

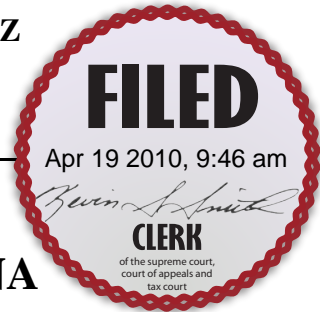
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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HUBERT L. DUNITHAN and JACQUELINE A. )  
DUNITHAN, )

Appellants-Plaintiffs, )

vs. )

No. 34A05-0912-CV-710

DOMINION VENTURES, LLC d/b/a )  
DOMINION VENTURES, LLC, KOKOMO )  
SERIES, RALPH COCHRAN JAMES LUCHS, )  
GENE MEHMEL, and TREASURER OF )  
HOWARD COUNTY, INDIANA, )

Appellees-Defendants. )

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APPEAL FROM THE HOWARD SUPERIOR COURT  
The Honorable George A. Hopkins, Judge  
Cause No. 34D04-0906-MF-00639

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**APRIL 19, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Senior Judge**

## STATEMENT OF THE CASE

Appellants Hubert L. Dunithan and Jacqueline A. Dunithan (“the Dunithans”) appeal from the trial court’s grant of Appellees Ralph Cochran and James Luchs’ Motion to Dismiss.<sup>1</sup> We reverse and remand.

## ISSUES

The Dunithans raise one issue, which we restate as whether the trial court erred by granting Cochran and Luchs’ Motion to Dismiss.

## FACTS AND PROCEDURAL HISTORY

The Dunithans and Dominion executed a Land Contract for the sale of real estate known as Woodland Estates. The first page of the Land Contract bears the date “12-1-6.” Appellant’s App. p. 30. According to the notary block for their signatures, the Dunithans signed the Land Contract on November 18, 2006. In addition, a notary block indicates that Cochran, Luchs, Mehmel and Sidney Henriquez signed the Land Contract on behalf of Dominion on December 12, 2006.

Cochran, Luchs, and Mehmel also signed a “Personal Guarantee,” which, like the Land Contract, bears the date “12-1-6.” Appellant’s App. p. 35. The Personal Guarantee provides:

IN CONSIDERATION OF [the Dunithans] (SELLER), SELLING TO [Dominion] (PURCHASER), THE PROPERTY AND BUSINESS KNOWN AS ‘WOODLAND ESTATES’ LOCATED AT 2212 N 250 E, KOKOMO, IN 46901, A LAND CONTRACT HAS BEEN EXECUTED BY THE BUYER & SELLER. RALPH COCHRAN, JAMES LUCHS,

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<sup>1</sup> Dominion Ventures, LLC d/b/a Dominion Ventures, LLC Kokomo Series (“Dominion”), Gene Mehmel, and the Treasurer of Howard County, Indiana (“Treasurer”), are not participating in this appeal. Nevertheless, a party of record in the trial court remains a party on appeal. Ind. Appellate Rule 17(A).

GENE MEHMEL GUARANTOR(S), AS PARTIES HAVING A FINANCIAL INTEREST IN THE PURCHASE OF SAID BUSINESS & PROPERTY, HEREBY GUARANTEE(S) SELLER THE FULL PERFORMANCE OF ALL THE TERMS, CONDITIONS & COVENANTS OF THE LAND CONTRACT &/OR SECURITY AGREEMENT &/OR PROMISSORY NOTE, IF APPLICABLE, FOR 'WOODLAND ESTATES', TOGETHER WITH COSTS OF COLLECTION & REASONABLE ATTORNEY FEES.

THIS GUARANTEE IS EFFECTIVE ON THE DATE OF THIS 'PERSONAL GUARANTEE' & SHALL EXTEND THROUGH THE ENTIRE TERM OF THE LAND CONTRACT. THIS AGREEMENT SHALL BIND THE HEIRS, PERSONAL REPRESENTATIVES & SUCCESSORS OF GUARANTOR(S).

*Id.* Cochran, Luchs, and Mehmel's signatures are undated and are not notarized.

Subsequently, Dominion failed to make payments under the Land Contract for several months and abandoned Woodland Estates. The Dunithans filed a four-count Complaint. Under Count I, the Dunithans sued Dominion for breach of the Land Contract.<sup>2</sup> Under Counts II, III, and IV, the Dunithans sued Cochran, Luchs, and Mehmel, respectively, on their Personal Guarantee.

Cochran and Luchs filed a Motion to Dismiss pursuant to Indiana Trial Rule 12(B)(6). The Dunithans responded to the Motion. On October 22, 2009, the trial court granted Cochran and Luchs' Motion to Dismiss and dismissed Counts II and III of the Dunithans' Complaint with prejudice. The trial court subsequently entered judgment in favor of Cochran and Luchs pursuant to Indiana Trial Rule 54(B).

