Document #G702, certifying the state of construction for which Advances are to be made, to the date of said request; (ii) an Owner's Affidavit for construction mortgage advances; (iii) a Contractor's Affidavit for construction mortgage advances; (iv) a statement clearly setting forth the sum to be advanced; (v) a certification that the work performed is in compliance with the Drawing and Specifications; (vi) foundation survey(s) when foundations are installed; and (vii) a certification that the undistributed portion of the Loan in the category from which the Advance is requested is sufficient to complete construction of the project.
>
> (b) <u>Title Certification.</u> Advances will be made in reliance and conditioned upon the written certification by the issuer of the Title Policy that the security for

> the Advances and all prior Advances remains a valid first lien, which certification shall be in form acceptable to the Bank.
>
> (c) Amount of Advance. Advances will be in reliance and conditioned upon an inspection to be made by the Bank or its representatives and the actual determination of the subjs to be advances will be made at the complete discretion of the Bank for work completed and in place. . . . shall be in accordance with Schedule B, C and D as set forth in 2.1(b). (Emphasis added).

J. The Actual Mechanics of the Advance Process

When requesting the advances, Judith Kubicka, who worked for Bell and Oakshire as an informal office manager from 1985 to 2007, would prepare the draw requests or advances, a process she began on February 10, 2004. Initially, Kubicka sought guidance from Candida "Candy" Hoarn-Pangaldi (Hoarn), who was in charge of processing construction loan advances for the Bank. Hoarn served in that capacity during the life of the Project and stopped working for the Bank in 2011.

Ultimately, they agreed upon the following procedures. P34. Oakshire would submit a draw request, which contained the schedule of work completed and the amount of funds requested. Then Hoarn would contact the external inspector to coordinate the inspection. The advance package would be sent to the inspector from the Bank for a specific advance number, usually with a cover sheet. 1T94. P53-58. A site schedule would be attached and was based on the same site schedule attached to the Loan Agreement. P54.

Generally, the inspections were conducted by Ernest "Ernie" Roenbeck or John Truhan, who were partners in Captiva Development during the relevant time period. The primary goal of the visits was to inspect the premises and confirm in writing what was observed and whether the task or tasks at issue were completed. P56. The document attached as Schedule B to the Loan Agreement, was the actual form of document received when he was asked to do an inspection. P21. Oakshire prepared the Schedule of Costs, which was broken down into: Column A, Item No.; Column B, Description of Work; Column C, Scheduled Value (budgeted costs); Column D, From Previous Application (paid costs); Column E, Requested This Period; Column F, Total Completed; Schedule G, F/C (percentage completed); Column H, Balance to Finish; and Column I, Retainage. D8. Schedule B gave the Bank a snapshot of the flow of funds for each task.

The inspection concerned only hard costs, which are costs that can be verified such as a roof, a pipe installation or paving, as opposed to soft costs, which may involve things like contingencies, soil testing and other earthworks as well as the installation of water, utilities, and sewer storm drainage systems. 1T100, 4T31. Multiple documents, however, indicate that money went to other soft costs like salaries, marketing, private donations, party supply stores, a lawyer, business supply stores and utilities.

In most, if not all of the letters from the inspectors, they stated in bold that "Owner and contract affidavits signed and sealed should be submitted <u>before</u> any funds are released." P42, P56, P57. These inspections were important to the Bank because "[t]hat's the whole basis of the construction loan . . . work in place . . . that's our collateral." 1T97. Hoarn would also await the first lien letter, which would inform the Bank that since the prior advance, no liens had been placed on the property by, for example, a bank, vendor or anything affecting title. 1T98, P57.

After Hoarn assembled the paperwork "package" for each advance, she would deliver it to Margiotta or another loan officer, who would sign off and return the package to Hoarn, who would then process the advance, credit the account and collect the fees. It is clear that Hoarn's responsibility was essentially to assemble the package, advise if anything was missing and then give it to the loan officer for his signature. It was not her responsibility to determine whether to approve or reject a draw request. The advance "memo," which was a one-page document usually entitled "Inspection Report," would be sent to Oakshire and Wouter, indicating the amount of the draw, the inspection fee, the percentage of a fee associated with the draw amount, and follow up documentation needed, including the owners/contractor's affidavit and the settlement statement reflecting the various transactions during that period, an example of which was embodied in P48.

If the inspector advised that something could not be verified, Hoarn would request invoices from Oakshire and advise the loan officer, who would make the ultimate decision as to whether to approve it. Hoarn could not recall, however, whether she ever received any follow up documents such as invoices, contracts or bills of lading. 5T178.

K. Bathgate Raises Concerns

Bathgate testified that no one from the Bank or Oakshire ever advised him that Oakshire was not providing the prerequisite forms for advances. 11T:16. He believed it was the responsibility of the Bank and not him to monitor Oakshire's finances and to "loan the money for what it said they would loan the money for." 11T129. Bathgate initially testified that neither he nor his law office received the requests or advances. 11T10. He changed his testimony upon being shown D-38 and D-39, noting that it appeared his office did receive those two requests. 11T11-12. Bathgate conceded, however, that he generally received the one-page fax confirmation of advances.

On March 1, 2004, which was only a little more than a month after the closing, Bathgate wrote a memorandum to Bell. P435. He expressed concern that there was a "significant increase in [projected] expenses ($4,714,720), which amounted to a cost' increase of $6[.6] MM." 12T126 and P435. Bathgate deemed that increase "scary," adding that there were new items that had not been previously listed. Bathgate asked Bell if they were missing anything and whether Bell was confident in those numbers. He added that he had thought they had plenty of "fat" in the construction estimate (3M x 16 bldgs. = 48MM-56MM) ($8MM in "Fat") and asked, "where is the 'fat' now?" Bathgate testified, however, that he did not recall bringing this concern to the Bank's attention, reiterating that the Bank was in a better position to monitor the financing of the project. 12T6-12. On March 3, 2004, Bell responded to Bathgate, explaining the reasons for the adjustments and that there was a shift of funds from site costs to construction costs. P51.

On May 5, 2004, Bathgate wrote another memo to Bell addressing how to allocate costs related to the closing between Bathgate and the Bank. 12T:15. Bathgate advised Bell that on April 28, 2004, he had wired the sum of $1,218,500 to the original seller of the land in full satisfaction of the Note and incurred other transaction costs. Consequently, Bathgate stated that "<u>our entity</u> owes me back the following: …$1,272,650.000." (Emphasis added). According to Bathgate, he was referring to the venture between Oakshire as developer and Bathgate as property owner, not to his having any ownership interests in Oakshire. 12T16. Although Bathgate asked Bell to sign that memorandum indicating that the latter accepted those terms, there is no signed copy.

L. The Margiotta Memo and Modifications to the Agreement

Meanwhile, on May 19, 2004, Margiotta wrote a memo to the file indicating that the terms of the loan had changed (1) to allow construction to begin on buildings 3 and 4, even though there were not 18 contracts in the first six buildings and (2) to transfer $650,000 of the $3M dedicated to the clubhouse construction budget to construction of the putting course. Oakshire was essentially requesting to waive the 18-unit pre-sale requirement. That amendment to the terms was signed and approved by Scharpf, Davis and Margiotta. P12.

In the meantime, the first sale of the condominium did not occur until around December 2005, when three units were sold for the average price of approximately $1.2M. Also in December 2005, Oakshire/Bathgate applied for a second mortgage loan for $6.8M from the Royal Bank. T172. By that time, the Loan to Value (LTV) Ratio was 2.3618**.** D52, 53, 59. Between January and June 2006, eleven (11) additional units were sold.

M. The Second Loan - $48M

In June 2006, after being advised by Avery that the Project had large cost overruns and that Oakshire was looking for additional funds from the Bank, Bathgate met with principals of the Bank, at which time Oakshire requested a new loan in the amount of approximately $48M. At a meeting on July 12, 2006, Bathgate questioned Amboy's officers (Scharpf, Davis and Margiotta) about whether Amboy had complied with the terms of the $25M Loan Agreement. According to Bathgate, he was assured by all three of them that the Bank was following all of the terms and conditions of the Loan Agreement and "staying within its four corners." 11T39. Around this time, Bathgate retained the independent accounting firm of Withum Smith & Brown (Withum) to determine whether the money that was borrowed was properly allocated and what work remained to be completed. He expressed concern that the Bank had not received financial reports from Oakshire.

Although the first thirty-two advances generally proceeded without any significant issues except as set forth above, Oakshire referred to Advance 33 from July 26, 2006 as a "special draw advance" in the amount of $2.4M because of "severe cost overruns" with the clubhouse. P353, 355. Generally, Oakshire did not provide any documentation to substantiate the increased costs. 3T128. 1T178. That request was approved although Hoarn advised Oakshire that "there is no inspection required on this draw." P353.

