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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

3115 SEPULVEDA BOULEVARD
HOLDINGS,

Plaintiff, Cross-defendant, and
Respondent,

v.

MICHAEL H. MUGEL,

Defendant, Cross-complainant, and
Appellant.

G045288

(Super. Ct. No. 30-2010-00334633)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Rus, Miliband & Smith, Ronald Rus, Joel S. Miliband, and M. Peter Crinella for Defendant, Cross-complainant, and Appellant.

Perkins Coie, James D. DeRoche, Jeffrey S. Goodfried and Monica M. Ortiz for Plaintiff, Cross-defendant, and Respondent.

3115 Sepulveda Boulevard Holdings (Sepulveda) filed a breach of guaranty action against Michael H. Mugel. Both parties filed motions for summary judgment. The court denied Mugel's motion and granted Sepulveda's motion. It awarded Sepulveda \$1.4 million plus interest. On appeal, Mugel argues the court made incorrect legal conclusions about issues relating to Sepulveda's case, resulting in an erroneous judgment. We disagree and affirm the judgment.

I

Mugel was the manager of a limited liability company, West LA City Portfolio, (hereafter the Borrower), formed as a special purpose entity to borrow money. In December 2006, the Borrower entered into an agreement with CW Capital (hereafter the Lender) for a \$10.9 million loan. Mugel signed all the loan documents on behalf of the Borrower in his capacity as the manager. The purpose of the loan was to purchase property in Los Angeles, and the promissory note was secured by a deed of trust as well as an "assignment of rents," both recorded against the property.

The deed of trust was titled "Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing." Relevant to this case, the deed of trust specified the Borrower must provide a \$1.4 million letter of credit to the Lender if the current tenant vacated the property while the loan was outstanding. The money was earmarked for tenant improvement costs, leasing commissions incurred with the re-letting of the premises, and "debt service shortfall." It was agreed the Lender could draw on the letter of credit if there was an "event of default" or if the letter of credit was not delivered in a timely manner. Mugel was not a party to the deed of trust.

However, Mugel individually executed a written guaranty "for the benefit" of the Borrower (the Guaranty Agreement). The Guaranty Agreement stated the Borrower promised to pay the lender \$10.9 million, secured by the deed of trust and assignment of rents. The agreement provided, "Lender is not willing to make the [l]oan,

or otherwise extend credit, to Borrower unless Guarantor unconditionally guarantees payment and performance to Lender of the Guaranteed Obligations (as herein defined); and [¶] . . . Guarantor is the owner of a[n] . . . interest in Borrower, and . . . will directly benefit from Lender's making the Loan to Borrower. [¶] . . . [A]s an inducement to Lender to make the Loan to Borrower, and to extend such additional credit as Lender may from time to time agree to extend under the Loan Documents," the parties have agreed to the terms of the Guaranty Agreement. The "Guaranteed Obligations" included paying all amounts owed under the terms of the Borrower's promissory note and producing a \$1.4 million letter of credit in the event the tenant vacated the premises.

In November 2008, the tenant gave notice it was vacating the premises. The Lender sent a letter addressed to the Borrower at Mugel's address, and separately copied Mugel, demanding they produce a letter of credit. Six days later, the Lender sent another letter, again demanding a letter of credit. In January 2009, the Lender sent a letter stating the Borrower had defaulted and it was accelerating the loan. It demanded full payment of all the debt secured by the deed of trust and a letter of credit.

Nine months later, Red Mountain Retail Group (RMRG) sent a letter to the Lender attempting to halt the foreclosure and negotiate a waiver of Mugel's guaranty obligation. Mugel, signed the letter twice, once as manager of the Borrower, and again as an individual. The request was denied.

On November 18, 2009, the Lender foreclosed on the deed of trust and conveyed the property to Sepulveda at a trustee sale. The Lender received \$6.6 million from the sale proceeds. The outstanding debt owed on the property was \$11,690,054, leaving a net deficit amount of \$5,090,054. Sepulveda's lawsuit alleged it was entitled to the \$1.4 million letter of credit guaranteed by Mugel to help cover the deficit.

