THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

INLAND MORTGAGE CAPITAL CORP. **Appellee**	**TRIAL DIVISION – CIVIL**
	October Term 2008 **No. 4107**
VS.	
ESAT ASLANSAN & AYSEL ASLANSAN, **Appellants**	**Superior Court No.** **967 EDA 2012**

OPINION

PROCEDURAL HISTORY

Defendants, Esat Aslansan and Aysel Aslansan Appeal this Court's Order dated January 19, 2012, granting the Motion for Summary Judgment submitted by Plaintiff, Inland Mortgage Capital Corporation (hereinafter "Inland") and entering judgment in favor of Inland.

FACTUAL BACKGROUND

Plaintiff Inland is a commercial mortgage lender organized as a corporation under the laws of the state of Maryland with its principal place of business in Oak Brook, Illinois. (Compl., ¶ 1). Defendant Front Street, LLC is the general partner of 38 N. Front Street Associates, L.P. (hereinafter "Front Street"), which is the owner of real property and facilities located in Philadelphia County, Pennsylvania. (Compl., ¶ 2). Defendant Murat Aslansan is the managing member of Front Street. (Pre-Trial Mem. of Pl. 1). Defendant Amanda Aslansan is Murat Aslansan's wife and acting rental manager for the Property. *Id.* Defendants Esat Aslansan and Aysel Aslansan are Defendant Murat

Aslansan's parents. *Id*. Defendants Front Street LLC, Murat Aslansan, Amanda Aslansan, Esat Aslansan and Aysel Aslansan are collectively referred to herein as "Defendants."

On June 16, 2006, Front Street, for valuable consideration, executed, made, delivered and accepted the terms and conditions of a Promissory Note made payable to Inland in the principal sum of eight million nine hundred eighty five thousand dollars ($8,985,000.00) (the "Promissory Note") for the acquisition and renovation of a 32 unit condominium building located at 38 North Front Street in Philadelphia (the "Winne Building"). (Compl., ¶ 8; Defs.' Mem. of Law in Opp'n to Pl.'s Mo. for Summ. J. 1). Relevant to the instant matter, the Promissory Note provided that the "final balloon payment of all outstanding principal and all accrued and unpaid interest and all sums then due and payable under this Note, the Mortgage . . . and the Other Loan Documents . . . shall be paid on June 30, 2007." (Compl., ¶ 9). The Promissory Note further provided that Inland "may elect to extend the Initial Maturity Date of this Note for not more than two (2) consecutive terms of six (6) months each . . . " (Pl. Mot. for Summ. J. ¶ 9).

As security for all sums advanced on June 16, 2006, Front Street executed and delivered to Inland an Open-End Mortgage and Security Agreement (the "Mortgage"), which conveyed to Inland a mortgage interest in the Property and a security interest in all of the collateral set forth in the Promissory Note, the Mortgage, and in all documents and agreements executed in connection therewith (collectively, the "Loan Documents"). (Compl., ¶ 10). The Mortgage was recorded on June 20, 2006 in the Office of the Recorder of Deeds of Philadelphia County, Pennsylvania, as Instrument No. 51367232. (Compl., ¶ 13).

The Mortgage provided, in relevant part, that "it shall be a default by Mortgagor [Front Street] under this Mortgage if Mortgagor shall fail to timely pay any sum due under the Note or if any default shall occur under any document evidencing or securing the Note." (Compl., ¶ 19). Pursuant to Section 4 of the Mortgage, upon Front Street's failure to make timely payments under the Promissory Note, Inland may at its option, declare the entire principal sum and all accrued and unpaid interest and any additional sums to be immediately due and payable. (Compl., ¶ 20).

Pursuant to the Mortgage, Front Street granted Inland a security interest pursuant to Article 9 of the Uniform Commercial Code in the equipment, fixtures, accounts, general intangibles and other personal property in, on or relating to the Property (the "Collateral Property"). (Compl., ¶ 11). Inland's security interest in the Collateral Property was perfected by the filing of a UCC Filing Statement. (Compl., ¶ 12).