A separate writing dated July 27, 2006 from Hoarn to Oakshire, however, still required the owner's/contractor's affidavit, closing statement and certification of first lien continuation. P357. Oakshire did provide the "owner and contractor's affidavit" and the settlement statement. P358, P360. The crucial part of those affidavits states that "all material men, services and laborers who have performed work within two weeks of the date of performance of such work and to whom less than $200.00 was due therefore have been paid in full." P362. Margiotta recognized that the language of that paragraph did not make sense because $200 is not a significant expense.

Also on July 27, 2006, Margiotta wrote another memo to Scharpf and Davis recommending the $2.4 million construction advance because the Borrower had reached "its sublimit allocation for clubhouse funding, which was $3,000,000." D53, P361. The memo also stated as follows: "The Borrower has requested additional clubhouse, site improvement and construction funding which will be presented at the August 8, 2006 Loan

& Alco Committee Meeting. The second mortgage lender has also agreed to this advance." In other words, the Bank informed Royal Bank of these modifications but not Bathgate even though the Clubhouse costs had increased from $3M to $5.4M. That request was accepted and approved by Davis and Scharpf whose signatures appear at the bottom of the memo --- before the request went to the Loan Committee.

The Loan Presentation document from July 26, 2006, also stated that the principal outstanding "will be limited to the Legal Lending Limit minus the principal balance of the loan and minus the unsecured portion the LOC" in the amount of $32,600,850. P348. The purpose of the lending limit was to protect the Borrower, the Lender and the Guarantor. 3T27. It is important to note, however, that by this time, the loan was a "pass 4," meaning that the risk rating had worsened significantly having begun as a "pass 1." The Bank conceded that based on that rating, it was a potentially problematic loan. 3T111.

As reflected in the Bank's Settlement Statements, the LTV Ratio based upon the $25M Loan was 2.36 in July 2006, which significantly exceed the agreed-upon rate of .75. On August 8, 2006, the Loan Presentation was nonetheless approved by Margiotta, Davis and Scharpf. P348. That same day, the Bank drafted a commitment letter, which was signed by both Bell and Bathgate on behalf of Oakshire the Borrower although Bathgate testified that was a mistake because he did not have an ownership interest in Oakshire. Bathgate and Bell signed as individual guarantors. P348, 364. On August 18, 2008, Bathgate sent the Bank the executed Loan Application, dated August 6, 2006.

N. The Otteau Appraisal

The Otteau Appraisal dated August 22, 2006, made the following assessments based upon the 82 remaining units:

1) The ***as is*** value to a single purchaser, consisting of a 24.86-acre tract, conditionally approved for 96 residential building lots, 82 of which are the subject of this appraisal, assuming that site improvements have not yet been installed to property, which was valued at **$22,550,000**.
2) The ***as if improved*** value to a single purchaser of a 24.86-acre tract with approvals for 96 age-restricted residential condominium dwellings, 82 of which are subject to this appraisal, conditioned upon all subdivision site improvements being installed to the property, which was valued at **$24,600,000**.
3) The ***gross sellout*** value of 82 condominium dwelling units, which was valued at **$104,340,000** and based on an average house size of 4500 s.f. and the average overall selling price of $1,272,439. (Emphasis added).

O. Advances Continue

On or about September 22, 2006, Oakshire submitted Advance Request 34, for $2,002,863.15. That advance was to be made at the time of the closing of the second loan for $48 million. Again, Truhan sent the Bank a letter that the owner and contractor affidavits should be provided before release of the funds. P368. That advance package was lacking the usual fax cover sheet because Margiotta "was there to advance the funds." 1T184.

On or about September 27, 2006, the $48M Loan Agreement was drafted. P371. Wouters notarized the document. It contained the same conditions precedent for advances that are contained in the $25M Loan Agreement. Despite those requirements, there is no evidence that the Bank/Oakshire used AIA Form G702 Certifications certifying receipt of payment. Once again, Oakshire was the Borrower and Bell and Bathgate signed in their individual capacities as guarantors. When he signed the agreement, Bathgate was not aware of any appraisal of the property. 11T49

As with the 2004 Loan Policy, the 2006 Policy also required financial statements, tax records and proof of prior success from the borrower. D74. The 2006 Agreement also stated that: "Nothing contained herein or in the other loan documents or any other agreements contemplated hereby or executed approximately simultaneously herewith shall impose upon the lender an obligation to see to the proper application by the Borrower of money advanced hereunder . . ." Bathgate could have cancelled the Guaranty at this point but did not. Instead, he moved forward with the $48M loan. He testified that he signed the agreement because he relied on the Bank's representations that it had honored the prior agreement.

P. The Withum Report

On or about November 8, 2006, Bathgate received the Withum Report, which concluded that of the forty-eight (48) units that were part of Phase 1, fifteen (15) units had been sold and closed; fifteen (15) more had been sold but NOT closed; and eighteen (18) units were completely unsold. They expected that more would close after November. 11T58. Ultimately, only four (4) units in that second category actually closed. Bathgate did not offer to advance the necessary funds to complete additional units ($6.6M) 12T112. Withum also reported that there were accounts payable to vendors in the amount of $2,675,000, which was 10% of the total project. With one exception, there had not been an invoice or contract provided from any vendor, subcontractor or material man for any of the advances. 3T143.

Q. The LTV

By November 2006, the principal balance of the loan was $26,667,015.07 even though the total value of the property was only $24,600,000, reflecting an LTV of 1.97, which is almost 200% more than the LTV ratio limit. Consequently, the Bank began to co-sign checks with Oakshire. Advances 35-37 occurred through March of 2007.

R. Termination of the Guaranty/Default

Bell died in April of 2007 and thereafter, Royal Bank sued Bathgate but not Oakshire. After a $6 million judgment, they settled for $2 million. D-80. After Bell died, Bathgate retained counsel, Helen Davis Chaitman, Esq. On April 10, 2007, Chaitman advised the Bank that Bathgate would no longer be guaranteeing any additional advances until the shortfall was resolved. P393A.

On May 1, 2007, the Bank advised Oakshire, Bathgate and Bell's estate that they were in default and demanded payment. P394. The letter from Margiotta also stated that during their prior meeting, the Bank had agreed to continue payments of all accounts payable if there was additional collateral pledged. Bathgate declined.

Around that time, Wouters ceased representing Oakshire, which then became represented by a new attorney, who also represented Bell's Estate. At some point, a receiver was appointed for Oakshire. In early May, the Estate and Bathgate discussed possible settlement, but it never came to fruition. Bathgate testified that in early June 2007, he advised the Bank that he had no obligation to continue his guaranty, which was terminated through his attorney, and suggested that the units under contract should be completed and sold to enable them to use the proceeds to pay down the debt owed to the Bank.

S. Foreclosure

Amboy did not commence foreclosure on the remaining unsold units until October 4, 2007. Bathgate asserts that Amboy failed to take commercially reasonable action in late 2006 and 2007 to maximize the value of the collateral securing the loans in mitigation of its alleged damages, in that Amboy did not promptly proceed with immediate funding of all units that could have been completed in 2007 and then sold. At the end of 2007, Bathgate urged the Bank to advance $1,632,870 to Oakshire so that the ten units that were then under contract could be completed and sold, which would result in a yield of $7,512,999. The Bank declined.

On January 29, 2008, a receiver was appointed in the foreclosure action. He was given authority to, among other things, sell seven units whose sales had been pending. P416. On May 27, 2008, the Receiver's duties were expanded to enable him to sell more units. P417. Those powers were extended again on August 1, 2008. P418.

In 2009, Amboy entered into an agreement with the Federal Reserve Bank and the New Jersey Department of Banking that required Amboy to improve its credit administration and management. At that time, other loans by the Bank were also going into default, which led to the resignations of Davis and Scharpf.

After the final judgment of foreclosure in the amount of $34,476,100.11 was entered on August 26, 2009, the remaining property was sold at Sheriff's Sale on November 2, 2009. At that time, the value of the property was $23,805,000, which included all unsold units.

In light of the foregoing, the Bank is seeking $25,206,698.08 in damages calculated by Robert Beni, who ultimately replaced Margiotta, based upon (1) the principal amount due under the $48M Loan as of October 15, 2008; (2) interest that accrued at the default rate under the $48M Note less the credit for the value of the property as per the Foreclosure Order; and (3) the net proceeds from the date Bathgate terminated the Guaranty through October 15, 2008, the date of the Certification for the Foreclosure Agreement. In making his calculation, Beni considered the final foreclosure judgement of $34,476,100.11 and added the aggregate amount due, $2,304,178.57, as of October 15, 2008, for a total of $36,780,278.68**.** He then deducted $23,805,000, which was set forth in the August 2021 Foreclosure Order**,** leaving $12,975,278 at the time of the foreclosure judgment. P428. He used an interest rate of 12.25% based upon the prime rate and calculated $12,069,351.93 in interest up until the time of trial, which was 5,245 days. Adding the foreclosure amount to the interest, Beni calculated a total of $25,206,698.08.