In January 2010, Sepulveda sued Mugel for breach of guaranty. Mugel demurred to the complaint alleging the foreclosure extinguished his obligations under the Guaranty Agreement. The court overruled the demurrer. Mugel then filed a

cross-complaint against Sepulveda for breach of contract and declaratory relief. Each party filed motions for summary judgment based on the undisputed facts. Mugel again alleged his obligation under the Guaranty Agreement had been extinguished. The court determined Mugel was liable under the Guaranty Agreement.

II

“‘Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] ‘‘We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.’” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’ [Citation.] [¶] ‘A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.’ [Citation.] The materiality of a disputed fact is measured by the pleadings [citations], which ‘set the boundaries of the issues to be resolved at summary judgment.’ [Citations.]” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250.)

Keeping in mind this standard of review, we conclude the trial court was correct. On appeal, Mugel asserts that in ruling in favor of Sepulveda, the court ignored two fatal factual flaws with Sepulveda’s case: (1) after November 18, 2009, Mugel had no further obligation on the guaranty because the deed of trust containing the principal obligation was extinguished, and (2) demand for the letter of credit was not given to Mugel prior to foreclosure. He asserts these errors warrant reversal of the judgment and entry of the judgment in his favor. We find no error.

A. The Guaranty Obligation was Not Extinguished by Foreclosure

Mugel asserts the guaranty was extinguished by the foreclosure sale. He asserts that because the obligation to provide the letter of credit was entirely contained in

the deed of trust, the Guaranty Agreement was limited and dependent on the deed of trust. He cites to authority holding the sale of property on which there is a lien will extinguish the lien. (See Civ. Code, § 2910 [lien is extinguished upon full satisfaction of a debt].) He concludes that after foreclosure of the property, the deed of trust no longer existed and the purchaser at the trustee's sale, i.e., Sepulveda, cannot enforce any obligations of the deed of trust or the Guaranty Agreement.

The argument is based on the faulty premise the guaranty obligation was dependent or limited to the deed of trust. The trial court correctly determined the deed of trust and Guaranty Agreement were separate legal documents creating distinct and independent legal obligations. The two documents plainly show the Lender expressly required separate promises to pay from the Borrower under the deed of trust, and from the guarantor (Mugel individually) under the Guaranty Agreement. As will be discussed in more detail below, we conclude that based on the language of the Guaranty Agreement, the law regarding continuing guarantees, and the many express waivers contained in the Guaranty Agreement, the Lender created a stand-alone obligation that was not extinguished with the deed of trust.

i. General Principles Applicable to Deeds of Trust

“A real property loan generally involves two documents, a promissory note and a security instrument. The security instrument secures the promissory note. This instrument ‘entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust (with the debtor and creditor known as trustor and beneficiary and a neutral third party known as trustee). The security instrument may also be a mortgage In either case, the creditor is said to have a lien on the property given as security, which is also referred to as collateral.’ [Citation.] [¶] A security interest cannot exist without an underlying obligation, and therefore a mortgage or deed of trust is generally extinguished by either payment or sale

of the property in an amount which satisfies the lien. (Civ. Code, §§ 2909, 2910.)”
(*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235 (*Alliance*).

The deed of trust generally grants to the trustee the power to default and enforce the lender’s nonjudicial foreclosure rights. (*State of California ex rel. Bowen v. Bank of America Corp.* (2005) 126 Cal.App.4th 225, 231 [one primary function of a trustee of a deed of trust is to foreclose against the real property when necessary].) After there has been a foreclosure sale, the deed of trust is “extinguished,” having no more legal effect. (*Alliance, supra*, 10 Cal.4th at p. 1235.) The deed of trust performed as intended, the creditor obtained either a payment or sale of the property to collect an amount that hopefully fully satisfied the lien.

ii. General Principles Applicable to this Guaranty Agreement

“Civil Code section 2787 provides in relevant part: ‘A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor.’ We independently review a lease and a guaranty agreement subject to the usual rules of contract interpretation. [Citations.] Where the contract language ‘is clear and explicit,’ its terms are interpreted without regard to extrinsic evidence. (Civ. Code, §§ 1638, 1639.)” (*Central Building, LLC v. Cooper* (2005) 127 Cal.App.4th 1053, 1058 (*Central Building*).

