STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1434

Republic Bank, as successor to
First Commercial Bank,
Respondent,

vs.

Virginia M. Carlson, et al.,
Appellants,

Michael Leuer, et al.,
Defendants,

and

Sundblad Construction, Inc.,
Intervenor,

and

James Fenning,
Third Party Plaintiff,

Land Title, Inc.,
Third Party Defendant.

Filed July 8, 2013
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-09-29874

Donald R. McNeil, Jeffrey Scott, Heley, Duncan & Melander, PLLP, Minneapolis, Minnesota (for respondent)

Bennett Hartz, Jonathan L. R. Drewes, Michael James Wang, Drewes Law, PLLC, Minneapolis, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

PETERSON, Judge

In this appeal from a partial summary judgment, appellant-guarantors argue that the district court erred in upholding the terms of a guaranty that permitted respondent-bank to extend the terms of underlying loans by three months. We affirm.

FACTS

This appeal is brought by husband-and-wife guarantors Virginia and Philip Carlson, who claim that the district court erred by granting partial summary judgment to First Commercial Bank, predecessor to respondent Republic Bank, asserting that the bank lacked authority to extend the payment period of an individual guaranty[1] executed by the Carlsons to cover a loan made by the bank. In 2006, the bank had agreed to finance an office-condominium construction project in Orono known as the Amber Woods Office Centre, LLC. Over the next two years, Amber Woods obtained three loans to finance the project, and individual investors, including the Carlsons and three other individuals, all of whom had various ownership interests in Amber Woods, signed personal guaranties to

[1] The Carlsons executed identical individual guaranties, which we will refer to in the singular.

secure the loans. The guaranty for the first loan to Amber Woods is the subject of this appeal.

For the first loan, Amber Woods executed a mortgage and note in favor of the bank for $3,869,380. The loan was to be repaid by September 28, 2008. Carlsons and the other investors executed identical personal guaranties on September 28, 2006, to ensure payment on the first note. The Carlsons' guaranty provides:

> CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. . . . *Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.*
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> INDEBTEDNESS. . . . *"Indebtedness" includes*, without limitation, . . . *transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations* whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason . . .; and originated then reduced or extinguished and then afterwards increased or reinstated.
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> If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability

> under the terms of this Guaranty and any such other unterminated guaranties.
>
> CONTINUING GUARANTY. THIS IS A 'CONTINUING GUARANTY' UNDER WHICH *GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING* OR ACQUIRED, *ON AN OPEN AND CONTINUING BASIS*. . . .
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> DURATION OF GUARANTY. *This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. . . . This Guaranty will continue to bind Guarantor for all the indebtedness incurred by Borrower or committed by Lender . . ., including any extensions . . . of the indebtedness. . . .*
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> GUARANTOR'S AUTHORIZATION TO LENDER. *Guarantor authorizes Lender, . . . without notice . . . to . . . extend . . . one or more times the time for payment or other terms of the indebtedness or any part of the indebtedness, . . .; extensions may be repeated and may be for longer than the original loan term*[.]

(Emphasis added.)

On December 29, 2008, the bank extended the maturity dates for the first note to March 29, 2009. At that time, the other investors executed "replacement" guaranties to cover the first note and mortgage, but the Carlsons did not. Amber Woods defaulted on the first note and mortgage, that mortgage was foreclosed by statutory foreclosure, and the bank purchased the property at a sheriff's sale on September 17, 2009.

The bank then initiated a three-count breach-of-contract action against all of the investor-guarantors in November 2009, seeking, among other things, the $600,000 deficiency that remained on the first note following the sheriff's sale. Two investors settled with the bank, and the bank moved for partial summary judgment against the Carlsons and the remaining investor. Following a hearing, the district court granted partial summary judgment to the bank. The remaining issue involving disbursal of funds held in escrow was tried to the court, and the court issued its decision on May 14, 2012. The Carlsons then initiated this appeal. The Carlsons did not order a transcript of the summary-judgment hearing, stating that the legal issues could be reviewed without a transcript. By order of this court, appellate review is limited to whether the district court's conclusions of law are supported by the findings of fact.

In their appellate reply brief, the Carlsons asked this court to strike the bank's appellate brief, because the bank went into receivership during the pendency of this appeal, the judgment against the Carlsons was sold to Republic Bank & Trust Company, and Republic is now the real party in interest in this appeal. This court issued an order that substitutes Republic for the bank in this appeal. The order states that counsel who represented the bank before it went into receivership "will remain responsible for the defense of this appeal."

