

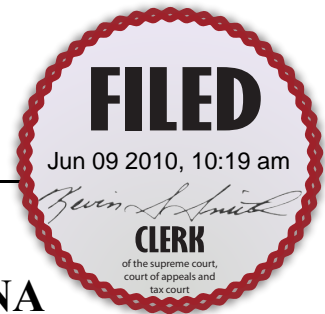
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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the
case.

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**IN THE
COURT OF APPEALS OF INDIANA**

COPENHAVER CONSTRUCTION)
CONSULTANTS, LLC, CCC PROPERTY)
MANAGEMENT, LLC, BRENT COPENHAVER,))
SANDRA J. KAZMIERZAK, BRIAN E.)
COPENHAVER, DENNIS E. COPENHAVER,)
And DEBORAH S. COPENHAVER,)

Appellants,)

vs.)

LINCOLN BANK, f/k/a LINCOLN FEDERAL)
SAVINGS BANK,)

Appellee.)

No. 32A01-0909-CV-476

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Mark A. Smith, Judge
Cause No. 32D04-0809-MF-15

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dennis E. Copenhaver and Deborah Copenhaver, Brent Copenhaver, Sandra J. Kazmierzak, Brian E. Copenhaver, and Copenhaver Construction Consultants, LLC, and Copenhaver Construction Consultants Property Management, LLC (collectively “Defendants”) appeal from the trial court’s grant of summary judgment in favor of Lincoln Bank¹ (“Bank”) and denial of their counter-motion for partial summary judgment.

We affirm.

ISSUES

1. Whether the trial court erred in failing to find that the guaranties signed by Dennis and Deborah Copenhaver were void for lack of consideration.
2. Whether the trial court erred in failing to find, in the alternative, that Dennis and Deborah Copenhaver were released from their obligations under the guaranties because of a material alteration in the underlying contract.
3. Whether the trial court erred in finding that Bank had a security interest in the Johnson County real estate by way of the Johnson County mortgage.

¹ First Merchants Bank is the successor by merger of Lincoln Bank.

4. Whether the trial court erred in awarding to Bank the cost associated with redeeming the Johnson County real estate from tax sale.

FACTS

The undisputed facts² are as follows: Copenhaver Construction Consultants LLC (“CCC”) is a limited liability company located in Greenwood, Indiana. CCC is managed by members, Sandra Kazmierzak and Brian Copenhaver. Brent Copenhaver is also a member of CCC.³ On November 13, 2001, CCC executed a promissory note (“Original Promissory Note”) in favor of Bank in the amount of \$346,950.00 pursuant to loan number 0110000061. The Original Promissory Note states, in part, “This loan is subject to the terms and conditions of a commitment letter dated 12/12/01.”⁴ (App. 127). The commitment letter lists Brent Copenhaver, Brian Copenhaver, and Sandra Kazmierzak as the borrowers. Dennis and Deborah Copenhaver (“Dennis and Deborah”) are identified as issuers of a “[f]ull and unconditional guarantee.” (App. 182). The commitment letter states the loan amount as \$346,950.00 at an interest rate of 7.75%; identifies the collateral as real estate located at 8483 and 8499 E. U.S. Highway 36 in Avon, Hendricks County, Indiana; and states the loan purpose as the purchase of commercial property.

² Pursuant to Indiana Appellate Rule 46(B)(1), Bank has elected to omit the statement of issues, the statement of the case, and the statement of facts. We remind counsel that this rule provides that “[i]f any of these statements is omitted, the brief shall state that the appellee agrees with the appellant’s statements.” In the absence of such a statement in Bank’s brief, we proceed herein under the belief that Bank does not dispute the facts asserted in the Copenhavers’ brief.

³ Dennis and Deborah Copenhaver are the parents of Brian and Brent Copenhaver. Sandra Kazmierzak is described as an aunt.

⁴ The record contains no commitment letter bearing that date, but does contain a single commitment letter, dated 9/12/01.

Also on November 13, 2001, CCC executed a real estate mortgage (“Original Mortgage”) in favor of Bank on real estate located at 8483 and 8499 U.S. Highway 36 in Avon, Hendricks County, Indiana. The Original Mortgage secured the Original Promissory Note in the amount of \$346,950.00 and defined the “Secured Debt” as

[d]ebt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions.