“When a guaranty agreement incorporates another contract, the two documents are read together and “[c]onstrued fairly and reasonably as a whole according to the intention of the parties.” [Citations.] [Citation.] In other words, when a party undertakes to guarantee the faithful performance of another contract, the guarantor is contracting in reference to the other contract; ‘otherwise it would not know what obligation it was assuming.’ [Citation.]” (*Central Building, supra*, 127 Cal.App.4th at p. 1058.) However, the law is settled that although the documents are read together, “‘A contract of guaranty gives rise to a separate and independent obligation from that which binds the principal debtor.’ (*Security-First Nat. Bank v. Chapman* (1940)

41 Cal.App.2d 219, 221.)” (*Talbott v. Hustwit* (2008) 164 Cal.App.4th 148, 151.)

In this case, the Guaranty Agreement defined its nature and scope as follows: “Guarantor hereby irrevocably and unconditionally guarantees to Lender . . . and assign[s] the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise.” The “Guaranteed Obligations” were defined as: (a) “all amounts” owed by the Borrower under the terms of the promissory note; (b) payment of “all of the stated obligations of Borrower under the Environmental and Hazardous Substance Indemnification Agreement;” and (c) “the obligation to provide a \$1,400,000 letter of credit pursuant to and in accordance with section 11(kk) of the Security Instrument.”

The Guaranty Agreement referenced section 11(kk) of the deed of trust. That section, titled “Shoe Pavilion,” provided Shoe Pavilion Corporation was the tenant of the premises and if a “Shoe Pavilion Triggering Event” happened, such as it vacated the premises, then “Borrower shall within three (3) [b]usiness [d]ays of Lender’s demand, provide Lender with the Shoe Pavilion Letter of Credit (as herein defined).” The deed of trust defined the Shoe Pavilion Letter of Credit as meaning “an irrevocable and unconditional evergreen letter of credit in the amount of \$1,400,000, issued by a bank with a credit rating of ‘A’ or better . . . drawn from the account of a third party other than Borrower or Borrower’s general partner or managing member.” The Guaranty Agreement stated the Lender was not willing to make the Loan unless the “Guarantor unconditionally guarantee[d] payment and performance” of the above “Guaranteed Obligations.”

The duration of a guaranty obligation is usually defined by the terms of the agreement. “Guaranty agreements may be limited or continuing. ‘A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.’ (Civ. Code, § 2814.) ‘A continuing guaranty is a contract pursuant to which a

person agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee.’ (Rest.3d Suretyship and Guaranty, § 16.) [¶] The guaranty of payment of a tenant’s present and future rent liability is an example of a continuing guaranty. (See, e.g., Office Leasing (Cont.Ed.Bar 2004) Guaranty of Lease, §§ 46.9, 46.24, pp. 1108, 1115-1117.)” (*Central Building, supra*, 127 Cal.App.4th at p. 1059.)

The Guaranty Agreement in this case applied to future obligations and was expressly defined as a continuing guaranty. Indeed, the Guaranty Agreement devoted section 1.3 to defining the “Nature of Guaranty,” and stated, “This Guaranty is an irrevocable, absolute, *continuing guaranty* of payment and performance” (Italics added.) “Although in general a continuing guaranty may be revoked at any time (Civ. Code, § 2815),¹ the guaranty in this case was expressly made irrevocable and had no expiration date.” (*Central Building, supra*, 127 Cal.App.4th at p. 1059.)²

In this case, the Guaranty Agreement also contained multiple waivers of potential rights and defenses. (See Rest.3d Suretyship and Guaranty, § 48, pp. 208-209 [a guarantor may validly waive rights and defenses in agreement].) This language further supports the legal conclusion Mugel’s guarantor obligations were separate and independent from the deed of trust.

¹ Civil Code section 2815 provides: “A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.”

² “In contrast to a continuing guaranty, . . . a limited guaranty [would typically contain the following language:] ‘At the expiration of the Guaranty Period, the obligations of Guarantor under this Guaranty shall automatically terminate.’ The ‘guaranty period’ is specifically defined as the starting and ending date of the lease. [Citation.] No similar limiting language is present in the guaranty agreement[] in this case. Such language would have conflicted with the express terms of the agreements.” (*Central Building, supra*, 127 Cal.App.4th at p. 1060.)

