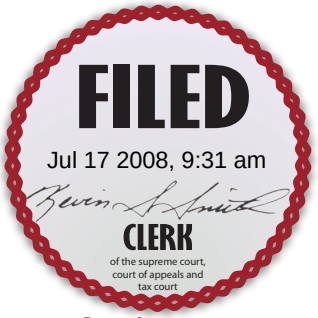

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IN THE
COURT OF APPEALS OF INDIANA

TALIB ALWAY, JOSEPH SAVIANO and ALWAY DEVELOPMENT CORPORATION,	)	
Appellants,	)	
vs.	)	No. 71A03-0712-CV-608
BIG C LUMBER COMPANY, INC,	)	
Appellee.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-0604-CT-96

July 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Talib Alway appeals the trial court's order finding him liable as a personal guarantor to Big C Lumber Co. ("Big C") for debts incurred by Joseph Saviano d/b/a Classic Builders.

We reverse.

ISSUE

Whether the trial court erred when it considered extrinsic evidence as to the guaranty and proceeded to reform the guaranty's terms.

FACTS

In March of 1996, Alway approached Big C to open a credit account for the purpose of providing home-building supplies and materials for Alway Development Corporation ("Alway Development").[1] On March 22, 1996, Alway executed a credit application and sales agreement on behalf of Alway Development, and a "continuing guaranty" as "principal officer and stockholder" thereof to "personally guarantee[]" payment to Big C. (App. 161). Subsequently, Big C supplied building materials to Alway Development and was paid therefor.

Three years later, in October of 1999, Big C considered the Alway account to be "on good standing." (Tr. 18). Alway brought his brother-in-law, Joseph Saviano, to meet with Steven Brown, the credit manager of Big C, to help Saviano establish a credit account with Big C on October 7, 1999. A credit application was submitted for A.Y.S.

[1] Alway testified that he was president and the only shareholder of the corporation.

Construction by Saviano as "owner or principle [sic]." (App. 163). Brown indicated that based on Saviano's troubled credit history, Big C would not extend credit to A.Y.S. in Saviano's name alone, and a guarantor would be needed. Alway agreed to sign the guaranty form provided by Brown. Both Saviano and Alway then executed the "continuing guaranty," which stated that "the undersigned, being a principal officer and stockholder of ANY CORPORATION OF JOSEPH SAVIANO AS PRINCIPAL (herein called the "Company")" did "personally guarantee[]" payment to Big C for debts of "the Company." (App. 166). The words "ANY CORPORATION OF JOSEPH SAVIANO AS PRINCIPAL" were handwritten on the form by Brown at the time the guaranty was executed.

Almost three years later, on May 8, 2002, Saviano applied with Big C for an additional line of credit for another business that he started. He, alone, executed a second Big C credit application and sales agreement for "Classic Builders," as "owner or principle [sic]" of his new business. (App. 164). Also on May 8, 2002, Big C secured another "continuing guaranty" from Saviano to personally guarantee payment for debts of "Classic Builders." (App. 165). However, Big C sought no personal guaranty from Alway as to the debts of Classic Builders.

On April 6, 2006, Big C filed its complaint "on account and individual guaranty" against Alway Development, Saviano, and Alway. (App. 175). The complaint alleged an account delinquency by Alway Development of $10,582.08; an account delinquency by Saviano of $94,210.62; and Alway's personal liability as guarantor of both accounts. With respect to the Saviano delinquency, the complaint had attached to it the "corporate

and individual guarantees" – the credit application and sales agreement executed on May 8, 2002, by Saviano for Classic Builders; the May 8, 2002 continuing guaranty personally executed by Saviano for Classic Builders; and the October 7, 1999 continuing guaranty executed by both Saviano and Alway and identifying them as "principal officer and stockholder of ANY CORPORATION OF JOSEPH SAVIANO AS PRINCIPAL." (App. 176, 182).

The matter was tried before the bench on July 23, 2007, and September 14, 2007. The evidence at trial established that the amounts due on the Saviano account had been incurred solely by Classic Builders after May of 2002, and that at the time that account was opened, there was nothing owed on the A.Y.S. account. Evidence also established that A.Y.S. had been a corporation, but was dissolved in 2003; however, Classic Builders had never been incorporated but was simply the name under which Saviano did construction business after May of 2002. Over objection by Alway, the trial court heard testimony by Brown that when Saviano applied for a credit account for Classic Builders, Big C assumed that Alway "had backed him"; that Saviano signed the Classic Builders credit application "on the basis of Talib Alway having a personal guarantee . . . in Saviano's business"; and that Alway's personal guaranty of October 1999 "was still in effect." (Tr. 22, 23). However, Big C never contacted Alway regarding the new credit application submitted by Saviano for Classic Builders.

The trial court issued its findings of fact and conclusions of law on November 26, 2007.[2] Therein, although not finding that the October 1999 continuing guaranty was ambiguous, the trial court found that the

> personal guaranty did not reflect the intent of the parties, which was to have any credit extended to Mr. Saviano (whether individually, as a d/b/a/ or in a corporation) guaranteed by both himself and Talib Alway.

(App. 6). The trial court further found that Big C

> would not have entered into the credit agreement and guaranty involving Classic Builders if it believed that the personal guaranty of October 7, 1999 did not still have effect in any way.

