NO. COA11-96
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

CONSOLIDATED ELECTRICAL
DISTRIBUTORS, INC.,
Plaintiff,

v. Wake County
No. 08 CVS 6825

WIELTECH ELECTRIC COMPANY, LLC;
BEN WIELAND, individually;
TONY C. HEIGHT, individually;
CATHERINE ROBERSON, individually;
JENNIFER D. FORTENBERRY,
individually;
BENJAMIN CONSTRUCTION, INC.;
SOUTHSTAR HOLDINGS-DURHAM II, LLC,
Defendants.

Appeal by defendant Fortenberry from judgment entered 16 August 2010 by Judge Marvin K. Blount in Wake County Superior Court. Heard in the Court of Appeals 26 May 2011.

Vann & Sheridan, LLP, by Cody R. Loughridge and Nan E. Hannah, for plaintiff.

Sue E. Anthony for defendant Fortenberry.

ELMORE, Judge.

Jennifer D. Fortenberry (defendant) appeals from an entry of summary judgment in favor of Consolidated Electrical

Distributors, Inc. (plaintiff), holding defendant liable to plaintiff for $79,486.38 plus interest and attorneys' fees. Because we agree that defendant was personally liable to plaintiff, we affirm.

On 8 September 2006, defendant and Benjamin Joseph Wieland signed a letter addressed to the vendors, customers, and partners of WielTech Electric Company (WielTech) regarding a "[c]hange of business structure." The body of the letter states, in its entirety:

> Let it be known that on the 8th Day of September, 2006[,] WielTech Electric Company became a manager managed Limited Liability Company between organizers Benjamin Joseph Wieland and Jennifer Dawn Fortenberry. From this date forward any and all business transactions, accounts or any other business relationship formed for WielTech Electric Co[.] by Tony C. Height, Catherine Roberson or any other person shall be transferred wholly into the newly formed LLC and the two individual organizers.

Both defendant and Wieland signed the letter, and both were designated "organizers." In her affidavit, defendant admitted that she agreed to be an "organizer" when Wieland formed the LLC and that her signature appears on the letter.

Plaintiff sued defendant as well as Wieland, Wieltech Electric Company LLC, Tony C. Height, Catherine Roberson, Benjamin Construction, Inc., and Southstar Holdings-Durham II,

LLC, to recover $79,486.38 in past due invoices. On 30 January 2006, Wieltech submitted by fax a credit application and agreement for credit sales to plaintiff, which Height and Roberson signed as personal guarantors. Pursuant to that credit agreement, plaintiff supplied materials to Wieltech. However, Wieltech did not pay all of the invoices, resulting in the lawsuit. Plaintiff sued defendant under the theory that the 8 September 2006 letter constituted a personal guaranty by defendant of any debts incurred by WielTech, including the debt to plaintiff. Both parties moved for summary judgment, which the trial court granted in favor of plaintiff.

On appeal, defendant argues that summary judgment was improper because the 8 September 2006 letter does not constitute a personal guaranty by her of the debt to plaintiff, because it does not comply with the statute of frauds. We disagree.

> The party moving for summary judgment is entitled to judgment as a matter of law only when there is no genuine issue of material fact. The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact. To overcome a motion for summary judgment, the nonmoving party must then produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial.
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> Before summary judgment may be entered,

> it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. In making this determination, the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized. Further, any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated.

Creech v. Melnik, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (quotations and citations omitted). We review an order of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

The statute of frauds is codified as follows:

> No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

N.C. Gen. Stat. § 22-1 (2009). Although there is no dispute that the document in question here was in writing and signed by defendant, defendant asserts that the document did not contain a "special promise to answer the debt."

Defendant first points to *Marvel Lamp Co. v. Capel*, in which this Court held that a letter stating that the defendant "would try to pay off" the balance owed to the plaintiff was "insufficient to constitute a definite promise to answer for the debt[.]" 45 N.C. App. 105, 107-08, 262 S.E.2d 368, 369, 370 (1980). We explained that the "letter [wa]s so vague and indefinite that the writer's intentions [we]re insufficient to support a cause of action" and did not include the "amount the defendant would pay plaintiff, the date payment would be made, or the event that would determine when payment would be due." *Id.*, 262 S.E.2d at 370 (citation omitted). Defendant also points to *Deaton v. Coble*, in which our Supreme Court held that the following statement could not constitute a written "special promise" under N.C. Gen. Stat. § 22-1: "I agree to Ed Deaton $1000.00 of this amount when I pay off." 245 N.C. 190, 190, 194, 95 S.E.2d 569, 569, 572 (1956). The Court characterized this sentence as "incomplete, and uncertain in meaning[,]" and thus it did not constitute a "special promise." *Id.* at 194, 95 S.E.2d at 572.

These cases are distinguishable. First, the letter in question did not state that defendant "would try to pay off" any debts accrued by WielTech. It stated that any and all business

accounts formed for WielTech by Height or Roberson, including plaintiff's account, "shall be transferred wholly" to the individual organizers, one of whom was defendant. The parties knew what amount they had agreed to and when those payments were due, pursuant to their existing credit agreement. Second, the letter in question is cogent and not composed of incomprehensible sentence fragments as in *Deaton*. Accordingly, we hold that the 8 September 2006 letter did constitute a written special promise under section 22-1 and we affirm the order of summary judgment in favor of plaintiff.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).