For example, the Guaranty Agreement provided Mugel waived all rights listed in Civil Code section 2856,³ including “all rights and defenses that [he] may have because the debtor’s debt is secured by real property. This means, among other things: [¶] (i) The Creditor may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by the debtor. [¶] (ii) If the Creditor forecloses on any real property collateral pledged by the debtor: [¶] (A) The amount of the debt may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. [¶] (B) The Creditor may collect from Guarantor even if the creditor, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from the debtor.” In short, the agreement provides the Lender may collect from the guarantor before or *after* a foreclosure sale without concern for any of the ordinary rights or defenses, as those have all been waived.

In addition, the Guaranty Agreement provided, “Guarantor further hereby waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed Guarantor’s rights of subrogation and reimbursement against the principal by the operation of [s]ection 580d of the Code of

³ Civil Code section 2856 provides, “(a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following: [¶] (1) The guarantor or other surety’s rights of subrogation, reimbursement, indemnification, and contribution and any other rights and defenses that are or may become available to the guarantor or other surety by reason of [s]ections 2787 to 2855, inclusive. [¶] (2) Any rights or defenses the guarantor or other surety may have in respect of his or her obligations as a guarantor or other surety by reason of any election of remedies by the creditor. [¶] (3) Any rights or defenses the guarantor or other surety may have because the principal’s note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon, directly or indirectly, the application of [s]ection 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal’s note or other obligation.”

Civil Procedure or otherwise.” This election of remedies waiver is further support for interpreting the agreement as a continuing guaranty obligation, effective before and after a nonjudicial foreclosure. Mugel does not cite to any language in the agreement, and we found none, suggesting the Lender’s rights against the guarantor were revoked, nullified, or otherwise extinguished after a nonjudicial foreclosure sale.

Moreover, Mugel’s waiver of his rights and defense under Code of Civil Procedure section 580d is particularly significant. Ordinarily when a lender elects the remedy of nonjudicial foreclosure sale on the property, the lender cannot seek any deficiency from the borrower. The guarantor’s obligation may be extinguished as well. (See Code Civ. Proc., § 580d; *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 (*Gradsky*).)

In *Gradsky*, the secured creditor nonjudicially foreclosed on the trust deed and then sought to collect the unpaid balance from a third party guarantor. (*Gradsky, supra*, 265 Cal.App.2d at p. 41.) The *Gradsky* court concluded the creditor could not pursue the guarantor based on estoppel principles. (*Ibid.*) The court reasoned that the creditor, by nonjudicially foreclosing, had given the primary obligor a complete defense to any further obligation to pay on the note (by virtue of the operation of Code of Civil Procedure section 580d), and therefore, the creditor had destroyed the subrogation rights the guarantor would otherwise have possessed against the primary obligor. (*Id.* at pp. 45-47.) Because the creditor had destroyed the guarantor’s subrogation rights, the court determined the creditor was estopped from suing on the guarantee. (*Id.* at p. 47.)

In this case, Mugel, standing in a different position than the borrower, waived this *Gradsky* defense, permitting the lender to seek relief from him as a guarantor regardless of a foreclosure. Although the lengthy list of general statutory waivers

covered this point, the Guaranty Agreement additionally specified (in section 6.16) waiver of any remedy based on the *Gradsky* case.⁴

In addition to statutory waivers, Mugel also waived any right to require the lender to enforce the obligations of the guarantor first against the Borrower: “No Duty to Pursue Others: It shall not be necessary for Lender (and Guarantor hereby waives any rights which Guarantor may have to require Lender), in order to enforce the obligations of Guarantor hereunder, first to (i) institute suit or exhaust its remedies against Borrower or others liable on the Loan or the Guaranteed Obligations or any other person, (ii) enforce Lender’s rights against any collateral . . . (iii) enforce Lender’s rights against any other guarantors of the Guaranteed Obligations, (iv) join Borrower or any others liable on the Guaranteed Obligations in any action seeking to enforce this Guaranty, (v) exhaust any remedies available to Lender against any collateral . . . or (vi) resort to any other means of obtaining payment of the Guaranteed Obligations. Lender shall not be required to mitigate damages or take any other action to reduce, collect or enforce the Guaranteed Obligations.”