As additional security for the loan, Murat Aslansan, Amanda Aslansan and Front Street LLC (collectively, the "Principal Guarantors") executed and delivered to Inland a Loan Guaranty Agreement on June 16, 2006, pursuant to which, each Principal Guarantor "hereby irrevocably, absolutely, unconditionally, and fully guarantees to Lender [Inland] (a) the full and prompt payment when due . . . " and the Principal Guarantors agreed that "if any of the Indebtedness is not paid . . . Guarantor shall immediately pay all Indebtedness as if the Indebtedness constituted the direct and primary obligation of Guarantors." (Compl., ¶ 14). Each Loan Guaranty Agreement further provides that the "Guarantor hereby waives and agrees not to assert or take advantage of . . . (d) demand, presentment of payment, notice of non-payment, protest, notice of protest and all other notices of any kind . . . " (Pl. Mot. for Summ. J. ¶ 28).

As further security for the loan, Esat Aslansan and Aysel Aslansan (hereinafter, "Additional Guarantors") executed and delivered to Inland an additional Loan Guaranty Agreement on June 16, 2006 limiting the Additional Guarantors' liability to five hundred thousand dollars ($500,000.00). (Compl., ¶ 15).

Inland and Front Street also entered into an ancillary agreement (hereinafter the "Holdback Agreement") providing that Inland would make loan disbursements within five business days of its receipt of all material required to process the requested disbursement.[1] (Pl's Mem. of Law in Supp. of Its Prelim. Objections to Defs.' Countercl. 2-3). Inland failed to make such timely payments on each of the twenty-two (22) draw requests by Front Street. (Def's New Matter Countercl. Pursuant to Pa.R.C.P. 1030 ¶ 7). According to Defendants, these consistent delays in payment compelled Front Street to extend the term of the loan and pay extension fees to Inland. *Id*. at ¶ 10.

On May 13, 2008, Inland and Front Street entered into a Loan Modification Agreement that increased the principal amount advanced to Front Street to nine million seven hundred forty five thousand dollars ($9,745,000.00) and extended the Maturity Date, as defined by the Promissory Note, to June 30, 2008. (Compl., ¶ 16). The Loan Modification Agreement further provided that the Guaranty obligations of Esat Aslansan and Aysel Aslansan "shall not exceed $8,985,000." (Compl., ¶ 16). Finally, the Loan Modification Agreement provided for the payment of Extension Fees, a Mechanics' Lien Fee and a Loan Modification Commitment Fee to Inland. (Compl., ¶ 16). Pursuant to the Loan Modification Agreement, Inland and Front Street executed a Mortgage Modification Agreement, recorded on May 15, 2008 in the Office of the Recorder of

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[1] Section 9(d) of the Holdback Agreement provides for the application of Illinois law. (Pl's Mem. of Law in Supp. of Its Prelim. Objections to Defs.' Countercl. Ex. A. § 9(d)).

Deeds of Philadelphia County, Pennsylvania, as Instrument No. 51906184. (Compl., ¶¶ 17-18).

On June 30, 2008, the Maturity Date provided by the Loan Modification Agreement, Front Street failed to repay the Promissory Note including the final balloon payment of all outstanding principal and all accrued and unpaid interest and all other sums then due and payable. (Compl., ¶ 21). Defendants allege in their Answer to Plaintiff's Complaint that the June 30, 2008 Maturity Date was extended. (Ans. ¶ 21). The alleged extension was not memorialized in writing. (Pl. Mot. for Summ. J. ¶ 22).

By letters dated September 22, 2008, Inland notified Defendants that Front Street had defaulted on the Promissory Note by failing to repay the Loan on the Maturity Date. (Compl., ¶ 22). Inland further demanded full payment and satisfaction of all amounts due and owing to Inland under the Loan Documents.[2] (Compl., ¶ 23). Despite Inland's written demands, Front Street failed to pay the full indebtedness due and owing to Inland. (Compl., ¶ 24).

