STATE OF MICHIGAN

COURT OF APPEALS

BANDIT INDUSTRIES, INC.,

Plaintiff-Appellee,

v

WILLIAM H. BAYLES,

Defendant-Appellant,

and

HOBBS INTERNATIONAL, INC., doing business as HOBBS EQUIPMENT COMPANY,

Defendant.

UNPUBLISHED
June 9, 1998

No. 201781
Isabella Circuit Court
LC No. 95-008746 CK

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant William H. Bayles appeals as of right from a judgment entered against him in favor of plaintiff for $87,500. After a bench trial, the trial court found that defendant, who was president and owner of Hobbs International, Inc. ("Hobbs"), had personally guaranteed a corporate debt owed to plaintiff when he executed a personally signed facsimile offering his assurance of payment. We affirm the judgment for plaintiff.

In October 1992, plaintiff and Hobbs entered into a dealership agreement by which Hobbs was granted the nonexclusive right to sell certain models of plaintiff's portable wood chipping devices in Connecticut and New York. Soon after this business relationship commenced, Hobbs became delinquent in the payment of its account with plaintiff. Plaintiff began to require shipment to Hobbs on a cash-on-delivery basis only, and on a number of occasions plaintiff required payment prior to shipment. Hobbs set up a payment schedule to commence in July 1993, but payments continued to be delinquent.

During this time, Hobbs contacted plaintiff regarding a proposed government contract with the State of Connecticut that called for five specially manufactured wood chippers at a cost of $87,500. While plaintiff accepted the order to build the units, the sales manager and a partial owner of plaintiff, Dennis Tracy, expressed concerns to Hobbs regarding its delinquent account. In a facsimile sent on September 13, 1993, Tracy again expressed these concerns and explained that he would need "assurances" that payment for the units would be forthcoming before they were shipped. Over the course of several telephone calls between Tracy and both Hobbs' sales manager, Larry Rosetti, and Hobbs' financial consultant, Rosemary Rourke, several options for "assurances" were discussed. They discussed the possibility of obtaining a dual party check, but this proved impossible since the government contract bid had been submitted only under Hobbs' name. They also discussed obtaining a personal guarantee from defendant.

Although Rourke recalled that she told Tracy that a personal guarantee would be unlikely, she also told him that she would discuss it with defendant. Rourke discussed with defendant his "assurance" options, and defendant testified that he told Rourke that he would never give his "personal guarantee to anyone except the bank because you can't get a bank loan unless you do." Rourke then drafted a facsimile for defendant to sign on October 8, 1993 as a "nice thing to do for someone who's really working with us." Later that day, plaintiff received this facsimile, which in its entirety stated:

> Dear Dennis:
>
> Rosemarie just informed me of your great cooperation to work with us to retain the order from the State of Connecticut, and our commitment to pay you promptly when we get paid by the state. Please accept this fax as my assurance that you will be paid when we are. Thanks for working with us.
>
> Sincerely,
>
> /s/ Bill

Upon receiving this assurance, plaintiff shipped the wood chippers to the Connecticut Department of Transportation and sent the invoices to Hobbs on October 11, 1993. Although Hobbs was paid by the State of Connecticut in November or December 1993, plaintiff never received payment from Hobbs or defendant. Plaintiff was notified in December 1993 that Hobbs intended to declare bankruptcy, which it did on December 3, 1993. Tracy continued to try to work with Hobbs and request payment; however, neither Hobbs nor defendant complied and instead they severed all contact with plaintiff.

On August 9, 1995, plaintiff filed a complaint seeking damages against Hobbs and against defendant as a personal guarantor. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), claiming that there were no genuine issues of material fact and that the language used in the facsimile could not as a matter of law constitute his personal guarantee of Hobbs' obligation. The trial court denied the motion because it found issues of fact regarding the intent of the parties. Defendant then renewed his motion for summary disposition and plaintiff filed a cross-motion for

summary disposition pursuant to MCR 2.116(C)(10), claiming that the facsimile unequivocally represented defendant's personal guarantee. Again, both of these motions were denied. Thereafter, on December 12, 1996, a bench trial was conducted. After the submission of plaintiff's proofs, defendant moved for a directed verdict, which was taken under advisement. Following the conclusion of trial, Judge Chamberlain granted a judgment in the amount of $87,500 in favor of plaintiff and denied defendant's motion for a directed verdict. In its opinion, the trial court found that defendant did not "subjectively intend" to provide a personal guarantee. It held, however, that a guarantee nonetheless was created by the language of the facsimile because "assurance" was synonymous with "guarantee" according to legal and other dictionaries. Finally, the trial court held that the guarantee created by the facsimile was the personal guarantee of defendant because the manner in which he signed the facsimile did not include the corporate name or his title.

