STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0815

Robert R. Andrews, Jr.,
Respondent,

vs.

Jonathan C. Bruntjen,
Defendant,

Gale L. Stead,
Appellant.

Filed March 10, 2014
Affirmed
Johnson, Judge
Dissenting, Smith, Judge

Hennepin County District Court
File No. 27-CV-11-14453

Sarah B. Bennett, William E. Sjoholm, Thomsen & Nybeck, P.A., Bloomington, Minnesota (for respondent)

John R. Neve, Evan H. Weiner, Neve Webb, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Two real-estate investors borrowed money from a third real-estate investor. The two borrowers promised "jointly and severally" to repay the loan. Neither did so, and the first borrower filed for bankruptcy. The lender sued the second borrower and, after a court trial, obtained a judgment for the principal amount of the loan, interest, costs, and attorney fees. We conclude that the district court did not err by concluding that the second borrower is obligated to repay the loan. Therefore, we affirm.

FACTS

Robert R. Andrews is the president of St. Anthony Real Estate Company (SAREC). His company is owned by 12 persons; his ownership share is less than 10%. Jonathan C. Bruntjen is the managing partner of Twin Cities Real Estate Partners, LLC (TCREP). Bruntjen owns a 67% stake in the company. Gale L. Stead, who is Bruntjen's step-father-in-law, is an optometrist who owns a 33% stake in TCREP as a passive investment. Andrews and Bruntjen, individually and through SAREC and TCREP, have collaborated in various ways, including the ownership and operation of real-estate joint ventures.

In 2010, Bruntjen and his real-estate operations were experiencing financial difficulties. Among other things, a creditor was demanding that Bruntjen and TCREP pay a debt of approximately $131,000. To satisfy that creditor, Bruntjen and Stead borrowed $131,313.22 from Andrews on November 8, 2010. The promissory note

identifies Bruntjen and Stead as "Borrowers" and provides that they are "jointly and severally" liable for repayment of the loan by February 8, 2011.

On the same day that they executed the promissory note, the parties also executed a separate agreement, entitled "Restructuring Agreement," which provides for an alternative means by which Bruntjen and Stead could repay the loan. The restructuring agreement recited that Bruntjen had failed to make capital contributions to various mutually owned business entities, that Bruntjen "has no prospect of being able to pay back these loans or otherwise fund his capital contributions to" the mutually owned business entities, that "the financial condition of [Bruntjen] is such as to threaten the financial condition of TCREP," and that the parties intended for the loan to be "paid off . . . by the transfers and conveyances and assignments set forth below," of which there were two types. The first was a transfer by Bruntjen and TCREP of their interests in four joint-venture companies to Andrews, except for a 1% non-voting interest in each company. The second was a conveyance by Bruntjen and TCREP of their interests in five specified properties to Andrews. The restructuring agreement required "all necessary documents [to] be executed and delivered by November 30, 2010." Bruntjen signed the restructuring agreement twice, in his individual capacity and as a member of TCREP; Stead signed it as a member of TCREP.

Bruntjen and TCREP did not perform any of the actions specified in the restructuring agreement by November 30, 2010.

On February 8, 2011, Bruntjen caused TCREP to transfer to SAREC four of the five properties identified in the restructuring agreement. In exchange, Andrews credited

other debts that TCREP owed to SAREC by the estimated amount of TCREP's equity in the four properties.

On February 14, 2011, Andrews sent a letter to Bruntjen and Stead in which he demanded repayment of the November 8, 2010 loan. Neither Bruntjen nor Stead repaid the loan.

In May 2011, Andrews commenced this action in the Hennepin County District Court. In his complaint, Andrews alleged two claims: breach of contract and unjust enrichment. For relief, Andrews sought a money judgment against Bruntjen and Stead for the principal amount of the loan as well as interest, costs, and attorney fees.

Bruntjen did not respond to the complaint. In September 2011, he filed a Chapter 7 bankruptcy petition. The petition lists the November 8, 2010 loan from Andrews as an unsatisfied debt. Thereafter, Andrews's claim against Bruntjen was automatically stayed by operation of federal bankruptcy law. *See* 11 U.S.C. § 362(a)(1).

In July 2012, Andrews's claim against Stead was tried to the court in one day. In October 2012, the district court issued findings of fact, conclusions of law, and an order for judgment in favor of Andrews and against Stead. In November 2012, Stead moved for amended findings or a new trial. In March 2013, the district court denied Stead's motion for a new trial but granted in part and denied in part his motion for amended findings. The district court again ordered judgment for Andrews and against Stead. Stead appeals.

D E C I S I O N

I.