Inland commenced this action for breach of the Loan Guaranty Agreements by filing a complaint on October 31, 2008 against Defendants. *See* Docket. Defendants filed an Answer with New Matter in opposition to Inland's Complaint on January 2, 2009, and Inland filed a Reply on January 22, 2009. *Id*. On June 29, 2009, Front Street filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania. (Pl. Mot. for Summ. J. ¶ 35). Front Street, Murat Aslansan and Amanda

[2] At the time of default, however, the notice address in the Loan Documents was no longer a working address for Defendants. (Pl. Mot. for Summ. J. ¶ 30). Moreover, the Loan Guaranty Agreements did not include a notice address for the Guarantors. *Id*. at ¶ 32. As such, Inland sent notices of default to Marsha Wolf, Defendants' legal counsel at closing and Front Street's ongoing escrow agent. *Id*. at ¶ 33.

Aslansan stipulated to the amount Front Street owed Inland before Front Street petitioned for bankruptcy. *Id*. at ¶ 36.

Inland filed a Motion for Summary Judgment on November 2, 2009. *See* Docket. On December 3, 2009, Defendants filed both a Motion to Amend their Answer and an Answer in Opposition to Inland's Motion for Summary Judgment. *Id*. The case was deferred by the Honorable Howland Abramson on December 3, 2009 due to pending bankruptcy action. *Id*. On January 5, 2010, Judge Abramson granted Defendants' Motion to Amend but the Order was vacated on January 6, 2010 because the case was in deferred status. *Id*. The case was removed from deferred status on August 20, 2010, by Judge Abramson. *Id*.

On September 17, 2010, Inland filed a Reply in Support of the Motion for Summary Judgment. *Id*. Judge Abramson granted Defendants' Motion to Amend their Answer on October 29, 2010. *Id*. Defendants filed a Counterclaim against Inland on November 8, 2010. *Id*. Inland filed Preliminary Objections to Defendants' Counterclaims on November 29, 2010. *Id*.

On December 8, 2010 Judge Abramson granted Inland's Motion for Summary Judgment, ruling that (1) Defendants Murat Aslansan, Amanda Aslansan and Front Street are "liable for the full payment of indebtedness, including interest, and the costs and fees expended in collecting the indebtedness" and (2) Defendants Esat Aslansan and Aysel Aslansan are "liable for the full payment of the indebtedness, including interest, and costs and fees expended in collecting the indebtedness up to $500,000." *Id*. The Order further instructed the parties to submit to the Court memoranda setting forth their calculations of damages based on the Court's findings. *Id*. Inland filed such Memorandum on

December 22, 2010. *Id*. Defendants filed an Amended Counterclaim on December 20, 2010 alleging breach of contract, misrepresentation and fraud/intentional misrepresentation. *Id*. Additionally, Defendants filed a Motion for Reconsideration of the December 8, 2010 Order on December 22, 2010. *Id*. Inland filed Preliminary Objections to Defendants' Counterclaim on January 10, 2011. *Id*. On January 11, 2011, the Court granted Defendants' Motion for Reconsideration and vacated the order granting Inland's Motion for Summary Judgment dated December 8, 2010. *Id*.

Inland filed an Answer in Opposition of Defendants' Motion for Reconsideration on January 18, 2011. *Id*. Defendants filed an Answer in Opposition to Inland's Preliminary Objections to Defendants' Amended Counterclaim on January 31, 2011. *Id*. On June 13, 2011, the Court sustained Inland's Preliminary Objections to Defendants' Amended Counterclaim and dismissed Defendants' Amended Counterclaim. *Id*. On June 15, 2011, the Court denied Defendants' Motion for Reconsideration and reinstated the Court's Order dated December 8, 2010 granting Summary Judgment in favor of Inland. *Id*. Moreover, the June 15, 2011 Order entered judgment in favor of Inland and against Defendants, jointly and severally, in the amount of three million eight hundred twenty seven thousand sixty nine dollars and ninety-six cents ($3,827,069.96). *Id*. The Order limited the joint and several liability of Additional Guarantors to five hundred thousand dollars ($500,000.00) pursuant to the Loan Guaranty Agreement. *Id*. Finally, the Order provided for an assessment of damages hearing to determine the remainder of Inland's damages, if any, with respect to 1) the principal balance as of June 30, 2008; 2) the total amount that Front Street paid to Inland; 3) the applicable interest rate and the

