IN THE COURT OF APPEALS OF IOWA

No. 1-363 / 10-1835
Filed July 27, 2011

NORTHWEST BANK & TRUST COMPANY, A Federal Savings Bank,
Plaintiff-Appellant,

vs.

WITT EXPRESS, INC., an Iowa Corporation, FLOYD W. NEWCOMB, ELBURN D. BERRONG, and CARL M. WITT JR.,
Defendants-Appellees.

ELBURN D. BERRONG,
Counterclaim Plaintiff,

vs.

NORTHWEST BANK & TRUST COMPANY, a Federal Savings Bank,
Counterclaim Defendant.

ELBURN D. BERRONG,
Cross-Plaintiff,

vs.

WITT EXPRESS, INC., an Iowa Corporation, FLOYD W. NEWCOMB and CARL M. WITT JR.,
Cross-Defendants.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Northwest Bank & Trust Company appeals from a district court ruling denying its cause of action based on its enforcement of guaranties of loans. **AFFIRMED.**

Tara A. Moffit and Thomas J. Pastrnak of Pastrnak Law Firm, P.C., Davenport, for appellant.

Rex J. Ridenour, Davenport, and Gary Allison of Allison Law Office, P.C., Muscatine, for appellee Floyd Newcomb.

William R. Jahn Jr. of Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C., Burlington, for appellee Elburn Berrong.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Northwest Bank & Trust Company appeals from a district court ruling denying its cause of action based on its enforcement of guaranties of Floyd Newcomb and Elburn Berrong for loans to Carl Witt. Northwest Bank argues the district court erred in finding there was a mutual mistake regarding the guaranties, and in denying Northwest Bank recovery under the guaranties. Newcomb and Berrong believed the guaranties were restrictive; Northwest Bank believed the guaranties were continuing. Upon our review, we conclude Newcomb and Berrong cannot rely on the defense of mutual mistake to void the guaranties because the mistake was not mutual or common to both parties. However, in reviewing the circumstances of this case and credible extrinsic evidence in the record, we decline to interpret or construe the guaranties to require Newcomb and Berrong to be liable for the indebtedness of Witt Express, Inc., or any obligations Witt personally guaranteed of Witt Express, Inc. We therefore affirm the ruling of the district court.

I. Background Facts and Proceedings.

Carl Witt has been a truck driver for over thirty years. In 2001, Witt owned his own semi-tractor, and entered a leasing agreement with Floyd Newcomb's corporation to pull its trailers. Floyd Newcomb has been in the trucking business for more than forty years. He is a successful businessman with a net worth of approximately $3.5 million. When acquiring trailers for his trucking business, Newcomb made a practice of purchasing used running gears and having a new

box installed. The remanufacture of the trailers resulted in a significant profit for Newcomb as the new equipment had a value almost twice the investment.

In April 2004, Witt asked Newcomb to assist him in acquiring his own trailer to remanufacture. Newcomb agreed and located a wrecked trailer in Massachusetts for Witt to purchase. Witt was unable to finance the trailer himself. Newcomb assisted in arranging the financing for the trailer, and volunteered to co-sign for Witt's loan. Newcomb contacted Carroll Huff, a commercial loan officer at Northwest Bank, to obtain a loan. Newcomb and Huff had an established business relationship and had worked together on many transactions over a period of ten years.

Witt, Newcomb, and Huff met in Huff's office at Northwest Bank to close the loan on April 22, 2004. The loan documents were not entirely complete as the title to the remanufactured trailer was not yet available and the exact amount of the loan was not filled in. The parties discussed that the amount of the loan from Northwest Bank to Witt would be approximately $18,000, with the remanufactured trailer valued at $30,000.

Newcomb executed a guaranty regarding Witt's indebtedness to Northwest Bank. Newcomb asked Huff whether he could be released from the guaranty after Witt made his payments for a year or so, and Huff said no, the guaranty was for the term of the loan. Newcomb did not read the guaranty before signing it. Witt and Newcomb understood Newcomb to be guarantying Witt's repayment of the loan for the trailer. However, the bank's form document provided for a guaranty to any and all indebtedness, secured or unsecured,

incurred by Witt. The line on the guaranty describing the debt was left blank, but the guarantor's liability was noted as "UNLIMITED" in amount.

In September 2004, Witt contacted Huff at Northwest Bank to finance Witt's purchase of a tractor from Elburn Berrong. Huff called Newcomb to ask whether he would guaranty Witt's indebtedness for purchase of the tractor, but Newcomb refused.[1] Berrong agreed to provide the guaranty for Witt's purchase of the tractor.