Although Bathgate proffered no expert to challenge Beni's assertions, he contends that Beni's interest calculation is erroneous as a matter of law. Instead of relying on R. 4:42-11(a) for his calculations, Bathgate contends that Beni improperly calculated interest by the higher default rate set forth in the $48M note.

II. EXPERT TESTIMONY

A. The Bank's Expert Morrow

J.F. (Chip) Morrow testified on behalf of the Bank and was qualified as an expert in construction lending and servicing. In addition to the actual loan and related documents and loan policies of the Bank, Morrow relied primarily on three sources for his opinions: Comptroller's Handbook of Commercial Real Estate and Construction Lending (1998), Federal Reserve Board's Commercial Bank Examination Manual for Division of Banking Supervision and Regulation (1994-2010) and the AlexInformation Loan Procedures Manual. Morrow described those documents as providing industry parameters, norms and standards for residential construction loans applicable to the Bank.

1. Whether the Bank sufficiently reviewed Bell's proven track record

First, Morrow testified that the Bank had appropriately reviewed Bell's prior experience and ability in finance and marketing. 4T207. According to Morrow, he recalled seeing three or four projects that Bell performed as either supervisor, owner or contractor but did not provide specific information about them. 4T208.

2. Whether the Bank was required to periodically review financial statements

Next, Morrow testified that it was not the responsibility of the Bank to obtain financial statements and review them on a regular basis. 4T38. There were other ways to monitor the financial performance of the project by, for example, reviewing title reports. 110. With no evidence of any lawsuit by vendors against Oakshire, Morrow opined that the Bank had no reason to know of the shortfall. 110. He added that the Bank did not necessarily need financial statements from a one-asset entity like Oakshire although he did not cite to any authority. 4T55.

3. Whether the Bank had a duty to monitor payments being allocated consistent with advances

According to Morrow, the Bank had no independent duty to monitor the loan. 4T106. He later contradicted himself, however, when he conceded that the Bank should have monitored loans to ensure that advances were being timely paid by, for example, requesting invoices. 4T46-47. Morrow believed that because no party ever filed any liens, however, the Bank had no reason to discover the $2.6M in unpaid vendors before November 2006.

4. Whether deviations from the Agreements were permissible

a. Whether Bathgate waived notice to any modifications

Morrow testified that the Bank's decision to not advise Bathgate of any modifications to the loan agreement, did <u>not</u> constitute a breach of the Bank's policy. He believed that the Guaranty indicated that Bathgate had agreed <u>not</u> to be informed of any modifications. 4T161. Among other things, Morrow stated that the Bank could even change the forms that were used to approve advances. 4T186.

Based upon that opinion, Morrow concluded that the waiver requested by Oakshire in May 2004 was reasonable and within the Bank's sole discretion even though he acknowledged that because the end buyers were not in place, it would "never [be] anything but a speculative project" until the bank's loan was paid off in its entirety. 4T221. Relying on the language of the loan agreement, however, he testified that even if the loan were deemed speculative, such loans were not prohibited by the Bank's policy, the Examination Manual or the Comptroller Handbook, which is indeed accurate. D1, at 41.

b. Modification of advance requirements

According to Morrow, the Bank was also not required to adhere strictly to the terms of the Agreement because of how "advance" was defined. Morrow added that changes were permissible because he believed that the Loan Agreement was for the Lender's exclusive benefit and that no one had standing to require satisfaction of any conditions.

Based upon those concepts, Morrow testified that the Borrower was not required to submit the AIA document with each advance because the Owner/Contractor Affidavit “basically fulfill[ed] the same requirements” as the AIA document. 4T191. According to Morrow, the OCC Exam Manual, Loan Procedure Manual and Comptroller Handbook did not even mention the AIA form. 4T191. Morrow added that because there was no architect “available” on an ongoing basis, it was acceptable for the owner/contractor to sign off on the AIA document. He based that opinion about no architect being available on the lack of any architectural agreement in the Bank’s records. 4T65.

Morrow interpreted the reference to material men to whom less than $200 was due and the reference to “within two weeks of performance” to mean that it related to work completed within two weeks of the advance. He also interpreted that provision as meaning that the Borrower is “certifying that everybody has been paid in full” based in part upon banking “parlance.” 4T43. He believed that language satisfied the Progress Payment Plan section of the Comptroller’s Handbook, which related to draws and advances, and states “[t]he borrower also certifies that the conditions of the loan have been met, e.g., that all requested funds are being used for the project and that suppliers and subcontractors are being paid.”

To reinforce his position that Bathgate was not permitted to insist on performance of the Agreement’s terms, Morrow relied on the following language: “nothing herein contained shall impose upon the Lender any obligation to enforce any term, covenant or condition contained herein. Failure of the Lender, to insist upon strict performance by the Borrower or Guarantor(s) of any term, covenant or condition of this Agreement shall not be deemed to be a waiver or relinquishment of any such term, covenant or condition.”

c. Whether owner could also be the contractor

As for the issue of whether it was proper to allow Oakshire to serve as contractor and buyer, Morrow concluded that the Bank followed industry standards even though the Loan Policy stated differently. 4T208. He believed there were other ways for the Bank to monitor the fiscal health of the project, although he did not specify what that was beyond title documents.

d. Whether the Loans exceeded the LTV Ratio

In calculating the LTV Ratio, Morrow relied on the Comptrollers Handbook to define the LTV as the "percentage or ratio that is derived at the time of the loan origination by dividing an extension of credit by the total value of the property . . . securing and being improved by the extension of credit, plus the amount . . . readily marketable or other acceptable non-real estate collateral." 4T212. He based his LTV calculation on the "gross sellout" figure set forth in the Appraisal, even though he testified that he never reviewed any appraisal when he prepared his report.

He began with the 2003 appraisal value of $102,060,000 and concluded that the maximum loan outstanding at 75% could be $76,545,000. Because the actual loan and LOC were $35,000,980, he calculated the LTV Ratio on the first loan at 35.25%.

For the 2006 loan when the gross sellout value of the property was appraised slightly higher at $104,340,000, Morrow calculated the maximum value under the 75% LTV to be $78,256,000. "So… Amboy's maximum loan was $58,627,200, which is 56.19%" and far below the 75%. 4T214. He equated it to a liquidation value without citing to any authority. 5T103.

5. Whether Bathgate was aware of the project's finances

According to Morrow's review of the documents, Bathgate was "totally aware of the project and the budgets there" because he procured the second loan with Royal Bank in 2005 and retained Withum in summer 2006. Likewise, Morrow testified that Bathgate received advances 1 through 33 via fax notice. 4T18. Therefore, to the extent there was any increase in risk, Morrow opined that Bathgate had accepted and acknowledged the risks, adding that his awareness was corroborated by the fact that loan administration documents were sent to his law firm. He admitted, however, that Bathgate himself had no obligation to monitor Oakshire's financial condition and whether monies being advanced were actually going to the designated vendors and subcontractors. 4T72.

6. Morrow's Conclusion

Because Morrow opined that the Bank had not improperly run afoul of any of the operative documents among the parties or standards in the industry, Morrow concluded that the Bank did not materially alter the nature of the risk. 4T15. Similarly, because Morrow concluded that the Bank was following industry standards, he believed that the Bank did not increase the risk of the project by how it modified and administered it. 5T12. Again, Morrow relied on "industry standards" including the Comptroller Handbook and Bank Examination Manual in addition to the loan policies of the Bank itself. 4T16.

B. Bathgate's Expert – Nicholas B. Jalowski

Prior to this trial, Jalowski had been qualified as an expert on bank practices and procedures in other cases. At trial, his testimony was based on large part of his thirty-six years of experience with hundreds of loans related to residential track development and lending practices, bank loan policies and procedures over the course of hundreds of loans. 8T159. He also testified about his education and experience working at various banks in underwriting, credit analysis and loan administration, including draws or advances. Except for a short stint in the 1970s, his clients were not generally banks but rather, borrowers. Part of the Bank's challenge of this expert's report and related testimony was based on the lack of any reference to any treatises, credit administration guidelines or regulations, requirements of the Federal Reserve Bank or requirements of the Comptroller of Currency.

When Bathgate asked that Jalowski be considered qualified as an expert in bank lending practices and the standards involved in the administration of loans and loan advances, the Bank objected because he did not have the proper expertise from a "lender's point of view." Jalowski did testify, however, that he had experience in loan administration and approving draws or advances. That he did not render opinions based upon specific regulations does not nullify his expertise. Correa v. Maggiore, 196 N.J. Super. 273, 282 (1984) (stating that "expertise may be acquired by occupational experience") (citing Rockland Electric Co. v. Bolo Corp., 66 N.J. Super. 171, 176 (App. Div. 1961)). He relied on other information including, but not limited to the operative documents themselves including the Loan Agreement and the Loan Policy. Most notably, many of his opinions were supported by authority relied on by Morrow, albeit different provisions.