* * *

A Promissory Note dated 11/13/2001[.]

(App. 42). On January 8, 2002, Dennis and Deborah executed a real estate mortgage (“Johnson County Mortgage”) in favor of Bank encumbering Lot #1 in Woodmere Estates in Johnson County. The total principal amount secured by the Johnson County Mortgage was a maximum of \$40,000.00; and the “Secured Debt” was defined as

Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions.

* * *

A Promissory Note dated 11/13/2001[.]

(App. 184).

Also on January 8, 2002, each of the Defendants, including Dennis and Deborah, executed identical personal guaranties in favor of Bank and on behalf of CCC. The “absolute, unconditional and continuing” guaranties provide, in part, that in order

to induce [Bank] . . . to make loans or extend other accommodations to or for the account of [CCC] . . . or to engage in any other transactions with [CCC], the [respective Defendants, including Dennis and Deborah] hereby absolutely and unconditionally guarantee[] to [Bank] the full and prompt payment when due . . . of each and every debt, liability and obligation of

every type and description which [CCC] may now or at any time hereafter owe to [Bank] Without limitation, this guaranty includes the following described debt(s): **all present and future debt.**

(App. 38). The guaranties also stated that each guarantor was liable to Bank “for all indebtedness, without any limitation as to amount[], plus accrued interest . . . and all attorneys’ fees, collection costs and enforcement expenses referable thereto.” (App. 38).

On June 9, 2002, CCC executed a promissory note in favor of Bank for \$749,600.00 under new loan number 207000060 (“First 207000060 Promissory Note”). The First 207000060 Promissory Note was secured by property located at 41 Casco Drive, Avon, Hendricks County, Indiana, and provided, in pertinent part, “[t]his loan is fully guaranteed by Brent Copenhaver, Brian Copenhaver, Sandra Kazmierzak, Dennis Copenhaver, and Debra [sic] Copenhaver.” (App. 146). Dennis and Deborah did not execute any documents in connection with the First 207000060 Promissory Note; nor had they revoked the guaranties that they executed on January 8, 2002. When the Original Promissory Note matured on November 13, 2002, CCC failed to pay the outstanding indebtedness and defaulted on the loan.

On July 8, 2005, CCC executed a promissory note (“Second 207000060 Promissory Note”) in favor of Bank in the amount of \$693,096.00, which was secured by real estate located at 63 and 127 Casco Drive, Avon, Indiana. The Second 207000060 Promissory Note increased the applicable interest rate and contained no reference to Dennis and Deborah’s guaranties. Neither Dennis nor Deborah executed any documents

in connection with the Second 207000060 Promissory Note; nor had they revoked the guaranties that they executed on January 8, 2002.

On June 26, 2008, CCC executed a promissory note in favor of Bank in the amount of \$319,964.70 (“Fourth⁵ 207000060 Promissory Note”). The Fourth 207000060 Promissory Note also included the following language, “[CCC] acknowledges that this Note is secured by a mortgage dated 11/31/01 [the Original Mortgage] Also securing this note are unlimited commercial guaranties provided by Sandra K., Brian Copenhaver, Brent Copenhaver, Dennis Copenhaver and Deborah Copenhaver.” (App. 30). Dennis and Deborah did not execute any documents in connection with the Fourth 207000060 Promissory Note; nor had they revoked the guaranties that they executed on January 8, 2002. On August 26, 2008, the Fourth 207000060 Promissory Note matured; however, CCC failed to pay the full indebtedness on that note and defaulted. Dennis and Deborah Copenhaver never revoked their guaranties.

On September 25, 2008, Bank filed a Complaint on Promissory Note, on Guaranties, and for Foreclosure of Mortgage against Defendants, seeking *inter alia*, a money judgment against Dennis and Deborah, pursuant to their personal guaranties for \$319,964.70, plus interest, fees, and costs on the Fourth 207000060 Promissory Note. On February 6, 2009, Bank filed a motion for summary judgment wherein it sought a money judgment against CCC on the Fourth 207000060 Promissory Note; foreclosure of

⁵ On August 31, 2007, CCC executed a promissory note in favor of Bank in the amount of \$319,964.70 pursuant to loan 207000060 (“Third 207000060 Promissory Note”).

the Original Mortgage on 8499⁶ E. U.S. Highway 36, Avon, Indiana; and a money judgment against Dennis and Deborah on their guaranties.

