STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN NATIONAL BANK,

Plaintiff-Appellee,

v

CLAUDY E. JONES,

Defendant-Appellant,

and

BJ GREETINGS, INC., RAY WILLIAMS,

Defendants.

UNPUBLISHED
March 4, 1997

No. 187978
Wayne Circuit Court
LC No. 94-431273-CK

Before: Jansen, P.J., and Reilly and W.C. Buhl,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's grant of summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(9) and (10). We affirm.

The dispute in this action centers around a loan agreement between BJ Greetings, Inc. and plaintiff. Plaintiff loaned BJ Greetings $76,000 on April 16, 1990. "In consideration of and in order to induce [plaintiff] . . . to loan" the money to BJ Greetings, defendant signed an unlimited guaranty of BJ Greetings' debt to plaintiff. Pursuant to the agreement, defendant agreed to make full and prompt payment of all of BJ Greetings' debt to plaintiff in the event of BJ Greetings' default. BJ Greetings defaulted on its note to plaintiff, leaving a portion of the total debt unpaid. Plaintiff sought payment from defendant pursuant to the agreement. Defendant refused to pay and upon receiving plaintiff's complaint, claimed that he was unaware the document he signed was an unlimited guaranty of payment of BJ Greetings' debt, that the parties' agreement lacked consideration, that plaintiff's action was barred

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* Circuit judge, sitting on the Court of Appeals by assignment.

because of its own negligence, and that the guaranty contract should be rescinded due to the parties' mutual mistake.

Plaintiff filed its motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Plaintiff argued that defendant admitted that he refused to make payment on the guaranty and that he failed to state a valid defense. Plaintiff further argued that there was no genuine issue of material fact; defendant could not factually support his defenses. The trial court granted plaintiff's motion pursuant to both MCR 2.116(C)(9) and (10). We reverse the trial court's grant of summary disposition to plaintiff pursuant to MCR 2.116(C)(9), but affirm the grant of summary disposition pursuant to MCR 2.116(C)(10).

Defendant argues that the trial court erred when it granted plaintiff's motion pursuant to MCR 2.116(C)(9) after concluding that defendant failed to deny the material allegations of plaintiff's complaint. We agree.

A motion for summary disposition pursuant to MCR 2.116(C)(9) is properly granted where the party opposing the motion has failed to state a valid defense to the claim against him or her. The motion is tested by the pleadings alone and may not be granted unless the non-moving party's defenses are "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery." *Grebner v Clinton Twp,* 216 Mich App 736, 740; 550 NW2d 265 (1996).

In the instant action, defendant admitted refusing to pay plaintiff for BJ Greetings' debt; however, defendant denied liability on the guaranty contract and claimed that he lacked knowledge of the nature of the document which he signed. Moreover, defendant alleged that the contract was voidable because it lacked consideration and that the contract should be rescinded because of mutual mistake. Under these circumstances, we hold that the trial court erred when it granted plaintiff's motion pursuant to MCR 2.116(C)(9).

Defendant next argues that the trial court erred when it granted plaintiff's motion pursuant to MCR 2.116(C)(10) because he presented sufficient documentary evidence which demonstrate that there are factual issues for trial. We disagree.

To overcome a party's motion for summary disposition brought pursuant to MCR 2.116(C)(10), the nonmovant must demonstrate that considering all documentary evidence submitted by the parties and drawing all inferences in his or her favor, a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Pinckney Community Schools v Continental Cas Co,* 213 Mich App 521, 525; 540 NW2d 748 (1995). Defendant argues that there are several issues on which reasonable minds might differ.

First, defendant argues that reasonable minds might differ as to whether there was sufficient consideration to support the guaranty contract. Courts ordinarily will not inquire into the adequacy of the consideration for a promise; however, rescission of a contract may be ordered where the inadequacy of the consideration for the contract was so gross as to shock the conscience of the court.

Moffit v Sederlund, 145 Mich App 1, 11; 378 NW2d 491 (1986). We conclude that there was adequate consideration for the instant contract. With respect to surety contracts, we have held that a surety's liability corresponds with that of the principal and that when the principal may be held liable for breach of a contract, so may the surety. *Hunters Pointe Partners, LP v USF&G*, 194 Mich App 294, 298 n 2; 486 NW2d 136 (1992). Similarly, when a principal may be held liable for breach of a loan agreement, so may the principal's guarantor.

According to the loan agreement between BJ Greetings and plaintiff, plaintiff loaned the company $76,000 in exchange for BJ Greetings' promise to repay the debt and in exchange for defendant's guaranty. There was clearly adequate consideration for the underlying loan agreement; therefore, there was likewise adequate consideration for the guaranty contract.

Defendant next argues that plaintiff was negligent by entering into the guaranty agreement before assessing his creditworthiness and is therefore barred from holding him personally liable on the guaranty contract. We reject this argument.

Michigan courts have held that a payee's negligence which causes a guarantor loss that could have otherwise been avoided could operate as a release. See *Piasecki v Fidelity Corp of Mich*, 339 Mich 328, 337; 63 NW2d 671 (1954); *In re Kelley's Estate*, 173 Mich 492, 502; 139 NW 250 (1913). However, the cases standing for that proposition involved a payee's negligence which occurred subsequent to the formation of the underlying contract that might have served to increase the guarantor's liability beyond what was originally contemplated. In the instant action, assuming plaintiff was negligent, the negligence occurred before the parties entered into their agreement and could not serve to increase defendant's liability beyond the amount contemplated in the guaranty agreement.

Defendant next argues that the contract should be rescinded because of the parties' mutual mistake. We disagree. Mutual mistake exists when both parties to the contract are mistaken as to an essential element of the contract or where one party is mistaken as a result of the other's fraud. *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). Defendant has presented no facts in support of the conclusion that plaintiff was mistaken as to the nature of the parties' agreement nor has defendant presented facts in support of the conclusion that defendant was mistaken as a result of fraud on the part of plaintiff. Although defendant argues that he believed he was merely signing a loan agreement as an agent of BJ Greetings, that he was never advised that he was signing an agreement, and that he was never advised to contact an attorney before signing the document; defendant has presented no evidence to support the conclusion that plaintiff misled him where the agreement clearly stated "**GUARANTY**" at its top and where the nature of the agreement was plain on its face.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl