STATE OF MICHIGAN

COURT OF APPEALS

CADLE COMPANY II, INC.,

Plaintiff-Appellee,

v

P.M. GROUP, INC.,

Defendant,

and

DANIEL D. ARMISTEAD

Defendant-Appellant.

UNPUBLISHED
October 25, 2007

No. 275099
Oakland Circuit Court
LC No. 05-069140-CK

Before: Owens, J.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant Daniel D. Armistead (Armistead) appeals by right from the trial court's order granting plaintiff's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This action arises out plaintiff's attempt to collect a debt that it alleges that Armistead personally guaranteed. In 2002, Armistead, the president of P.M. Group Inc., signed an unlimited personal guaranty that stated in relevant part:

> In consideration of any credit or other financial accommodation heretofore or hereafter extended by [Fifth Third Bank] … to the P.M. Group ("Debtor") … [Armistead] … guarantees prompt payment when due and at all times thereafter of any and all existing and future indebtedness and liabilities of every nature and kind, including all renewals, extensions and modifications thereof, now or hereafter owing from Debtor to Bank, however and whenever created…. The indebtedness includes any and all indebtedness and obligations now or hereafter owing to Bank and all affiliates of Fifth Third Bankcorp by Debtor, regardless of whether any such indebtedness or obligation is (a) not presently indebted or contemplated by Debtor, Bank or Guarantor, (b) indirect, contingent or secondary,

> or (c) unrelated to, or of a different kind of class from, any indebtedness or obligations of Debtor to Bank that are now owing or are committed or contemplated.

On July 1, 2004, Fifth Third Bank and P.M. Group executed a revolving note for $250,000. Fifth Third Bank alleged that P.M. Group defaulted on this note and filed suit against P.M. Group for repayment and against Armistead for repayment pursuant to the June 25, 2002 personal guaranty. Fifth Third Bank assigned its right to collect on the promissory note to plaintiff.

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that Armistead was responsible for repayment of the July 1, 2004 note pursuant to the 2002 guaranty. After a hearing on plaintiff's motion, the court concluded that "the documents speak for themselves," granted plaintiff's motion for summary disposition, and entered a judgment in favor of plaintiff and against Armistead in the amount of $315,778.18.

Armistead argues on appeal that Fifth Third Bank waived or modified the provision in the guaranty specifying that it extended to all future debts. He asserts that the intent to waive or modify is evidenced by an agreement that July 2004 note was a stand alone note not guaranteed by the June 2002 guaranty and by the parties' course of conduct, which indicates that a new guaranty was executed for each new note extinguishing the previous guaranties.

Initially, we note that Armistead has not properly preserved this argument for appeal. Armistead argued below that the 2004 note was intended by the parties to be a stand alone obligation not covered by the 2002 guaranty; however, he failed to argue below that the guaranty had been subsequently modified by the parties. This issue is therefore not properly preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Regardless, in reviewing the merits of the claim, we conclude that the alleged modification or waiver of the guaranty is unenforceable under Michigan's statute of frauds, MCL 566.132. The 2002 guaranty was part of a financial accommodation between Fifth Third Bank, plaintiff's predecessor in interest, and P.M. Group. As such, it falls within the meaning of MCL 566.132(2). Accordingly, any modification or waiver of the guaranty is not enforceable unless it is in writing and signed by an authorized representative of Fifth Third Bank. *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 549-550; 619 NW2d 66 (2000). The undisputed evidence discloses that no authorized representative of Fifth Third Bank signed such a modification or waiver. Therefore, the alleged agreement to modify or waive the guaranty is unenforceable under MCL 566.132(2). Thus, the plain language of the guaranty indicating that it applies to all future debts "unrelated to, or of a different kind of class from, any indebtedness or obligations of Debtor to Bank that are now owing or are committed or contemplated" must be enforced as written. *Real Estate One v Heller*, 272 Mich App 174, 178; 724 NW2d 738 (2006).

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis