STATE OF MICHIGAN

COURT OF APPEALS

WELLS FARGO BANK, NA,

Plaintiff-Appellee,

v

MICHAEL J. WALSH,

Defendant-Appellant.

UNPUBLISHED
October 29, 2020

No. 350960
Oakland Circuit Court
LC No. 2019-172860-CB

Before: BOONSTRA, P.J., and MARKEY and HOOD, JJ.

PER CURIAM.

Defendant Michael J. Walsh appeals by right the trial court's opinion and order granting summary disposition in favor of plaintiff Wells Fargo Bank, N.A. (WFB). This action stems from WFB's effort to enforce an alleged personal guaranty made by Walsh with respect to repayment of any outstanding debt on a line of credit for Walsh's business, Custom Touch, Inc. We affirm.

On November 21, 2003, during a recorded telephone conversation between a WFB representative and Walsh, Walsh made a paperless application for a business line of credit for Custom Touch. In the course of that phone conversation, Walsh agreed to personally guarantee repayment of monies loaned to Custom Touch and that California law applied should any dispute arise. According to WFB, it mailed Walsh a standard credit-agreement form prepared by WFB in October 2002 and generally used with numerous WFB loan customers. This contract reduced to writing the rights and obligations of the parties with respect to the business line of credit. This agreement was later amended by a 2013 business-customer agreement. The two written agreements made no specific mention of Walsh's personal guaranty. Custom Touch eventually defaulted on the business line of credit, owing a total of $100,905. WFB filed the instant action seeking to collect from Walsh pursuant to his personal guaranty the money Custom Touch owed. Walsh did not file an answer and instead immediately moved for summary disposition. WFB then filed a competing motion for summary disposition. The trial court denied Walsh's motion and granted summary disposition to WFB under MCR 2.116(C)(9), (C)(10), and (I)(2), and entered judgment in the bank's favor. Subsequently, Walsh moved for reconsideration, which the trial court denied. This appeal ensued.

Walsh presents a series of arguments on appeal challenging the trial court's summary disposition ruling. We conclude that Walsh's arguments are unavailing. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Walsh first contends that summary disposition in favor of WFB was inappropriate under MCR 2.116(C)(9) because Walsh had not even filed a responsive pleading. Walsh is correct. MCR 2.116(C)(9) provides for summary disposition when "[t]he opposing party has failed to state a valid defense to the claim asserted against him . . . ." "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). "[A] court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9)." *Id.* at 565; see also MCR 2.116(G)(5) ("Only the pleadings may be considered when the motion is based on subrule [C][8] or [9]."). MCR 2.110(A) defines the term "pleadings," and "[a] motion for summary disposition is not a responsive pleading under MCR 2.110(A)." *Village of Dimondale*, 240 Mich App at 565. Walsh did not file a responsive pleading in this case—just a motion for summary disposition. Accordingly, for purposes of MCR 2.116(C)(9), it cannot be said that Walsh failed to *plead* a valid defense to WFB's claim. The trial court thus erred in awarding summary disposition to WFB under MCR 2.116(C)(9).

Walsh next maintains that in granting summary disposition in favor of WFB under MCR 2.116(C)(10),[1] the trial court erred by focusing on only a few of the lines in the 2003 phone transcript when determining that Walsh had personally guaranteed to repay monies loaned to Custom Touch. According to Walsh, the trial court failed to consider other portions of the phone transcript as well as other documents, including the original credit agreement and the 2013 amended agreement, which Walsh claims created factual issues regarding the existence or terms of the guaranty.

[1] MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

Initially, Walsh admits that the transcript of the 2003 telephone conversation is accurate. During the recorded call, the following exchange took place between WFB's representative and Walsh:

> *Q*. You personally guaranty [sic] to pay Wells Fargo upon demand all that you owe on the business line account.
>
> As grantor, you authorize Wells Fargo without notice or prior consent to change any of the terms of the amount of your company's business line account.
>
> In addition, you agree to pay attorney's fees and other expenses incurred in enforcing this guaranty.
>
> *A*. Uh-huh.
>
> *Q*. This guaranty benefits the Wells Fargo Bank and its successors and assigns.
>
> Finally, you agree this audiotaped application may be used as evidence of your agreement to the terms of this guaranty.
>
> *A*. Uh-huh.
>
> *Q*. Do you understand and agree to these terms?
>
> *A*. Yes.

Walsh also expressed his understanding and agreement that California law would apply to the line-of-credit agreement and his personal guaranty. Under California law, a guaranty or surety

> contract is to be interpreted by the same rules used in construing other types of contracts, with a view towards effectuating the purposes for which the contract was designed. Extrinsic evidence is admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible, and it is the instrument itself that must be given effect. [*United States Leasing Corp v duPont*, 69 Cal 2d 275, 284; 444 P2d 65 (1968) (quotation marks and citations omitted).]

In this case, the personal guaranty came in the form of the oral agreement between WFB and Walsh that was reached during the 2003 recorded telephone conversation.[2] The transcript plainly reflected that Walsh agreed to guarantee repayment of monies loaned to Custom Touch under the line-of-credit agreement. Walsh further agreed during the phone conversation that the recording could be used as evidence of the personal guaranty. The trial court properly focused on this portion of the transcript because it contained the language pertinent to establishing Walsh's agreement to personally guarantee repayment. Walsh argues that the trial court should have considered other parts of the transcript as well as the documents setting forth the terms and

[2] We will address later Walsh's separate argument that a written guaranty was required.

conditions of the line-of-credit agreement, i.e., the original credit agreement and the 2013 amended agreement. But Walsh identifies no language in either the transcript or the other documents that calls into question the clear language of the transcript quoted above. Given the abundant clarity of the oral personal guaranty, we find there were no factual issues that precluded the grant of summary disposition to WFB under MCR 2.116(C)(10). Thus, Walsh's challenge of the trial court's analysis on this point lacks merit.

Walsh next argues that factual questions existed regarding whether the dispute was subject to arbitration under the original credit agreement and the 2013 amended credit agreement. Walsh asserts that he may be entitled to compel arbitration and seeks discovery regarding the limited issue of arbitrability. Walsh's argument fails for multiple reasons. He did not raise the arbitration issue in his motion for summary disposition. Walsh first mentioned the arbitration matter in his summary disposition reply brief and even then his argument was only three lines long and cited no supporting authority. Walsh later presented a two-paragraph argument on the arbitration issue in his brief responding to WFB's motion for summary disposition, but again that argument was not well developed or adequately supported by caselaw citations. And as the trial court noted, Walsh's motion for summary disposition was based on MCR 2.116(C)(8) and (10), not (C)(7), which is the subrule applicable to dismissal based on an agreement to arbitrate. See *Registered Nurses, Registered Pharmacists Union v Hurley Med Ctr*, 328 Mich App 528, 535; 938 NW2d 800 (2019).

The trial court indicated that Walsh had made only a cursory argument on the arbitration issue, and the court therefore declined to address the matter in the absence of full and complete briefing. Walsh fails to present any discernible appellate argument challenging the trial court's determination that Walsh's argument below was too cursory. "When an appellant fails to address the basis of a trial court's decision, this Court need not even consider granting relief." *Seifeddine v Jaber*, 327 Mich App 514, 522; 934 NW2d 64 (2019). Walsh's argument on this issue fails for that reason alone. Moreover, the trial court was correct in its conclusion that Walsh only cursorily raised the arbitration issue below. The trial court aptly cited *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008), for the proposition that "[t]rial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." Walsh essentially ignores the trial court's reasoning, offering no appellate argument for why this Court should disagree with the trial court. Walsh "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Seifeddine*, 327 Mich App at 521 (citation omitted).

Additionally, both the original line-of-credit agreement and the 2013 amended agreement provided for arbitration upon the "demand of any party," but Walsh has presented no evidence that he was a party to the credit agreements. WFB argues that the credit agreements were between WFB and Custom Touch. In other words, according to WFB, the credit agreements set forth the terms and conditions as between WFB and Custom Touch, while the guaranty agreement, by contrast, was formed pursuant to the 2003 phone conversation. Walsh was not a party to the credit

agreements and thus had no contractual right to demand arbitration.[3] But even if Walsh had been a party to those credit agreements, the documents provided for mandatory arbitration upon the demand of a party, and Walsh never actually demanded arbitration. Again, Walsh only belatedly raised arbitration as an issue in a cursory manner when he filed his reply brief and when he filed his response to WFB's summary disposition motion, and even then, he did not actually demand arbitration.

