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**IN THE
COURT OF APPEALS OF INDIANA**

MAINSOURCE BANK, successor in interest to)
FIRST COMMUNITY BANK & TRUST,)

Appellant-Defendant,)

vs.)

No. 49A02-0707-CV-547

CALVIN E. BRENNEMAN,)
LEO N. STENZ, TIMOTHY S. BORNE,)
TONY J. BONANNO,)

Appellees-Plaintiffs.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0506-CC-22117

DECEMBER 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Mainsource Bank (“MainSource”), successor in interest to First Community Bank & Trust (“First Community”) appeals from the trial court’s order granting summary judgment to Defendants-Appellees Calvin E. Brenneman (“Brenneman”), Leo N. Stenz (“Stenz”), Timothy S. Borne (“Borne”), and Tony J. Bonanno (“Bonanno”), collectively, (“the Appellees”).

We reverse and remand.

ISSUE

The sole issue presented for our review in this appeal is whether the trial court erred by entering summary judgment in this cause of action involving liability on personal guaranties for a business loan.

FACTS AND PROCEDURAL HISTORY

According to our standard of review, we state the following facts in the light most favorable to MainSource, the non-movant. *See Hamilton v. Ashton*, 846 N.E.2d 309, 311 (Ind. Ct. App. 2006). DNS Drive-Ins, Inc., sought financing from First Community, predecessor of MainSource, to acquire and operate a restaurant in Speedway, Indiana. Carl Unger (“Unger”) and the Appellees were the guarantors of the financing. The loan DNS sought was for \$376,470.00. First Community Bank approved the loan in that amount at the rate of prime plus 4% interest based upon the personal guaranties. That loan was never issued.

Later that year, in the summer of 2002, Unger, on behalf of himself and the Appellees, approached First Community about acquiring financing for a different

corporation, SNC Drive-Ins, Inc., in order to convert the same facility in Speedway, Indiana, from a Dog 'N Suds to a Sonic restaurant. Borne negotiated with First Community Bank about obtaining a lower interest rate than that originally proposed under the previous loan request.

First Community issued the loan to SNC Drive-Ins, Inc. in October of 2002, at an interest rate of 4% per annum. SNC Drive-Ins, Inc. subsequently defaulted on the loan and petitioned for bankruptcy dissolution and discharge. MainSource made unsuccessful demands of SNC Drive-Ins, Inc. prior to the filing of the petition for bankruptcy, and made unsuccessful demands of the Appellees for payment on the indebtedness.

MainSource filed a complaint against the Appellees on June 8, 2005, seeking to enforce the personal guaranties on the loan. The Appellees denied liability. On February 7, 2006, the Appellees filed a motion for summary judgment. On December 1, 2006, MainSource requested that the trial court set the motion for hearing. The trial court heard arguments on the motion on March 12, 2007, and took the matter under advisement. On April 5, 2007, the trial court granted the Appellees' motion for summary judgment. This appeal ensued.

DISCUSSION AND DECISION

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. The review of a summary judgment motion is limited to those materials designated to the trial court. We must carefully review decisions on

summary judgment motions to ensure that the parties were not improperly denied their day in court.

Kreighbaum v. First National Bank & Trust, 776 N.E.2d 413, 418 (Ind. Ct. App. 2002).

A party seeking summary judgment bears the burden of showing the absence of a factual issue and his entitlement to judgment as a matter of law. *Id.* All pleadings, affidavits, and testimony are construed liberally and in the light most favorable to the nonmoving party. *Id.* at 419.

A factual issue is "material" for the purposes of a summary judgment motion if it bears on the ultimate resolution of a relevant issue. Ind. Trial Rule 56 (C); *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Butler v. City of Indianapolis*, 668 N.E.2d 1227, 1228 (Ind. 1996). A genuine issue of material fact exists in summary judgment context where facts concerning an issue that would dispose of the litigation are in dispute or where the facts are capable of supporting conflicting inferences. *Poznanski ex rel. Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind. 2003). When material facts conflict or undisputed facts lead to conflicting inferences, summary judgment is inappropriate, even if court believes the nonmoving party will not succeed at trial. *Greathouse v. Armstrong*, 616 N.E.2d 364, 366 (Ind. 1993).

The Appellees asserted below that the personal guaranties MainSource is attempting to enforce are neither genuine, nor authorized. The Appellees also dispute MainSource's argument that the Appellees ratified the loan and guaranties. The validity

of the personal guaranties is the legal issue that could dispose of the litigation. The Appellees argue that the signatures are forged and that the Appellees had no knowledge of the terms of the loan and guaranties. MainSource argues that the Appellees knew the terms of the previous financing arrangement, and that the Appellees either personally signed or authorized the signing of the personal guaranties in order to obtain the financing at issue.

In support of its position, MainSource designated to the trial court Unger's affidavit. Unger stated that each of the Appellees either personally executed their personal guaranties or directed the execution by authorized proxy, Unger. Unger also stated that Borne personally negotiated with First Community in order to obtain a more advantageous rate of interest. Unger stated that the Appellees agreed to the guaranty of the loan.

MainSource also designated the affidavit of Albert R. Jackson, III ("Jackson"), the president of First Community in 2002. Jackson stated that the Appellees and Unger presented financial statements and income tax returns to First Community for review for the original proposed financing. The Appellees and Unger were presented as guarantors of the financing. First Community approved of the issuance of the loan conditioned upon the personal guaranties of Unger and the Appellees. Jackson stated that he directly contacted Borne about the request for financing for SNC. Jackson's affidavit details a conversation with Borne about lowering the interest rate on the financing due in part to the reduced risk to First Community based upon the guaranties of the Appellees and Unger. Jackson's affidavit also details Borne's approval of the terms of the loan after

Jackson reviewed the financial information and agreed to lower the interest rate. Jackson indicated that First Community would not have issued the loan without the personal guaranties.

The Appellees cite to portions of Unger's deposition to contradict his assertion that the Appellees personally signed the guaranties or authorized him to do so for him. The Appellees also cite to portions of Jackson's deposition which could be construed as contradicting his assertions or weakening his statements regarding the financing. However, those citations illustrate the conflicting positions of the parties here on appeal about the validity of the guaranties.

Therefore, the trial court was faced with the Unger and Jackson affidavits asserting liability on the guaranties, and the Appellees' affidavits asserting that there had been no personal execution or authority to execute the guaranties at issue. Also, designated were portions of depositions, which illustrate the vague recollection of the parties regarding the particulars of the financing and each person's understanding and involvement. The depositions also illustrate the loose practice of the parties in record keeping.

Because there is a genuine issue of material fact, the trial court erred by granting the Appellees' motion for summary judgment. The material facts before the trial court conflicted regarding whether the guaranties were personally executed or executed with authority by Unger. The resolution of those conflicting facts is duty of the trier of fact.

CONCLUSION

The trial court erred by granting the Appellees' motion for summary judgment. A genuine issue of material fact exists regarding Unger's authority to sign for some or all of the Appellees. Resolution of those conflicting facts bears directly on the issue of the validity of the personal guaranties. Therefore, we remand this matter to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

BAKER, C.J., and FRIEDLANDER, J., concur.