⁴ “Special State Provisions. To the extent permitted by law, Guarantor hereby also waives and agrees not to assert or take advantage of: [¶] (i) Any defense based upon Lender’s election of any remedy against any Guarantor including the defense to enforcement of this Agreement (the ‘*Gradsky*’ defense based upon . . . *Gradsky*[, *supra*,] 265 Cal.App.2d 40, or subsequent cases[,]) which, absent this waiver, Guarantor would have by virtue of an election by Lender to conduct a non-judicial [*sic*] foreclosure sale of the [s]ecur[ed] [p]roperty, it being understood by Guarantor that any such non-judicial [*sic*] foreclosure sale will destroy, by operation of . . . Code of Civil Procedure [s]ection 580d, all rights of any party to a deficiency judgment against the Borrower, and, as a consequence, will destroy all rights which Guarantor would otherwise have (including without limitation, the right of subrogation, the right of reimbursement, and the right of contribution) to proceed against the Borrower and to recover any such amount, and that Lender could be otherwise estopped from pursuing Guarantor for a deficiency judgment after a non-judicial [*sic*] foreclosure sale on the theory that a guarantor should be exonerated if a lender elects a remedy that eliminates the guarantor’s subrogation, reimbursement, or contribution rights.”

Based on this large collection of express waivers and language establishing a continuing obligation, the trial court correctly determined the parties intended the guaranty was independent from the deed of trust, and unlike the deed of trust would not become extinguished by a nonjudicial foreclosure sale. Mugel was obligated to issue the letter of credit when the Shoe Pavillion vacated the premises. As explained, a letter of credit is an asset created for the benefit of the debtor that is an obligation owed independently by the issuing bank. (See *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178.) There is nothing in the language of the Guaranty Agreement suggesting the obligation would terminate when the deed of trust was extinguished. To the contrary, in making the promise to produce a letter of credit, Mugel expressly waived any defense which could have arisen from the underlying transaction. This meant the Lender was entitled to liquidate that independent asset, without prejudice to its right to pursue nonjudicial foreclosure against other assets. To hold the Guaranty Agreement secured nothing more than what was already provided for in the deed of trust, would require us to ignore large portions of the agreement and essentially render the Guaranty Agreement superfluous.

We note Mugel presents no legal authority to support his claim the continuing guaranty was extinguished as a result of the nonjudicial foreclosure. Our research uncovered legal authority holding generally a guaranty is an independent obligation and can be created to continue, as in this case, after a nonjudicial foreclosure. The Guaranty Agreement in this case could not be revoked under any circumstances unless its terms expressed otherwise. (Civ. Code, § 2787.)

Mugel also fails to cite to a single case to support his theory that when an independent guaranty obligation incorporates by reference language from a deed of trust the guaranty obligation becomes dependent on the existence of the deed of trust. Oddly enough, one of the cases Mugel relies upon demonstrates the guarantor's obligation continues to exist as long as that is the intention expressed by the parties to their

agreement. (*Central Building, supra*, 127 Cal.App.4th at p. 1059.) In that case, the landlord filed an action against the guarantors of a commercial lease for breaching the continuing guaranty after the tenant failed to pay rent. The guarantor argued that because the lease had expired, his obligation under the guarantee had expired as well. The court rejected this argument, concluding it was clear from the language of the Guaranty Agreement the parties intended the guaranty to apply to an extended term of the lease pursuant and for a holding over period. (*Id.* at p. 1062.) Similarly in this case, expiration of the deed of trust did not nullify Mugel’s separate obligation to pay under the Guaranty Agreement, wherein the parties expressly agreed the obligation would extend past a nonjudicial foreclosure sale. In conclusion, due to the language of the Guaranty Agreement, the law regarding continuing guarantees, and the multiple express waivers described above, we reject Mugel’s argument the Guaranty Agreement was extinguished with the deed of trust. The trial court properly found there was no factual or legal basis to hold Mugel was relieved of his independent obligation as the guarantor.

B. There was a Proper Demand for a Letter of Credit

Mugel asserts a “[d]emand for the letter of credit, a condition precedent to [his] obligation, was not made . . . prior to foreclosure.” He explains, section 1.5 of the Guaranty Agreement contained a condition precedent requiring the Lender to “demand” a letter of credit from the guarantor. Mugel argues the three demand letters sent to the Borrower cannot also be deemed a demand relating to him. He is wrong.

