RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-001217-MR

RODNEY HOWSON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 11-CI-400629

JP MORGAN CHASE BANK, N.A.;
DAVIS RESEARCH SERVICES, INC.;
AND LESLIE POORE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Rodney Howson brings this appeal from an April 23, 2012, Opinion and Order of the Jefferson Circuit Court granting summary judgment in favor of JP Morgan Chase Bank, N.A. (Chase Bank) upon a personal guaranty agreement. We affirm.

The sole issue on appeal centers upon the validity and enforceability of a guaranty agreement under Kentucky Revised Statutes (KRS) 371.065. Howson was vice president of Davis Research Services, Inc. (Davis Research). In May 2010, Davis Research executed and tendered a promissory note to Chase Bank in consideration of a commercial loan in the principal amount of $233,902.34.[1] Concomitant therewith, Howson and Leslie Poore, President of Davis Research, executed a "Continuing Unlimited Guaranty" (guaranty agreement) to secure repayment of the business loan. Under its terms, Howson and Poore personally guaranteed payment of "loans" extended to Davis Research by Chase Bank. In early 2011, Davis Research defaulted under the terms of the promissory note.

In February 2011, Chase Bank filed an action against Davis Research, Poore, and Howson in Jefferson Circuit Court seeking recovery of the past due sums owed under the promissory note and seeking enforcement of Howson's obligation for the debt under the guaranty agreement. Chase Bank filed a motion for summary judgment against Howson for payment of the promissory note indebtedness under the terms of the guaranty agreement. In response, Howson argued that the guaranty agreement violated KRS 371.065 and was invalid.

By Opinion and Order entered April 23, 2012, the circuit court upheld the validity of the guaranty agreement under KRS 371.065 and granted Chase

[1] This was a renewal promissory note for the original loan and promissory note entered into on February 8, 2007, in the principal amount of $250,000 that was also personally guaranteed by Howson. The record does not reflect that Rodney Howson ever protested or challenged his personal guaranty for the original loan indebtedness.

Bank a summary judgment in the amount of $231,703.13 against Howson, for the balance owed on the promissory note, plus interest and costs. This appeal follows.

Howson maintains that the circuit court erroneously rendered summary judgment in favor of Chase Bank. He argues that the guaranty agreement is invalid as violative of KRS 371.065. For the reasons hereinafter set forth, we disagree.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). Resolution of this appeal revolves around an issue of law – the validity of the guaranty agreement under KRS 371.065.

KRS 371.065 reads, in pertinent part:

> (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. . . .

In this Commonwealth, KRS 371.065 mandates that a valid and enforceable guaranty agreement must either: (1) be written on the instrument it guarantees, (2) expressly refer to the instrument it guarantees, or (3) be in writing, signed by the guarantor, and specifically state the maximum aggregate amount of liability and the termination date of the guaranty. If a guaranty agreement fails to comply with

the forgoing mandates of KRS 371.065, the guaranty agreement is invalid and unenforceable.

In this case, we have reviewed the terms of the guaranty agreement at issue. The guaranty agreement clearly was not written on the instrument it guaranteed, as the promissory note and guaranty agreement were two separate documents. *See Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609 (Ky. 2004). Also, we do not believe that the guaranty agreement expressly referenced the instrument (promissory note) it guaranteed. We are aware that the circuit court concluded that the guaranty agreement did expressly reference the promissory note. It reasoned that "[t]he guaranty references Davis [Research] as the borrower and includes a reference number to specifically identify the loan [promissory note] being guaranteed."

On the guaranty agreement, this reference number is found at the top of the document and is specifically listed under the information identifying the borrower. It reads as follows:

> Borrower:
>
> Davis Research Services, Inc.
> 1850 Taylor Ave Ste 7
> LOUISVILLE, KY 40213
> Reference Number: 20KY0139601-5

This is the only mention of the reference number in the guaranty agreement, and most importantly, there is no language linking the terms of the guaranty agreement to the reference number or the promissory note. In short, upon examination of the whole of the guaranty agreement, we do not believe that the reference number as used therein constitutes an express reference to the promissory note as required by KRS 371.065. *See Smith v. Bethlehem Sand & Gravel Co., LLC*, 342 S.W.3d 288 (Ky. App. 2011).

As the guaranty agreement was not written on the promissory note and did not expressly reference the promissory note, we must now determine whether the guaranty agreement was an independent writing, signed by the guarantor that specifically stated the maximum aggregate liability amount being guaranteed and the precise termination date of the guaranty as required by KRS 371.065. *See Smith*, 342 S.W.3d 288. There can be no dispute that the guaranty agreement signed by Howson was in writing. However, the issue of whether the guaranty agreement specifically set forth the maximum aggregate liability of the guarantor and the termination date is much disputed between the parties in this appeal.