amount of interest; 4) disputed fees; and 5) attorney's fees. *Id*. The case was placed in deferred bankruptcy status on June 16, 2011. *Id*.

On January 4, 2012, the case was returned to active status and at a status conference held on January 17, 2012, Inland withdrew its request for any further damages. *Id*. As such, the Court entered final judgment granting Inland's Motion for Summary Judgment pursuant to the provisions of Judge Abramson's Order dated June 15, 2011. *Id*. Defendants Esat Aslansan and Aysel Aslansan (hereinafter, "Appellants") timely appealed and filed their Rule 1925(b) Statement of Errors Complained of on Appeal on May 2, 2012. *See* Def's Statement of Errors Complained of on Appeal.

The issues for appeal are:

1. Whether the Court committed an error of law when it sustained Inland's preliminary objections to Defendants' amended counterclaim.
2. Whether the Court erred in granting Inland's motion for summary judgment because there were genuine issues of material fact regarding whether Esat Aslansan and Aysel Aslansan received proper consideration for the personal guaranty.
3. Whether the Court committed an error of law when granting Inland's motion for summary judgment because there were genuine issues of material fact regarding whether Esat Aslansan and Aysel Aslansan signed the May 8, 2008 Modification Agreement and because their purported signatures were not notarized.
4. Whether the Court erred when granting Inland's motion for summary judgment because there were genuine issues of material fact regarding whether there was a default or occurrence of an event triggering the personal guaranty and, if so, whether Esat Aslansan and Aysel Aslansan are entitled to benefit from the sale of unsold units and payments by Front Street pursuant to the October 7, 2009 stipulation.

LEGAL ANALYSIS

Summary Judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which states,

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. 1035.2.

In determining whether Summary Judgment is proper, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue of material fact exists are resolved against the moving party. *Pa.State Univ. v. Cnty. of Centre*, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). The appellate court's scope of review is plenary. *O'Donoghue v. Laurel Sav. Ass'n*, 556 Pa. 349, 354, 728 A.2d 914, 916 (1999). A trial court's decision to grant or deny a motion for summary judgment will only be reversed where the lower court committed an error of law or abused its discretion. *Cochran v. GAF Corp.*, 542 Pa. 210, 215, 666 A.2d 245, 248 (1995).

Appellants' Rule 1925(b) Statement identifies five supposed errors made by the Court in adjudicating this action. For the reasons set forth below, Appellants have waived and failed to preserve each of the issues they seek to raise before the Superior Court. As such, Appellants' Appeal is subject to quashal. *See Steiner v. Markel*, 600 Pa. 515, 521-22, 968 A.2d 1253, 1256 (2009) (stating that "[t]his Court has consistently held that an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties"). Accordingly, the issues set forth in Appellants' Rule 1925(b) Statement are waived and the alleged errors lack substantive merit.

Appellants first contend that the Court erred in sustaining Inland's preliminary objections to Defendants' amended counterclaim alleging breach of contract, misrepresentation and fraud/intentional misrepresentation. Rule 1925(b) requires an appellant to identify each error it intends to challenge "with sufficient detail to identify all pertinent issues for the judge." Pa. R.A.P. 1925(b)(4)(ii). An appellant waives all issues that are either (1) not included in appellant's Rule 1925(b) statement, or (2) not raised in accordance with the provisions of Rule 1925(b)(4). Pa. R.A.P. 1925(b)(4)(vii). Thus, issues that are not described "with sufficient detail" as provided by Rule 1925(b)(4)(ii) are waived. *See Commonwealth v. Hansley*, 24 A.3d 410, 415-16 (Pa. Super. 2011) (holding that appellant waived issues by failing to specify various "issues on appeal in his Rule 1925(b) statement and precluded the trial court's review of those claims as a result").

