STATE OF MICHIGAN

COURT OF APPEALS

COGSDILL ENTERPRISES, INC.,

Plaintiff-Appellant,

v

MAC PRECISION, INC.,

Defendant,

and

FLEX MANUFACTURING, INC.,

Defendant-Appellee.

UNPUBLISHED
June 4, 1999

No. 201884
Macomb Circuit Court
LC No. 93-000628 CK

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order entering judgment in favor of defendant-appellee following a bench trial. We affirm.

I. Basic Facts and Procedural History

Defendant Mac Precision, Inc. (hereinafter Mac), who is not a party to this appeal, placed an order with plaintiff on May 14, 1992, for five hundred deburring tools. At a cost of $32 per tool, the total cost of the contract was $16,000. Mac agreed to pay cash for the tools upon delivery. Sometime later, Mac told plaintiff that it needed to ship some of the tools early. Plaintiff agreed, and Mac took delivery of sixty tools on June 30, 1992. Because Mac could not pay for the tools upon delivery, plaintiff agreed to hand over the tools in return for Mac's promise to pay for the tools within thirty days. Mac eventually paid the $1,920 due on the sixty tools sometime in September 1992.

Plaintiff then called Mac when the remaining 440 deburring tools were ready. On August 4, 1992, Charles Foresi, a sales representative employed by Mac, went to plaintiff's place of business to pick up the remaining tools. Foresi told plaintiff that Mac could not pay for the tools at that time, and

asked that Mac be allowed to take the tools in exchange for a promise to pay within thirty days. Cameron Cogsdill, president and owner of plaintiff Cogsdill Enterprises, testified at trial that when he rejected this offer, Foresi then produced a written guarantee of payment from Flex. Plaintiff contended below that the letter was not written until August 11, 1992. The guarantee, which was typed on defendant's letterhead, read in pertinent part:

> Gentlemen:
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> This letter is to advise you concerning our guarantee of payment.
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> Mac Precision, Inc. has ordered (500) deburring tools from you for a total of $16,000.00.
>
> Flex Mfg., Inc. will guarantee timely payment in full for the order.
>
> Thank you.
>
> Respectfully yours,
>
> Flex Mfg., Inc.
>
> Quin R. Gleason, President

The guaranty was dated August 11, 1992, and bore the signature "Quin R. Gleason." Gleason testified at trial that his signature was placed on the guaranty by his daughter while Gleason was away from the office. Gleason's daughter, who works as a secretary for defendant, testified that she typed the letter at the request of Don McGregor, the president of Mac. Gleason indicated that although he never gave his daughter the authority to sign his name to this guaranty, and although he never intended to enter into a guaranty contract with plaintiff, he nonetheless "authorized" the signature after he was told by his daughter what she had done. In Gleason's words, "it was too late to get the letter back." Gleason never communicated with plaintiff either about the fact that the signature was not his, or that he had subsequently decided to authorize the signature. Plaintiff was never paid for the 440 tools.

On December 14, 1992, plaintiff filed a five-count complaint against Mac and defendant. Counts I, II, and III were aimed at Mac. Count IV (promissory estoppel) named both Mac and defendant, and count V (seeking to enforce the alleged guaranty) named defendant only. On January 15, 1993, the trial court entered a default judgment in the amount of $14,220 against Mac. Both plaintiff and defendant filed motions for summary disposition on counts IV and V. On January 7, 1994, the trial court denied plaintiff's motion and granted defendant's motion pursuant to MCR 2.116(C)(8) and (10). Concluding that the trial court had erred in granting summary disposition to defendant, this Court reversed and remanded the case in an unpublished per curiam opinion. *Cogsdill Enterprises, Inc v Mac Precision, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 1996 (Docket No. 173009).

