An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-855

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

WEINBRENNER SHOE COMPANY, INC.,
Plaintiff

v.

Mecklenburg County
No. 03 CVS 21771

STEVEN GILLIS, WILLIAM R. SCOTT and SAL LICITRA,
Defendants.

Appeal by Defendant Steven Gillis from an order entered 3 February 2005 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 March 2006.

Horack, Talley, Pharr & Lowndes, P.A., by William B. Hamel and John W. Bowers, for Plaintiff-Appellee.

Hamilton, Fay, Moon, Stephens, Steele & Martin, PLLC, by David G. Redding, for Defendant-Appellant Steven Gillis.

STEPHENS, Judge.

Weinbrenner Shoe Company ("Plaintiff") is a Wisconsin corporation in the business of manufacturing shoes and other footwear. At all times pertinent hereto, Record Industrial Company, Inc. ("RICO") was a North Carolina corporation in the business of selling shoes and other footwear. Steven Gillis ("Defendant"), William R. Scott and Sal Licitra were shareholders in RICO who, prior to 23 January 1995, approached Plaintiff to obtain financing for RICO's business operations, which Plaintiff agreed to extend. Pursuant to a "Note" dated 23 January 1995, RICO borrowed $200,000.00 from Plaintiff with interest to accrue at a rate of prime plus one point five percent per year. On that same

day, pursuant to a separate "Inventory Note," RICO borrowed an additional $100,000.00 related to the sale of inventory from Plaintiff, with the same interest terms. Each document set forth RICO's repayment obligations. RICO fully and timely complied with the schedule for payment of these two loans.

In addition, pursuant to a Loan and Security Agreement ("Agreement"), RICO agreed to purchase additional footwear from Plaintiff at certain levels in the years following Plaintiff's extension of the cash and inventory loans. From 1996 to and including 2001, RICO purchased footwear products from Plaintiff for which RICO failed to pay all sums due. RICO is no longer in business.

On 30 December 2003, Plaintiff filed a verified complaint alleging that Defendant, Scott and Licitra were jointly and severally liable for the products RICO purchased but did not pay for, as well as accrued and continuing interest and attorney fees. On 2 March 2004, Defendant and Licitra filed an answer[1] in which they admitted that RICO, in its corporate capacity, purchased products from Plaintiff for which RICO failed to pay all sums due Plaintiff, but denied that they were personally liable for any debt of RICO other than the loan amounts covered by the cash and inventory notes, both of which had been fully paid.

On 15 November 2004, Plaintiff moved for summary judgment. On 3 February 2005, the Honorable Robert P. Johnston allowed

[1] No Answer was filed on behalf of William R. Scott, nor has he otherwise made any appearance in this case.

Plaintiff's motion on the issue of Defendant's, Scott's and Licitra's liability for payment of the balance owed Plaintiff, but denied the motion on the amount of damages. The parties then entered into a joint stipulation as to the amount of damages, and on 7 February 2005, Judge Johnston entered a judgment against Defendant, Scott and Licitra, jointly and severally, in the principal amount of $186,301.12, together with interest in the amount of $206,610.35 and attorney fees in the amount of $58,936.72. Defendant, through counsel, timely gave notice of appeal to this Court.[2] For the reasons stated herein, we affirm the trial court's determination.

The dispositive question on this appeal is whether the "Guaranty" executed by Defendant created a continuing guaranty to pay the open account debts incurred by RICO for additional inventory after the original cash and inventory notes were paid off. Plaintiff argues that the plain language of the Guaranty, as well as the terms of the contemporaneously executed Loan and Security Agreement, unambiguously establish a continuing guaranty that Defendant would be responsible for payment of RICO's ongoing debts. Defendant argues that the Guaranty is ambiguous and does not contain sufficient language to establish a legally binding continuing guaranty. We agree with Plaintiff and therefore hold that summary judgment for Plaintiff on the liability issue was proper as a matter of law.

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[2] Prior to the filing of the notice of appeal, Licitra sought protection under Chapter 7 of the United States Bankruptcy Code, and he has not participated in this appeal.

North Carolina law governing summary judgment motions is well-settled. A motion for summary judgment should be granted when, considering the evidence in a light most favorable to the non-moving party, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2005); *Carolina Water Serv., Inc. v. Town of Atl. Beach*, 121 N.C. App. 23, 27, 464 S.E.2d 317, 320 (1995), *disc. review denied*, 342 N.C. 894, 467 S.E.2d 901 (1996). "The party moving for summary judgment has the burden of clearly establishing a lack of any triable issue of fact by the record proper before the court." *Jennings Communication Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 639, 486 S.E.2d 229, 231 (1997). The appellate court's review of a trial court's entry of summary judgment is *de novo*. *Cater v. Barker*, ___ N.C. App. ___, 617 S.E.2d 113, 116 (2005), *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (No. COA04-795) (Filed Mar. 3, 2006).

In this case, the trial court found Defendant liable as a matter of law under the terms of the parties' Guaranty. "A guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor." *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602, *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). Since a guaranty is a contract between the parties, *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978), "[t]he enforceability of the guarantor's promise is determined primarily by the law of contracts." *Gillespie v. De Witt*, 53 N.C. App. 252,

259, 280 S.E.2d 736, 741, *disc. review denied,* 304 N.C. 390, 285 S.E.2d 832 (1981). We thus apply the principles of contract construction in our interpretation of the terms of the Guaranty at issue.