Furthermore, Walsh has waived any right to compel arbitration. "In general, defending the action or proceeding with the trial, that is defending an action without seeking to invoke a right to compel arbitration, constitutes a waiver of the right to arbitration." *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998) (quotation marks and citations omitted). Once he was served with WFB's complaint, Walsh indisputably had notice of the contractual arbitration provisions because the two agreements containing the arbitration language were appended to the complaint. Yet, rather than seek to compel arbitration or file a motion for summary disposition under MCR 2.116(C)(7) on the basis of the contractual arbitration provisions, Walsh instead filed a motion for summary disposition under MCR 2.116(C)(8) and (10). Walsh was thus defending the case on the merits absent a demand for arbitration. See *id*. at 356-357.

Walsh next maintains that the trial court erred by rejecting his argument that his obligation as guarantor was exonerated by WFB's purported alterations of the underlying obligation. Walsh contends that, contrary to the trial court's reasoning, Walsh did not consent to any changes to the underlying obligation. Walsh's argument on this issue is unavailing.

Cal Civil Code 2819 provides, in relevant part:

> A surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

"A surety is not exonerated from liability by a change in the contract between the principal and the creditor which is made with his consent, and such consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of such act." *Southern California First Nat'l Bank v Olsen*, 41 Cal App 3d 234, 240; 116 Cal Rptr 4 (1974) (citation omitted).

Initially, we conclude that Walsh has abandoned this issue because his appellate presentation is deficient. He fails to cite any supporting authority in the argument section of his principal brief on appeal. Further, Walsh fails to offer any coherent argument in his principal appellate brief explaining how Custom Touch's original obligation had been altered. "A party may not simply announce a position and leave it to this Court to make the party's arguments and

[3] Absent an abuse of the corporate form, a corporate entity is separate and distinct from its owner. *Green v Ziegelman*, 310 Mich App 436, 451; 873 NW2d 794 (2015).

search for authority to support the party's position. Failure to adequately brief an issue constitutes abandonment." *Seifeddine*, 327 Mich App at 519-520 (citation omitted).[4]

Walsh suggested below that Custom Touch's original obligation had been altered because the 2013 amended credit agreement purportedly replaced California law with South Dakota law as the law governing the line-of-credit agreement. But Walsh seems to have abandoned any such contention in this Court because he does not make that argument on appeal. In any event, Walsh has never identified any relevant differences between California law and South Dakota law that would effectuate an alteration of Custom Touch's original obligation.[5]

On appeal, Walsh makes a confusing argument that there is a difference between the transcript of the 2003 telephone conversation and the original credit agreement with respect to the extent of WFB's authority to change the terms or amount of the line of credit. In the 2003 recorded conversation, Walsh agreed that WFB could "without notice or prior consent . . . change any of the terms of the amount of [Custom Touch's] business line account." The original credit agreement provided that WFB "may change any of the terms of any of Customer's accounts (including payment terms and finance charges) at any time." According to Walsh's proposed interpretation, the 2003 recorded phone call allowed WFB to change only the *amount* of the line of credit, whereas the original credit agreement, which WFB claims to have sent Walsh after the 2003 phone call, provided that WFB could change any terms, not simply the amount. Therefore, Walsh suggests that the original credit agreement altered Custom Touch's obligations by stating that WFB could change any terms of the line-of-credit agreement, not simply the amount of the line of credit.

Assuming that the original credit agreement granted more authority to WFB to change the terms of the line of credit than did the 2003 recorded telephone call, we do not see how this amounts to an alteration of Custom Touch's original obligation, which is the relevant inquiry under Cal Civil Code 2819. That is, even if the original credit agreement granted WFB additional *authority* to alter Custom Touch's original obligation, Walsh has not presented evidence that WFB actually *exercised* that authority. We therefore conclude that Walsh's argument on this issue fails.[6]

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[4] In addressing this issue in his reply brief on appeal, Walsh cites one opinion of a lower federal court on a tangential matter, but he still fails to cite any pertinent authority on the central issue. Also, in his reply brief, Walsh attempts to expand somewhat on the confusing argument set forth in his principal brief, discussed below, regarding how Custom Touch's original obligation had been altered. Reply briefs must be confined to rebuttal. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). Walsh's reply brief thus cannot be viewed as correcting deficiencies in his principal brief on appeal.

[5] Also, Walsh argued below that the August 2013 amended credit agreement was inapplicable because Custom Touch stopped using and paying on the line of credit in May 2013.