Although the court ultimately deems him qualified in bank lending practices and the standards, the court made clear that it had discretion to weigh the qualifications and accordingly assess the credibility of Jalowski. The trier of fact is free to accept all, part or none of a witness' testimony as is embodied in the Model Jury Charges.

Parenthetically, because this is a breach of contract claim, the court is not convinced an expert was technically necessary although both experts did indeed assist the trier of fact in understanding the language in the various documents and banking practices. Ultimately, the court is satisfied that Jalowski had a foundation for rendering an expert opinion based upon his experience in the industry. Regardless, to have disqualified Jalowski as an expert would have run afoul of Seoung Ouk Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015), which prohibits an application at trial disguised as an in limine motion to have a dispositive impact on a case.

In his report and testimony, Jalowski offered three opinions: (1) the Bank did not adhere to the usual and customary standards of the construction lending industry in administering the Oakshire loan relationship; (2) by not following industry standards, the Bank increased its risk of loss on the loans advances and ultimately incurred large losses because of its own behavior; and (3) in its administration, the Bank fundamentally altered the risks of the project, which materially and fundamentally altered and increased the risk Amboy seeks to impose on Bathgate as guarantor. Each deviation will be addressed in turn.

1. Failure to confirm financial viability of borrower

Jalowski testified the Bank did not conduct any independent analysis of Bell's qualifications or proven track record prior to the loan agreement, which is necessary to determine whether the owner/builder has experience and "demonstrated ability" to manage and build the project. Not only must the owner/builder/contractor have experience in construction to build the units, but he must also have marketing and sales experience to decrease the inventory. Such an inquiry is the customary standard of care.

Consequently, Jalowski opined that the Bank's failure to conduct an "independent review or due diligence" represented a deviation from its own policies and general banking/lending practices.

2. Failure to regularly review financial statements

Jalowski also criticized the Bank's failure to review financial statements of Oakshire on a regular basis, which he deemed a violation of policy and of Section 6.7 of the Loan Agreement. Jalowski testified that such language was standard and that had it complied with this provision, the Bank would have seen a negative cash flow at the beginning of the project as early as late 2005. 9T37, 59. Jalowski noted that again, when it administered the 2006 loan, the Bank did not review or even require those same financial documents. 8T. If it had, the Bank could have decreased the risk and speculative nature of the project by withholding advances and allocating them to accounts payable.

3. Failure to comply with Section 4.3's conditions precedent for advances

Jalowski explained that the advance process was not followed in two ways. First, on more than one occasion, the Bank approved draws for amounts that were not approved by the inspector including advance numbers 2,3,5,7,8,14,16,19 and 21. 9T41. Second, the seven conditions precedent in Section 4.3 of the Loan Agreement, which were standard in the industry, were not followed. Jalowski emphasized that Truhan himself recommended them in his initial report and in bold in each inspection letter 8T161. According to Jalowski, the modification of that requirement was a material change, which increased the risk of the money not being properly allocated and accounts payable becoming a problem.

4. Breach of the Loan Policy

Jalowski also criticized the Bank for not following its Loan Policy, which states that loaning to a borrower who is also the general contractor is not recommended and that the borrower should be properly vetted to ensure a proven track record and sufficient finances. D1 at 41. Another breach of the policy was due to the speculative nature of the loan, which was deemed "unacceptable."

5. Breach of the Loan Agreement – Section 2.1

According to Jalowski, the structure of the lending in the original loan was important, especially the condition that there be 18 units under contract <u>before</u> advances occurred on the first 6 buildings. Jalowski testified that it was prudent bank policy to impose those requirements because it lowers the risk and the speculative nature of the loan. 8T155.

Consequently, Jalowski criticized the Bank for the changes set forth in Margiotta's May 2004 Memorandum, which waived the 18-unit contract requirement and allowed a transfer of $650k from the clubhouse to the putting green. 8T204. According to Jalowski, the Bank should have determined why these modifications were needed and how Oakshire intended to finish the clubhouse after the $650k was allocated to the putting green, which was not part of the original budget. Lastly, he testified that the Bank should have modified those terms in writing, adding that even Davis testified that a written modification would have been required to change the terms of the loan agreement. 8T211.

6. Section 2.1 – failure to fall within the LTV Ratio

In explaining the 75% LTV Ratio, Jalowski testified that it protected the Bank by maintaining a "cushion of equity" if there is an adverse event such as cost overruns or a downward turn in the market. 8T157. The appraisal process was critical because it enables the Bank to identify an **as is** value "that they're lending into as well so that they know what the value of the collateral is." 8T175. Jalowski did not believe there was any authority for using the "gross sellout" value instead of the appraised as is value.

7. Failure to mitigate losses

According to Jalowski, the Bank failed to follow its own policy when a loan goes bad. D1, at 37. Early on, it should have recognized that the project was underfunded and should have intervened by better controlling the advances, long before November 2006.

LEGAL ANALYSIS

I. WHETHER A FIDUCIARY DUTY EXISTS

As a threshold issue, Bathgate fails to cite to any case law to support his position that the Bank owed him a fiduciary duty. In United Jersey Bank v. Kensey, the court enumerated three instances when a duty to disclose may arise: where the parties have a fiduciary relationship such as attorney/client or principal/agent; where one or more parties to the transaction "expressly reposes…a trust and confidence in the other… or [because of the] circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence . . . is necessarily implied; and contracts which are 'intrinsically fiduciary' in nature and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties." 306 N.J. Super. 540, 551 (App. Div. 1997) (citing Berman v. Gurwicz, 189 N.J. Super. 89, 93 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49, certif. denied, 94 N.J. 549 (1983)); see also Globe Motor Car Co. v. First Fid. Bank, N.A., 273 N.J. Super. 388, 393 (Law Div. 1993).

The virtually unanimous rule is that creditor-debtor relationships rarely give rise to a fiduciary duty. United Jersey Bank, 306 N.J. Super. at 552. In the context of banks and borrowers, it is understood that transactions between them are conducted at arms-length, with each party acting in their own interest. Id. at 553. Although the Loan Policy refers to a lender being in a fiduciary position and Margiotta testified that the Bank had a fiduciary duty, he is a lay person providing a legal conclusion, which is improper. Because there is no presumed relationship between a bank and its customer, let alone a special relationship founded in special trust or confidence like an attorney client relationship, the Bank did not have a fiduciary duty to Bathgate as a matter of law.

II. WHETHER BATHGATE BREACHED THE GUARANTY

When interpreting a contract, the court's goal is to ascertain the "intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain . . . ." Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 184 (1981)(quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953)). As a matter of law, Bathgate breached the Guaranty. There is no dispute that Bathgate did not comply with the Guaranty because did not pay back the loan or provide more collateral when asked. Likewise, there is no dispute he actually terminated the Guaranty. Therefore, the next two inquiries are whether the Bank breached the Loan Agreements, thereby allowing rescission of the Guaranty and estopping the Bank from requiring Bathgate to perform under the Guaranty and whether Bathgate is estopped from asserting that the Bank violated the Loan Agreements because he allegedly was aware of the finances and was in a position to intervene.

III. WHETHER THE BANK BREACHED THE LOAN AGREEMENTS

A. Financial Due Diligence Prior to Loan

The Loan Policy states in relevant part that:

> To assure project completion, the loan officer should check the builder general contractor's track record as carefully as that of the borrower developer. Questions to raise would include: Has the builder done similar projects, is it bona fide, and if not why? What is its reputation in the marketplace as determined from other developers who have used its services?

The record is clear that the Bank did not ask for or review financial statements or tax returns. That first issue is undisputed.

As for second part of that policy regarding Bell's reputation and background experience, the Bank did not perform any independent investigation. There was, however, some evidence of him having some experience. For example, the loan summary referenced Bell having thirty years' experience being a developer/builder in projects ranging from 14 to 650 units. That information, however, was allegedly supplied to Margiotta by Avery who had financial incentive for the loan being approved although Margiotta could not recall, however, whether Oakshire or Bell actually provided any proof. 9T185, P13. Even putting aside that Avery did not testify, making any of the statements about what he told the Bank hearsay, there is no documentation to support his opinion. Likewise, although Morrow testified about Bell being involved with a few projects, he could not provide any specific information.

Ultimately, the failure to investigate Bell's prior successes or failures was inconsistent with the Bank's Loan Policy, which recognized that loaning a borrower money when he or she is also the general contractor is inherently risky and requires a deeper inquiry. The relevant portion states in relevant part: "When a borrower acts as its own general contractor, the lending officer will want to establish the borrower's credentials as a builder. A borrower acting as his own general contractor generally is not recommended unless Amboy had satisfactory prior experience and borrower is knowledgeable in finance and marketing." In addition to Oakshire/Bell not having any satisfactory prior experience with the Bank, the Bank failed to proffer any specific instances to demonstrate that Bell was successful builder or knowledgeable in finance and marketing.