Stead first argues that the district court erred by rejecting his primary affirmative defense to Andrews's breach-of-contract claim and by entering judgment in favor of Andrews. Stead contends that he should not be liable on Andrews's breach-of-contract claim because he was not a primary obligor on the note but, rather, was either a surety or guarantor and, furthermore, that his obligations were released because the terms of the loan were modified without his consent. This court applies a clearly erroneous standard of review to a district court's findings of fact, *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999), and a *de novo* standard of review to a district court's interpretation of a contract and its conclusions of law, *Valspar Refinish, Inc. v. Gaylord's, Inc.* 764 N.W.2d 359, 364 (Minn. 2009).

Stead does not dispute that the loan Andrews made on November 8, 2010 has not been repaid. He contends only that he is not obligated to repay it. He seeks to make a distinction between a co-borrower and a surety or a guarantor. "A surety is any person who, being liable to pay a debt, is entitled . . . to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so." *Wendlandt v. Sohre*, 37 Minn. 162, 163, 33 N.W. 700, 701 (1887). A guarantor is similar to a surety but is not a party to the agreement giving rise to the debt and, therefore, is not obligated to pay the debt until the primary obligor defaults. *Schmidt v. McKenzie*, 215 Minn. 1, 6-7, 9 N.W.2d 1, 3-4 (1943). Either a surety or a guarantor may be released if there is a material alteration in the terms of the debt to which the surety or guarantor did not

consent. *Board of Comm'rs of Fillmore Cnty. v. Greenleaf*, 80 Minn. 242, 244, 83 N.W. 157, 158 (1900) (surety); *Schmidt*, 215 Minn. at 8-9, 9 N.W.2d at 4-5 (guarantor).

Stead contends that he is either a surety or a guarantor and that the restructuring agreement was modified when Andrews and Bruntjen arranged for TCREP to transfer four properties to SAREC to discharge other debts, which made it impossible for Bruntjen to use those properties to satisfy the loan that Andrews made on November 8, 2010. The district court rejected Stead's argument in its post-trial order. The district court found that Stead is a co-borrower under the promissory note and a surety under the restructuring agreement. The district court also found that the restructuring agreement lapsed when TCREP did not effectuate the contemplated transfers by the November 30, 2010 deadline and that TCREP's transfers of four properties to SAREC on February 8, 2011, were not made pursuant to the lapsed restructuring agreement. The district court further found that there was no modification of the agreements related to the loan. Accordingly, the district court concluded that Stead remains bound by his obligation to repay the loan according to the terms of the promissory note.

It is clear that Stead is not a guarantor because he was a party to the promissory note. *See Schmidt*, 215 Minn. at 6-7, 9 N.W.2d at 3-4. The question remains whether he is a co-borrower or a surety. But we need not answer that question to resolve the appeal. Even if we assume that Stead is a surety, we would uphold the district court's decision on the ground that the district court did not err by finding that the restructuring agreement was not modified. The district court did not err in this finding for at least three reasons. First, the district court reasonably found that the restructuring agreement lapsed when

Bruntjen and TCREP did not perform any of the actions required by the restructuring agreement by the November 30, 2010 deadline. Second, the restructuring agreement itself provides that it "may not be amended or modified except in a writing signed by [Bruntjen], TCREP, and [Andrews]." The same principle is well-established in the caselaw: "a written contract may be modified after its execution by the acts and conduct of the parties in the same manner as a contract may be entered into in the first place." *Wormsbecker v. Donovan Constr. Co.*, 247 Minn. 32, 41, 76 N.W.2d 643, 649 (1956). Third, even if the restructuring agreement were modified, the loan agreements as a whole would be modified only with respect to the manner of repayment, which did not expose Stead to greater liability. *See Midway Nat'l Bank v. Gustafson*, 282 Minn. 73, 79, 165 N.W.2d 218, 223 (1968). Thus, Stead could not establish his modification-of-suretyship defense to Andrews's breach-of-contract claim, even if we were to assume that he entered into the loan agreement as a surety.

Stead attempts to prevail on appeal by emphasizing Andrews's trial testimony that Bruntjen "threw [Stead] under the bus" when he caused TCREP to transfer to SAREC some of the properties identified in the restructuring agreement to satisfy other debts. That part of Andrews's testimony may have dramatic flair, but it does not compel reversal of the district court's decision. Andrews's characterization of Bruntjen's actions is consistent with the district court's statement that Bruntjen made a choice to use the properties owned by TCREP to discharge other debts rather than to satisfy the loan that Andrews made on November 8, 2010. The record plainly shows that all of the parties were at risk between November 2010 and February 2011 and were well aware of it.

Andrews knew that Bruntjen and TCREP were in a precarious financial condition when he made the loan in November 2010, in part because Bruntjen already was in default on other loans that Andrews had made to him. Andrews sought to minimize his risk by insisting that Stead sign the November 8, 2010 promissory note. It is not difficult to understand why Andrews sought repayment of the loan from Stead. Andrews's "under the bus" comment while on the witness stand does not transform Bruntjen's actions or Andrews's actions into something unjustified, as Stead repeatedly suggests.