D E C I S I O N

Generally, an appellate court reviews a district court's grant of summary judgment de novo to "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview*

Muir Doran, LLC v. JADT Dev. Grp., LLC, 790 N.W.2d 167, 170 (Minn. 2010). Citing *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970), this court limited the appeal "to whether the district court's conclusions of law are supported by the findings of fact," because the Carlsons did not order a transcript. The interpretation of an unambiguous contract, and the determination whether a contract is ambiguous are questions of law subject to de novo review. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (determination whether contract is ambiguous); *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011 (interpretation of unambiguous contract), *review denied* (Minn. July 19, 2011).

"[T]he goal of contract interpretation is to ascertain and enforce the intent of the parties." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 14 (Minn. 2012) (quotation omitted). Contract language that is unambiguous "must be given its plain and ordinary meaning." *Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009). Contract language is unambiguous if "it has only one reasonable interpretation." *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010).

A guaranty is "a collateral contract to answer for the payment of a debt or the performance of a duty in case of the default of another who is primarily liable to pay or perform the same." *Charmoll Fashions, Inc. v. Otto*, 311 Minn. 213, 216, 248 N.W.2d 717, 719 (1976) (quotations omitted); *see Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 275, 64 N.W.2d 517, 522 (1954) (explaining that guaranty is collateral to primary or principal obligation of another).

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral.

Charmoll Fashons, Inc., 311 Minn. at 217, 248 N.W.2d at 719 (quotations omitted). "[A] guaranty is construed the same as any other contract, the intent of the parties being derived from the commonly accepted meaning of the words and clauses used, taken as a whole." *Am. Tobacco Co. v. Chalfen*, 260 Minn. 79, 81, 108 N.W.2d 702, 704 (1961).

The guaranty that the Carlsons executed provides that they "agree[] to guarantee the full and punctual payment, performance and satisfaction of the indebtedness of [Amber Woods] to [the bank]." The guaranty expressly states that the bank is "authorized . . . to . . . extend . . . one or more times the time for payment . . . ; [and] extensions . . . may be for longer than the original loan term." Regarding duration, the guaranty states that it "will continue to bind [the Carlsons] for all the indebtedness incurred by [Amber Woods] or committed by [the bank]" and that the Carlsons' "obligations are continuing," their "'[i]ndebtedness' includes . . . transactions that . . . extend . . . these debts, liabilities and obligations," and the guaranty "will continue in full force until all the indebtedness incurred or contracted . . . shall have been fully and finally paid and satisfied."

The Carlsons argue that the bank and Amber Woods' alteration of the terms of the original loan revoked the Carlsons' guaranty because (1) a material change in a loan's payment terms releases its guarantors, (2) prejudice is not required to show that loan

changes released the Carlsons from the guaranty, and (3) "payment date" is a material term of a loan.

The Carlsons principally rely on two seminal cases that set forth the general law regarding continuing obligations of guarantors when the terms of the underlying loan agreement change. In *Schmidt v. McKenzie*, the supreme court ruled that a guarantor has "the right to insist that he is bound to the extent, in manner, and under the circumstances pointed out in his obligation, and no further." 215 Minn. 1, 9-10, 9 N.W.2d 1, 5 (1943) (quotation omitted). The court held that when the guarantor agreed to cover a $10,000 note that provided for the maker to supply beer to the payee and the payee to pay for one-half of the beer and apply the balance due to payment of the note, the guarantor was not required to cover the note when the maker and payee later unilaterally altered the terms of their contract to provide for payment in cash in full for the delivery of beer valued at $26,719.68. *Id*. at 4-6, 11, 9 N.W.2d at 3, 6. Similarly, in *Clark*, the supreme court ruled that a buyer's and seller's renegotiation of the terms of a sales agreement, after the buyer defaulted on the original agreement, relieved the guarantors of their contractual duties when the renegotiation resulted in extension of the time of payment on the original contract, a term of which the guarantors were not informed and to which they had not agreed. 241 Minn. at 269-70, 276, 64 N.W.2d at 519-20, 523 (1954). The court said that the guarantors were "asked to guarantee the performance of an entirely different contract from the one originally made by the principal" and relied on "[t]he general rule . . . that a valid agreement between the principal debtor and creditor by which the time of payment or performance of the principal obligation is extended without the consent of the

guarantor releases and discharges the guarantor from liability on the contract of guaranty." *Id*. at 276, 64 N.W.2d at 523