In light of the foregoing, Bathgate met his burden of proving by a preponderance of the evidence that the Bank violated its own policy by failing to verify Oakshire's and

Bell's financial credentials, experience in marketing and finance, or general past successes in similar projects. In so doing, those violations caused the loan to collapse. The court finds Jalowski' s testimony to be credible in that these failures had an adverse impact on the loan and contributed to its ultimate failure, although expert testimony is probably not even needed to reach that conclusion. If you have a policy that explains its purpose, but the agent fails to follow it, it is intuitive that a failure to follow it would lead to a negative result. More specifically, here, before entering into a loan agreement, it is wholly logical even to a layperson that one should inquire or review the borrower's finances to ensure reimbursement. And in fact, here, there was a poor outcome. To this day, no one was able to confirm whether Bell actually had any prior successful experiences. Morrow's testimony that the Bank was not required to undertake those steps was not logical or credible but more importantly, it was not supported by any of the operating documents or resources that he relied on.

B. Duty to Regularly Review Financial Documents - Section 6.7

According to Bathgate, it was important to him for the Bank to obtain customary and standard financial statements from the independent CPA to create a snapshot of what has been paid, what work has been completed and what was owed. 11T239. In fact, he had provided his personal financial information to the Bank before the first loan.

Two high-ranking officers, including Margiotta and Davis, agreed that the Obligors had a financial obligation to provide documents like financial statements and tax returns. For example, Margiotta testified that it was the usual stipulation for the borrower and guarantors to have a continuing obligation to supply that information. Margiotta also admitted he was unaware of having received any such documents from Oakshire or Bell after the loan agreements. Importantly, Margiotta recognized that by not requesting financial documents, there was no way for the Bank to know if Bell had any side deals with vendors or contractors or was otherwise having any other financial issues. Because the Bank did not ask any of those questions, it did not follow its own policies, a fact that Morrow does not acknowledge despite testimony of the Bank's officers.

The credibility of Morrow's testimony was also discredited by some of the Manuals he relied on in his report, albeit different provisions. For example, the Examination Manual stated that, "[t]o detect signs of a borrower's financial problems, the bank should review the borrower's financial statements on a periodic, quarterly basis, assessing the liquidity debt level and cash flow, the degree of information the financial statements provide the bank insofar as understanding the borrower's financial condition so concerned depends primarily on whether the borrower is single-asset entity of a multi-asset entity." He was also contradicted by the Commercial Bank Manual, which stated that whether it is a one or multi-asset entity, "one issue is of importance to financial statements of both entities relates to monitoring changes in accounts and trade payables. Monitoring these payables in a detailed manner helps the bank determine if trade payables are paid late or if there are any unpaid bills. In the event of problems, a bank might choose to either pay bills directly or request an additional credit check on the borrower." 4T57.

Without citing to any authority, Morrow did not believe that those materials from the subcontractors or vendors would have assisted in monitoring because of the size of the project. 4T60. He went on to testify that there were "alternative ways of accomplishing the same thing, and that's what Amboy chose to do." 4T60. Yet, Morrow opined that the Bank was only required to request "the information that they felt was necessary for the administration of the loan according to the industry, which is exactly what happened." 4T48-49. While Morrow may believe that the Bank only was required to request what it deemed necessary, that proved to be ineffective in preventing the collateral from becoming worthless.

In light of the foregoing, the court finds that Bathgate proved by a preponderance of the evidence that the Bank breached both the Loan Agreements and its own Bank Policy by failing to obtain any financial information from Bell and Oakshire during the course of the loans. As a result, the Bank did not recognize that Oakshire was not in good fiscal health. That breach materially increased Bathgate's risk and goes hand in hand with the failure to monitor advances, which were improperly applied to unapproved soft costs to help keep Oakshire afloat.

C. Allocation of Loan Proceeds and Limitations on Advances– Section 2.1

Section 2.1(c) set forth the parameters for the revolving line of credit and required advances be limited to $3.3M per six-unit building subject to the 75% LTV ratio. For the first six buildings, construction was required to be performed in stages and could not move on to additional buildings without signed contracts from purchasers for 18 units. Margiotta acknowledged that the minimum contract requirement was necessary because they were uncertain of the project because it was age-restricted and very high-end. Stated simply, they needed to sell the units to pay back the loan before new units were built. Based upon those requirements, Bathgate believed that just as the Bank was limiting its risk by making that a requirement, he would be protected as well. Parenthetically, as of August 2006, the minimum 18-unit requirement had still not been met.

Surprisingly, less than three months after the loan agreement had been signed, Margiotta wrote his memo recommending removal of the 18-unit minimum sales requirement and transfer of $650,000 from the clubhouse budget to the putting green. That amendment to the terms was signed and approved by Scharpf, Davis and Margiotta. P12. In other words, this was not the decision of a single, rogue bank officer.

Bathgate contends he did not learn about changes like the May 2004 Margiotta Memo until this litigation had commenced. Bathgate was in disbelief regarding these modifications, stating that "who assumed that the bank would unilaterally change the deal, change the requirements that were imposed in the agreement, repeatedly, over the life that they were involved in this transaction?" 12T27. Most importantly, Davis provided the following pivotal testimony, which supports Bathgate's position.

> Q. [I]n your experience as head of the department at Amboy Bank, a loan and security agreement is entered into, and it is also signed not only by the borrower and the bank, but by a guarantor who is a party to that document, can the bank say well, I'm going to unilateral – the bank is going to unilaterally change it, going to someone else?
>
> A. Not without a modification.
>
> Q. And when you say not without a modification, you mean a written modification that, again the same parties sign.
>
> A. Correct.
> 8T56:8-19.

In contrast, Morrow believed that provisions of the agreements could be modified if requested and justified by the Borrower without informing the Guarantor. While the Guaranty states that the Bank could modify the agreement without notice, it also contains the qualifying clause that it can do so "without affecting the liability of the undersigned and any of them." Here, the premise of Bathgate's argument is that those modifications affected their collective liability because of the significant cost overruns. More importantly, the Loan Agreement did not contain that same language allowing unilateral modifications.

Nonetheless, the Bank contends it was entitled to modifications without notice to Bathgate because he waived his right to receive that information based upon the definition of "advance," which is defined as any payment of Money under the Loan "whether or not in accordance with the terms of this Agreement." According to Morrow, Bathgate had agreed "not to be informed of anything," adding that the Bank had "carte blanche" to change the terms. Although the Bank contends that the Agreement allowed it to make advances "without receiving all the documents provided for [as] condition to the advances," it did not actually contain such language. Margiotta admitted not advising Bathgate of that adjustment because he believed the onus was on Bell to tell Bathgate of the requested change.

The court finds that Bathgate did not waive any and all modifications to the loan agreement and that any change needed to be in writing signed by the parties for several reasons. First, the structure of the original loan ensured that there would be sufficient funds to repay the bank with excess collateral. Jalowski testified that it was prudent bank policy to impose those requirements because it lowers the risk and the speculative nature of the loan. 8T155. By eliminating the pre-sale requirement, there` were no longer deposits coming into the fund. That material change transformed the loan from somewhat risky to purely speculative, which was unacceptable according to the Loan Policy, and therefore, increased the risk to the Bank and the Guarantor as well as the Borrower. 9T10. In light of the foregoing, the court rejects the notion that the agreement was solely for the Bank's benefit and that no one other than the Bank had standing to enforce the agreements in large part because various individuals admitted that the agreement was to benefit all three parties in interest – the Bank, Bathgate and Oakshire/Bell.

According to Jalowski, the Bank should have determined why these modifications were needed and how Oakshire intended to finish the clubhouse after the $650K was allocated to the putting green, which was not part of the original budget. In his words, the Bank should have "taken a deeper dive" into why a portion of the project was being underfunded. 9T15. Jalowski opined that unilaterally changing those terms altered the structure of the deal in a fundamental and material manner. That change made the loan even more speculative, thereby increasing the risk.

Based upon the credible testimony of Davis, Jalowski and Bathgate, the court finds that Bathgate has shown by a preponderance of the evidence that the Bank breached the agreements by unilaterally changing the material terms set forth in Section 2.1. Those actions increased the risk of loss by making the deal more speculative and not maintaining sufficient collateral.