Whether the facsimile language here constituted a guaranty contract is a question of law. *Angelo Iafrate Co v M & K Development Co,* 80 Mich App 508, 514; 264 NW2d 45 (1978). "Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *UAW-GM Human Resource Center v KSL Recreation Corp,* __ Mich App __; __ NW2d __ (Docket No. 189693, issued 3/6/98). This Court reviews the trial court's conclusions of law de novo and its findings of fact for clear error. *Omnicom v Giannetti Investment Co,* 221 Mich App 341, 348; 561 NW2d 138 (1997).

Defendant first argues that the trial court improperly held that the language in a facsimile signed by defendant constituted a personal guaranty contract by defendant. A guaranty contract is "an enforceable undertaking or promise by one person collateral to a primary or principal obligation of another which binds the person making the promise to performance of the primary obligation in the event of nonperformance; the secondary party thus becomes primarily responsible for performance." *Angelo, supra* at 514. General rules of construction apply in interpreting guaranty contracts. 38 CJS, Guaranty, § 50.

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp,* 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). There must be mutual assent or "a meeting of the minds" on all the material terms. *West Bloomfield Hospital v Certificate of Need Bd (On Remand),* 223 Mich App 507, 519; 567 NW2d 1 (1997). A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

We must look first for the intent of the parties in the language used in the instrument. *UAW-GM, supra*. "This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *Id.* Where this language is clear, the court must determine whether an "objective manifestation of mutual assent appeared." *Angelo, supra* at 514. However, where the contract language is ambiguous or susceptible to multiple meanings, it becomes necessary to then determine the intention of the parties by reading the contract with reference to extrinsic facts. *Griffin Mfg Co v Mitshkun,* 223 Mich 640, 642; 207 NW 814 (1926). "Such effect must be given to the

instrument as will best accord with the intention of the parties as manifested by its terms taken in connection with the subject-matter and the surrounding circumstances." *Columbus Sewer-Pipe Co v Ganser,* 58 Mich 385, 391; 25 NW 377 (1885).

Accordingly, in an effort to analyze this case consistently with existing contract law, we must begin by looking to the words of the facsimile to determine if they objectively manifest the mutual intent of the parties. First, the facsimile signed and sent by defendant specifically used the word, "assurance." Defendant's use of this word does not remove the focus of our search from the parties' intentions, but is instructive in determining such intentions. Since "contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided," *UAW-GM, supra,* we agree with the trial court's reliance on the common dictionary definition of this term. See *People v Denio,* 454 Mich 691, 699; 564 NW2d 13 (1997). "Assurance" is commonly understood to mean guarantee or promise. We will not ignore the plain meaning of defendant's own words unless another intent is manifest.

Second, we note that the facsimile's first sentence conveys "*our* commitment to pay you promptly when *we* get paid;" yet the second sentence states: "*my* assurance that you will be paid when we are" (emphasis added.) This phraseology could certainly be construed in terms of there being a specific emphasis in the second sentence on defendant's personal commitment to plaintiff, especially because an "assurance" was the purpose of the facsimile. When read in context, the dichotomy between the first and second sentences raises a strong positive implication in favor of plaintiff's argument that defendant was personally guaranteeing payment. Thus, plaintiff's reliance upon defendant's personal guarantee seems reasonable based on this construction.

Third, the entirety of the facsimile reasonably appears to communicate a guarantee to pay plaintiff. Although the language is informal and not written in technical legal parlance, the Michigan Supreme Court has long recognized that guarantees written by business people rather than lawyers are frequently given under more informal circumstances. *Columbus Sewer-Pipe, supra* at 391. Therefore, "a wide latitude should be allowed in their interpretation, and in discovering the intention of the parties." *Id.* Business people should be able to rely upon instruments that reasonably appear to communicate promises and guarantees, without resorting to a bevy of attorneys for interpretation.

Fourth, defendant signed the facsimile only as "Bill" and without either his corporate title or the corporate name. Although the trial court erred when it applied *Saint Joseph Valley Bank v Napoleon Motors Co,* 230 Mich 498; 202 NW 933 (1925) and held that the absence of the corporate name and defendant's job title in the closing of the fax conclusively resulted in the contract constituting a personal guarantee, nevertheless such a circumstance does constitute some evidence that defendant made the promise in his personal capacity. The Court in *Saint Joseph Valley, supra* at 501-02, held that, when a contract is signed in the name of the corporation alone, it is conclusively a corporate guarantee; and if signed by corporate officers using their titles but without the corporate name, the writing would be ambiguous. Ambiguities must be solved by investigating the surrounding circumstances beyond the signatures. *Id*. The Court did not specifically discuss the third possibility, found in the case at bar, in which an officer of the corporation signs the document without reference to either the corporation or his title.