Section 1.5 of the Guaranty Agreement provided: “Payment By Guarantor. If all or any part of the Guaranteed Obligations shall not be punctually paid when due, whether at demand, maturity, acceleration or otherwise, Guarantor shall, immediately upon demand by Lender, and without presentment, protest, notice of protest, notice of non-payment [*sic*], notice of intention to accelerate the maturity, notice of acceleration of maturity, or any other notice whatsoever, pay the lawful money . . . the amount due on the Guaranteed Obligations to Lender at Lender’s address as set forth herein. Such

demand(s) may be made at any time coincident with or after the time for payment of all or part of the Guaranteed Obligations, and may be made from time to time with respect to the same or different items of Guaranteed Obligations. Such demand shall be deemed made, given and received in accordance with the notice provisions hereof.”

Section 621 titled “Notices” provides, “All notices given hereunder shall be in writing and shall be either hand delivered or mailed, by registered U.S. mail, Return Receipt Requested, first class postage prepaid, to the parties at their respective addresses below” The Guarantor’s address listed is 1234 East 17th Street, Santa Ana, CA, 92701.

In summary, the guarantor’s obligation was triggered by a demand in writing either hand delivered or mailed to his address. There were no specified requirements for the written format of the demand. There was no need of any prior notices of nonpayment or acceleration of the maturity date. There was no timeline or deadline for making the demand. It appears the threshold for a demand request was very minimal.

In this case, the trial court determined the three letters sent to the Borrower and copied to Mugel qualified as demands. Mugel conceded he knew the Borrower had breached its obligation. However, Mugel contends the Lender had to address the letter to him personally (Mr. Mugel) and the same letter could not be used as a demand for both the Borrower and the Guarantor. Not so.

Briefly, we will summarize the contents of the letters sent to the Borrower and Mugel on November 20, 2008, November 26, 2008, and January 28, 2009. The November 20 letter stated it was sent via facsimile, Federal Express, and e-mail. The letter correctly listed the Borrower’s address as being Mugel’s address (1234 East 17th Street, Santa Ana). The salutation states, “Dear Borrower” and the opening paragraphs describe how “a Shoe Pavilion Trigger Event” had occurred by Shoe Pavilion vacating

the premises. It stated that pursuant to section 11(kk) of the deed of trust, the Lender “demands that Borrower” provide a letter of credit within three days.

The next sentence of the letter provides, “Reference is hereby made to that certain Guaranty . . . executed by Michael H. Mugel (the Guarantor). Please note that the Guarantor is copied on this letter because the obligation of Borrower to deliver the Shoe Pavilion Letter of Credit is a ‘Guaranteed Obligation’ as set forth in the Guaranty.” Below the signature line, the letter shows it was copied to Mugel’s attorney, “Ross Newman (via e-mail)” and also to Mugel “(via first class mail and e-mail).”

The November 26 letter essentially sets forth the same information and was mailed to the same address. In addition, it warns that if a letter of credit is not received within 30 days, the Lender may exercise its rights and remedies under the loan documents and accelerate the loan, commence foreclosure and seek appointment of a receiver for the property. The letter again made “reference” to the guarantor’s obligation to deliver the letter of credit and again stated Mugel “is copied on this letter because of the obligation.” The letter was copied to Mugel “(via facsimile and federal express).”

The January 28 letter, mailed to Mugel’s address, restated the triggering event and the Borrower’s default. It stated the letter was “formal notice to you of the acceleration of the Loan’s maturity and demand upon you to immediately pay to the Trust all of the outstanding principal, interest, default interest, late charges, prepayment fees and all costs, expenses, attorneys’ fees and other amounts as provided for in the loan documents.” In addition, the letter warned foreclosure was a possibility. The letter included the same paragraph making “reference” to the guarantor’s obligation to provide a letter of credit. The letter was copied to Mugel “(via facsimile and federal express).”

At the hearing, the court noted Mugel was not a “silent partner living [in] Bermuda somewhere.” It found Mugel owned and operated the Borrower company and was well aware of what was going on and its inability to pay. The court concluded the letters talk about the guarantee and about the obligation of the Borrower, “[t]he only

thing it does not say – apparently that’s what this argument rises and falls on, it doesn’t say at the top, Dear Mr. Mugel. . . . I think the fair reading of the letter under the circumstances make it pristine a clear demand was being made.”