D. Conditions Precedent to Advances – Section 4.3

The conditions precedent to advances were important to Bathgate as he understood those monies would be going to work in place, i.e., general construction, as identified in the Schedules to ensure that the money would be used for the vendor listed and for the specific work being described and that there were sufficient monies available to finish a specific task. Section 4.3 required an AIA Document/G702; owner's affidavit; contractor's affidavit; amount requested; certification that the work performed complied with plan and with the schedules including budgeted costs and paid costs; and a certification that the undistributed portion of the Loan in the category from which the Advance is requested is sufficient to complete the project. 12T129.

These requirements were consistent with Truhan's initial report, which explicitly recommended those forms as well as copies of complete signed and dated contracts for all major draw requests, approved of by both the project Architect and the General Contractor and Owner. In addition to his report, most if not all of the letters from Truhan stated in bold that the affidavits from the architect and owner/contractor should be submitted "<u>before any funds are released</u>." P42, P56, P57. These inspections were important to the Bank because "[t]hat's the whole basis of the construction loan . . . work in place . . . that's our collateral." 1T97. It is undisputed that there were no AIA/G702 forms in the Bank's file. These omissions are particularly troubling because five advances were processed without an inspection, and seven were processed even though the construction and development could not be verified by the inspector, which was not disputed at trial. This is evidence of additional breaches of the Agreement.

Truhan, however, had also testified that the AIA forms and owner affidavits could be used interchangeably although he cited to nothing. Morrow agreed with Truhan that the Owner/Contractor Affidavit "basically fulfill[ed] the same requirements" as the AIA document. 4T191. Morrow added that because there was no architect "available" on an ongoing basis, it was acceptable for the owner/contractor to sign off on the AIA document. Morrow added that the OCC Exam Manual, the Bank's Loan Procedure Manual and Comptroller Handbook did not even mention the AIA form. 4T191. That the Loan Policy and other resources did not require it, however, does not negate the contractual requirement in the Loan Agreements to provide those forms.

In fact, Bathgate relied on that provision because the G702 Form certifies that the money will be used for the vendor listed and for the specific work being described and that there are sufficient monies available to finish that specific task. 12T129. He placed emphasis on the mandatory language, which said that documents enumerated therein "shall" accompany any advance requests. He presumed that the Bank would administer the loan in accordance with the "four corners" of the loan agreement and repeatedly received assurances. His expectation was that if an inspector says a portion is 80% completed, that said statement was correct such that the money was not going to pay for personal expenses or soft costs.

Jalowski explained the significance of these failures. For example, he criticized the Bank for not following the recommendations of Truhan to require the AIA document, which needs to be signed by the architect, who is certifying that the work has progressed as indicated and that quality of that work is consistent with the contract documents. D64. It also requires the contractor to certify that all payments regarding prior advances have been completed.

According to Jalowski, the Owner's affidavit is insufficient because it fails to certify that the contractors have been paid in full for all of the work covered by the prior advance. He deemed the absence of this document as highly unusual. Even if there was no architect to sign the AIA form as testified to by Morrow, there was nothing precluding Bell from providing the language to reassure that the advances were being properly applied. That language is clear and unequivocal and provides:

> The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief, the Work covered by this Application for Payment has been completed in accordance with the Contract documents, that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from the Owner, and that current payment shown herein is now due. (Emphasis added).

In contrast, the owner's affidavit provided by Bell only stated there were no construction liens or other encumbrances other than the lien of the first mortgage and that "[a]ll material men services and laborers who have performed work within two weeks of the date of performance of such work and to whom less than $200.00 was due therefore have been paid in full, see list of payables attached." Morrow interpreted that language as first meaning that it related to work completed within two weeks of the advance. Second, he interpreted that provision that the Borrower is "certifying that everybody has been paid in full" based in part upon banking "parlance" although he may have added "a comma or two" to make it read better.

Incredibly, Morrow initially testified that the Bank had no duty to monitor the advances, but he later changed his position when he was confronted on cross examination. Morrow was also contradicted by the Comptrollers Handbook, which he relied upon in part in proffering some of his opinions, which states that "a bank must monitor the progress of the projects it is financing to ensure that the borrower's request for funds is appropriate for the particular stage of development and in accordance with the predetermined disbursement schedule." 4T50. Likewise, it states that "the bank must obtain accurate and timely inspection reports reflecting the status of the project and alerting it to situations where the project is not proceeding as planned." Thereafter, it states that "other ways to detect problems including an updated credit report on the developer to determine if there are any unpaid bills, if trade payables are being paid . . ."

4T50. In addition, that paragraph provides that "a bank should also verify tax payments to ensure the borrower is making timely payment." Morrow testified that the Bank did monitor accounts payable "[t]hrough the certification of the title company that liens were not being filed." 4T5.

Morrow, however, was also contradicted by the Commercial Bank Manual, which stated that the regulators should review whether the disbursements are authorized in writing by the contractor, borrower, inspector, subcontractors, and/or lending officer. Regardless, Morrow had no issue that there were no vendor invoices when the Bank approved the $650K in May 2004 and believed that there was a "good explanation" for those increased costs. 4T69.

After reviewing all the evidence including testimony, the court finds that the Bank's advancing money without AIA/G702 Forms was a breach of the Loan Agreement. Had they properly monitored the advances, they would have learned that that money went to soft costs like salaries, marketing, private donations, party supply stores, a lawyer, business supply stores and utilities and not to the vendors Oakshire had represented would receive the money. In addition to Jalowski's testimony regarding the Form's purpose and why its absence constituted a material change that led to the Project's demise, even Margiotta had testified in his deposition regarding why that document was important. Likewise, Davis, who was ultimately the Chief Lending Officer, testified that the form was standard during his thirty-year career in banking.

In contrast, Truhan's testimony was not credible regarding those forms' interchangeability. If he believed that those forms achieved the same purpose and were interchangeable, why did he make recommendations that they both be provided? If the

AIA/G370 document was interchangeable, why did he put that requirement or recommendation in bold? Although Truhan was generally credible, that testimony was unsupported by any reference and somewhat disingenuous.

E. Whether the LTV Ratio Met the 75% Requirement

Both parties appear to agree that generally, the LTV Ratio based upon the 2003 Appraisal was within the proper range at the beginning of the project, even though they calculated those figures differently. In making the calculation, Morrow divided the loan amount of $25,980,000 by the gross sellout value of $102,060,000, meaning that that the LTV Ratio was 25.45%. Even adding the LOC of $10,000,000 to the loan and then dividing it by the gross sellout value, the Morrow contends that the LTV Ratio was still 35.25% and therefore, well below the 75% LTV Ratio. Jalowski estimated that based on the "as is" value (without site improvements") of $7,887,000, the LTV Ratio in 2004 was 55% and therefore, acceptable. 9T78. Although the LTV Ratio exceeded 75% in December 2005 as set forth in the settlement statement, Jalowski testified that the Bank's obligation to intervene to address the excessive LTV Ratio was not triggered until August 2006.

They experts diverge, however, in calculating the LTV Ratio based upon the 2006 Appraisal, which made the following assessments regarding the 82 remaining units:

- The ***as is*** value to a single purchaser, consisting of a 24.86-acre tract, conditionally approved for 96 residential building lots, 82 of which are the subject of this appraisal, assuming that site improvements have not yet been installed to property, which was valued at **$22,550,000**.

- The ***as if improved*** value to a single purchaser of a 24.86-acre tract with approvals for 96 age-restricted residential condominium dwellings, 82 of which are subject to this appraisal, conditioned upon all subdivision site improvements being installed to the property, which was valued at **$24,600,000**.

- The ***gross sellout*** value of 82 condominium dwelling units, which was valued at **$104,340,000** and based on an . . .the average overall selling price of **$1,272,439.**

For the 2006 LTV, Morrow divided the second loan amount of $48,627,200 by the gross sellout value of $104,3400,000 to conclude that the LTV Ratio was 46.60%. In contrast, Jalowski stated that if you divided the loan balance of $25,980,00 as set forth in the Bank's 2006 loan write up by the as is value of $22,550,000, the LTV Ratio was 115%. 10T149-50. Meanwhile, in its monthly settlement statements, the Bank would divide the loan balance, which was $22,944,151.92 in July 2006 by the amount of the original loan of $25,980,000, for an LTV Ratio of 2.36. D53A. In its November statement, the Bank divided $48,627,200 by the as if improved value, which was $24,600.000, to reach an LTV Ratio of 197%. D59.

The point is that the Bank and Jalowski used the value if sold to a single developer (with one figure being as is and the other being as if improved), whereas Morrow used the gross sellout value if the individual units were sold to individual third parties. As noted by Jalowski, it was important to measure "what is already erected against the loan advanced" rather than the final product once all of the units were finally constructed.

Morrow testified that because the units were not going to be sold to a "single purchaser," the gross sellout value was the value to be used as the units were to be sold separately to end users based upon his experience at the FDIC. When asked if the manuals he relied upon referred to "gross sell-out value," he responded that "market value is gross sell-out—market value of the real property is the gross sale price of the property, it's overall for the project." The various documents including the Appraisal did not define market value as the "completed" project. 5T83.