Witt, Berrong, and Huff met in Huff's office at Northwest Bank to close the loan on September 27, 2004. The loan documents were complete, and the amount of the loan from Northwest Bank to Witt was approximately $21,000. Berrong executed a guaranty regarding Witt's indebtedness to Northwest Bank. Again, the guaranty signed by Berrong was a form document with the line describing the debt left blank. However, the guaranty stated that the guarantor's liability was "UNLIMITED" in amount creating a guaranty to any and all indebtedness incurred by Witt. Berrong also did not read the guaranty before signing it.

In 2005, Witt incorporated his trucking business in Iowa and created Witt Express, Inc. Witt's understanding was that he was required to incorporate and provide an Iowa-based entity in order to enable Northwest Bank to make loans to his business, as his personal residence was in Florida. Witt also understood from his conversations with Huff that after he incorporated, Newcomb and Berrong were no longer guarantors of his loans.

[1] Huff testified he did not call Newcomb.

Northwest Bank, through Huff, continued to do business with Witt. Witt refinanced loans in 2006. The refinancing agreement required the signature of guarantor(s), and was signed by Witt, but not Newcomb or Berrong. The trailer and tractor loans previously guaranteed by Newcomb and Berrong were marked as "paid." Northwest Bank made two loans to Witt Express, including a loan of $19,488 on June 13, 2006, and a loan of $78,701 on September 29, 2006. Witt executed a guaranty to Northwest Bank guarantying Witt Express's debt. The guaranty signed by Witt was an unlimited and continuing guaranty, similar to those signed by Newcomb and Berrong.

In 2007, Witt Express began experiencing financial difficulties and stopped making payments on the notes owed to Northwest Bank. As of May 8, 2009, the principal due on Witt Express's loans was $43,324.61 with interest accruing at the rate of $11.93 per day. Northwest Bank filed a petition against Newcomb, Berrong, Witt Express Inc., and Witt. The claims against Newcomb and Berrong, sought their joint and several liability as guarantors. Northwest Bank requested judgment in the amount of $43,324.61, with interest, attorney fees, and expenses.

Newcomb and Berrong filed answers denying liability and asserting affirmative defenses, including mutual mistake, contending the respective guaranties were for the specific purchase of the trailer and tractor only. Berrong also filed a counterclaim against Northwest Bank for fraud. On November 20, 2009, the district court entered partial summary judgment against Witt Express and Witt in the amount of $45,816.73 with interest accruing at $11.93 per day,

and attorney fees and expenses in the amount of $2878.41. However, the district court overruled Northwest Bank's motion for partial summary judgment against Newcomb and Berrong, concluding a genuine issue of fact existed, and that "extrinsic evidence and its credibility must be considered to interpret the guaranty contracts, and to determine the intent of the parties when the guaranty contracts were executed."

A bench trial was held on April 6, 2010. On September 13, 2010, the court issued its ruling denying recovery to Northwest Bank, based on its finding of mutual mistake as to the loans covered by the guaranties. The court concluded the Newcomb and Berrong guaranties "were not meant to be unconditional guaranties for all loans taken out in the future by Witt, or any company Witt formed and personally guaranteed." The court denied recovery on Berrong's counterclaim for fraud. On September 23, 2010, Northwest Bank filed an Iowa Rule of Civil Procedure 1.904(2) motion, which the court denied. Northwest Bank now appeals.

II. Scope and Standards of Review.

The affirmative defense of mutual mistake is an issue heard in equity, and is reviewed de novo. *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 855 (Iowa 1990). The reviewing court is to "review the whole record, adjudicating anew the parties' rights on the issue presented." *Id*. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.907; *Harding v. Willie*, 458 N.W.2d 612, 613 (Iowa Ct. App. 1990). A contract may be voidable if the plaintiff carries the

burden of proof to establish the mutuality of mistake by clear, satisfactory, and convincing evidence. *Gouge v. McNamara*, 586 N.W.2d 710, 713 (Iowa Ct. App. 1998); *see also Schuknecht v. W. Mut. Ins. Co.*, 203 N.W.2d 605, 609 (Iowa 1973).

In regard to the district court's denial of judgment on the guaranty, the action was at law and is reviewed for correction of errors of law. *Beal Bank v. Siems*, 670 N.W.2d 119, 125 (Iowa 2003). We are not bound by the court's legal conclusions. *Id.* We are bound, however, by the court's factual findings if they are supported by substantial evidence. *Id.* A finding is supported by substantial evidence if it may reasonably be inferred from the evidence. *Id*. "In assessing the evidence, we view the record in the light most favorable to the prevailing party, indulging in all legitimate inferences that may fairly and reasonably be deduced from the evidence." *Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405, 409 (Iowa 1997).