On April 13, 2009, Dennis and Deborah filed their response in opposition to Bank's motion for summary judgment and counter-motion for summary judgment.⁷ Therein they argued *inter alia* that their guaranties were void for lack of consideration; and that even if the guaranties were properly supported by consideration, Dennis and Deborah were released from their obligations thereunder because of a material alteration of the underlying contract. Defendants also requested specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52.

On May 14, 2009, Bank filed a brief in opposition to Dennis and Deborah's counter-motion for summary judgment. On June 5, 2009, the trial court entered summary judgment for Bank against CCC and CCC Property Management. Specifically, the trial court awarded to Bank a money judgment against CCC in the amount of \$345,287.96.⁸ The trial court also ordered that Bank could foreclose the Original Mortgage and CCC's interest in the Hendricks County real estate.

On May 29, 2009, First Merchants Bank of Central Indiana, successor by merger to Lincoln Bank, paid \$4,698.18 to redeem the Johnson County real estate from tax sale.

⁶ The real estate located at 8483 E. U.S. Highway 36, Avon, Indiana had since been sold or transferred to one of the Copenhavers individually.

⁷ CCC did not oppose Bank's motion for summary judgment. The remaining defendants filed a separate response, but relied upon the same designation of evidence as Dennis and Deborah.

⁸ CCC's money judgment included principal, interest, the cost of title insurance, and attorney's fees.

On June 16, 2009, Bank filed a supplemental designation of materials relied upon in support of its motion for summary judgment and a supplemental affidavit of debt requesting the costs of redeeming the Johnson County real estate from the tax sale. On July 10, 2009, the trial court issued its findings of fact, conclusions of law and judgment, wherein it stated, in pertinent part, the following:

14. The guaranties of the Guarantors are valid and enforceable; and therefore, the Guarantors are personally liable to Bank for \$345,287.96, plus interest after June 4, 2009 up to the date of judgment at the statutory rate of 8% per annum, or \$75.68 a day.

15. Pursuant to their guaranties, an additional \$4,698.18 is owed Bank by Dennis E. Copenhaver and Deborah S. Copenhaver for the redemption of the Johnson County Real Estate from tax sale.

16. Because Dennis E. Copenhaver and Deborah S. Copenhaver are liable to Bank, their guaranties are secured by the Johnson County Mortgage up to \$40,000.00.

17. There are no genuine issues of material fact regarding the debt owed and liability of the Guarantors to Bank, as well as with respect to the validity and enforceability of the Johnson County mortgage.

(Order 6-10). Thus, the trial court granted Bank's motion for summary judgment and denied Dennis and Deborah's counter-motion. On August 7, 2009, Defendants filed a motion to correct error, which the trial court denied on August 31, 2009.

DECISION

Dennis and Deborah argue that the trial court erred in granting Bank's motion for summary judgment and in denying their counter-motion for partial summary judgment.

The law of summary judgment is well established. The purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation

about which there can be no factual dispute and which may be determined as a matter of law. On appeal, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We construe all facts and reasonable inferences drawn from those facts in favor of the nonmoving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. However, where [as here] the facts are undisputed and the issue presented is a pure question of law, we review the matter de novo. The trial court entered an order containing findings of fact. This, however, does not change the nature of our review on summary judgment. In the summary judgment context, the entry of specific facts and conclusions aids our review by providing us with a statement of reasons for the trial court's decision, but it has no other effect.

Miller v. Yedlowski, 916 N.E.2d 246, 249 (Ind. Ct. App. 2009) (internal citations omitted).

We initially note that the trial court here entered findings of fact and conclusions of law. “Where a trial court enters findings of fact and conclusions thereon in granting a motion for summary judgment, as the trial court did in this case, the entry of specific findings and conclusions does not alter the nature of our review.” *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411, 419 (Ind. Ct. App. 2006). In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions; they merely aid our review by providing us with a statement of reasons for the trial court's actions. *Id.*

We also observe that summary judgment is especially appropriate in the context of contract interpretation because the construction of a written contract is a question of law. *Von Hor v. Doe*, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007).

