

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000080-MR

RICHARD T. WINKLER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-01637

KENTUCKY ECONOMIC DEVELOPMENT
FINANCE AUTHORITY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: This is an appeal by Appellant, Richard T. Winkler (Winkler), against Appellee, Kentucky Economic Development Finance Authority (KEDFA), from the Franklin Circuit Court's granting of a summary judgment against Winkler on November 8, 2004. Following a review of the record, we affirm.

On May 10, 2000, Central Kentucky Coatings, Inc. (CKC) received a loan from KEDFA in the amount of \$100,000.00. The promissory note dated May 10, 2000 was signed by the borrower,

CKC,¹ and two guarantors individually, Matthew T. Winkler and Richard T. Winkler. On the same date, a Guaranty Agreement was signed by Matthew T. Winkler and Richard T. Winkler, in their individual capacities, as well as, J. Don Goodin, on behalf of KEDFA. A third document was also signed that day, a loan agreement. Signing the loan agreement were J. Don Goodin, on behalf of KEDFA; Matthew T. Winkler, CKC president; and Matthew T. Winkler and Richard T. Winkler, as guarantors in their individual capacities. The note was secured by a security interest in collateral, CKC's equipment.² KEDFA filed its financing statement to perfect its security interest on September 18, 2002.

According to the record, a federal tax lien was filed September 11, 2001 against CKC. The federal tax lien was filed before KEDFA filed its financing statement. Therefore, the federal tax lien took priority. CKC later filed bankruptcy and was ultimately sold to pay its creditors. Subsequently, on December 23, 2003, KEDFA filed a complaint against Matthew T. Winkler and Richard T. Winkler, individually, alleging that payments had not been made in accordance with the terms and conditions of the promissory note and guaranty agreement.

¹ The signature was by Matthew T. Winkler, CKC president.

² This was one of three methods of security established in the Loan Agreement.

KEDFA filed a motion for summary judgment against Winkler May 10, 2004.³ Winkler responded June 2, 2004 and claimed there were genuine issues of material fact in the matter precluding a granting of summary judgment.⁴ KEDFA filed its reply June 7, 2004 denying that any questions of material fact existed. Winkler then filed his "sur-reply" June 16, 2004. Following a hearing October 26, 2004, the trial court granted KEDFA's motion for summary judgment.⁵

Winkler then filed a motion to alter, amend, or vacate pursuant to Ky CR 59.05 November 18, 2004.⁶ KEDFA filed its Response November 29, 2004. Following a hearing December 8, 2004, the trial court issued an order dated December 21, 2004

³ The motion did not seek summary judgment against Matthew T. Winkler.

⁴ Specifically, Winkler stated two questions of fact existed: (1) did Winkler waive any and all defenses to the enforcement of the Guaranty and (2) was the Guaranty Agreement breached by KEDFA's actions in failing to record a UCC statement.

⁵ The hearing was delayed, in part, due to a transfer of the matter from Division II to Division I per order dated June 29, 2004. Also, according to the two Entry of Appearances filed in the record, KEDFA replaced counsel in August and again in September 2004.

⁶ Winkler had three primary arguments with several sub-arguments contained therein. Winkler's three primary arguments were as follows: (1) Whether or not the UCC applies, the obligation of "Good Faith and Fair Dealing" implied in all contracts in Kentucky prohibits enforcement of Winkler's Guaranty after KEDFA failed to perfect its interest in the Loan's collateral; (2) Kentucky's high Summary Judgment standard combined with the factual determination of "good faith" prohibits this case from being determined as a matter of law; and (3) The UCC does not apply to the guaranty, and Kentucky's general contract law should apply to the Guaranty.

denying Winkler's CR 59.05 motion. Winkler then filed his notice of appeal January 7, 2005.⁷

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there was no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d

⁷ Winkler raises eight primary arguments in his Appellate Brief, including one with five sub-arguments, in support of his appeal as follows: (1) the applicable standard of review is *de novo*; (2) in addition to the presumptions in favor of Winkler under the summary judgment standard, any ambiguities in the loan documents must be construed against KEDFA, the drafter of those documents; (3) whether or not the UCC applies, the obligation of "good faith and fair dealing" implied in all contracts in Kentucky prohibits enforcement of Winkler's guaranty after KEDFA failed to perfect its interest in the loan's collateral; (4) the determination of "good faith" under the UCC is an issue of material fact in Kentucky; (5) Kentucky's high summary judgment standard combined with the factual issue of "good faith" prohibits this case from being determined as a matter of law; (6) consent to impairment of collateral under KRS 355.3-605 of Kentucky's UCC must be explicit, and Kentucky courts err on the side of the guarantor if there is any hint of unclarity; (7) the UCC does not apply to the guaranty, and Kentucky's general contract law should apply to the guaranty; and (8) if perfection of KEDFA's security interest in CKC's loan was not a material part of Winkler's guaranty, Winkler's belief that perfection was part of the bargain is a unilateral mistake prohibiting enforcement of the guaranty.