III. The Guaranties.

The contracts at issue in this case are the guaranties executed by Newcomb and Berrong. A guaranty is a contract by one party to another party for the fulfillment of the promise of a third party. *See City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 86 (Iowa 2004). The extent of a guarantor's obligation must be determined from the parties' written contract. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 276 (Iowa 1982). Accordingly, the rules concerning the interpretation and construction of contracts are applicable to guaranties. *Andrew v. Austin*, 213 Iowa 963, 967, 232 N.W. 79, 81 (1930) ("The same rule is to be

applied in the construction of contracts of guaranty as other contracts."); *see also Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp*., 266 N.W.2d 22, 25 (Iowa 1978) (observing that interpretation involves ascertaining the meaning of contractual words).

The Newcomb and Berrong guaranties provided the following language:

> [T]he Undersigned guaranties to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several . . .).
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> . . . .
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> This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender . . . .

In general, payment of the debt "by the principal discharges the guarantor and terminates the obligation." *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388, 390 (Iowa 1988). The parties may, however, agree to a "continuing guaranty," which is ordinarily effective until revoked by the guarantor. *Bankers Trust*, 326 N.W.2d at 277. A continuing guaranty "'contemplates a future course of dealing during an indefinite period, or it is intended to cover a series of transactions or a succession of credits.'" *Id.* (quoting 38 Am. Jur. 2d *Guaranty* § 23, at 1023 (1968)); *see also Wellman Sav. Bank*, 454 N.W.2d at 857 (finding guarantor was liable for her son's multiple debts to the bank under a continuing guaranty agreement). A restricted guaranty, however, is limited to a single transaction or to a limited number of specific transactions. *Maresh Sheet Metal Works v.*

N.R.G., Ltd., 304 N.W .2d 436, 440 (Iowa 1981) (stating there are two types of guaranties—restrictive and continuing).

IV. Mutual Mistake.

Here, the district court determined that Newcomb and Berrong intended to sign restrictive guaranties, whereas Northwest Bank intended for the guaranties to be continuing. The court determined a mutual mistake of fact existed as to what loans the Newcomb and Berrong guaranties covered.

"A mistake is a belief that is not in accord with the facts." Restatement (Second) of Contracts § 151, at 383 (1981). As our supreme court has explained:

> Mistakes in the formation of contracts include mistakes in an underlying assumption concerning matters relevant to the decision to enter into a contract. In this category of mistake, the agreement was reached and expressed correctly, yet based on a false assumption.

State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 151 (Iowa 2001) (citations omitted). For a mistake to be considered mutual, it must exist at the time of the contract and must be common to both parties. *Nichols v. City of Evansdale*, 687 N.W.2d 562, 570-71 (Iowa 2004); *Krieger v. Iowa Dep't of Human Servs.*, 439 N.W.2d 200, 203 (Iowa 1989).

The difficulty in applying the defense of mutual mistake in this case is that "[g]enerally, an agreement speaks for itself and absent fraud or mistake, ignorance of the contents will not serve to negate or avoid its contents." *Advance Elevator Co., Inc. v. Four State Supply Co.*, 572 N.W.2d 186, 188 (Iowa Ct. App. 1997). If a party is able or has had the opportunity to read the agreement, the

party is charged with notice of its terms and conditions. *Id*. "It is well-settled that failure to read a contract before signing it will not invalidate the contract." *Peak v. Adams*, ___ N.W.2d ___, ___ (Iowa 2011).

Newcomb and Berrong had the opportunity to read the terms of the guaranties and are bound by those terms. *See id*. The terms include that the guaranties were unlimited and continuing guaranties as relating to "the account of Carl M. Witt, Jr." Thus, the mistake was not mutual, because it was not common to both parties. *See Krieger*, 439 N.W.2d at 203. Newcomb and Berrong believed the guaranties were restrictive; Northwest Bank believed the guaranties were continuing, consistent with the terms of the guaranties. No mutuality of mistake existed, only a unilateral mistake on behalf of Newcomb and Berrong—a mistake that could have been resolved by a reading of the guaranties. Because Newcomb and Berrong had the opportunity to read the terms of the guaranties they signed, and cannot rely on the defense of mutual mistake, they are bound by the continuing guaranty.

