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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2373**

Capital One Small Business,
Appellant,

vs.

James T. Johnson, et al.,
Respondents.

**Filed November 18, 2008
Reversed and remanded
Johnson, Judge**

Ramsey County District Court
File No. 62-C2-07-005532

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Capital One Small Business sued James T. Johnson to collect a debt arising from Johnson's use of a credit card that was issued to him and his business, Minnesota Bulk, Inc. (MBI). The district court granted Johnson's motion to dismiss the complaint on the ground that Johnson is not personally bound by a written agreement he signed. We

conclude that Capital One's complaint stated a claim against Johnson upon which relief may be granted and, therefore, reverse and remand.

FACTS

In 2002, James T. Johnson was owner and president of MBI. In April 2002, Johnson completed a short application to obtain a credit card from Capital One, F.S.B. He signed the credit application as an "authorizing signatory" for MBI.

In May 2007, Capital One Small Business commenced this action against both MBI and Johnson, alleging that both defendants were in default on their obligation to pay the balance on the account, which was approximately \$8,000. Johnson moved to dismiss the action pursuant to Minn. R. Civ. P. 12.02(e) on the ground that he is not a party to the agreement. The district court granted Johnson's motion, reasoning that Johnson cannot be held personally liable for the credit-card debt because he signed the agreement only in his capacity as a representative of MBI. Capital One then voluntarily dismissed its claim against MBI. Capital One appeals from the district court's dismissal of its claim against Johnson.

DECISION

Capital One argues that Johnson may be held personally liable for the outstanding credit-card debt because he signed the credit application not only as an agent of MBI but also on his own behalf. In reviewing a dismissal pursuant to rule 12.02(e), this court conducts a de novo review of the sufficiency of the claim and accepts as true all allegations stated in the complaint. *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005). A reviewing court "will not uphold a dismissal if it is possible on any

evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 836 (Minn. 2004) (alterations omitted) (quotation omitted).

Agency principles apply when a corporate agent, such as an officer of a corporation, enters into a contract on behalf of the corporation. *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co.*, 379 N.W.2d 186, 188 (Minn. App. 1985), *review denied* (Mar. 14, 1986). "[T]he general rule is that an officer of a corporation is not liable to its creditors for corporate debts." *Haas v. Harris*, 347 N.W.2d 838, 840 (Minn. App. 1984). "Where an agent, acting for a disclosed principal, enters into a contract with third persons for and on account of his principal and in [the principal's] name, the contract is that of the principal and does not give rise to any contractual obligation running to the agent." *Kost v. Peterson*, 292 Minn. 46, 49, 193 N.W.2d 291, 294 (1971); *see also Froelich v. Aspenal, Inc.*, 369 N.W.2d 37, 39 (Minn. App. 1985) (citing Restatement (Second) of Agency § 320 (1958)).

The general rule does not apply, however, if the agent and the contracting third-party have "otherwise agreed." Restatement (Second) of Agency § 320, *cited in Froelich*, 369 N.W.2d at 39; *Haas*, 347 N.W.2d at 840. An agent who signs a contract on behalf of a principal also may be personally liable as a "comaker" if the contract reflects an intent on the part of the agent to be personally bound, jointly and severally, with the principal. *Twin City Co-op Credit Union v. Bartlett*, 266 Minn. 366, 369-71, 123 N.W.2d 675, 677-78 (1963). A "comaker" is to be distinguished from a guarantor, who makes a promise that "is collateral to a primary or principal obligation on the part of another and

which binds the obligor to performance in the event of nonperformance by such other, the latter being bound to perform primarily.’ A guarantor is not a party to the principal obligation.” *Id.* at 369, 123 N.W.2d at 677 (quoting *Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 275, 64 N.W.2d 517, 522 (1954)).

In this case, the credit application signed by Johnson includes the following language, which was printed directly above Johnson’s signature:

On behalf of the Company *and myself*, I have read the Important Disclosures and Terms of Offer on the back of the letter, and I agree on behalf of the Company *and myself* that the Company *and I* will be bound as specified therein. You are authorized to check the Company’s (and my) credit record and my employment history.

(Emphasis added.) The credit application from which this language is excerpted was submitted to the district court with Capital One’s motion papers. This procedure is proper because a district court may review and consider a written contract when deciding a motion to dismiss if “the complaint refers to the contract and the contract is central to the claims alleged.” *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995); *see also Brown v. State*, 617 N.W.2d 421, 424 (Minn. App. 2000), *review denied* (Nov. 21, 2000).

By its plain language, the excerpted language suggests that, in addition to committing MBI to a contractual obligation, Johnson also was assuming a contractual obligation in his personal capacity. This conclusion follows naturally from the use of language that refers to both the company and Johnson: “I agree on behalf of the Company *and myself* that the Company *and I* will be bound as specified therein.” (Emphasis

added.) In short, this language supports Capital One's claim that Johnson is a comaker with liability on the principal obligation, jointly and severally with MBI.

The above-quoted language refers to "Important Disclosures" and "Terms of Offer" that were either on the reverse side of the credit application or were sent to Johnson on a separate document along with the credit application. Capital One's appendix to its appellate brief includes a document on which are printed, in fine type, the Important Disclosures and Terms of Offer to which the credit application refers. Members of this court questioned counsel about the Important Disclosures and Terms of Offer at oral argument. But on further examination of the district court file, it is apparent that the document on which the Important Disclosures and Terms of Offer are printed was not included in the motion papers that Capital One submitted to the district court. Thus, the Important Disclosures and Terms of Offer were not before the district court when it considered Johnson's motion. We note that an appellate appendix generally should not include documents that were not submitted to the district court. *See Citizens Concerned for Kids v. Yellow Medicine East Indep. Sch. Dist. No. 2190*, 703 N.W.2d 582, 588 (Minn. App. 2005) (holding that under Minn. R. Civ. App. P. 110.01, this court is "ordinarily precluded from considering documents that were not received by the decisionmaker below"); *Jinadu v. CenTrust Mortgage Corp.*, 517 N.W.2d 84, 88 (Minn. App. 1994) (striking from appendix documents that were not presented to district court), *review denied* (Minn. July 27, 1994).

In any event, regardless whether the Important Disclosures and Terms of Offer were in the district court record, Johnson's motion should have been denied. The key

question, both in the district court and in this court, is whether “it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Radke*, 694 N.W.2d at 793 (quotation omitted); *see also Hauschildt*, 686 N.W.2d at 836. The contractual language accompanying Johnson’s signature is sufficient to allow Capital One to prove that Johnson is a comaker and, thus, that he assumed personal liability for the credit agreement. The credit application’s reference to Important Disclosures and Terms of Offer has no substantive meaning without the disclosures and terms themselves, but the reference does not preclude Capital One from proving that Johnson is personally liable for the outstanding credit balance and does not diminish the possibility of such proof.

Johnson contends that Capital One waived the issue whether he is personally liable by not identifying a specific theory of liability in its memorandum opposing Johnson’s motion to dismiss. The memorandum Capital One filed in the district court was quite general in its legal arguments. Although Capital One’s memorandum did not use the term “comaker,” Capital One’s argument to the district court is consistent with Capital One’s argument to this court that Johnson may be held personally liable on the credit agreement. Thus, Capital One adequately preserved the argument that is the central issue on appeal.

In sum, Capital One’s complaint stated a claim against Johnson upon which relief may be granted, and the district court erred by granting Johnson’s motion to dismiss.

Reversed and remanded.