Chase Bank argues, and the circuit court agreed, that the guaranty agreement specifically incorporated by reference certain "additional terms" and as to these additional terms, Chase Bank cites to the following:

> SPECIFIC LIMITATION IN KENTUCKY. If the LPO state is Kentucky or Guarantor is a resident of, organized under or has its chief executive office in Kentucky, then anything in the Guaranty to the contrary notwithstanding, the maximum aggregate liability of Guarantor under the

> Guaranty shall not exceed the sum of (a) Ten Million Dollars ($10,000,000.00), plus (b) interest and fees constituting part of the Indebtedness, plus (c) all Collection Amounts. The Guaranty is a continuing guaranty and shall remain in full force and effect so long as any of the Indebtedness has not been fully paid or performed; provided, however, anything in the Guaranty to the contrary notwithstanding, the Guaranty shall terminate on January 1, 2025[,] except that such termination shall not affect the liability of Guarantor with respect to the Remaining Indebtedness.

Based upon the above additional terms, Chase Bank maintains that the maximum aggregate liability amount was specifically set forth as ten million dollars ($10,000,000) and the termination date of the guaranty agreement was expressly set on January 1, 2025. Hence, Chase Bank contends that the guaranty agreement complied with the mandates of KRS 371.065.

Conversely, Howson asserts that the additional terms were not attached to the guaranty agreement, were never seen by him, and cannot be viewed as incorporated into the guaranty agreement. Alternatively, Howson maintains that the stated maximum amount of ten million dollars and the termination date of January 1, 2025, did not satisfy the mandates of KRS 371.065. Howson points out that the ten million dollar sum and termination date of January 1, 2025, bared no actual relation to the terms of the promissory note; rather, these additional terms were merely standard boiler plate terms generally utilized by Chase Bank in an attempt to comply with KRS 371.065.

To begin, it is inconsequential that the additional terms were not attached to the guaranty agreement or reviewed by Howson. *See Cline v. Allis-Chalmers*

*Corp.*, 690 S.W.2d 764 (Ky. App. 1985). A contract may validly incorporate by reference a separate and noncontemporaneous document. 11 *Williston on Contracts* § 30:25 (4th ed. 2013). In fact, the Kentucky Court of Appeals recently upheld the validity of a guaranty agreement that specifically incorporated by reference a separate document. *Smith v. Bethlehem Sand & Gravel Co., LLC*, 342 S.W.3d 288 (Ky. App. 2011). Herein, the guaranty agreement plainly and specifically incorporated by reference the additional terms; thus, we believe that the additional terms are binding upon Howson.[2] *See Home Lumber Co. v. Appalachian Reg'l Hosp., Inc.*, 722 S.W.2d 912 (Ky. 1987). To the extent Howson now asserts that he did not receive the additional terms, he is estopped from asserting the same. He signed the guaranty agreement and at minimum was duty bound to obtain and read the additional terms since they were expressly incorporated into the guaranty agreement he signed. A party who can read must stand bound by the words of the contract he has signed. *Ky. Road Oiling Co. v. Sharp*, 257 Ky. 378, 78 S.W.2d 38 (1934).

Howson also argues that the maximum aggregate liability for the guarantor in the amount of ten million dollars and the termination date of January 1, 2025, has no relation to the promissory note. On its face, the argument raises a legitimate concern. However, the explicit terms of KRS 371.065 do not require same, and we

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[2] The guaranty agreement specifically reads:

> Certain definitions and other additional terms and conditions of this Guaranty are . . . Incorporated herein by reference (the "Additional Terms"). . . .

are hesitant to imply such a requirement.[3] KRS 371.065 only mandates that a maximum aggregate amount of liability and a specific termination date be set forth in the guaranty agreement. Neither requirement is defined in the statute and thus we can only give the words stated therein their plain meaning. *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10 (Ky. App. 2008).

The inclusion of a large dollar aggregate limitation or extended termination date for the guaranty agreement does not violate the statute nor can we infer that it violates the legislative intent behind the statute. Giving the words in this statute their plain meaning, we must conclude the terms of the guaranty agreement, including the incorporated terms, comply with KRS 371.065.

In sum, we are of the opinion that the guaranty agreement is enforceable and that summary judgment in favor of appellees was proper.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[3] Our Supreme Court held that Kentucky Revised Statutes (KRS) 371.065 "is a consumer-protection provision designed to protect the guarantor by reducing the risk of a guarantor agreeing to guarantee an unknown obligation." *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 615 (Ky. 2004).

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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