Morrow agreed that "value" is defined as: "An opinion or estimate set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of the real property prepared in accordance with the agency's appraisal regulations and guidance." 5T80. Morrow believed, however, that no distinction between "gross sell out value" and "market value" was necessary in those manuals because "bankers are smart enough to know what that means." Ultimately, Morrow admitted that the Bank requested the "as if improved" value from the appraiser. 5T84.

In contrast, Jalowski's calculations were consistent with the definitions of "market value" in the Loan Agreement and the Appraisal, where it was defined as "the most probable price that a property should bring in a competitive and open market value under all conditions requisite to a fair sale." The Appraisal's definition of market value is based on uniform standards of professional appraisal practice. When counsel attempted to equate "market value" with "gross sell out" value during cross-examination, Jalowski was consistent and testified that they were defined differently.

Based upon the testimony and the evidence, the court finds that gross sellout value is very different from both as is and as if improved values. Logically, "as is" value, which Jalowski relies upon, makes the most sense because it was the value of the property as it existed at that moment. Although the as if improved value is very close, it assumes things not yet in existence or not yet completed. Regardless of whether you used "as is" or "as if improved value," however, the point is that the LTV Ratio was far greater than 75% in 2006.

Having reviewed the evidence and testimony, the court finds that Morrow's testimony was not credible and simply illogical, especially given the concession that the value must be measured based on at the time of the loan was administered, not the projected sale price because it would be subject to too many variables. The definition in the loan agreement does not define "market value" as the projected sale price of each unit multiplied by the number of units to be sold. It contemplates a single buyer of "the property." Morrow could not cite to any authority that supported using the gross sell out value, and eventually admitted that there was no reference to "completed project" or "gross sellout" value in the relevant manuals or the Bank documents**.** Although he also relied on his experience at the FDIC, the Federal Reserve defined LTV ratio as "the total amount of credit being extended divided by the value of the underlying property." 5T76. In light of the foregoing, the court finds that the LTV was well beyond the 75% limit, which Jalowski stated should have been discovered by the Bank by August 2006, which is another example of a breach of the relevant agreements. 8T56.

IV. Whether Bank's Failure to Mitigate Damages Runs Afoul of the Loan Policy

To the extent Bathgate contends that the Bank failed to mitigate damages by selling off properties as he suggested in late 2006, the court is not satisfied that Bathgate met his evidentiary burden to show the Bank breached any duty or that implementation of his suggestion would have decreased the losses. Bathgate did, however, meet his burden by demonstrating that the Lending Officer should have recognized the "material" deterioration in the credit and then limited additional damage by not making advances.

The Senior Lending Officers should have reexamined up to date on all credits and for all loans above the lending authority because a senior officer "has responsibility towards deteriorating credits" and should be the first person to recognize such a problem The provision goes on to say that if a credit shows "material deterioration," he is then obligated to limit the Bank's exposure with that borrower by not advancing additional funds. Jalowski testified that this provision signifies that if your credit is deteriorating, that you stop advancing until you can ascertain what is occurring, as is standard in the industry. 9T95. Had Margiotta not served as both the lending officer who brokered the loans and as the lending officer approving advances, which is against the Loan Policy, another officer may have recognized the peril the project was in. Therefore, for the foregoing reasons, the court finds that Bathgate demonstrated by a preponderance of the evidence that the Bank's failure to stop advancing monies long before Bell died contributed to the ultimate losses and was inconsistent with the Loan Policy.

V. Whether the Bank's Breach Excused Bathgate's Duties as Guarantor

Where several writings are made as part of one transaction relating to the same subject matter, they may be read together as one instrument, and the recitals in one may be explained, amplified or limited by reference to the other -- the one draws contractual sustenance from the other. Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 21 (App. Div. 1985). Consistent with that notion, the loan agreements and guarantees need to be read together and not in isolation to accurately provide context and derive their meaning. The Bank does not dispute that fundamental tenet. Nor does the Bank dispute the tenet that a contract (including a guaranty) must be read against the draftsperson, which in this case is the Bank. Center 48 Ltd. P'ship v. May Dept. Stores, 355 N.J. Super. 390, 405-06 (App. Div. 2002). Similarly, the guaranty "must be read in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved." Id. At 406. While any ambiguity should be construed in favor of the guarantor, "the agreement should be interpreted according to its clear terms so as to affect the objective expectations of the parties." Id.

A material alteration or variance from a contract discharges a guarantor if he did not consent to that change. See Mosaic Title Co. v. Jones, 111 N.J.L. 385 (E&A); In re M.S. Wien & Co., 54 B.R. 183 (1985). A risk is deemed "material" if the change actually increases the guarantor's risk or liability. Center 48 Ltd., 355 N.J. Super.at 410. To secure this remedy, the obligor is not excused unless "the modification creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the transaction prior to modification." Id. (quoting Restatement (Third) of Suretyship and Guaranty, Section 41(b)(i)(1996)). Whether a material breach has occurred is a question reserved for resolution by the factfinder. Chance v. McCann, 405 N.J. Super. 547,566 (App. Div. 2009).

This concept is consistent with general contract law, which states that "If during the course of performance one party fails to perform essential obligations under the contract," he may be considered to have committed a material breach and the other party may elect to terminate it. Id. at 565 (citations omitted). "Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence of consistent recurrences which tend to 'defeat the purpose of the contract.' In applying the test of materiality to such contracts, a court should evaluate the 'ratio quantitively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such breach will be repeated.'" Magnet Res., Inc. v. Summit MRI, Inc. 318 N.J. Super. 275, 285-86 (App. Div. 1998) (citing Restatement (Second) of Contracts Section 237 (1981)).

In Center 48 Ltd., the court concluded that there was not a material change to warrant excusing the guarantor's obligations regarding the original lessee's performance. There, the lessee rented to a sublessee who vacated the premises, and the lessor sued the guarantor. 358 N.J. Super. at 410. The guarantor attempted to argue that the parties never agreed that it would guarantee a sublease – only the lease. Ultimately, the court concluded that it was not a material or fundamental change that affected the guarantor's risk and therefore, declined to discharge the guarantor from its obligations. The court also rejected the plaintiff's rescission argument because the parties had substantially performed. Id. at 412.

Although he may have had transactional experience, Bathgate testified he was never involved in a development/construction project like the Monmouth or in the amount at issue. While he should accept some responsibility for the ultimate outcome, he did not have any legal obligation to monitor administration of the loan or intervene. Moreover, he repeatedly testified that how this loan was administered was not in accordance with his expectations or the terms of the contract. To assume that the Bank would have followed the terms of the agreement is wholly reasonable for anyone guaranteeing a loan. Likewise, except for the unpersuasive testimony of Morrow, no expert from any bank testified that the administration of this loan was proper. The fact that the FDIC had to intervene because of loan administration problems lends credence to the argument that the Bank was not operating within norms and standards. Notably, even Scharpf testified at his deposition that the amount of failed loans during this time were excessive. While indeed, there is no specific mention of this transaction being reviewed by the FDIC, it certainly lends credibility to the argument that the Bank was not following the industry's own best practices.

Here, the Bank made material alterations to the Loan Agreements without notice to, and written consent of, Bathgate by not reviewing finances before and during the administration of the loan; significantly changing how the funds were allocated and the minimum sale prerequisite, which existed to ensure the revolving line of credit; approving advances without the documents required by the agreements including the AIA/G370 form, which would have alerted the Bank to significant underfunding as early as 2005; approving advances without verification of work in place and ensuring that they went to hard costs rather than soft costs; failing to stop advances as soon as they received the Withum Report; and failing to limit advances to maintain the 75% LTV Ratio, which was fatal to the viability of the collateral. These breaches imposed risks that were "fundamentally different" from what they had agreed to in the Agreements. As the court previously found, there was fact and expert testimony that these actions and inactions constituted material breaches that caused the failure of the loan.

As a remedy, the caselaw is clear that a court may rescind a contract "where there is original invalidity, fraud, failure of consideration, or material breach or default." Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336, 519 A.2d 368 (Ch.Div.1986). Likewise, "a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 427 (1997)

The remedy is discretionary with the court and should not be granted where there has been substantial performance of the contract. Intertech Assoc., Inc. v. City of

Paterson, 255 N.J. Super. 52, 59 (App. Div. 1993) . Most commonly, courts have applied the doctrine of substantial performance to cases that involve building contracts. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 429, 502 (1992). The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantive particulars, so that their right to compensation may not be forfeited by reason of mere technical or unimportant omissions or defects. Amerada Hess Corp v. Quinn, 143 N.J. Super 237, 253, 362 A.2d 1258 (Law Div. 1976) (citations omitted). Outside of the construction context, however, the doctrine of substantial performance is less clear: "we see no real or practical difference between a conclusion that a party materially breached a contract, and a conclusion that the party failed to substantially comply with its obligations under a contract. To decide otherwise would be simply to engage in linguistic games." 49 *New Jersey Practice: Business Law Deskbook*, § 1.11 at 20 (2007) citing (General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296 (3d Cir. 2001)).