1. Lack of Consideration

Dennis and Deborah argue that they are not liable to Bank because their guaranty contracts⁹ were not properly supported by consideration. Specifically, they cite *Jackson v. Luellen Farms*, 877 N.E.2d 848, 848-49 (Ind. Ct. App. 2007) for the propositions that sufficient consideration for a guaranty contract exists where the guaranty is made at the time of the underlying contract; but, where the guaranty is executed subsequent to the original contract, one of five conditions set out in *Jackson* must be met “in order for the same consideration used to support the original contract to serve as consideration for the guaranty.” They argue that none of the *Jackson* conditions is met here. We disagree.

“A valid contract requires offer, acceptance, consideration, and manifestation of mutual assent.” *Family Video Movie Club, Inc. v. Home Folks, Inc.*, 827 N.E.2d 582, 585 (Ind. Ct. App. 2005). Consideration is defined as “[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee.” *Jackson*, 877 N.E.2d at 857 (citing Black’s Law Dictionary 300 (7th ed. 1999)). It is well-settled that

[p]ast consideration can generally not support a new obligation or promise. “If a person has been benefited in the past by some act or forbearance for which he incurred no legal liability and ‘afterwards, whether from good feeling or interested motives, he makes a promise to

⁹ “A guaranty [contract] is a conditional promise to answer for a debt or default of another person.” *TW General Contracting Services, Inc. v. First Farmers Bank & Trust*, 904 N.E.2d 1285, 1288 (Ind. Ct. App. 2009). “[T]he guarantor promises to pay only if the debtor/borrower fails to pay.” *Id.*

the person by whose act or forbearance he has benefited, and that promise is made on no other consideration than the past benefit, it is gratuitous and cannot be enforced.’”

Id. at 858.

In order for the same consideration used to support the underlying contract to serve as consideration for the guaranty, one of the following five conditions must exist:

- (1) The guaranty was executed pursuant to an understanding had before and was an inducement to the execution of the principal contract; or
- (2) The guaranty was delivered before any obligation or liability was incurred under the principal contract; or
- (3) The guaranty was made pursuant to a contract provision; or
- (4) The principal contract does not become operative until the execution of a guaranty; or
- (5) The guaranty expressly refers to a previous agreement between the principal debtor and creditor which is executory in its character and embraces prospective dealings between the parties.

Id. at 859 (emphasis added).

Here, in finding that *Jackson* condition (1) was met, the trial court found, in part:

2. First Merchants made its original loan in the amount of \$346,950.00 for the purchase of the Hendricks County real estate on the condition that the Guarantors would be personally liable for repayment of the loan, as set forth in the commitment letter. Although Brent Copenhaver, Brian E. Copenhaver, and Sandra Kazmierzak, signed guaranties instead of the Original Promissory Note, the condition of the commitment letter and the inducement for Bank to make the loan that they be personally liable for the loan was met.

3. The September 12, 2001 commitment letter stated that the loan was also conditioned on the guaranties of Dennis E. Copenhaver and Deborah S. Copenhaver. Therefore, the guaranties signed by the Guarantors on January 8, 2002 were signed pursuant to an understanding had before and was an inducement to the execution of the Original Promissory Note on November 31, 2001.

4. The Guaranties signed on January 8, 2002 obligate the Guarantors on “the payment and performance of each and every debt, liability and obligation of every type and description which [CCC] may now or **at any time hereafter** owe to [Bank] (**whether such debt, liability or obligation now exists or is hereafter created or incurred . . .**). Without limitation, [the Guaranties [sic] debt] includes . . . All present and future debt.” (emphasis added).

6. [sic] The Fourth 207000060 Promissory Note reflects it is a renewal of the Third 207000060 Promissory Note. The financial accommodation of Bank renewing the loan, as evidenced by the Fourth 207000060 Promissory Note, was conditioned upon the “continuing Unlimited Commercial Guaranties provided by Sandra Kazmierzak, Brian Copenhaver, Brent Copenhaver, Dennis Copenhaver, and Deborah Copenhaver.”

7. The guaranties are supported by sufficient consideration because they were signed pursuant to a prior understanding, without which Bank would not have made the original loan, and because Bank relied upon the continuing liability of the Guarantors in deciding to renew the loan.