[6] In his reply brief on appeal, Walsh suggests that the mere existence of the original credit agreement and the 2013 amended credit agreement reflects alterations of Custom Touch's original obligation, but this argument is not appropriately focused on the language of Cal Civil Code 2819. The issue is not whether any amendment of the line-of-credit agreement occurred, but rather

Finally, Walsh argues that under California law the personal guaranty had to be in writing and signed by Walsh. We disagree.

Cal Civil Code 2793 provides, "Except as prescribed by the next section, a suretyship obligation must be in writing, and signed by the surety; but the writing need not express a consideration." Cal Civil Code 2794 provides, in relevant part:

> A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:
>
> * * *
>
> (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person[.]

An oral guaranty is thus enforceable if the guarantor gained a business or personal advantage from the transaction. *RCA Corp v Hunt*, 133 Cal App 3d 903, 906; 184 Cal Rptr 633 (1982), citing Cal Civil Code 2794(4) and *Farr & Stone Ins Brokers, Inc v Lopez*, 61 Cal App 3d 618; 132 Cal Rptr 641 (1976). Walsh indisputably gained a business or personal advantage from the transaction because he was the president and sole shareholder of Custom Touch, which received funds from WFB under the line-of-credit agreement. Walsh contends that Cal Civil Code 2794(4) applies only when the guaranty pertains to a preexisting obligation, i.e., when an underlying obligation was part of a transaction that occurred before the transaction that produced the guaranty agreement. Walsh, however, has cited no case containing a holding to that effect. Although the statute refers to an antecedent obligation, it does not make a preexisting obligation a condition of the exception to the writing requirement. Indeed, the California Supreme Court in *Merritt v J A Stafford Co*, 68 Cal 2d 619, 628; 440 P2d 927 (1968), explained the operation of Cal Civil Code 2794(4) as follows:

> It is well settled that whenever the leading and main object of the promisor is not to become surety or guarantor of another but to subserve some purpose or interest of his own, the promise is not within the statute even though performance of the promise may pay the debt or discharge the obligation of another.

Here, it is clear that Walsh's leading and main objective was not to become a surety or guarantor but to simply serve his own personal interests connected to keeping his business afloat.

Our case has similarities to *Michael Distrib Co, Inc v Tobin*, 225 Cal App 2d 655; 37 Cal Rptr 518 (1964), in which the plaintiff lumber company supplied lumber under contract to two corporations for purposes of a housing project, and the defendant, a corporate officer and majority stockholder in the corporations, made a personal and oral promise ensuring payment for the

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whether that amendment altered Custom Touch's original obligation. That is, Walsh appears to conflate an amendment of the line-of-credit agreement with an alteration of Custom Touch's original obligation, but Walsh offers no argument that would justify such conflation.

lumber. The California court addressed, in part, the applicability of Cal Civil Code 2794(4), and ruled:

> In the case before us, the trial court found that [the defendant] was benefited personally by the contract, and that his promise to pay for the building materials was supported by consideration consisting of plaintiff's future and continued delivery of lumber and building supplies.
>
> The deduction of the trial court that [the defendant] was motivated in making the promise by considerations of benefit to himself was justified. . . . As the owner of 51 per cent of the capital stock of both corporations, he had a very direct and personal interest in their affairs. From the evidence it reasonably could be concluded that the pecuniary benefit which he might hope to reap from the success of the housing project was the main object of his promise. . . . We find no error in the trial court's conclusion that the statute of frauds did not operate as a bar in the instant case. [*Id.* at 666-667.]

In the instant case, sole-shareholder Walsh was certainly motivated in making the personal guaranty by considerations of ultimate benefit to himself. Accordingly, Walsh's argument that a writing was required to enforce the personal guaranty fails.[7]

We affirm. Having fully prevailed on appeal, WFB may tax costs under MCR 7.219.

/s/ Mark T. Boonstra
/s/Jane E. Markey
/s/ Karen M. Fort Hood

[7] We note that the 2013 amended agreement defined an "Account Guarantor" as follows:

> An individual who *signed* as an authorized representative of the business *and as a personal guarantor* of the business' debt to the Bank, who has full access to Account funds and the ability to obtain information about the Account from customer service and online banking. An Account Guarantor is personally liable for the entire debt incurred on the Account. [Emphasis added.]

This language suggests that WFB itself only recognized personal guarantors if a purported guarantor had signed a personal guaranty. Walsh, however, does not construct any argument based on this provision, and it is not our role to find and develop arguments for the parties.