STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1379

RCH Mortgage Fund IV, LLC,
Respondent,

vs.

Byrd, LLC, et al.,
Appellants,

Tennessee Commerce Bank, et al.,
Defendants.

Filed April 29, 2013
Affirmed
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CV-12-940

Kevin J. Dunlevy, Beisel & Dunlevy, P.A., Minneapolis, Minnesota; and Rebecca F. Schiller, Schiller & Adam, P.A., St. Paul, Minnesota (for respondent)

Kay Nord Hunt, Barry A. O'Neil, Deborah C. Swenson, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Johnson, Chief Judge; Rodenberg, Judge; and Toussaint, Judge.[*]

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

Byrd, LLC defaulted on two promissory notes that were secured by a mortgage on real property and guaranteed by Byrd's chief manager. The district court entered summary judgment for the lender after concluding, as a matter of law, that Byrd was in default on its obligation to repay the notes, that Byrd had breached a term of the mortgage by giving another lender a mortgage encumbering the same real property, and that Byrd's chief manager is liable on his personal guaranty of the notes. We conclude that the district court did not err in its analysis of RCH's motion and, therefore, affirm.

FACTS

In August 2007, Byrd borrowed approximately $2,814,000 from LaSalle Bank, the predecessor-in-interest of RCH Mortgage Fund IV, LLC, the respondent in this appeal. Byrd's chief manager, M.G. Kaminski, executed and delivered two promissory notes to LaSalle. Paragraph 14 of each note limits the lender's ability to obtain repayment in the event of default by providing that the lender must rely on its security interest in real property, unless one of four specified events were to occur:

> [N]either [Byrd] nor any Guarantor shall be personally liable to pay the Principal Amount, or any other amount due, or to perform any obligation, under the Loan Documents, and Lender agrees to look solely to the Property and any other collateral heretofore, now or hereafter pledged by any party to secure the loan; provided, however, in the event (i) of any fraud, willful misconduct or material misrepresentation by [Byrd] or any Guarantor in connection with the Loan, (ii) the first full monthly payment on the Note is not paid when due, (iii) of a breach of the terms of *Paragraphs 16 or 17* of the Mortgage or (iv) of the voluntary filing by [Byrd], or the

> filing against [Byrd] by any Guarantor or any affiliate of any Guarantor, or an involuntary filing against [Byrd] in which [Byrd] or Guarantor acts in collusion with the filing party with respect to the filing, of any proceeding for relief under any federal or state bankruptcy, insolvency or receivership laws or any assignment for the benefit of creditors made by [Byrd], the limitation on recourse set forth in this *Paragraph 14* will be null and void and completely inapplicable, and this Note shall be with full recourse to [Byrd].

The third clause of this paragraph, which refers to paragraph 17 of the LaSalle mortgage, is at issue in this appeal.

The notes were secured by a mortgage that encumbered two parcels of real property in Hennepin County. LaSalle recorded the mortgage in October 2007 as the first lien on the properties. Paragraph 17 of the mortgage, which is referenced in paragraph 14 of the notes, restricts Byrd's ability to further encumber the real property that secures the notes:

> **No Additional Liens.** [Byrd] covenants not to execute any mortgage, deed of trust, security agreement, assignment of leases and rents or other agreement granting a lien (except the liens granted to Lender by the Loan Documents) or, except as set forth in *Paragraph 2* above, take or fail to take any other action which would result in a lien against the interest of [Byrd] in the Property without Lender's prior written consent.

The notes also were secured by a personal guaranty executed by Kaminski in which he agreed to pay the balance due on the notes if one of four specified events were to occur. The guaranty provides, in paragraph 1.2, as follows:

> **Definition of Guaranteed Obligations.** As used herein, the term "***Guaranteed Obligations***" shall mean the unpaid balance of the Loan (as defined in the Note) in the event of (i) any fraud, willful misconduct or material

> misrepresentation by [Byrd] or any Guarantor in connection with the Loan, (ii) [Byrd's] failure to make first full monthly payment on the Note when due, (iii) a breach of the terms of *Paragraphs 16 or 17* of the Mortgage or (iv) the voluntary filing by [Byrd], or the filing against [Byrd] by any Guarantor or any affiliate of any Guarantor, or an involuntary filing against [Byrd] in which [Byrd] or Guarantor acts in collusion with the filing party with respect to the filing, of any proceeding for relief under any federal or state bankruptcy, insolvency or receivership laws or any assignment for the benefit of creditors made by [Byrd].

Thus, both the lenders' recourse options and Kaminski's personal guaranty depend on the occurrence of one of four specified triggering events, including a breach of paragraph 17 of the LaSalle mortgage.