(App. 14-15).

a. Prior Understanding

The record contains specifically designated evidentiary support for the trial court’s conclusion that Dennis and Deborah’s January 8, 2002 guaranties were executed pursuant to a prior understanding. Bank’s commitment letter of September 12, 2001 evinces the existence of a prior understanding between CCC and Bank that Dennis and Deborah would execute “full and unconditional” guaranties in favor of Bank with respect to monies that CCC borrowed from Bank.¹⁰ (App. 182). The commitment letter expressly

¹⁰ Dennis and Deborah contend that because they were not listed as addressees on the commitment letter, they were not privy to any understanding referenced therein. We are not persuaded, and observe that they do not challenge the veracity of the contents of the commitment letter, which is signed by their son, CCC member-manager, Brian E. Copenhaver.

states Bank's "commitment to provide [CCC] with the following secured borrowing arrangement," the terms and conditions of which are nearly identical to the Original Promissory Note:

BORROWER: Brent [and] Brian [] Copenhaver & Sandra Kazmierzak

AMOUNT: \$346,950.00

RATE: 7.75% Fixed for 60 months

COLLATERAL: A first real estate mortgage on real estate . . . located at 8483 . . . and 8499 E. U.S. Highway 36, . . . in Avon Indiana 46123

GUARANTOR: Full and unconditional guarantee of Dennis E. Copenhaver and Deborah S. Copenhaver

(App. 182, 183) (emphasis added).

The record also contains specifically designated evidentiary support for the trial court's conclusion that Dennis and Deborah's January 8, 2002 guaranties were an inducement to Bank to enter into the Original Promissory Note. (App. 38). Bank prepared the September 12, 2001 commitment letter in contemplation of prospective Original Promissory Note; thus, the terms and conditions referenced in the commitment letter mirror the terms of the Original Promissory Note.¹¹ The Original Promissory Note incorporated by reference the commitment letter, which expressly includes Dennis and Deborah's execution of "[f]ull and unconditional guarant[ies]" among the "terms and conditions" of the prospective "secured borrowing arrangement." (App. 182, 183).

¹¹The commitment letter and Original Promissory Note contain identical interest rates, principal amounts, collateral and stated purposes for the loan.

The plain language of the guaranties further supports the trial court’s conclusion that Dennis and Deborah executed the guaranties in order to induce Bank to enter the Original Promissory Note. By guaranteeing to Bank that they would pay CCC’s present and future debt, Dennis and Deborah brought the Original Promissory Note within the scope of their guaranty. Dennis and Deborah’s guaranties expressly provide that

[in order] **to induce [Bank] . . . at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of [CCC] . . . or to engage in any other transactions with [CCC], [Dennis and Deborah] hereby absolutely and unconditionally guarantee[] to [Bank] the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:**

* * *

- B. If this **X** is checked, **[Dennis and Deborah] guarantee[] to [Bank] the payment and performance of each and every debt, liability and obligation of every type and description which [CCC] may now or at any time hereafter owe to [Bank] (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the “Indebtedness”). Without limitation, this guaranty includes the following described debt(s): **All present and future debt.****

(App. 38).

The language of the guaranties is neither unclear nor ambiguous, and, therefore, “must be given its plain meaning.” *Van Prooyen Builders, Inc. v. Lambert*, 907 N.E.2d 1032, 1035 (Ind. Ct. App. 2009). By signing the guaranties on January 8, 2002, Dennis

and Deborah indicated their intention to guarantee to Bank the repayment of CCC's present or then-existing debt, which included the \$346,950.00 principal amount borrowed under the Original Promissory Note on November 13, 2001.

Dennis and Deborah's intention to guarantee to Bank the payment of the monies that CCC borrowed under the Original Promissory Note was first referenced in Bank's September 12, 2001 commitment letter, which contemplated the parties' execution of the Original Promissory Note. Subsequently, when the Original Promissory Note was executed on November 13, 2001, it provided that it was subject to the terms and conditions of the commitment letter. Lastly, Dennis and Deborah's guaranties expressly stated their intention to be personally liable to Bank for the payment of CCC's existing debt, which at the time the guaranties were executed included the monies owed under the Original Promissory Note.

Based upon the foregoing, we cannot say that a genuine issue of material fact exists as to whether Dennis and Deborah's guaranties (1) were executed pursuant to an understanding had before and were an inducement to the execution of the Original Promissory Note; and, therefore, (2) were properly supported by consideration.