476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra, 138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co., supra 149 S.W.3d at 439, (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits,⁸ if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing Ky CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra, 138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Further, an appellate

⁸ "Affidavits" in CR 56.03 includes any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, 395 S.W.2d 575, 583 (Ky. 1965).

court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. Id. We now turn to the Opinion and Order granting the summary judgment.

The court states, in pertinent part, the following in its Opinion and Order:

Examinations of the two instruments pled in the complaint lead this Court to conclude that Kentucky's Uniform Commercial Code is applicable.

It is undisputed that the Note dated May 10, 2000, . . . is a negotiable instrument and subject to the provision of Article 3 of the Uniform Commercial Code, KRS 355.3-101, et seq. [Winkler] is secondarily liable as an accommodation party who "signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument . . ." KRS 355.3-419(1).

The pertinent statute for instruments signed for accommodation is KRS 355.3-419(3), which provides in part:

A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is . . . accompanied by words indicating that the signer is acting as surety of guarantor with respect to the obligation of another party to the instrument. . . .

The question then follows whether the provisions of KRS 355.3-419 apply only to

the Note or to the Guaranty as well? . . . More particularly, "the UCC apply(ies) to "guaranties appearing upon the face of the commercial instrument or at least executed in simultaneous contemplation." (Citation omitted.)

In the case before this Court, the Note and Guaranty, executed contemporaneously by [Winkler], relate specifically and exclusively to the other. The words of guaranty are in both instruments. The terms are no different. . . . The fact the Guaranty is on a separate sheet of paper is obviously not a measure of whether the Code is displaced.

This Court is satisfied [Winkler's] Guaranty is not separate or independent from the Note executed by [Winkler], but ancillary, and is so interrelated to it, that it must be construed under KRS 355.3-101 et seq.

. . .

KRS 355.3-605(5),(7) relating to the discharge of indorsers and accommodation parties, provides: . . . Under subsection (5) or (6) of this section, impairing value of an interest in collateral includes; (a) Failure to obtain or maintain perfection or recordation of the interest in collateral;

Notwithstanding this protection for an accommodation party, Kentucky Uniform Commercial Code allows the waiver of the defense of impaired collateral by a guarantor's advanced written consent.

. . .

The Note and Guaranty recite that [Winkler] specifically and

unambiguously consented in advance to [KEDFA's] failure to perfect its security interest in the borrower's collateral.

The consent in the Note is as follows:

The holder of this Note may, with or without notice to any party, and without affecting the obligations of any . . . accommodation party . . . to this Note, and without limitation, (4) change, exchange or release any property in which the Authority has any interest securing this Note, and (5) suspend the right to enforce against any such collateral.

The consent in the Guaranty is found in paragraph 7:

This is a guarantee of payment and not merely a guarantee of collection. The Guarantors expressly waive any right to require that any action be brought against or to require that resort be had to any collateral security or to any other guarantee before a demand for payment is made by the Authority upon the Guarantors.

Under the Note and Guaranty, [KEDFA] had "full freedom of action" with respect to the collateral. (Citation omitted.) [Winkler's] consent excused [KEDFA's] obligation to do anything with the collateral for [Winkler's] benefit and operated as a waiver of [Winkler's] right to claim discharge under impairment of collateral provision of KRS 353.3-605. [Winkler] is therefore liable under the Note and Guaranty.

We agree with the circuit court that the UCC is applicable to the guaranty agreement as well as the promissory note. Provisions of the UCC apply to guaranties appearing upon the face of the commercial instrument or, at least, executed in simultaneous contemplation. Tresslar Co., Inc. v. Fritts, 665 S.W.2d 314, 316 (Ky.App. 1984). The promissory note, guaranty agreement, and the loan agreement were each executed on the same date. Both Matthew T. Winkler and Richard T. Winkler signed each document in their individual capacity as a guaranty. We further agree that each of the guarantors were accommodation parties as defined by KRS 355.3-419(3).

