

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of February, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

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JOEL ROSS, ERIC LEVINE, JERDE
DEVELOPMENT CO.,
Plaintiffs-Counter
Defendants-Appellees,

MELANIE L. CYGANOWSKI,
Receiver-Appellee,

-v.-

10-4556-cv

STANLEY E. THOMAS, S. THOMAS
ENTERPRISES OF SACRAMENTO, LLC,
Defendants-Counter
Claimants-Appellants.

-----X

1 **FOR APPELLANT:**

Kirk M. McAlpin, Jr., Cushing,
2 Morris, Ambruster & Montgomery,
3 LLP, Atlanta, GA, Steven
4 Spielvogel, Gallion & Spielvogel
5 LLP, New York, NY.
6

7 **FOR APPELLEES:**

8 Colin R.P. Delaney, Smith,
9 Gambrell & Russell, LLP,
10 Atlanta, GA, John J. Lee, Smith,
11 Gambrell & Russell, LLP, New
12 York, NY.

13 Appeal from a judgment of the United States District
14 Court for the Southern District of New York (Scheidlin,
15 J.).

16
17 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
18 **AND DECREED** that the judgment of the district court be
19 **AFFIRMED.**
20

21 Defendants Stanley Thomas and S. Thomas Enterprises of
22 Sacramento, LLC ("Thomas Enterprises"), appeal from a
23 judgment entered on summary judgment by the United States
24 District Court for the Southern District of New York
25 (Scheidlin, J.). We assume the parties' familiarity with
26 the facts, procedural history, and issues presented on
27 appeal.
28

29 Plaintiffs are real estate developers who partnered
30 with defendants to develop the Union Pacific rail yard in
31 Sacramento, California into residential, commercial, and
32 retail space. The operating agreement of Thomas
33 Enterprises--of which Thomas was the sole member and
34 manager--provided that plaintiffs would receive up to a
35 total of \$10 million upon two contingencies, one of which
36 being when Thomas Enterprises comes into receipt of "Certain
37 Excess Amounts" of cash. Plaintiffs contend that a \$125
38 million loan that defendants secured from an affiliate of
39 Inland America Realty Trust created sufficient "Excess
40 Amounts" of cash to entitle them to \$10 million under the
41 operating agreement. The district court agreed and granted
42 summary judgment in plaintiffs' favor.
43

44 In the context of contractual disputes, "[w]e have
45 repeatedly held that . . . summary judgment may be granted
46 only where the language of the contract is unambiguous."

1 Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182,
2 1192 (2d Cir. 1996). Under Delaware law--which the parties
3 agree controls interpretation of the operating agreement--we
4 look at the "objective" meaning of a contract, i.e., the
5 "words found in the written instrument." Sassano v. CIBC
6 World Mkts. Corp., 948 A.2d 453, 462 (Del. Ch. 2008). "When
7 the plain, common, and ordinary meaning of the words lends
8 itself to only one reasonable interpretation, that
9 interpretation controls the litigation." Id. Ambiguity
10 exists only when "the provisions in controversy are fairly
11 susceptible [to] different interpretations or may have two
12 or more different meanings." Eagle Indus. v. Devilbiss
13 Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997).

14
15 Plaintiffs' entitlement to the claimed distribution
16 turns on whether the Inland loan was a "Capital
17 Transaction,"--a term defined in the operating agreement to
18 include "a financing or refinancing of all or any portion of
19 the Real Property or the Project." Joint Appendix at 55.
20 The district court properly found that the Inland loan was a
21 Capital Transaction. The loan obtained by defendants was to
22 be used for the Union Pacific rail yard project, it was
23 secured by a deed to the property, and a portion of the loan
24 was immediately used to pay off the previous financing for
25 the project.

26
27 Defendants argue that the entire \$125 million loan
28 cannot meet the definition of "financing or refinancing"
29 because they believe (contrary to Inland) that the property
30 was worth much less than \$125 million, they argue that
31 financing can only exist up to the value of the property,
32 and they assert that most of the loan was attributable to
33 Thomas's personal guarantee. In interpreting a contract, we
34 are required to give words their plain and ordinary meaning.
35 See Northwestern Nat. Ins. Co. v. Esmark, Inc., 672 A.2d 41,
36 44 (Del. 1996). Financing is commonly understood to mean
37 "[t]he act or process of raising or providing funds."
38 Black's Law Dictionary (9th ed. 2009). Likewise, one act
39 of refinancing is "repaying the existing loan with money
40 acquired from a new loan." Id. These terms describe
41 precisely the purpose of the Inland loan. Thomas's personal
42 guarantee, a common requirement of banks, does not alter the
43 analysis.

1 Finding no merit in defendants' remaining arguments, we
2 hereby **AFFIRM** the judgment of the district court.
3

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5 FOR THE COURT:
6 CATHERINE O'HAGAN WOLFE, CLERK
7
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