2. Material Alteration to Underlying Contract

In the alternative, Dennis and Deborah argue that even if their guaranties are properly supported by consideration, the trial court erred in failing to acknowledge that a material alteration of the underlying contract occurred under the circumstances. Specifically, they argue they are not liable to Bank (1) because the designated evidence

does not indicate that they knew of or consented to the execution of the 207000060 Promissory Notes; and (2) because the material alteration to the Original Promissory Note “contained in the four subsequent 207000060 Promissory Notes, and executed pursuant to an entirely new loan released Dennis and Deborah from their obligations incurred under the guaranties.” Copenhavers’ Br. at 24. We disagree.

At issue herein is the interpretation of a guaranty contract.

The rules governing the interpretation and construction of contracts generally apply to the interpretation and construction of a guaranty contract. The extent of a guarantor’s liability is determined by the terms of his or her contract. 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 its terms. The contract of a guarantor is to be construed based upon the intent of the parties, which is ascertained from the instrument itself read in light of the surrounding circumstances.

A guarantor’s liability will not be extended by implication beyond the terms of his or her contract. “A guarantor is a favorite in the law and is not bound beyond the strict terms of the engagement. Moreover, a guaranty of a particular debt does not extend to other indebtedness not within the manifest intention of the parties.”

Keesling v. T.E.K. Partners, LLC, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007) (internal citations omitted) (emphasis added). The guaranty and any other written agreements it incorporates must be construed together in order to determine the parties’ intentions. *Noble Roman’s, Inc., v. Ward*, 760 N.E.2d 1132, 1145 (Ind. Ct. App. 2002).

We excerpt the relevant designated portions of Dennis and Deborah’s guaranties below:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and **to induce [Bank], at its option, at any time**

or from time to time to make loans or extend other accommodations to or for the account of [CCC] . . . or to engage in any other transactions with [CCC], [Dennis and Deborah] guarantee[] to [Bank] the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

- A. If this ____ is checked, [Dennis and Deborah] guarantee[] to [Bank] the payment and performance of the debt, liability or obligation of [CCC] to [Bank] evidenced by or arising out of the following: _____ and any extensions, renewals or replacements thereof (herein after referred to as the "Indebtedness.").
- B. If this X is checked, **[Dennis and Deborah] guarantee[] to [Bank] the payment and performance of each and every debt, liability and obligation of every type and description which [CCC] may now or at any time hereafter owe to [Bank] (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): All present and future debt.**

* * *

[Dennis and Deborah] further acknowledge[] and agree[] with [Bank] that:

1. **No act or thing need occur to establish the liability of [Dennis and Deborah] hereunder**, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate [Dennis and Deborah] or modify, reduce, limit or release the liability of [Dennis and Deborah] to guaranty the obligation.
2. **This is an absolute, unconditional and continuing guaranty of payment of the indebtedness** and shall continue to be in force and be binding upon [Dennis and Deborah], whether or not all indebtedness is paid in full, until this guaranty is revoked by written notice actually received by [Bank], and such revocation shall not be effective as to

Indebtedness existing or committed for at the time of actual receipt of such notice by the lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking.

* * *

4. The liability of [Dennis and Deborah] hereunder shall be limited to a principal amount of \$ **Unlimited** (if unlimited or if no amount is stated, [Dennis and Deborah] shall be liable for all indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of [Dennis and Deborah] hereunder.

* * *

ADDITIONAL PROVISIONS

5. Whether or not any existing relationship between [Dennis and Deborah] and [CCC] has been changed or ended and whether or not this guaranty has been revoked, [Bank] may . . . enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by [Dennis and Deborah] and without any notice to [Dennis and Deborah].

* * *

7. [Dennis and Deborah] waive[] any and all defenses, claims and discharges of [CCC] or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. * * * [Dennis and Deborah] expressly agree[] that [Dennis and Deborah] shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness [Dennis and Deborah] shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the [CCC]'s obligations had not been discharged.

* * *

13. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each and every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned. This guaranty shall be effective upon delivery to [Bank], without further act, condition or acceptance by [Bank], shall be binding

upon [Dennis and Deborah] and the heirs, representatives, successors and assigns of [Dennis and Deborah] and shall inure to the benefit of [Bank] and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. Except as authorized by the terms herein, **this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by [Dennis and Deborah] and [Bank].** This guaranty shall be governed by the law of the State in which it is executed.