This appeal is determinative upon whether Winkler, as guarantor, waived his right to discharge based upon KRS 355.3-605(5)-(7)(a).⁹ Specifically, did the documents executed May 10, 2000 constitute a waiver by Winkler, as guarantor, precluding a

⁹ KRS 355.3-605(5)-(7)(a) states in pertinent part:

(5) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligator is discharged to the extent of the impairment.

. . . .

(6) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred.

. . . .

(7) Under subsection (5) or (6) of this section, impairing value of an interest in collateral includes: (a) Failure to obtain or maintain perfection or recordation of the interest in collateral;

claim of collateral value impairment? Whether the terms of the contracts are ambiguous will determine how our analysis will proceed.

If an ambiguity exists, a court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 106 (Ky. 2003), (citing Whitlow v. Whitlow, 267 S.W.2d 739, 740 (Ky. 1954)). In the absence of ambiguity, a written instrument will be enforced strictly according to its terms. Id., (citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966)). In such cases, a court will interpret the contract's terms by assigning the language its ordinary meaning and without resort to extrinsic evidence. Id., (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000)). We turn now to the documents executed in relation to the loan to CKC.

We agree with the circuit court that language was included in the promissory note which constituted such a waiver. The relevant paragraphs of the promissory note are as follows:

This Note is secured by a first security interest on the Collateral as set forth in the Security Agreement between [CKC], as Debtor, and [KEDFA]; and, by a Guaranty Agreement.

. . .

The holder of this Note may, with or without notice to any party, and without affecting the obligations of any . . . guarantor, . . ., accommodation party or any other party to this Note, and without limitation, . . . (4) change, exchange or release any property in which [KEDFA] has any interest securing this Note, and (5) suspend the right to enforce against any such collateral.

We also agree with the circuit court that language was included in the guaranty agreement which constituted such a waiver. The relevant paragraphs of the guaranty agreement are as follows:

7. This is a guarantee of payment and not merely a guarantee of collection. The Guarantors [i.e. Winkler]¹⁰ expressly waive any right to require that any action be brought against or to require that resort be had to any collateral security or to any other guarantee before a demand for payment is made by the Authority upon [Winkler].

8. If [CKC] shall fail to make a payment of principal and/or interest on the Loan when and as the same becomes due, whether by acceleration, or otherwise, under the terms of the Loan Documents, [KEDFA] may immediately send a notice of default and demand for payment to [Winkler]. . . Without the necessity for any further notice or action by [KEDFA] other than such written

¹⁰ All references in the Guaranty Agreement and Loan Agreement state Guarantors meaning Matthew T. Winkler and Richard T. Winkler; however, for purposes of clarity in this opinion, any reference to Guarantors in the Guaranty Agreement and Loan Agreement shall be substituted with Winkler.

notice and demand of performance, [Winkler] shall, within twenty (20) days from the date of receipt of said notice and demand pay in one installment all amount of principal of and accrued interest due on the Loan then outstanding and any other charges or costs then applicable, or any other amount acceptable to [KEDFA].

9. The obligations of [Winkler] under this Guaranty are absolute and unconditional, joint and several. The obligations of [Winkler] shall not be affected, impaired, modified, released or limited by any occurrence or condition whatsoever without limitation, by and of the following, whether or not with notice to or the consent of [Winkler]:

. . .

G. The taking or the omission of taking of any action, or the assertion or exercise by [KEDFA] of any rights or remedies under the Loan Documents¹¹ or this Guaranty or delay in or failure to assert or otherwise exercise any of such rights or remedies;

H. Any failure, omission, delay or lack on the part of [KEDFA] to enforce, assert or exercise any rights, power or remedy conferred on [KEDFA] in the Loan Documents or this Guaranty, or any other act or acts on the part of [KEDFA].

I. The voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets, marshaling of assets and liabilities, receivership, insolvency, or bankruptcy, assignment for the benefit of creditors, or re-adjustment or, or other similar proceedings affecting [Winkler],

¹¹ The term "Loan Documents" is defined in the Guaranty Agreement as the Loan Agreement, Promissory Note, and Security Agreement.

[CKC], or [KEDFA], or any of the assets of any of them, or any allegation or contest of the validity of this Guaranty, the Loan Documents in any such proceeding;

. . .