Here, Appellants failed to provide any detail – let alone "sufficient detail" – as to why they think this Court erred in sustaining Inland's preliminary objections to Defendants' amended counterclaim. Appellants have merely advised the Court that they think the order was incorrect, without providing any explanation or reasoning in support of their assertion. Appellants have left the Court to guess as to the reasons supporting their claim of error. Accordingly, Appellants have waived this issue on appeal.

Furthermore, addressing Appellants' first contention on the merits produces the same result. Appellants argue that the Trial Court erred in concluding that Appellants lacked standing to assert a breach of contract counterclaim against Inland because Appellants were not parties to the Holdback Agreement. The Holdback Agreement provides that Illinois law shall govern any disputes. Under Illinois law, "there is a strong

presumption that the parties to a contract intend the provisions of that contract to apply to them, and not to third parties." *Caswell v. Zoya Int'l, Inc.*, 654 N.E.2d 552, 554 (Ill. App. 1995), citing *Barney v. Unity Paving, Inc.*, 639 N.E.2d 592 (Ill. App. 1994). Thus, in order for a non-party to sue for breach of contract, "The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear." *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 178 N.E. 498 (1931). If the non-party's benefit is "merely incidental," then the non-party "has no right of recovery under the contract." *Caswell*, 654 N.E.2d at 554.

In *Performance Elec., Inc. v. CIB Bank*, the court concluded that guarantors to a loan agreement lacked standing to file suit for breach of contract against the lender because guarantors were not parties to the loan agreement. 371 Ill.App.3d 1037, 309 Ill.Dec. 538, 864 N.E.2d 779, 782 (1st Dist. 2007); *See also Borough of Berwick v. Quandel Group Inc*., 440 Pa.Super. 367, 369-70, 655 A.2d 606, 607 (1995) (holding that Plaintiff Borough lacked standing to sue for breach of construction contract because Plaintiff was not a party to the contract, but instead "insulated itself from the plant construction, and instead used the separate legal entity of the Authority to build, maintain and own the plant").

Here, it is apparent that Defendants' benefit, if any, was at most "incidental" and indirect. Despite the legal requirement that Defendants identify express language in the Holdback Agreement "affirmatively" indicating the parties' intent to benefit the Defendants, the Defendants' Counterclaim fails to identify any such language. The Holdback Agreement provides for the extension of financing to Front Street, not to the Defendants, for the purpose of enabling Front Street to acquire and renovate the Winne

Building. There is no indication – either in the Holdback Agreement or in Defendants' Counterclaim – that the Promissory Note was made for Defendants' direct benefit. Accordingly, Defendants lack standing and their breach of contract claim was properly dismissed.

Next, Appellants allege that the Trial Court erred in dismissing Defendants' Amended Counterclaim for misrepresentation on the basis that Defendants failed to allege that Inland made any misrepresentations to Defendants directly. Appellants contend that Inland made misrepresentations to Defendants in the Loan Documents themselves and that Inland had a duty to act in good faith.

"Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Bortz v. Noon*, 556 Pa. 489, 500, 729 A.2d 555, 561 (1999).

Here, Defendants have failed to allege any facts to adequately support these elements. Defendants simply allege that "Plaintiff made negligent misrepresentations upon which the defendants reasonably relied to their substantial detriment." (Defs.' New Matter Countercl. Pursuant to Pa.R.C.P. 1031 ¶ 14). Defendants, however, fail to identify any material misrepresentations made by Inland. Moreover, Defendants Counterclaim is completely devoid of any facts regarding Inland's knowledge or intentions in making the alleged misrepresentations. *See* Defs.' New Matter Countercl. Pursuant to Pa.R.C.P. 1031 ¶¶ 13-20. As such, Defendants' misrepresentation counterclaim was properly dismissed.