V. Interpretation of the Guaranties.

Our analysis is not complete, as we can rely on any ground raised before the district court. "[A] successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected" by the district court. *Johnston Equip. Corp. v. Indus. Indem*., 489 N.W.2d 13, 16 (Iowa 1992); *see also EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002). A reviewing court is obliged to affirm an appeal where any proper basis appears in the record for a trial court's judgment, even though it is not one upon

which the court based its holding. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (Iowa 1994); *Citizens First Nat'l Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980). Newcomb and Berrong both urged that the guaranties should not be construed or interpreted to encompass their liability for the corporate debts of Witt Express Inc., or Witt's guaranties of those corporate debts. We agree.

In our review of the guaranties, we observe that there is no language or term that specifically states that the guaranties encompass the debts or obligations of Witt Express, Inc., or guaranties any guarantee of Carl Witt Jr., of the debts or obligations of Witt Express, Inc. Both guaranties specifically state the guarantors are guarantying the loans of the "account of Carl M. Witt Jr." We also observe that Witt's personal guaranty of the corporate debts of his corporation states that he is guarantying the loans of the "account of Witt Express, Inc." We construe guaranty contracts according to the intention of the parties as ascertained by the language used in the contract and the circumstances of the guaranty. *Williams v. Dark*, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987). Extrinsic evidence may be considered to show what the parties meant by the language of the guaranty. *Wellman Sav. Bank*, 454 N.W.2d at 856; *Hamilton v. Wosepka*, 261 Iowa 299, 305, 154 N.W.2d 164, 167 (1967) ("It was the function of the trial court to ascertain the true intent and meaning of the parties to the contract as revealed by the language used there . . . ."). Our goal in reviewing extrinsic evidence in this case is to "ascertain the *mutual* intent of the two parties" of the guaranties, because the contracts required "a meeting of the minds." *See Peak*, ___ N.W.2d at ___.

Relevant extrinsic evidence may include "the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." *Id.*; *NevadaCare, Inc. v. Dep't of Human Servs*., 783 N.W.2d 459, 466 (Iowa 2010). Extrinsic evidence is not admissible to show what the parties meant to say, or to vary the terms of the guaranty. *Bankers Trust*, 326 N.W.2d at 276.

In explaining the use of extrinsic evidence in interpretation, our supreme court has quoted the following treatise language with approval:

> "It is true that the language of some agreements has been believed to be so plain and clear that the court needs no assistance in interpreting. Even in these cases, however, it will be found that the court has had the aid of parol evidence of the surrounding circumstances. The meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party. Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence."

Hamilton, 154 N.W.2d at 168-69 (quoting 3 Corbin on Contracts, § 579, at 414-20 (1960)); *see also Fausel v. JRJ Enter., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) (stating that the "meaning [of a contract] can almost never be plain except in a context").

The guaranties state that they are effective to

> every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several . . .).

Clearly from this language, the guaranties were intended to be broad in scope, unlimited in amount, and continuing in nature. However, there is no language or term that specifically states that the guaranties encompass the debts or obligations of Witt Express, Inc., or guaranties any guaranty of Carl Witt Jr., of the debts or obligations of Witt Express, Inc. Both guaranties specifically state the guarantors are guarantying the loans of the "account of Carl M. Witt Jr." We also note that Witt's personal guaranty of the corporate debts of his corporation states he is guarantying the loans of the "account of Witt Express, Inc." The guaranties executed by Newcomb and Berrong also state that they remain effective upon any "successors and assigns" of the guarantors as well as any "successors and assigns" of the lender, but fail to state they are effective upon any successors or assigns of Carl M. Witt, Jr. or his accounts.

Here, oral testimony was not "received for the purpose of varying the terms of a written instrument." *Hamilton*, 261 Iowa at 306, 154 N.W.2d at 167. Rather, "[t]his is a case where such oral testimony was received for the purpose of interpreting it." *Id*. The district court found the testimony of Newcomb, Berrong, and Witt as to their intent with the guaranties to be wholly consistent and credible. As the court noted:

> Newcomb, Berrong, and Witt testified at trial consistently that the 2004 loan guaranties by Berrong and Newcomb were for the specific purchase of a trailer and tractor. That they were co-signers and guarantors for those individual loans only. The Court finds that to be the case. The Court finds that Berrong and Newcomb's guaranties were not meant to be unconditional guaranties for all loans taken out in the future by Witt, or any company that Witt formed and personally guaranteed. The Court finds Newcomb's testimony that there is no way he would agree to such an unlimited guaranty if it were explained to him as very credible and supported

> by other evidence. For example, at the time the trucking company was not even incorporated, and it would be not able to be foreseen by anyone in 2004 that Berrong and Newcomb would become personally responsible for loans taken out by an entity that did not even exist just because they were guaranteed by the incorporator, Witt, for earlier loans. It would not make any business sense for a smart businessman, which by all appearances Mr. Newcomb is, to unconditionally guarantee, now and forever more, all loans taken out by Mr. Witt or his company with Northwest Bank. The same is true of Mr. Berrong, who also has a substantial net worth and was only involved with Witt to sell him a tractor/truck. The Court also found his testimony very convincing, as well as Mr. Witt's testimony, who clearly did not intend Berrong or Newcomb to be liable for further debts of him or the corporation as he sought to expand his own trucking company.