(App. 38-39, 40-41).

Dennis and Deborah rightly state that when the principal and obligee cause a material alteration of the underlying obligation without the guarantor's consent, the guarantor is discharged from further liability. *Kruse v. National Bank of Indianapolis*, 815 N.E.2d 137, 149 (Ind. Ct. App. 2004) (quoting *Yin v. Society Nat. Bank Indiana*, 665 N.E.2d 58, 64 (Ind. Ct. App. 1996)). A material alteration that effects a discharge is a change which "alters the legal identity of the principal's contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position." *Id.*

In support of their contention that a material alteration to the Original Promissory Loan operated to discharge their obligations, Dennis and Deborah rely heavily upon *S-Mart, Inc. v. Sweetwater Coffee Co., Ltd.*, 744 N.E.2d 580 (Ind. Ct. App. 2001), *trans. denied*. In *S-Mart*, convenience store S-Mart had previously operated an outdoor grill that sold food items to customers; however, the outdoor grill was not in operation when S-Mart agreed to lease part of its store to Sweetwater to operate an in-store coffee kiosk. Sweetwater's shareholders signed the original lease agreement as personal guarantors.

Approximately five months after Sweetwater began selling coffee, baked goods and sandwiches on S-Mart's premises, S-Mart resumed operating its outdoor grill. As a result, S-Mart proposed to amend the original lease with Sweetwater. As we noted,

[b]ecause the outdoor grill served food, and would utilize the kitchen area leased to Sweetwater, both of which would potentially interfere with Sweetwater's bakery and sandwich business, the parties subsequently negotiated [a Lease Amendment] . . . that allowed S-Mart to operate the outside grill and use the kitchen area in exchange for which [S-Mart] agreed to reduce Sweetwater's rent by \$750.00 per month.

Id. at 583. The guarantor shareholders notified S-Mart that they would not personally guarantee the lease amendment; thus, the lease amendment did not mention the guaranty provision of the lease agreement. Later, S-Mart became dissatisfied with Sweetwater's sales approach and announced that it would seek a new tenant.

Subsequently, when Sweetwater stopped paying rent, S-Mart sued for breach of the lease agreement and claimed that Sweetwater's shareholders were personally liable under their guaranties. The trial court found that the installation of the outdoor grill and terms of the lease amendment constituted a material alteration of the lease agreement that had changed the relationship between S-Mart and Sweetwater from landlord-tenant to that of competitors; and that the ensuing competitive relationship had substantially increased the risk to Sweetwater. The trial court thus concluded that Sweetwater's shareholders were not personally liable because their guaranty had not contemplated the amendment of the original lease.

On appeal, we agreed that the amendment to the lease (1) had materially altered the terms of the original lease agreement in a manner that was not contemplated by Sweetwater's shareholders when they issued their guaranty, and, thereby, (2) Sweetwater's risk had been "expanded beyond their original liability." *Id.* at 587. We affirmed the trial court's judgment that Sweetwater's shareholders were not personally liable as guarantors for the debts arising from Sweetwater's breach of the original lease agreement.

Dennis and Deborah's reliance on *S-Mart* is misplaced. Here, unlike *S-mart*, no material alteration occurred to the underlying contract which expanded their risk of liability beyond that contemplated by the parties at the time Dennis and Deborah issued their guaranty. The express language of Dennis and Deborah's designated guaranties expressly contemplates that CCC would borrow additional monies from Bank and that Dennis and Deborah, by signing, would be personally liable to Bank for those funds. In their guaranties, Dennis and Deborah "absolutely and unconditionally guarantee[d]" to Bank "every debt, liability and obligation" that CCC "may now or any time hereafter owe" to Bank, regardless of "whether such debt, liability or obligation now exists or is hereafter created or incurred." (App. 38). Dennis and Deborah guaranteed that "[w]ithout limitation, this guaranty includes "[a]ll present and future debt." *Id.*

In a recent opinion with starkly similar factual backdrop, we interpreted a guaranty that was verbatim of those herein, save that the instant guaranties include the clause, "All present and future debt." *Id.* We opined therein,

[P]ursuant to the clear, extremely global language of the Guaranties, these additional obligations could hardly be characterized as material alterations but rather as a logical continuation of the mutually beneficial lender-borrower-guarantor arrangement.