After Byrd and Kaminski executed the loan documents, the lender's rights were assigned several times. RCH received an assignment of the lender's rights in August 2009. At that time, Byrd no longer was making payments on the notes. RCH, Byrd, and Kaminski entered into a forbearance agreement in which Byrd and Kaminski acknowledged that Byrd was in default and that the amounts owed under the notes were due pursuant to an acceleration clause. The forbearance agreement required Byrd to make monthly installment payments of $7,000, to be applied first to accrued and unpaid interest and second to unpaid principal. The forbearance agreement also required Kaminski to ratify and reaffirm his personal guaranty and to agree to the following amendment of the guaranty:

> The "Guaranteed Obligations" shall also include the entire unpaid balance of the Loan (as defined in the Note); provided, however, unless a greater amount is due hereunder and included in the definition of "Guaranteed Obligations" under the foregoing provisions of this Section 1.2, the

> maximum amount of the "Guaranteed Obligations" shall be One Million Two Hundred Thousand Dollars and no/100 ($1,200,000.00) ("Limited Amount") plus interest accrued on the Limited Amount and costs of collection of the Limited Amount and enforcement of this Guaranty including without limitation attorney's fees incurred by Lender related to collection of the Limited Amount and enforcement of this Guaranty."

In late June 2010, Byrd borrowed $6,000,000 from Tennessee Commerce Bank (TCB). Kaminski, on behalf of Byrd, gave TCB a mortgage that encumbered the same parcels of real property that were encumbered by the mortgage given to LaSalle. During district court proceedings, Kaminski executed an affidavit in which he stated that the TCB mortgage was subject to two conditions. The first condition was "that the executed mortgage be placed in escrow." The second condition was "that the mortgage would only be recorded if Tennessee Commerce Bank obtained the consent of RCH or the present Noteholder." In July 2010, however, TCB recorded its mortgage. In August 2010, TCB executed a partial release of its mortgage. Thereafter, Byrd continued to be in default, and Kaminski did not pay the balance of the notes pursuant to the amended guaranty

In January 2012, RCH commenced this action to recover on the notes. RCH alleged that principal and interest were due under an acceleration clause, asked the district court to order the sale of the real property encumbered by the LaSalle mortgage, and sought judgments against Byrd and Kaminski for any unpaid balance. In April 2012, RCH moved for summary judgment. In July 2012, the district court granted RCH's motion after concluding, as a matter of law, that Byrd was in default on the notes, that the

execution of the TCB mortgage breached the LaSalle mortgage, and that Kaminski is personally liable for the unpaid balance pursuant to the amended guaranty. The district court also ordered the sale of the encumbered real property and ordered that RCH could recover any deficiency from Byrd and Kaminski if the proceeds of the sale were insufficient to pay the unpaid balance of the loans. Byrd and Kaminski appeal.

D E C I S I O N

A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On an appeal from summary judgment, this court considers: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to a grant of summary judgment and views the evidence in the light most favorable to the non-moving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

Appellants make two arguments on appeal. The first argument concerns the district court's interpretation of the LaSalle mortgage; the second argument concerns the district court's interpretation of the amended guaranty. The interpretation of a contract is a question of law, which this court reviews *de novo*. *Valspar*, 764 N.W.2d at 364. In

interpreting a contract, we give unambiguous language its plain and ordinary meaning. *Metropolitan Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009). If a contract is unambiguous, a court may not consider extrinsic evidence. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 392 n.1 (Minn. 1998).

I. Mortgage

Appellants argue that the district court erred by concluding, as a matter of law, that Byrd breached paragraph 17 of the LaSalle mortgage. Appellants contend that paragraph 17 of the LaSalle mortgage "does not forbid the execution of a subsequent mortgage that places a lien on the Property" but, rather, merely "precludes the execution of a subsequent mortgage that is *intended* to place a lien on the Property." They further contend that they did not intend to place a lien on the real property encumbered by the LaSalle mortgage because Kaminski executed the TCB mortgage "subject to two express conditions, both of which were specifically intended to avoid encumbering the Property with a lien in the absence of consent by RCH." Thus, appellants contend that Kaminski's execution of the TCB mortgage was not an "action which would result in a lien against the interest" of RCH, as prohibited by the LaSalle mortgage, because TCB was not authorized to record the TCB mortgage.

In paragraph 17 of the LaSalle mortgage, Kaminski, on behalf of Byrd, covenanted "not to execute any mortgage, . . . , security agreement, . . . or other agreement granting a lien . . . or . . . take or fail to take any other action which would result in a lien against the interest of [Byrd] in the Property without Lender's prior written consent." This language is silent on the issue of intent; it simply prohibits certain

conduct. Specifically, paragraph 17 prohibits Byrd from executing another mortgage and from taking any other action that would result in a lien on the encumbered real property, regardless whether Byrd intended for another lien on the encumbered property to be created or recorded.