Finally, Appellants contend that the Trial Court erred in sustaining Inland's Preliminary Objections with regard to Defendants' fraud/intentional misrepresentation counterclaim because Inland made representations to Defendants within the Loan Documents themselves and Inland had a duty to act in good faith. Appellants are unable to prevail on this claim, however, because Defendants' amended counterclaim failed to allege Inland made any representations to Defendants directly.

Pennsylvania Rule of Civil Procedure 1019(b) requires that "[a]verments of fraud or mistake shall be averred with particularity." Pa. R.C.P. 1019(b). A pleading satisfies Rule 1019(b) only if (1) the allegations adequately explain the nature of the alleged claim to the opposing party to permit the opposing part to prepare a defense; and (2) the detail provided is sufficient to convince the court that the averments are not merely subterfuge. *Bata v. Central Park Nat'l Bank*, 423 Pa. 373, 379-80, 224 A.2d 174, 179 (1966). As a leading Pennsylvania procedural treatise has observed: "Averments of fraud are meaningless epithets unless sufficient facts are set forth that will permit an inference that a claim is not without foundation or offered simply to harass an opposing party or to delay a pleader's own obligation." *2 Goodrich Amram 2d § 1019(b)*: 1 (2d ed.).

Defendants' Counterclaims for misrepresentation and fraud fail to satisfy Rule 1019(b)'s particularity requirement. In fact, the Counterclaims' only averment describing the circumstances of the alleged fraud is the following: Inland "represented it would timely provide draw disbursements." (Defs.' New Matter Countercl. Pursuant to Pa.R.C.P. 1031 ¶¶ 17, 25). The Counterclaims are silent as to the following: who made the alleged statement; to whom the alleged statement was made; the date and time of the alleged statement; the place where the alleged statement was made; whether the statement

was made orally or in writing, in a face to face communication or by telephone; and the identity of any witnesses to the alleged statement. *See Id*. ¶¶ 13-28. Moreover, Defendants do not provide sufficient factual detail to permit Inland to defend itself against Defendants' claims. Inland is unable to investigate the validity of Defendants' fraud claims because the pleading fails to supply critical information. Therefore, Defendants' fraud claims were not averred with particularity as required by Rule 1019(b) and thus were properly dismissed.

The second issue raised by Appellants – that the Court overlooked "genuine issues of material fact regarding whether the guarantee at issue was a contract of adhesion containing unconscionable terms" – is likewise impermissibly vague. (Defs.' Concise Statement of Errors Complained of on Appeal 2). Under Pennsylvania law, "unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *World Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 196 (3d Cir. 1992). The burden of proof is on the party challenging the agreement to show both elements. *Bayne v. Smith*, 965 A.2d 265, 266 (Pa. Super. Ct. 2009). "On a motion for summary judgment, a court may conclude, as a matter of law, that a contract or clause is enforceable regardless of an allegation of unconscionability, as long as there is no genuine issue of material fact." *Bishop v. Washington*, 480 A.2d 1088, 1094 (Pa. Super. Ct. 1984).

While Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment includes a section entitled "Unconscionable Terms – not to be enforced," Defendants fail to identify any facts or terms supporting a finding of

unconscionability. Defendants' only argument in urging the Court to deny Inland's Motion for Summary Judgment is the following: "As defendants have established Inland's misrepresentations, fraudulent conduct and unjust enrichment were incident to the creation of the Mortgage and subsequent amended documents, these claims/defenses of the defendants are properly asserted against mortgagee, Inland." (Def's Mem. of Law in Opp'n to Pl's Mot. for Summ. J. 8-9). Defendants fail to provide any facts that tend to support the determination that the terms were unreasonably favorable to Inland and that Defendants had no meaningful choice regarding acceptance of the contract terms.