In contrast, the district court found the testimony and documents submitted by Northwest Bank to be unconvincing and inconsistent. The court noted more than once that Huff's testimony did not seem credible, when taken as a whole and combined with Northwest Bank's documentations. As the court observed:

> Although Mr. Huff testified he explained the guaranties to both Newcomb and Berrong, the Court finds he did not explain the breadth of them, nor did he inform them of their long term responsibility. Mr. Huff has now retired and another loan officer took over these loans. The Court finds by evidence that it was the intent of all the parties only to guarantee the 2004 loans by both Plaintiff's Exhibits 5 and 6 [Witt Express refinancing documentation]. On page 3 of exhibit 5 and 6 they have a line for guarantors to sign and it is left blank. The Court finds unconvincing that it was left blank since the Bank considered the guaranties as financial statements and already in place. The Court also finds it significant evidence that Northwest Bank in September of 2004, just months after they obtained the guaranty [from Mr. Newcomb], called Mr. Newcomb and asked if he would guaranty [the second] loan also. He said "No" and they did not pursue it further or tell him he was already on the hook. Northwest Bank then sought and obtained a guaranty of that loan from Berrong. Why would the guaranty of Berrong be necessary, or even asking Newcomb if he would guaranty it, if they felt they had this broad blanket guaranty in effect already from Newcomb for all of Mr. Witt's debts? The Court

> finds the Bank's own actions and their documents do not substantiate their theory of unconditional guaranties that they now seek to enforce.

Although we acknowledge we are not bound by the court's credibility assessments, we do give weight to those findings. *See* Iowa R. App. P. 6.904(3)(*g*). This is because the district court had the opportunity to hear the evidence and view the witnesses firsthand. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). "When the interpretation of a contract depends on the credibility of extrinsic evidence or on a choice among reasonable inferences that can be drawn from the extrinsic evidence, the question of interpretation is determined by the finder of fact." *Peak*, ___ N.W.2d at ___; *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430 (Iowa 2008). It is apparent the district court gave careful and thoughtful attention to the contradictory evidence presented, and we find no reason to disagree with the court's credibility findings.

There was also a lack of evidence of any trade useage that may shed light on the proper interpretation of the terms of the guaranties such as "indirect" loans or obligations. There was also no evidence the past course of history between the parties involved guaranties, so their past business practices do not aid in the interpretation of the guaranties. The parties' discussions also never touched upon the subject of Witt creating a new corporate entity or any guaranty Witt may execute on behalf of such an entity.

Considering the circumstances surrounding the execution of the Newcomb and Berrong guaranties, including the situation and relations of the parties, the subject matter of the transaction, the statements made at the signing, and the

course of dealing between the parties, *see Peak*, ___ N.W.2d at ___; *NevadaCare, Inc.*, 783 N.W.2d at 466, we conclude the guaranties did not create an unlimited and continuing liability for all future indebtedness of any entity Witt incorporated, or any loan Witt personally guaranteed. *See Williams*, 417 N.W.2d at 251 (noting the intention of the parties as ascertained by the language used in the contract and the circumstances of the guaranty is considered by the court in construing the extent of a guaranty).

Although the guaranties encompass Witt's "indirect" obligations and are broad in scope, we decline to interpret the guaranties to require the guarantors to be liable for the corporate successor or assignee of Witt, or any obligations Witt guaranteed of his successor or assignee corporation, without a specific term or terms reciting their application to Witt's successors or assigns and any guaranty that he executes. To interpret these guaranties to include such obligations may increase the guarantors' risks, and generally any act on the part of the guaranty that increases a guarantor's risk discharges the guarantor from his or her obligation. *Fidelity Sav. Bank v. Wormhoudt Lumber Co.*, 251 Iowa 1121, 1126, 104 N.W.2d 462, 466 (1960). Further, guaranties are to be strictly construed according to their terms and not be extended or enlarged by implication. *Andrew v. Austin*, 213 Iowa 963, 967, 232 N.W. 79, 81 (1930).

We affirm the district court's order dismissing Northwest Bank's action against Newcomb and Berrong for enforcement of the guaranties in respect to any obligations owed by Witt Express Inc., or Witt's guaranty of those obligations.

AFFIRMED.