In addition, nothing in paragraph 17 requires a finding that Byrd caused a mortgage to be recorded. The word "lien" generally means a "legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied." *Black's Law Dictionary* 1006 (9th ed. 2009). The supreme court has stated that the term "has been generally recognized in this state to mean a hold or claim which one person has upon the property of another as security for a debt or charge." *In re Eggert's Estate*, 245 Minn. 401, 403, 72 N.W.2d 360, 361 (1955). A "lien" may exist even if it is not recorded. *See, e.g., Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co.*, 312 Minn. 162, 170, 251 N.W.2d 120, 125 (1977) (holding that unrecorded conveyance had priority over prior recording because of notice of the unrecorded conveyance). Thus, contrary to appellants' argument, nothing in paragraph 17 requires a finding that the TCB mortgage be recorded or that Kaminski intended TCB to record it. Furthermore, paragraph 21(d) of the LaSalle mortgage states that Byrd's "failure to strictly comply" with paragraph 17 constitutes a default.

Therefore, the district court did not err by concluding, as a matter of law, that appellants breached paragraph 17 of the LaSalle mortgage, which triggered RCH's right to require Byrd to pay the unpaid balance of the notes and to require Kaminski to do so pursuant to his amended guaranty.

II. Amended Guaranty

Kaminski argues that the district court erred by concluding, as a matter of law, that the amended guaranty makes him personally liable for the entire unpaid balance of the notes, even if the balance exceeds $1,200,000.

The amended guaranty contains two paragraphs in section 1.2 that are relevant to Kaminski's argument. The first was agreed to at the time of the origination of the loan; the second was agreed to at the time of the forbearance agreement. The first paragraph provides that, "in the event of . . . a breach of the terms of *Paragraphs 16 or 17* of the Mortgage," Kaminski must satisfy the "Guaranteed Obligations," which is defined in that paragraph as the unpaid balance of the loan. The second paragraph provides that "the maximum amount of the 'Guaranteed Obligations' shall be One Million Two Hundred Thousand Dollars and no/100 ($1,200,000.00)," but that provision is subject to an exception: "unless a greater amount is due hereunder and included in the definition of 'Guaranteed Obligations' under the foregoing provisions of this Section 1.2."

The district court interpreted these two paragraphs to provide that Kaminski agreed to two separate and independent guaranty obligations. First, the district court reasoned that, at the time of taking out the loan, Kaminski *conditionally* agreed to guarantee payment of the unpaid balance of the notes, if any of the four triggering events specified in paragraph 17 of the mortgage were to occur. Second, the district court reasoned that, at the time of the forbearance agreement, Kaminski *unconditionally* guaranteed payment of the unpaid balance of the notes in any amount up to $1,200,000, without regard for the occurrence of any triggering events.

Kaminski contends, in essence, that his obligation under the amended guaranty cannot exceed $1,200,000 under any circumstances. He contends that the amended guaranty is ambiguous and that the district court's interpretation is erroneous because its interpretation of the first paragraph makes the second paragraph meaningless, and vice versa. Kaminski misreads the two relevant paragraphs of section 1.2. The first paragraph obligates him to pay the "unpaid balance" of the notes if one of the specified triggering events occurs. The second paragraph obligates him to pay as much as $1,200,000 without any conditions or to pay the entire unpaid balance if he is required to do so by the original guaranty. The second paragraph does not limit the amount of Kaminski's obligation if "a greater amount is due" under the first paragraph. Read together, the two paragraphs simply provide for Kaminski's liability in the alternative: if one of the specified triggering events in the first paragraph occurs, he is liable for the entire unpaid balance of the loan; if one of those events does not occur, he is liable for only $1,200,000 of the unpaid balance of the loan.

This interpretation of the amended guaranty is not only evident from its plain language but also is consistent with the circumstances giving rise to a forbearance agreement. It is unlikely that a lender would agree to forego recovery on a defaulted note pursuant to an acceleration clause without obtaining assurances of repayment from a guarantor that are at least as beneficial to the lender as the original promises. If we were to interpret the amended guaranty as Kaminski urges, we would need to conclude that RCH limited its ability to recover the entire unpaid balance of the debt by agreeing to the amended guaranty and entering into the forbearance agreement.

Kaminski also contends that the district court's interpretation of the amended guaranty is unreasonable because it would permit RCH to recover $1,200,000 from him even if the unpaid balance of the loan were less than that amount after RCH received proceeds from the sale of the property. But the district court's order did not so state. The relevant provisions of the amended guaranty provide that Kaminski is obligated to pay only the "*unpaid* balance" of the notes (Emphasis added).

Therefore, the district court did not err by concluding, as a matter of law, that Kaminski is obligated by the amended guaranty to pay the entire unpaid balance of RCH's loan to Byrd.

In sum, the district court did not err by granting RCH's motion for summary judgment.

Affirmed.