Again, per the Guaranties, the Guarantors offered their absolute and unconditional Guaranties to the Lender to “induce” it to make loans to TW “at any time.” The Guarantors were not guaranteeing only certain liabilities of TW, but “each and every debt, liability and obligation of every type and description” that TW made or “hereafter created.” The Guarantors required no “act or thing” to establish the liability, and only “full payment and discharge of all indebtedness” would in any way exonerate the Guarantors. The Guaranties reiterated that they were “absolute, unconditional and continuing” and would “continue to be in force” and binding “whether or not all Indebtedness is paid in full” until “revoked by written notice actually received” by the Lender. * * * The liability was described as “UNLIMITED,” meaning the Guarantors would be “liable for all indebtedness, without any limitation as to amount.” Further, the “Indebtedness” could be “created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of” the Guarantors. Further, the Lender could “enter into transactions resulting in the creation or continuance of Indebtedness, without any consent,” of, approval by, or notice to the Guarantors. Finally, the Guaranties reiterated that they could not be terminated “except by a writing signed by” the Guarantors “and Lender.” There was no particular end date for the Guaranties.

In sum, the Guarantors signed the Guaranties. The plain language of the Guaranties made the Guarantors responsible for unlimited, ongoing liabilities of TW. None of the Guarantors provided written revocation of their Guaranties. Therefore, when TW defaulted, the Guarantors should have expected that they would need to fulfill their promises under the Guaranties.

TW General Contracting Services, Inc. v. First Farmers Bank & Trust, 904 N.E.2d 1285, 1290 (Ind. Ct. App. 2009).

We echo the sentiments expressed in *TW General Contracting* and conclude that the record contains specifically designated evidentiary support for the trial court’s conclusion that Dennis and Deborah are personally liable under their guaranties for

CCC's debts to Bank. The record reveals that they (1) signed guaranties that expressly contemplated future loans, extensions and renewals of indebtedness by Bank to CCC; (2) waived notice of, consent to, or approval of extensions or renewals of CCC's indebtedness; and (3) they never revoked their guaranties. We therefore reject their contention that "the new loan, new land purchases, and vast amount of additional debt were not foreseen by the parties at the time of execution of the Original Promissory notes, or at the time Dennis and Deborah executed their guaranties." Copenhavers' Br. at 29.

Accordingly, we cannot say that a genuine issue of material fact exists as to whether a material alteration of the underlying contract occurred under the circumstances.

3. Johnson County Real Estate

Dennis and Deborah Copenhaver also argue that the trial court erred in finding that the Fourth 207000060 Promissory Note is secured by the Johnson County Mortgage. Again, they argue that "[t]he Bank has no security interest in the Johnson County Mortgage" because their guaranties "are void for lack of consideration, or have otherwise been discharged by the material alteration of the Original Promissory Note." Copenhavers' Br. at 12. In light of our findings above, we conclude that no genuine issue of material fact exists as to whether the Bank had a security interest in the Johnson County Mortgage.

4. Costs of Redemption

Lastly, Dennis and Deborah Copenhaver argue that the trial court erred in awarding to Bank the cost of redeeming the Johnson County real estate at a tax sale.

They argue that the issue was not properly before the trial court, because “the Bank d[id] not set out a prayer for relief, or allegations in its complaint sufficient to support this award.” Copenhavers’ Br. at 13. They also argue that redemption costs are “more appropriately recovered in a foreclosure action.” Copenhavers’ Br. at 32.

We cannot say that the trial court erred in concluding that Dennis and Deborah are liable for the costs of redeeming the Johnson County real estate from tax sale. The express language of the designated guaranties contemplates Dennis and Deborah’s liability in this regard. Specifically, the guaranties provide that Dennis and Deborah’s liability is “unlimited” and they “shall be liable for all indebtedness, without any limitation as to amount[], plus accrued interest thereon and all attorney’s fees, collection costs and enforcement expenses referable thereto.” (App. 38). Thus, we conclude that no genuine issue of material fact exists with respect to the trial court’s award of redemption costs to Bank. Accordingly, summary judgment was properly granted to Bank.

Affirmed.

BAKER, C.J., and CRONE, J., concur.