STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY, SS. SUPERIOR COURT

Middleton Building Supply, Inc.

v.

David Gidge

Docket No. 98-C-185

ORDER

The plaintiff instituted this action seeking to recover monies owed to the plaintiff for the sale of building supplies to the defendant's company, ZLGH. Specifically, the plaintiff claims the defendant obtained a line of credit on behalf of ZLGH and personally guaranteed the amounts owed. The defendant admits that ZLGH owes at least $33,709.35 for supplies it purchased after the defendant obtained the line of credit. The defendant, however, disputes the allegation that he gave a personal guaranty for the amounts owed and claims he did not agree to personally guarantee the outstanding balance existing at the time he assumed ownership of ZLGH. The relevant facts are as follows.

Sometime in 1996, ZLGH Development, Inc. purchased the Long Hill Estates in Dover, New Hampshire, with the intent to build and sell residential housing on the lots contained in the development. Ira Rakatansky, the original owner of ZLGH, then opened a line of credit with the plaintiff for the purchase of building materials.

In addition, Mr. Rakatansky issued a personal guaranty for any monies ZLGH owed to the plaintiff.

Subsequently, ZLGH encountered financial difficulties and became delinquent on its account with the plaintiff. As a result of the difficulties, Ira Rakatansky sold ZLGH to the defendant, David Gidge. The transaction occurred in June, 1997, at which time the defendant, on behalf of ZLGH, assumed most of the corporate debt.

Sometime after the sale occurred, the defendant contacted Larry Twombley, general manager of the plaintiff, to inform him of the change in ownership. Mr. Twombley told the defendant about the significant outstanding balance remaining on the ZLGH account.

By mid-October, 1997, the financial circumstances of ZLGH had not improved, and the plaintiff filed a mechanics lien against several lots in the Long Hill Estates. Then, in early December, the plaintiff shut down the original ZLGH account and ceased delivering materials to the Long Hill Estates project. As a result of the mechanics lien, ZLGH was unable to obtain continued financing of the project and began negotiations with the plaintiff to release the lien.

On December 15, 1997, the plaintiff and ZLGH, Inc. reached an agreement whereby the plaintiff agreed to convert the mechanics lien to a general attachment and agreed to partially discharge the attachment as homes in the development were sold and payments were

made toward the outstanding balance.

On December 19, 1997, the defendant called Larry Twombley and asked to open a new account on behalf of ZLGH. Twombley informed Gidge that he would not open a new line of credit without obtaining a personal guaranty as well. Twombley then faxed to the defendant a credit application on which Twombley had marked the areas that Gidge needed to complete, including a signature line next to the personal guaranty. The defendant faxed the document back to Twombley signing only the second page and leaving the signature line on the personal guaranty blank. Twombley called the defendant and told him that he would not open a new account without a personal guaranty. The defendant then signed the personal guaranty and returned the document to Twombley.

The following language appears in small print on the credit application signed by the defendant:

> PERSONAL GUARANTY
>
> I/We principals of ZLGH Development (corporation) do hereby unconditionally guaranty payments of all indebtedness incurred on behalf of ZLGH /bank corporation, and do hereby agree to be responsible for all costs of collection and attorney's fees and the principal amount due and owing for any default. Further, I/We agree that Middleton does not have to exhaust any remedies in order to collect this sum due from ZLGH (corporation) prior to invoking this guaranty.

See Plaintiff's Ex. 2.

Although Twombley mailed an original credit application to the defendant, the defendant never completed it. Nor did the defendant obtain his wife's signature, who was the only other

principal, on either the original or the faxed copy of the credit application. Mrs. Gidge testified that after reviewing the original credit application carefully, she refused to personally guaranty the line of credit. At the time Gidge applied for the line of credit, the ZLGH account was $117,000 in arrears and 120 days overdue.

Both ZLGH accounts remained overdue and in February, 1998, the plaintiff again ceased delivering materials to the Long Hill Estates. From December 19, 1997 until February, 1998, when the second account was closed, ZLGH had incurred $33,709.35 in additional charges.

The plaintiff argues that the defendant signed a personal guaranty obligating him to pay the outstanding debts of ZLGH on both accounts. The defendant claims he did not intend to personally guaranty any obligations ZLGH owed to the plaintiff.

A guaranty is a conditional promise to pay the debt of another in the event of default by the principal debtor. See Prime Financial Group v. Smith, 137 N.H. 74, 76 (1993). It constitutes "a separate, independent contract between the guarantor and the creditor, and is collateral to the contractual obligation between the creditor and the principal debtor." 38 Am Jur 2d, Guaranty § 2. "The formation of a guaranty contract, like any other contract, is governed by the principles of mutual assent, adequate consideration, definiteness, and meeting of the minds." Id. at § 1. As such, "[t]he rules generally governing

construction of contracts apply to the construction of a guaranty." id. at § 5.