A one-day bench trial was held on January 27, 1997. In support of its finding of no cause of action, the trial court stated:

> The Court is making a factual finding that on August 4, 1992, . . . the tools were given by the plaintiff to the defendant MAC Precision, that the letter was drafted, the guaranty on August 11[,] 1992. The Court is finding further that there has been a failure on the part of the plaintiff to prove justifiable reliance. The Court is not convinced that indeed Mr. Gleason did authorize this guaranty. [Cogsdill] consistently throughout his testimony indicated that he assumed that Flex was going to guaranty and that by a mere phone call to Flex Manufacturing, Incorporated, . . . he on his own verified the legitimacy of this guaranty.
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> Although the employee may have had the authority to take and sign her employer's name, the Court is convinced by the testimony of Mr. Gleason that he never did authorize the guaranty, and I do accept defendant's argument with respect to the fact that it possibly would have been more beneficial to the plaintiff's case if the guaranty was presented to the plaintiff by a member of Flex. . . .
>
> So I'm concluding by saying that plaintiff has failed to prove justifiable reliance and further that the guaranty was written almost a week after the tools were delivered, and for that reason I'm finding no cause of action.

II. Allegations of Error

A. Dating of the Guaranty Letter

Plaintiff argues that the trial court committed error requiring reversal when it found that the guaranty was written on August 11, 1992. We disagree. This Court will not set aside a trial court's findings of fact unless they are clearly erroneous. MCR 2.613(C). "A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). On this matter, we are not left with such a conviction.

Gleason's daughter testified at trial that she had no doubt that she had typed the guaranty agreement and signed the document with Gleason's signature on August 11, 1992. She testified that she normally placed the current date on a letter whenever she types one. Although Cogsdill testified that the written guaranty was given to him on August 4, 1992, the same day that Mac received the remaining 440 deburring tools, there were no additional witnesses or documentation to support Cogsdill's testimony that the guaranty was given to him on that day. Deferring to the trial court's special opportunity to judge the credibility of the witnesses, MCR 2.613(C), we believe that there was sufficient evidence that the guaranty was written and signed on August 11, 1992.

B. Enforceability of the Guaranty

Plaintiff also argues that because it had a right to, and did in fact rely on plaintiff's promise to guarantee payment of Mac's debt, the trial court erred in not holding that the guaranty should not be given legal effect. We again disagree.

A guaranty contract is "an enforceable undertaking or promise by one person collateral to a primary or principal obligation of another which binds the person making the promise to performance of the primary obligation in the event of nonperformance; the secondary party thus becomes primarily responsible for performance." *Angelo Iafrate Co v M & K Development Co*, 80 Mich App 508, 514; 264 NW2d 45 (1978). See also Restatement Suretyship and Guaranty, §§ 1, 2, pp 4-5, 19-20. Generally, a guaranty contract must be supported by consideration. See *Angelo Iafrate Co, supra* at 516; Restatement Suretyship and Guaranty, § 9(1), p 34. However, there are certain situations where an enforceable contract will be found in the absence of consideration.[1] See Restatement Suretyship and Guaranty, § 9(2), pp 34-35; 1 Restatement Contracts, 2d, § 88, p 234.

One of the recognized substitutes for consideration is the doctrine of promissory estoppel. Restatement Suretyship and Guaranty, § 9(2)(d), p 35; 1 Restatement Contracts, 2d, § 88(c), p 234. Plaintiff asserts that because the evidence established that it justifiably relied on the guaranty when it released the remaining tools to Mac, the trial court should have held that defendant was estopped from avoiding enforcement of its promise. Initially, we note that plaintiff's argument appears to be firmly rooted on a finding that the guaranty letter was delivered on August 4, 1992. Given our earlier conclusion regarding the trial court's finding on the date the letter was written, see discussion IIA, *ante*, we believe the soundness of plaintiff's reasoning is undercut by such a presumption. To the extent that plaintiff's argument is not predicated on the dating of the guaranty letter, we still find it to be without merit.

The framework of a promissory estoppel claim in guaranty law is found in §9(2) of the Restatement of the Law of Suretyship and Guaranty,[2] which states:

> (2) A secondary obligation does not fail for lack of consideration if:
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> ***
>
> (d) the secondary obligor should reasonably expect its promise to induce action or forbearance of a substantial character on the part of the obligee or a third person, and the promise does induce such action or forbearance.[3]

Under the promissory estoppel doctrine, a promise to guarantee payment "is binding if injustice can be avoided only by enforcement of the promise." 1 Restatement Contracts, 2d, § 90(1), p 242. Accord *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