In sum, the record supports the district court's determination that Stead is obligated by the terms of the promissory note to repay the loan that Andrews made on November 8, 2010, and that his obligation is not relieved by a modification of the parties' agreements.

II.

Stead also argues that the district court erred by rejecting his defense that Andrews breached the implied covenant of good faith and fair dealing by causing Bruntjen to "throw [him] under the bus."

"Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (internal quotation marks omitted). The trial record provides ample support for the district court's determination that Andrews did not hinder Stead's performance under the contract. The promissory note and the restructuring agreement allowed the loan to be satisfied in either of two ways: the transfers of assets by

November 30, 2010, or the payment of cash by February 8, 2011. Andrews did not take any action that prevented Stead from paying off the loan with cash. Furthermore, "A party to a contract does not act in bad faith by asserting or enforcing [his] legal and contractual rights," *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998) (quotation omitted), and we already have determined that Andrews merely exercised his contractual right to obtain repayment of the loan by Stead.

In sum, the district court did not err by rejecting Stead's argument that Andrews breached the implied covenant of good faith and fair dealing.

Affirmed.

SMITH, Judge (dissenting)

I respectfully dissent for two reasons. First, I disagree with the majority's conclusion that Andrews and Bruntjen never reached an agreement to modify the restructuring agreement. In particular, I would hold that the restructuring agreement did not cease to operate after what the majority characterizes as the November 30 deadline because Andrews and Bruntjen agreed to extend and modify it. Delay in performance of a contract does not automatically nullify it. *Cf. Melco Inv. Co. v. Gapp*, 259 Minn. 82, 84-85, 105 N.W.2d 907, 909 (1960) (recognizing that a contract party with option to terminate a contract after a deadline for performance must take "some positive act to manifest his intention to terminate the contract"). The record establishes that, rather than terminating the restructuring agreement, Andrews worked with Bruntjen to extend and modify it while excluding Stead. The district court found that Stead "relied upon Bruntjen's statements that he and Andrews 'were working at revising some of the provisions of the Restructuring Agreement.'" The record demonstrates that, on November 30, Andrews offered modified terms for the restructuring agreement by email, stating that the transfer of four of the five properties in the original restructuring agreement would repay Andrews "for the 131,000 [he] had to lay out." Viewing this in combination with Bruntjen's ultimate transfer of those properties to the entity specified by Andrews, I would hold that this shows that Andrews and Bruntjen agreed to modify the restructuring agreement, and that their failure to obtain Stead's consent to the modified terms therefore released him from his obligation to repay the loan.

Second, I would hold that, even if Andrews and Bruntjen's actions were not a modification of the restructuring agreement, they were violations of the implied covenant of good faith and fair dealing that is a part of every contract. "Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). Bruntjen testified that, in the dying days of TCREP, he transferred the properties as Andrews directed, assuming that they would satisfy the $131,000 loan. Andrews directed and accepted these transfers, crediting the value of the transferred properties to other debts in a manner calculated to leave Stead on the hook for the $131,000 loan. The effect of the transfers was therefore to eliminate the option to transfer them under the terms of the restructuring agreement, all the while failing to notify Stead or obtain his consent. By thus removing Stead's option to ensure that the loan was repaid by transferring properties rather than cash, I would hold that Andrews and Bruntjen hindered Stead's ability to perform under the contract and that Stead is therefore released from his obligation to repay the loan.

The "dramatic flair" that the majority dismisses in Andrews's testimony underscores the dramatic effect of Andrews's actions. If Andrews and Bruntjen had made a different choice, such as making a different allocation or including Stead in the negotiations, the properties as the alternative form of payment would have been available to satisfy the obligation that Stead committed to fulfill. Throwing Stead "under the bus"

without notice and without consultation dramatically changed the basis of the underlying agreement.

I would also hold that Andrews and Bruntjen violated the implied covenant of good faith and fair dealing at a more fundamental level. In the contracting context, "good faith is simply the honest belief that [one's] conduct is rightful." *Wohlrabe v. Pownell*, 307 N.W.2d 478, 483 (Minn. 1981) (quotation omitted). Andrews testified that he and Bruntjen jointly "threw [Stead] under the bus" and that Stead "was going to get stuck on the $131[,000] one way or the other." This is an acknowledgment by Andrews that he knew his conduct was not rightful, but rather was calculated to exploit Stead's noninvolvement in the ongoing negotiations and transactions between Andrews and Bruntjen. I would hold that this willfully wrongful behavior violated the implied covenant of good faith and fair dealing and that it released Stead from any obligation under the contract.