11. No act of commission or omission of any kind or at any time upon the part of [KEDFA], in respect to any matter whatsoever, shall in any way affect or impair the rights of [KEDFA] to enforce any right, power of benefit of [KEDFA] under this Guaranty, or not setoff, claim, reduction or diminution of any obligations, or any defense of any kind or nature which [CKC] has or may have against [KEDFA] shall be available to [Winkler] in any suit or action brought by [KEDFA] to enforce any right, power or benefit under this Guaranty. This Guaranty shall be construed as a waiver by [Winkler] of any rights or claims [he] may have against [KEDFA] under this Guaranty or otherwise; it is the intention of this Agreement and the guarantee of payment provided for herein that [Winkler] shall be unconditionally, absolutely, jointly and severally obligated to perform fully all of the obligations, agreements, and covenants hereunder and pursuant to the Loan Documents for the benefit of [KEDFA].

We further believe that the loan agreement supports that no genuine issues of material fact existed in this matter. The relevant paragraphs of the loan agreement are as follows:

SECTION 3
Security

The Note and the Loan evidenced thereby are and shall be secured by and entitled to the benefits of all of the following:

3.1 Security Interest in Collateral.
The note evidencing the Loan will be secured

by a first lien on the Collateral, pursuant to the Security Agreement.

3.2 Guaranty. The Note and the Loan shall be further secured by the personal guaranty of the Guarantors, as set forth in the Guaranty.

3.3 Life Insurance. The Note and the Loan shall be further secured by a collateral assignment of a life insurance policy or policies on the life of one or more owners in an aggregate amount equal to the amount of the loan.

. . .

SECTION 7
Remedies Upon Default

. . .

7.2 Rights Under Security Instruments. If any Event of Default shall occur, [KEDFA] shall also have the rights and remedies granted it under any and all of the Loan Documents and Security Instruments securing or intended to secure the Loan and the Note.

7.3 Exercise of Remedies. The rights and remedies of [KEDFA] shall be deemed to be cumulative and shall be in addition to all those rights and remedies afforded to [KEDFA] at law or in equity. Any exercise of any rights or remedies shall not be deemed to be an election of that right or remedy to the exclusion of any other right or remedy.

SECTION 8
Conditions Precedent

. . .

8.4 Recordings. The Security Agreement, Financing Statement and any other documents or instruments as [KEDFA] **may**

request have been executed and delivered by [CKC] to be filed or recorded in such public offices as [KEDFA] **may** request to secure the Loan. (Emphasis added.)

. . .

SECTION 12
Guaranty of the Guarantors

12.1 Obligations. To induce [KEDFA] to enter into this Loan Agreement, [Winkler] [has] entered into the Guaranty. . .and thereby absolutely and unconditionally, jointly and severally guarantee to [KEDFA] (1) the full, prompt and unconditional performance of each and every covenant, agreement, warranty, representation and obligation of [CKC] under the Loan Documents; and, (2) the full, prompt and unconditional payment when due of all sums due or to become due to [KEDFA] under the Loan Documents in accordance with their respective terms. The liability of [Winkler] hereunder shall not be affected by any release, extension, renewal, modification, compromise, settlement or variation of any term of this Loan Agreement, the Note or of any guaranteed obligation, regardless of whether such action involves [CKC] or another Guarantor. . .

. . .

SECTION 14
Miscellaneous Provisions

. . .

14.5 Waivers by [CKC] and [Winkler]. [CKC] and [Winkler] hereby waive, to the extent permitted by applicable law, (a) all presentments, demands for performance, notices of nonperformance, protests, notices of protest and notices of dishonor in connection with the Note; (b) any

requirement of diligence or promptness on the part of [KEDFA] in enforcement of its rights under the provisions of the Loan Documents or the Security Instruments; and (c) any requirement of marshaling assets or proceeding against persons or assets in any particular order.

Based upon the foregoing, we believe no genuine issue of material fact existed as to whether Winkler waived his right to claim impairment of collateral upon KEDFA following their failure to perfect its security interest prior to the federal tax lien attaching. The language in the documents executed May 10, 2000, is clear and unambiguous and, as such, shall be enforced strictly according to its terms. While we sympathize with Winkler's situation, the terms of the documents plainly result in him being liable to KEDFA. The granting of the summary judgment to KEDFA by the circuit court was appropriate in that no genuine issues of material fact remained. Therefore, we affirm Franklin Circuit Court.

ALL CONCUR.

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