The facts of the case before us clearly show that a forbearance of a substantial character occurred. When the extension of time to pay was given on August 4, 1992, plaintiff could have brought suit for the money owed on the previously-delivered sixty tools, as well as for Mac's failure to pay for the remaining 460 tools upon delivery. Instead, plaintiff modified the contract by extending the time for

payment. Plaintiff's extension of time to pay for the deburring tools was, in effect, both a forbearance to sue, 38 Am Jur 2d, Guaranty, § 47, p 1051, and an extension of credit to Mac. See *Ryco Packaging Corp of Kansas v Chapelle International, Ltd*, 926 P2d 669, 675 (Kan App, 1997).

However, plaintiff failed to establish that plaintiff's forbearance or reliance was induced by a promise extended by defendant. There is no evidence whatsoever that defendant was personally involved in the negotiations that took place between plaintiff and Foresi for an extension of time to pay for the tools. *Pratt v Bates*, 40 Mich 37, 39 (1879); *Calkins v Chandler*, 36 Mich 320, 321; 24 Am Rep 593 (1877). Further, there is nothing in the record to indicate that defendant had any fore- or contemporaneous knowledge that Foresi would be offering defendant as a secondary obligor on the debt. Rather, defendant's involvement began a week after the extension was given and the tools were delivered. In other words, there was no promise on the part of defendant that would be enforceable at law under a theory of promissory estoppel. See Restatement Contracts, 2d, § 1, p 5 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").[4] Justice simply does not demand a contrary result.

Finally, we reject plaintiff's assertion that its reliance was justifiable under either the law of agency or respondeat superior. Even if the signature on the guaranty letter was somehow effective under either theory, plaintiff still cannot show how its actions on August 4, 1992, were made in reliance on a promise that was not made by the alleged secondary obligor until a week later. In any event, we do not believe that the trial court committed clear error when it found that Gleason never intended to officially authorize the guaranty of Mac's debt.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] The concept of consideration "refers to an element of exchange which is legally sufficient" to make a promise legally binding. Restatement Contracts, 2d, § 17, cm d. The element of exchange is one of "the two essential elements of a bargain." *Id.*, cm b. Accord *id.*, § 3 ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."); Corbin, Corbin on Contracts, § 193, p 277 (One volume ed, 1952) ("Most contacts are 'bargains' whereby two parties express mutual assent to an exchange of equivalents . . . .").

[2] The commentary to § 9 notes that "[s]ubsection (2)(d) is an application of Restatement, Second, Contracts § 90 to reliance on a secondary obligation." Restatement Suretyship and Guaranty, § 9, cm e. Restatement Contracts, 2d, § 90(1) states:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[3] The other subsections of §9(2) state that a guaranty contract can be found in the absence of consideration where:

> (a) the underlying obligation is supported by consideration and the later creation of the secondary obligation was part of the exchange for which the obligee bargained; or
>
> (b) the promise of the secondary obligor is in writing and signed by the secondary obligor and recites a nominal purported consideration; or
>
> (c) the promise of the secondary obligor is made binding by statute . . . .

None of these situations are implicated by the circumstances of the case at hand.

[4] Although the trial court was not presented with, and did not examine whether the alleged contract was supported by consideration, we note that plaintiff's forbearance would also serve as sufficient consideration for any guaranty contract between plaintiff and defendant. See *Bates, supra* at 40; 38 Am Jur 2d, Guaranty, §47, p 1051 ("Any delay is a detriment or inconvenience to the creditor or obligee and also a benefit to the debtor in that he is afforded further opportunity to meet the obligation . . . ."). However, because plaintiff's act of forbearance was not bargained for by defendant, the presence of consideration would not support the conclusion that a legally recognized guaranty contract had been formed. Defendant's creation of the guaranty letter was sufficiently contemporaneous with plaintiff's expressed willingness to extend the time of payment to Mac, but the evidence establishes that these two events were not bound up in a transaction in which both parties were active and knowledgeable participants. Further, until the written promise is delivered, "there is no basis for contact because, until the creditor is aware of the guarantor's promise, the creditor cannot extend the requested consideration as a part of the acceptance of the offer." 38 Am Jur 2d, Guaranty, § 50, p 1053.