Fifth, although defendant argues that, if the facsimile is a guaranty contract at all, it must be a guarantee of payment by the corporation and not by him personally, the language of the facsimile appears to preclude the possibility that it is a corporate guarantee. Defendant wrote that "you will be paid when *we* are" (emphasis added). This phrase conditions payment to plaintiff upon the receipt by the corporation of payment, presumably from the state. Yet this language adds nothing to the corporation's already existing obligation to pay its debts to plaintiff: It contains no additional corporate guarantee of payment to plaintiff in the event that the state does *not* pay the company. Assuming that this phrase was designed to have meaning within this "assurance" facsimile, it is likely that it was meant to refer to and emphasize the additional guarantee of payment requested by plaintiff. Since the phrase could not reasonably be interpreted to mean that Hobbs was guaranteeing payment if the State of Connecticut defaulted, any additional guarantee of payment would be defendant's personal guarantee in the event that Hobbs defaulted on its payment to plaintiff. Therefore, if the facsimile is a guaranty contract at all, it is more likely a personal guaranty contract by defendant and not the assurance of the corporation.

Overall, the words of the facsimile, in our judgment, point in the direction of a contract personally guaranteeing payment to plaintiff, although admittedly the words are not without ambiguity. Defendant argues that the facsimile was not meant to guarantee payment, but only to show his willingness to make the company succeed so that it could pay its creditors. Therefore, since the language contains some ambiguity, we must refer to extrinsic factors. Reference to the surrounding circumstances will aid us in better understanding the true intentions of the parties, as manifested by their words and actions.

Thus, we turn to a sixth factor, found in the surrounding facts of this facsimile. In our judgment, it is instructive that Tracy, plaintiff's partial owner, specifically *asked* for a personal guarantee from defendant as an assurance. Any response from defendant must be read in light of this request, since it set the stage for the negotiations. Unless contradicted by manifest evidence of a different intent by defendant, it identifies the subject matter of the negotiations and places defendant's response in context.

Seventh, plaintiff stated that it would not deliver the wood chippers without an assurance. Defendant knew of this condition when he sent the facsimile "assuring" payment. The facsimile was clearly an attempt to induce plaintiff to send the chippers, and plaintiff, in fact, relied on these words and sent $87,500 worth of equipment. Defendant should not be able to "assure" plaintiff of payment without his own words binding him to the promise, since plaintiff reasonably relied on that promise.

Lastly, the facsimile was sent in response to plaintiff's request for a guarantee. Although the parties did not specifically delineate their promises to each other in writing, plaintiff asked for a guarantee and defendant then sent the facsimile with "my assurance that you will be paid." Defendant did not reject plaintiff's request for a guarantee, nor make a counter proposal to effect delivery. Indeed, defendant simply responded to plaintiff's request in a manner that reasonably appeared to accept plaintiff's terms. Plaintiff is entitled to assume that it is dealing with business people of good faith and accept them at their words.

On the basis of these factors, we conclude that the words and circumstances of this facsimile indicate defendant's personal guarantee to pay plaintiff. Although the face of the writing is arguably ambiguous on its own, the surrounding circumstances show that the manifested intent of defendant, as well as of plaintiff, was to personally guarantee payment for the chippers before shipment. Plaintiff was entitled to rely upon defendant's "objective manifestation" of intent in his words and actions,[1] and was not obligated to hire attorneys to decode a relatively simple assurance of payment. In this case, defendants seeming assent by words and deeds to plaintiff's request reasonably led plaintiff to believe that defendant was promising to pay in the event that Hobbs defaulted. Therefore, we find that both parties did assent to this guaranty contract.

Defendant also argues that the trial court erred in denying both defendant's initial and renewed motions for summary disposition pursuant to MCR 2.116(C)(10). Defendant contends that the language of the fax unambiguously failed to state that he intended to personally answer for the debt of Hobbs if Hobbs defaulted on its debt to plaintiff. After reviewing de novo the trial court's ruling on these motions for summary disposition, *Atlas Valley Golf & Country Club, Inc v Goodrich*, 227 Mich App 14; 575 NW2d 56 (1997), we conclude that the trial court properly recognized an ambiguity created by the language in the facsimile. This inconsistent language created an ambiguity for which further fact finding was necessary to ascertain the intent of the parties. In this situation, a motion for summary disposition pursuant to MCR 2.116(C)(10) is inappropriate. *D'Avanzo v Wise & Marsac*, 223 Mich App 314, 319; 565 NW2d 915 (1997). The trial court did not err in denying the parties' motions.

For these reasons, we affirm the judgment, if not the reasoning, of the trial court for plaintiff, finding a personal guarantee in the facsimile signed by defendant.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] The trial court asserted that defendant did not "subjectively intend" to create a guaranty contract. However, this is not a proper question for the court in assessing a contract, since the standard is "objective manifestation of mutual assent," based on the parties' words and acts. *Angelo, supra* at 514.