The court concluded, “[T]here’s no genuine issue of triable fact with regard to a written demand having been made on the guarantor in this court’s opinion. I can only speak for my review of the documentation and the time that I have spent with this case and the case law. ¶¶ It shows – the evidence shows that letters were sent, and it is undisputed by [Mugel] that he received those letters and was on notice as the guarantor. There was a problem here and that payment had not been made, and ultimately he is signed off on the dotted line as a guarantor for a whole host of possible eventualities. I think [the three letters] make it clear that a demand for the obligation under the Guarant[y] was being requested.”

We agree with the trial court. The three letters qualified as demands for letters of credit from both the Borrower and the Guarantor. The obligation of the Borrower as well as the Guarantor was specifically referenced in each letter. The letters were sent to Mugel’s address and he was copied separately as an individual, not only as the manager/owner of the Borrower. Nothing in the Guaranty Agreement required Mugel’s name in the salutation portion of the letter to qualify as a valid demand. A demand is nothing more than the action of asking for the debt owed.⁵

⁵ In his reply brief, Mugel raises a new argument. He asserts the letters did not qualify as demands because the notice provision required the demands be sent by “registered U.S. mail, Return Receipt Requested, first class postage prepaid.” The letters attached as exhibits show they were copied to Mugel “via first class mail,” “email,” “facsimile,” and “federal express.” We need not address the argument. (See *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [“[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument”]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [“[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before’”].) Moreover, because the issue was not

Although we conclude the three letters constituted demands, we note Sepulveda's complaint also served as a demand. During argument below, Mugel's counsel commented he believed "[t]he closest that can be argued here is a demand for performance was made upon a filing of the complaint in this action." Counsel noted this sort of demand was untimely in this case because the demand must be made "during the existence of the obligation guaranteed," i.e., before the nonjudicial foreclosure.

Counsel was correct about the complaint qualifying as a demand but wrong about it being untimely. In the insurance context, courts have held the mere filing of a suit is a claim, when the policy defines a claim simply as a demand for money. In *Root v. American Equity Specialty Ins. Co.* (2005) 130 Cal.App.4th 926, 933, the court reasoned, "a suit, even an unserved suit, easily fits several of the definitions of 'demand' as an ordinary person might think of the word demand. 'The action or fact of demanding or claiming in legal form; a legal claim To ask for (a thing) with legal right or authority; to claim as something one is legally or rightfully entitled to.' (4 Oxford English Dict. (2d ed. 1989) pp. 430, 431.)" (See also *Bloom v. Bender* (1957) 48 Cal.2d 793, 800 [guarantor received proper notice of her obligation because the filing and serving of a lawsuit against her "constituted sufficient notice of default"].)

The bringing of the present action would also qualify as a demand as defined in the Guaranty Agreement. Contrary to Mugel's contention, there was no requirement the demand be made before nonjudicial foreclosure. To the contrary, the Guaranty Agreement specified "Such demand(s) may be made at any time coincident with or after the time for payment of all or part of the Guaranteed Obligations, and may be made from time to time with respect to the same or different items of Guaranteed

raised in the trial court, we cannot assume letters mailed first class to Mugel were not accompanied by a return receipt requested. More importantly, a return receipt is not a statutory requirement for a demand notice, and its purpose was simply to ensure delivery. Mugel conceded he received the letters.

Obligations.” Moreover, the Guaranty Agreement specifically provided prior notice of the default or acceleration was not required. Because the deed of trust and guaranty were distinct security instruments, damages for breach of the Guaranty Agreement was not dependent on the status of the deed of trust. The Guaranty Agreement anticipated the possibility that a nonjudicial foreclosure sale would occur before the Lender pursued its remedies under the terms of the Guaranty Agreement. And finally, in section 6.1 Mugel waived any right to claim the Lender waived its right to seek damages under the Guaranty Agreement by filing a complaint after foreclosure.⁶ In summary, the complaint effectively qualified as an additional demand for payment. The trial court properly entered summary judgment in Sepulveda’s favor.

III

The judgment is affirmed. Respondent shall recover its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.

⁶ It provided, “Waiver: No failure to exercise, and no delay in exercising, on the part of Lender, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof, or the exercise of any other right.”