More recently, however, appellate courts have recognized that parties to a guaranty may agree to permit extension of the payment period beyond the original payment term of the underlying loan. In *Currie State Bank v. Schmitz*, this court recognized the general rule that the time of repayment may not be extended without a guarantor's consent, but upheld the unilateral extension of a loan payment period when the guarantor had agreed to "any extensions and renewals . . . without notice." 628 N.W.2d 205, 209-10 (Minn. App. 2001). This court stated that the guarantor could not rely on the general rule in contravention of the plainly written guaranty language, because to do so would make "such documents . . . entirely worthless and chaos would prevail in our business relations." *Id*. at 210 (quotation omitted). In *Tri-County State Bank of Ortonville v. Golf Props., Inc.*, 395 N.W.2d 409, 412 (Minn. App. 1986), this court declined to credit four guarantors' arguments that they were not liable on personal guaranties by extension of the time of payment on the underlying bank loan, because the guaranties "expressly provide[d] that no notice of renewal or extension of indebtedness need be given to the guarantors." In *Currie State Bank*, this court distinguished between guaranty modifications that create "entirely distinct" contracts and those that, consistent with guaranty provisions, merely extend an existing guaranty. 628 N.W.2d at 209-10.

Here, the guaranty contains an express provision permitting the bank to extend the loan payment period without notice to the Carlsons: the guaranty states that the bank, "without notice," is "authorized" to "extend . . . one or more times the time for payment

or other terms of the indebtedness." Other language of the guaranty supports this provision by making the Carlsons' obligation "continuing," and including within the meaning of "indebtedness" any "transactions that . . . extend . . . these debts, liabilities and obligations" of the loan contracts. We conclude that the contract language permitting extension of the payment term of the loan should control, and the district court did not err in upholding the language of the guaranty that permitted extension of the payment period.

Citing *Midway Nat'l Bank v. Gustafson*, 282 Minn. 73, 165 N.W.2d 218 (1968), the bank argues that language in the Carlsons' guaranty served as a waiver of any defenses the Carlsons had to enforcement of the guaranty. In *Gustafson*, the supreme court upheld the enforceability of a guaranty, even after the parties to the underlying loan unilaterally altered the manner of payment, because the guaranty included a provision stating that extension of the time of payment did not affect the guarantor's liability. 282 Minn. at 79, 165 N.W.2d at 223. Here, the guaranty contains very broad waivers of the Carlsons' rights, including waivers of the "right to require [the bank] . . . to make any . . . notice of any kind, including . . . of any action or nonaction on the part of [Amber Woods], [the bank], [and others] in connection with the indebtedness or in connection with the creation of new or additional loans or obligations." These waiver provisions, consistent with *Midway Nat'l Bank*, also support the district court's decision to uphold the Carlsons' guaranty.

Finally, the Carlsons urge this court to revisit its order denying the Carlsons' motion to strike the brief of the bank because the bank is not the proper party in this appeal. The order also permits Republic to substitute for the bank in this appeal. We will

not alter our previous order. Under the law-of-the-case doctrine, "once an issue is considered and adjudicated, that issue should not be reexamined in that court." *Big Lake Lumber, Inc. v. Sec. Prop Invs., Inc.*, 820 N.W.2d 253, 257 (Minn. App. 2012) (quotation omitted). Furthermore, the issue was raised only in appellant's reply brief, although the Carlsons do not assert that they were unaware that the bank was closed by the Minnesota Department of Commerce in the fall of 2012, that the bank was thereafter sold to Republic, or that the bank's counsel was retained to continue to represent Republic as successor-in-interest in this appeal. The Carlsons should have challenged the propriety of Republic's appearance as a party in this appeal in their opening brief. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (confining an appellant's reply brief "to new matter[s] raised in the brief of the respondent"). And, even if Republic failed to seek formal substitution as a party in accordance with Minn. R. Civ. App. P. 143.02-.03, this court has authority to suspend the rules "[i]n the interest of expediting decision upon any matter before it, or for other good cause shown." Minn. R. Civ. App. P. 102.

Affirmed.