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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002189-MR

MAXX PARTS AND EQUIPMENT-KENTUCKY, INC. APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 03-CI-00012

MSD MINING COMPANY, INC. AND
WILLIAM S. DETHERAGE APPELLEES

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE: This appeal considers the validity of a guaranty agreement pursuant to KRS 371.065. As the guaranty agreement was written on the credit application being guaranteed, it was not required to contain language specifying maximum aggregate liability and termination date. Accordingly, we reverse the summary judgment granted to appellee William S.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Detherage and remand for proceedings consistent with this opinion.

Appellant, Maxx Parts and Equipment – Kentucky, Inc., (hereinafter "Maxx Parts") is a business engaged in the sale at retail of parts and supplies for the repair and maintenance of heavy construction and mining equipment. Appellee MSD Mining Company, Inc. (hereinafter "MSD") is engaged in the coal mining business. Appellee William S. Detherage (hereinafter "Detherage") is the principal owner of MSD.

On or about May 31, 2002, Detherage, acting on behalf of MSD, applied for credit with Maxx Parts for the purpose of purchasing parts and supplies on account. The credit application provided that Maxx Parts was authorized to collect interest at the rate of 1½% per month on invoice amounts not paid by the end of the next calendar month following the month of purchase. The credit application also included a section entitled "INDIVIDUAL PERSONAL GUARANTY", which states:

> I, Bill Detherage, residing at Hazard, KY for and in consideration for your extending credit at my request to MSD Mining Co. (hereinafter referred to as the "Company"), of which I am owner, hereby personally guarantee to you the payment at _____ in the State of Kentucky of any obligation of the Company and I hereby agree to bind myself to pay upon demand any sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guaranty shall be a continuing and irrevocable guaranty and the

> indemnity for such indebtedness of the Company. I do hereby waive notice of default, non-payment and notice thereof and consent to any modification or renewal of the credit agreement hereby guaranteed.

On January, 6, 2003, Maxx Parts filed suit against MSD and Detherage for an unpaid account balance totaling $24,245.35 (representing the price of goods sold to MSD) plus interest at the contract rate of 18% per annum. Maxx Parts subsequently moved for summary judgment. Detherage filed a cross-motion for summary judgment, contending that he is not personally liable for any debt of MSD because the guaranty agreement was not enforceable per KRS 371.065 as it did not specify maximum aggregate liability nor set forth a termination date. On September 17, 2003, the trial court granted Detherage's motion for summary judgment (the sole issue on appeal) finding that, pursuant to KRS 371.065, Detherage's guaranty was unenforceable.[2]

KRS 371.065, "Requirements for valid, enforceable guaranty", provides:

> (1) No guaranty of an indebtedness which either is not written on, or does not expressly refer to, the instrument or instruments being guaranteed shall be valid or enforceable unless it is in writing signed by the guarantor and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates. Termination of the

[2] In the same order the trial court denied Maxx Parts' motion for summary judgment, finding that issues of material fact existed as to liens and amounts owed. This issue was not appealed.

> guaranty on that date shall not affect the liability of the guarantor with respect to:
>
> (a) Obligations created or incurred prior to the date; or
>
> (b) Extensions or renewals of, interest accruing on, or fees, costs or expenses incurred with respect to, the obligations on or after the date.
>
> (2) Notwithstanding any other provision of this section, a guaranty may, in addition to the maximum aggregate liability of the guarantor specified therein, guarantee payment of interest accruing on the guaranteed indebtedness, and fees, charges and costs of collecting the guaranteed indebtedness, including reasonable attorneys' fees, without specifying the amount of the interest, fees, charges and costs.

In its September 17, 2003, order, the trial court found, in pertinent part:

> Pursuant to K.R.S. §371.065(1), a valid enforceable guaranty requires that the instrument be in writing signed by the guarantor; contain provisions specifying the amount of the maximum aggregate liability of the guarantor; and the date on which the guaranty terminates. It is undisputed that the guaranty at issue does not contain a stated maximum aggregate liability of the guarantor. The guaranty merely includes the terms "any obligation" and "any sum." Therefore, the guaranty is unenforceable and summary judgment for Defendant Detherage is proper.
>
> Detherage contends that the Individual Personal Guaranty is also unenforceable because it fails to state a date of termination. The Court finding summary judgment proper on the above grounds, it need not address this later contention.

Subsequent to the trial court's order, our Supreme Court decided the case of Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609 (Ky. 2004), factually similar to the present case, and which we agree with appellant is dispositive of the issue presented in this appeal. In Wheeler, the appellee, Washburn, was the president of HICO Transport. Washburn submitted to the appellant an "Application for Credit" on behalf of HICO for the purpose of establishing a line of credit to purchase fuel and other merchandise. The application contained two guaranty agreements (one on the front and one on the back), both of which Washburn signed as a guarantor of any credit extended to HICO. When the appellant sought enforcement of the guaranties, Washburn claimed that the guaranty agreements he signed were invalid and unenforceable under KRS 371.065 because they did not specify a maximum amount of liability and a termination date. Wheeler, at 611-612.

Our Supreme Court held, per the plain language of KRS 371.065, that a guaranty agreement which is written on the document being guaranteed is not required to state either maximum aggregate liability or a termination date. The Court explained:

> KRS 371.065's requirement that a guaranty state the guarantor's maximum liability and the guaranty's termination date is a consumer-protection provision designed to

> protect the guarantor by reducing the risk of a guarantor agreeing to guarantee an unknown obligation. When the guaranty agreement is found on the document being guaranteed, however, that risk is negligible, which KRS 371.065 recognizes by exempting such guaranty agreements from its heightened requirements. Here, the guaranty agreement is "written on" the credit application in two places. Thus, in accordance with the plain-meaning rule of statutory interpretation, we hold that, although KRS 371.065 otherwise applies to the guaranty agreements, *e.g.*, the agreements may "guarantee payment of interest accruing on the guaranteed indebtedness, and fees, charges and costs of collecting the guaranteed indebtedness, including reasonable attorneys' fees, without specifying the amount of the interest, fees, charges and costs,"[KRS 371.065(2)] the agreements were not required to state either Appellee's maximum liability or a termination date.

Wheeler, at 615.

Similarly, in the present case, the "INDIVIDUAL PERSONAL GUARANTY" at issue was written on the credit application. Therefore, per Wheeler, the guaranty agreement was not required to state either Detherage's maximum aggregate liability or a termination date.

For the aforementioned reasons, the summary judgment in favor of appellee William S. Detherage is reversed and the matter remanded to the Knox Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph W. Hoskins
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BRIEF FOR APPELLEES:

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