Finally, Defendants conclude that "certainly genuine issues of material fact exist as to the Defendants solvency at the time it incurred these financial obligations," but again provide no factual support for this statement. *Id*. Moreover, Defendants' sole legal support for this statement is two cites to the definition of "insolvency." *Id*. Under *Garden State Standardbred Sales Co. v. Sease*, the burden of proof is on Defendants to demonstrate that the conveyance was fraudulent. 611 A.2d 1239, 1242 (Pa. Super. Ct. 1992). Defendants have failed to meet this burden or identify a single material fact in dispute.

"Bold unsupported assertions of conclusory accusations cannot create genuine issues of material fact." *McCain v. Pennbank*, 379 Pa. Super. 313, 318-19, 549 A.2d 1311, 1313-14 (1988). To withstand a motion for summary judgment, a non-moving party must produce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that the fact finder could return a verdict in his favor. *Keystone Aerial Surveys, Inc. v. Pa. Prop. and Cas. Ins. Guar. Assoc.*, 777 A.2d 84, 89 (Pa. Super. 2001). Here, Defendants have failed to identify any material facts in dispute

and Inland has sufficiently demonstrated that it is entitled to judgment as a matter of law. *See Rosci v. AcroMed, Inc.*, 477 Pa.Super. 403, 412, 669 A.2d 959, 963 (1999) (holding that the court "review[s] all of the documentary evidence of record to determine whether there exists a genuine issue of material fact that would preclude the entry of summary judgment and, if not," the court must determine "whether the moving party is entitled to judgment in its favor as a matter of law"). Therefore, this Court's decision should be upheld.

Appellants' second contention is that the Court overlooked "genuine issues of material fact" as to whether Appellants received proper consideration for the personal guaranty. Appellants waived this issue, thereby failing to preserve the issue on Appeal. Pursuant to Pa. R. Civ. P. 1032(a), "[a] party waives all defenses and objections which are not presented either by preliminary objection, answer, or reply," with the exception of defenses not at issue here. Appellants did not plead failure of consideration as an affirmative defense in their answer but instead raised the issue for the first time in response to Inland's Motion for Summary Judgment. Therefore, this issue is waived and not preserved for Appeal. *See Joyce v. Mankham*, 318 Pa. Super. 561, 563, 465 A.2d 696, 697 (1983) (affirmative defenses not raised in new matter but raised for the first time in response to motion for summary judgment are waived: "Because affirmative defenses must be part of the pleadings, Pa. R.C.P. 1030, appellant's subsequent averment of estoppel and fraud in her answer to appellee's request for summary judgment failed to preserve the issue").

The final two issues raised by Appellants are that the Court erred in granting Summary Judgment to Inland notwithstanding supposed "genuine issues of material fact"

regarding two defenses that Appellants did not raise prior to filing their Rule 1925(a) Statement. These newly-alleged defenses are (1) Appellants' signatures on the May 8, 2008 Modification Agreement were not notarized; and (2) Front Street did not default, and if it did, Appellants "are entitled to the benefit of the sale" of condominium units at the Property. These defenses were not raised in Defendants' Answer to New Matter or at any other point during the litigation. As such, both of these issues are waived and are not preserved for Appeal. *See Steiner*, 968 A.2d at 1257 (holding that "[b]ecause issues not raised in the lower Court are waived and cannot be raised for the first time on Appeal, a 1925(b) Statement can therefore never be used to raise a claim in the first instance"). For the foregoing reasons, the issues raised in Appellants' Rule 1925(b) Statement have been waived and are not preserved for Appeal.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Plaintiff Inland Mortgage Capital Corp.'s Motion for Summary Judgment be **AFFIRMED**.

BY THE COURT:

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ALLAN L. TERESHKO, J.

____

Date

cc:
All Counsel:
Robert Martin Cavalier, Esq., for Appellants
Brian T. Feeney, Esq., for Appellee