Here, there were several material breaches. Although the Bank may have administered a significant portion of the loan, it did not “substantially perform” in accordance with the terms of the loans because of those breaches. The Bank did not perform in that it loaned monies that should have, but did not, result in substantial completion of the complex. It should have recognized this shortcoming. Had there been proper supervision and administration of the loan by the bank, it could have stopped the loss of collateral. To hold otherwise, would be based upon “linguistic games.” Regardless, in reviewing all the equities and the law, the Bank is not entitled to enforcement of the contract.

V. WHETHER BATHGATE'S AFFIRMATIVE DEFENSES SHOULD PREVAIL

A. Estoppel

Even if the Bank had substantially performed, thereby eliminating rescission as a remedy, Bathgate nonetheless has estoppel as a valid defense. "Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." Knorr v. Smeal, 178 N.J. 169, 178 (2003); Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. Mattia v. Northern Ins. Co. of New York, 35 N.J. Super. 503, 510 (App.Div.1955). The doctrine is invoked in "the interests of justice, morality and common fairness." Palatine I v. Planning Bd., 133 N.J. 546, 560 (1993) (quoting Gruber v. Mayor of Raritan Township, 39 N.J. 1, 13 (1962)). Estoppel, unlike waiver, requires the reliance of one party on another. Country Chevrolet, 190 N.J. Super. at 380. In short, to establish equitable estoppel, the party asserting that defense must demonstrate that the adverse party engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to its detriment. Miller v. Miller, 97 N.J. 154, 163 (1984).

As set forth in Carlsen v. Masters Mates & Pilots Pension Plan Trust, 80 N.J. 334 (1979), equitable estoppel requires a "misrepresentation or concealment of material facts known to the party allegedly estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse. The reliance by the injured party alleged must be "reasonable and justifiable." First

Union National Bank v. Nelkin, 354 N.J. Super. 557, 569 (App. Div. 2002); but see NY Mtg Trust v. Deely, 466 N.J. Super. 387, 400 (2021) (departing from Nelkin and relying on the Third Restatement but only regarding the standard for equitable subrogation, which is not at issue here). This equitable doctrine is "only applied in compelling circumstances to 'ensure that the loss is born by the party who made the injury possible or could have prevented it." First Union, 354 N.J. Super. at 568. (rejecting its application where the party asserting it failed to sufficiently argue that the bank had concealed any material facts unknown to them regarding their own financial position when the bank approved the mortgage loan). Here, the Bank made the injury possible and could have lessened the damage or prevented it.

For the reasons set forth above, Bathgate relied on the terms that existed to prevent a financial collapse. Many of those terms and prerequisites were the very reason he agreed to guarantee the loan. When those terms were changed and the collateral was dissipated without his knowledge and consent, it was to Bathgate's detriment (as well as the Bank and the Borrower). Because he was assured that the loan was being administered within the four corners of the agreement, he did not dig deeper. But it is the Bank's actions that are relevant to the defense. In short, because he relied on the Bank's representations, including, but not limited to, the representation that they were indeed following the agreement, which essentially induced him to guarantee the loans, the Bank is estopped from enforcing the Guarantee. To be clear, there was not a single, nefarious deviation from the Loan Agreements. Rather, there were many instances where the Bank failed to follow its own agreement, policy and banking standards, resulting in fundamental and material breaches.

B. Whether the Bank violated the covenant of good faith and fair dealing

Generally, the breach of the lender's duty of good faith and fair dealing must be egregious where, for example, the bank concealed self-interest in promotion a specific transaction. United Jersey Bank, 306 N.J. Super at 551. There is no duty under less egregious circumstances, where for example, the lenders failed to disclose the financial viability of a transaction the borrowers were preparing to enter. Ibid.

In United Jersey Bank, the Appellate Division ultimately rejected the borrower's argument that the Bank's loan policy manual and/or federal supervisory regulations prohibited the Bank from setting the loan to value ratio as it did. Id. at 560. The court cited to the manual's language indicating that the ratio was a "guideline" and could be "flexible." Likewise, it noted that guidelines by definition are not binding. Therefore, the court concluded that there was no deviation from the Bank's policy or the guidelines

Here, the Bank did not conceal any self-interest in promoting the loans. Although it may have induced Bathgate to enter into those agreements based upon certain promises that it would and did comply with the terms of the agreements, it cannot be said that the Bank did so fraudulently. At the very least, however, it was quite careless, but that does not give rise to this cause of action. Therefore, as a matter of law, the Bank did not violate the implied covenant of good faith and fair dealing.

C. Whether the Bank negligently administered the loans

"Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owed an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 280 (2002). This is especially true where a plaintiff claims no personal injury or property damage but asserts a claim for purely economic loss. See Saltiel, supra, 170 N.J. at 318. "Indeed, it is fundamental that a party's liability for breach should be governed strictly by the application of foreseeable damages stemming from the establishment of the contractual relationship. To hold otherwise would chill business relations through the application of unforeseen damages upon one who may elect to effectively breach an agreement." International Minerals & Mining Corp, 736 F. Supp. at 597; see also Wolpaw v. General Acc. Ins. Co., 272 N.J. Super. 41, 44 (App. Div. 1994) (liability is limited to the portion of plaintiff's actual loss attributable to the breach). Because there is no independent duty outside of the Loan Agreements and the Guarantees, the negligent administration claim must fail as a matter of law.

VII. Bathgate's Damages

According to Bathgate, he is entitled to recover under his counterclaim because he has been damaged by the negligent and wrongful conduct of the Bank, including its failure to maximize the collateral and timely mitigate the loss. Specifically, he contends that his damages are $19,742,241.16 based upon: the $822,241.16 he advanced to Bell per their private agreement; $16M under the Assignment Agreement with Bell; $2M for the settlement, resulting from the $6.1M judgment secured by the secondary lender, Royal Bank; $150,000 for the settlement with the insurance bond company, Lexon Insurance Company; and $700,000 he tendered to a buyer, Joseph Buckelew, who sought a return of a deposit on a unit at the Monmouth. Bathgate only summarily testified about those alleged damages and therefore, only a limited analysis is warranted.

Bathgate's claims for damages fail for several reasons. First, he fails to put forth any argument why the Bank would be liable to him for monies owed by Bell to Bathgate under either their private agreement or the assignment agreement. Second, he does not explain why the Bank should be held liable for any settlements that he willingly entered into transactions in which the Bank was not even a party. Third, he failed to provide evidence of proximate causation. Fourth, he provided no expert testimony on damages.

Lastly, the court would be remiss if it did not address all of the opportunities Bathgate had to right the ship, even though he was not obligated to do so under the documents. For example, he questioned Bell about the overruns in early 2004 but did not follow up and never requested financial statements from an accountant as set forth in their private agreement. Likewise, when he went to Royal Bank for an additional loan in (2005), he himself should have done a "deeper dive" into why that was necessary. Lastly, despite the instability of the project when they requested the $48M loan, and the fact that Bathgate retained Withum, he nonetheless signed the 2006 agreement as Guarantor before receiving the Withum Report. Therefore, although the court has found that Bathgate is not liable to the Bank, he had his own shortcomings regarding how he monitored this project overall.

VIII. WHETHER BATHGATE IS ESTOPPED FROM ASSERTING THAT THE BANK VIOLATED THE LOAN AGREEMENTS

In its estoppel argument, the Bank is turning its definition on its head. To reiterate, the Bank must show by a preponderance of the evidence that Bathgate engaged in conduct, either intentionally or under circumstances that induced reliance, and that Bathgate changed his position to the Bank's detriment. It is Bathgate who relied on the representations and the contract itself that the Bank would adhere to the checks and balances set forth in the Agreements. And it is the Bank that changed its position to Bathgate's detriment by modifying the material terms of the agreements without notice to and consent of Bathgate. And to be clear, the Bank changed its position long before

Bathgate refused to fulfill his duties as the Guarantor. To say that Bathgate is estopped from accusing the Bank of breach because ultimately, he did not comply with the Guaranty is a perversion of the law and the circumstances here. Therefore, the court finds that the Bank has failed to prove by a preponderance of the evidence that the Guaranty must be enforced against Bathgate based upon estoppel.

IX. CONCLUSION

Based upon the foregoing, the Bank failed to demonstrate by a preponderance of the evidence that it met its evidentiary burden on its claims. Likewise, Bathgate failed to meet his evidentiary burden regarding his counterclaim. Consequently, all of the pleadings are **dismissed with prejudice.**

/s/ MARA ZAZZALI-HOGAN, J.S.C.