### DISCUSSION AND DECISION

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<sup>2</sup> The Dunithans named the Treasurer as a defendant to address the Treasurer's interest in Woodland Estates due to unpaid property taxes.

An Indiana Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. *Tony v. Elkhart County*, 851 N.E.2d 1032, 1035 (Ind. Ct. App. 2006). A complaint may not be dismissed under Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. *Id.* In ruling on a motion to dismiss for failure to state a claim, the trial court is required to view the complaint in a light most favorable to the nonmoving party and with every reasonable inference in his or her favor. *Id.* The trial court may only look to the complaint, and well-pleaded material facts must be taken as admitted. *Id.*

In addition, under notice pleading, a plaintiff need only plead the operative facts involved in the litigation. *Id.* The plaintiff is required to provide a clear and concise statement that will put the defendants on notice as to what has taken place and the theory that the plaintiff plans to pursue in his or her attempt for recovery. *Id.* (quotation omitted). We view motions to dismiss for failure to state a claim with disfavor because such motions undermine the policy of deciding causes of action on their merits. *Id.*

The Dunithans assert that the trial court should not have dismissed their claims against Cochran and Luchs because the Personal Guarantee is supported by sufficient consideration, specifically the Land Contract.

The parties do not dispute that the Personal Guarantee purports to be a guaranty contract. A guaranty has been defined as a contract by which the guarantor undertakes in writing, upon sufficient consideration, to answer for the debt of another person.

*Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Services, Inc.*, 790 N.E.2d 549, 557 (Ind. Ct. App. 2003), *modified on reh'g*, 798 N.E.2d 248 (Ind. Ct. App. 2003), *transfer denied*. A guaranty contract must be in writing. *Id.* When a guaranty is executed contemporaneously with the contract it supports, no separate consideration is required for the guaranty. *Id.*

The interpretation of a guaranty is governed by the same rules applicable to other contracts. *Beradi v. Hardware Wholesalers, Inc.*, 625 N.E.2d 1259, 1261 (Ind. Ct. App. 1993), *reh'g denied, transfer denied*. A guaranty will be construed so as to give effect to the intentions of the parties, which is ascertained from the language of the contract in the light of the surrounding circumstances. *Id.* The terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within their terms. *Noble Roman's, Inc. v. Ward*, 760 N.E.2d 1132, 1138 (Ind. Ct. App. 2002). In interpreting a guaranty, the court must read it as a whole and give effect to all of its provisions if possible. *Kordick v. Merchants Nat'l Bank & Trust Co. of Indianapolis*, 496 N.E.2d 119, 123 (Ind. Ct. App. 1986).

In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract. *Geico Ins. Co. v. Rowell*, 705 N.E.2d 476, 482 (Ind. Ct. App. 1999), *reh'g denied*. In addition, so long as two or more instruments are part of the same transaction, different execution times will not prohibit the instruments from being construed together. *Id.*

In this case, the Land Contract was not signed by all parties until December 12, 2006. Nevertheless, both the Land Contract and the Personal Guarantee bear the date “12-1-6” at the top of their first pages. Appellants’ App. pp. 30, 35. Furthermore, the Personal Guarantee twice explicitly references the Land Contract for the sale of Woodland Estates. Consequently, despite the possible difference in dates of execution for the Land Contract and the Personal Guarantee, we conclude that they can be considered part of the same transaction.

Cochran and Luchs assert that the Personal Guarantee is a stand-alone document and that we cannot look beyond the four corners of the Guarantee to consider whether adequate consideration exists. Instead, Cochran and Luchs assert that because the Personal Guarantee refers to a land contract that had already been executed, and the Land Contract was executed after December 1, 2006, the Personal Guarantee must be read as referring to a different agreement. We reject this assertion because Cochran and Luchs’ interpretation would mandate a disregard of the Personal Guarantee’s explicit references to the sale of Woodland Estates. As is noted above, we must give effect to all of the Guarantee’s provisions if possible. Therefore, the contemporaneous documents rule applies, and the Land Contract and Personal Guaranty can be construed together. *See Geico*, 705 N.E.2d at 482 (considering a release of liability and a stipulation to be contemporaneous documents despite those documents being executed almost a week apart).

As we have noted, no separate consideration is required when a guaranty is executed contemporaneously with the contract that the guaranty is intended to support.

Therefore, the Land Contract supports the Personal Guarantee, and the Personal Guarantee is not, based on the facts currently before this Court, invalid for lack of consideration. We conclude that the face of the Dunithans' Complaint states claims against Cochran and Luchs upon which, if the claims were meritorious, the trial court could grant relief. Consequently, the trial court erred by dismissing Counts II and III of the Dunithans' Complaint.

### CONCLUSION

For these reasons, we reverse the trial court's grant of Cochran and Luchs' Motion to Dismiss and remand for further proceedings.

Reversed and remanded.

KIRSCH, J., and RILEY, J., concur.