In analyzing a contract, the court "look[s] to the parties' intent at the time the agreement was made, considering 'the written agreement, all its provisions, its subject matter, the situation of the parties at the time the agreement was entered into, and the object intended.'" Dunn v. CLD Paving, Inc., 140 N.H. 120, 122 (1995) (quoting R. Zoppo Co., Inc. v. City of Manchester, 122 N.H. 1109, 1114 (1982)) (cite omitted).

Generally, owners of a corporation are not personally liable for the corporation's debt. An officer who signs a contract on behalf of a corporation generally signs the contract in his capacity as an officer of the corporation, and not in his personal capacity. In this case, the parties executed a contract whereby Middleton Building Supply, Inc. agreed to extend credit to ZLGH Development. As such, ZLGH is the primary debtor under the contract.

In addition to the corporate obligation, however, the Application for Credit unambiguously and expressly contains a personal guaranty from the defendant in the case of default by the corporation. Specifically, the provision, which the defendant signed, indicates that he will "unconditionally guaranty payments of all indebtedness incurred on behalf of ZLGH . . . ." Plaintiff's Ex. 2. Where, as here, an instrument is "clear and explicit," and "show[s], with reasonable clarity, an intent to be

liable on an obligation in case of default by the primary obligor," it is enforceable as a guaranty. See 38 Am Jur 2d, Guaranty § 5. In addition, the court finds that Twombley specifically informed the defendant that he would not extend credit on behalf of ZLGH without a personal guaranty. The circumstances surrounding the extension of credit support the court's conclusion: the plaintiff had stopped providing materials to the job site approximately two weeks before the defendant signed the application; on December 15, 1997, the plaintiff and ZLGH had negotiated an agreement whereby the mechanic's lien would be removed and the bank would continue financing; in early December, Ron Nestor, the defendant's general contractor, informed Charlie Turner, Middleton's sales representative, that the defendant would be opening a new account to continue the project; the project was in jeopardy and Nestor was "scrambling for investors."

The defendant claims that since his wife did not sign the application, it is not effective as a personal guaranty. The following language appears on top of the signature lines of the personal guaranty, "ALL PRINCIPALS MUST SIGN THIS APPLICATION FOR IT TO BE REVIEWED." Contrary to the defendant's argument, however, the clause described above does not constitute a term of the contract the performance of which was required before the contract became binding. Rather, the clause is merely a mechanism the plaintiff designed to ensure that all principals personally

guaranteed the loan. By performing on the contract without obtaining both signatures, the plaintiff waived its right to collect against Mrs. Gidge in the event of corporate default. Moreover, the clause does not indicate that all principals must sign before the contract is enforceable, rather it informs the applicant that the plaintiff is not required to review the application without all signatures.

The defendant also claims that since the document was entitled "Credit Application" it was not a final agreement between the parties. First, the defendants own testimony belies this claim. Specifically, he acknowledged that the "application" was binding on the corporation and obliged it to pay for goods and materials it received. Second, the defendant signed the document agreeing to abide by its terms in addition to providing personal information necessary to process the credit request. Finally, the defendant had previously completed an identical application for a personal account in 1996 and performed according to its terms. Accordingly, the court finds the defendant is personally responsible for the debts ZLGH incurred from December 19, 1997 through February, 1998.

The plaintiff also claims the defendant is personally liable for the debts the company incurred before the defendant applied for and personally guaranteed the second line of credit. When the defendant purchased ZLGH, however, he assumed the debts incurred in the company's corporate capacity only. Ira Rakatansky, the

first owner of ZLGH, personally guaranteed the first credit account and still remains personally liable for the debts of ZLGH on that account. Indeed, the plaintiff's credit manager testified that the account the defendant opened in December, 1997, was a separate account with its own account number. That the plaintiff billed the defendant for all outstanding balances as the new corporate owner of ZLGH does not render the defendant's personal guaranty on the second line of credit retroactive to the first.

In summary, the court finds the defendant is personally responsible for $47,497.38 which represents the ZLGH account balance, plus interest, from December, 1997 through May, 2000.[1] Therefore, judgment against the defendant is entered in the amount of $47,497.38. The court rejects the plaintiff's claim that the defendant personally guaranteed the past balance due and owing at the time the defendant opened the second line of credit. Finally, the court awards reasonable attorneys fees that represent the cost of collection, as provided for in the signed credit application.

Plaintiff's Requests for Findings of Fact and Rulings of Law:

GRANTED: 1-16, 21-24

DENIED: 17-20

[1] The credit application clearly states that "all bills are due and payable within 10 days after the date of billing. . . . Past due accounts are subject to a FINANCIAL CHARGE which is computed by a 'PERIODIC RATE' of 1.5% per month on unpaid balances."

SO ORDERED.

Date: June 5, 2000

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Tina L. Nadeau
Presiding Justice