Id. The trial court then concluded that as a matter of law, it had equity jurisdiction to "retroactively reform[]" the personal guaranty of October 1999 "to reflect the intent of the parties"; and it retroactively reformed the guaranty such that Alway "personally guaranteed the full payment of all monies due under the agreement incurred by Joseph Saviano, individually." (App. 8, 9).

Accordingly, the trial court entered judgment in favor of Big C as to the damages sought on an account in the amount of $94,210.62; Alway's personal guaranty of liability on the account for the debts of Alway Development in the amount of $10,582.08; and Alway's personal guaranty of liability for the debts of Saviano. Alway appeals only the trial court's finding that he is personally liable on account for the debts of Saviano in the amount of $94,210.62.

DECISION

[2] Big C had filed a motion therefor pursuant to Indiana Trial Rule 52.

As Big C correctly notes, the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(C), which evokes a two-step standard of review whereby we determine whether the evidence supports the findings, and whether the evidence supports the judgment. *See* Ind. Trial Rule 52(C); *Atterholt v. Robinson*, 872 N.E.2d 633, 638-38 (Ind. Ct. App. 2007). Nevertheless, while we defer substantially to the trial court's findings of fact, we do not do so with respects to its conclusions of law. *Carmichael v. Siegel*, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001) (citing *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000)). Moreover, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. *Id.* (citing *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 974 (Ind. 1998)). We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions. *Id.* (citing *Anthem Ins. Cos., Inc. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1238 (Ind. 2000).

A promise by one person "to answer for the debt . . . of another" must be in writing. Ind. Code § 32-21-1-1(b)(2). Such "a promise to answer for the debt, default, or miscarriage of another person" is known in the law as a "guaranty." *S-Mart, Inc. v. Sweetwater Coffee Co., Ltd.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001), *trans. denied* (quoting AM.JUR.2d *Guaranty* § 1). The rules governing the interpretation and construction of contracts generally apply to the interpretation and construction of a guaranty contract. *S-Mart*, 744 N.E.2d at 585. Thus, the "extent of the guarantor's liability is determined by the terms of his or her contract." *Id.* In the absence of ambiguity, the construction of a guaranty is a question of law. *Modern Photo Offset*

Supply v. Woodfield Group, 663 N.E.2d 547, 549 (Ind. Ct. App. 1996); *McEntire v. Indiana Nat'l Bank*, 471 N.E.2d 1216, 1221 (Ind. Ct. App. 1984), *trans. denied*; *Loudermilk v. Casey*, 441 N.E.2d 1379, 1383 (Ind. Ct. App. 1982).

Moreover, "Indiana follows the 'four corners rule' that 'extrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction." *University of Southern Indiana Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006). Extrinsic evidence is "evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." *Simon Prop. Group, L.P. v. Michigan Sporting Goods Distribs., Inc.*, 837 N.E.2d 1058, 1071 n.10 (Ind. Ct. App. 2005), *trans. denied* (quoting *CWE Concrete Const., Inc. v. First Nat'l Bank*, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004), *trans. denied*). Only when a term of a guaranty is found ambiguous may the parties introduce extrinsic evidence of its meaning and does the term's interpretation become a question of fact. *Berardi v. Hardware Wholesalers, Inc.*, 625 N.E.2d 1259, 1261 (Ind. Ct. App. 1993) (citing *Loudermilk*, 441 N.E.2d at 1383).

Here, the guaranty signed by Alway provided that as "a principal officer and stockholder of any corporation of Joseph Saviano as principal," he "personally guarantee[d]" payment for debts owed to Big C by "any corporation of Joseph Saviano as principal." (App. 166). There is no ambiguity in the terms used by the guaranty, which was prepared by Big C and signed by Alway at the request of Big C. Therefore, there was no need for any interpretation of its terms. Any testimony by Brown as to Brown's

assumption that the guaranty held Alway personally liable for any future debts to Big C incurred by Saviano in any business enterprise was extrinsic evidence and should not have been considered.

Here, applying the terms of the guaranty to the evidence presented, we find the following. There is no evidence that Alway was "a principal officer and stockholder OF ANY CORPORATION OF JOSEPH SAVIANO AS PRINCIPAL," and specifically no evidence that Alway was "a principal officer and stockholder of" Classic Builders. *Id.* Further, as repeatedly argued to the trial court, it is undisputed that Classic Builders – for its debts incurred after May of 2002, upon which Big C sought to hold Alway liable based on the October 1999 guaranty – was not a corporation; and, therefore, not a "CORPORATION OF JOSEPH SAVIANO AS PRINCIPAL," *Id.* It was while doing business solely as Classic Builders that Saviano incurred the $94,210.61 debt owed to Big C. This debt was not personally guaranteed by Alway pursuant to the terms of the October 1999 guaranty signed by Alway. Therefore, the trial court erred as a matter of law when it found him personally liable therefor.

We reverse.[3]

NAJAM, J., and BROWN, J., concur.

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[3] Alway's appeal also argued that any order of attorney fees should include only those attributable to collection of the Alway Development account. However, the record does not reflect that an order for payment of attorney fees in this matter has been issued. The jurisdiction of an appellate court is limited to matters in which there has been a final trial court order. *Allstate Ins. Co. v. Fields*, 842 N.E.2d 804, 806 (Ind. 2006).