"A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction." *Carolina Place Joint Venture v. Flamers Charburgers, Inc.,* 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001) (citing *Jennings Communications Corp.*, 126 N.C. App. at 641, 486 S.E.2d at 232). When the language of a contract is clear and unambiguous, no genuine issue of material fact exists and construction of the contract is a matter of law for the court. *Id.; see also Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). "It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hagler,* 319 N.C. at 294, 354 S.E.2d at 234 (quoting *Hartford Accident & Indem. Co. v. Hood,* 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)). Moreover, all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what the parties undertook or intended. *Carolina Place Joint Venture,* 145 N.C. App. at 699, 551 S.E.2d at 571; *see also Yates v. Brown,* 275 N.C. 634, 640-41, 170 S.E.2d 477, 482 (1969) (holding that the negotiable note at issue in that case must be construed together with the writing on the back of the note and the

assignment and transfer contained in a separate document: "This is not varying the written contract. It is a construction of the written contract in its entirety." (citations omitted)).

In this case, the pertinent terms of the parties' Guaranty are as follows:

> 1. Guarantor hereby jointly and severally unconditionally and irrevocably guarantees to Weinbrenner the full and prompt payment and performance of all Liabilities, when and as the same become due from time to time, whether by lapse of time, acceleration or otherwise.
>
> As used in this Guaranty, "Liabilities" shall mean *all debt* owed by Debtor to Weinbrenner and *outstanding from time to time*, all interest thereon and all other sums which may or shall become due and payable pursuant thereto or to any other document executed in connection therewith.
>
> 2. In the event of any default by Debtor in making payment of any part of the Liabilities as it becomes due, Guarantor agrees, on demand by Weinbrenner, to pay *all sums due*, . . .
>
> . . . .
>
> 4. . . . it being the intent hereof that Guarantor shall remain liable as principal for performance of the obligations guaranteed hereby until all Liabilities now *or hereafter due* has [sic] been paid in full, . . .
>
> . . . .
>
> 6. This is an absolute, present and *continuing guaranty* of payment and performance and not of collection.
>
> . . . .
>
> 8. The obligations of Guarantor under this Guaranty *shall continue* in full force and effect until such time as *all* sums. . .due and payable to Weinbrenner under the terms of the Note *or any other document executed in*

> *connection therewith* have been indefeasibly paid in full.

(Emphasis added).

We believe that the following terms in the "Definitions" section of the Loan and Security Agreement, the "other document executed in connection" with the notes and the Guaranty, are pertinent to our disposition of the issue before us:

> "*Guarantors"* shall mean Russ Scott, Steve Gillis, and Sal Licitra.
>
> "*Guaranty*" shall mean the *continuing* unconditional guaranties referred to in Section IV . . . pursuant to which each Guarantor unconditionally guarantees *all obligations* owed by Borrower [RICO] to Lender [Plaintiff].
>
> . . . .
>
> "*Obligations*" shall mean and include *all loans, advances, debts, liabilities, obligations, covenants and duties owing, arising, due or payable from Borrower to Lender of any kind or nature, present or future, whether or not evidenced by any note, guaranty or other instrument, whether arising under this Agreement, the Note, or under the other Loan Documents or otherwise, . . . due or to become due, now existing or hereafter arising however acquired*.

(Emphasis added). In Section 4, "Guaranty" is defined to mean that "each Guarantor shall unconditionally guarantee the payment in full of *all Obligations* of Borrower owed to Lender . . . under this Agreement or the other Loan Documents." (Emphasis added).

We agree with Plaintiff and the trial court that the language of the Guaranty, standing alone, creates a continuing liability for the guarantors to be responsible for payment of RICO's debts. In *Amoco Oil Co.*, 78 N.C. App. at 720, 338 S.E.2d at 603, this Court

found a continuing guaranty where the "guaranty expressly states that it is a continuing guaranty." The actual language in *Amoco Oil Co.* was "[t]his instrument shall be considered as a general and continuing guaranty." *Id.* at 719, 338 S.E.2d at 603. In the instant case, the Guaranty states that "[t]his is an absolute, present *and continuing* guaranty of payment and performance[.]" (Emphasis added). The language of the instant Guaranty is virtually identical to the language in *Amoco Oil Co.* Indeed, this case cannot be rationally distinguished from *Amoco Oil Co.* Here, as in *Amoco Oil Co.*, "[t]he clear language of the guaranty rules." *Id.* at 720, 338 S.E.2d at 603.

We also agree with Plaintiff that the contemporaneously executed Loan and Security Agreement makes it clear that the guaranty was intended to be continuing in nature, "to enable the principal debtor to have credit over an extended time and to cover successive transactions." *Id.* In fact, consideration for the Agreement included "extensions of credit now or hereafter made" by Plaintiff to RICO. Further, the Agreement specifically and plainly defined its guaranty terms as "continuing" and expressly described the responsibility of each guarantor under the Guaranty to pay "*all*" obligations. Such obligations are broadly defined to include all debts, liabilities and obligations, "of any kind or nature," present "or future," "now existing or hereafter arising." Moreover, the Agreement specifically contemplated that there would be an ongoing debt relationship between RICO and Plaintiff by setting out a future purchase schedule, which included accelerating

amounts of footwear for each succeeding year and provided for penalties if RICO did not meet its obligation to purchase such amounts from Plaintiff. Plaintiff's intent to secure the payment of these ongoing debts is evidenced by Plaintiff's insistence on defining "Liabilities" under the Guaranty to mean "*all debt* owed by Debtor to Weinbrenner and outstanding from time to time[.]" That Defendant agreed to this language, in lieu of the language originally drafted by Defendant's attorney which limited the definition of liabilities to "all principal of the Note outstanding from time to time," unequivocally establishes that Defendant acquiesced in the creation of a continuing guaranty of payment of RICO's debts.

For these reasons, we reject Defendant's argument that the Guaranty terminated upon payment of the cash and inventory notes and hold that the trial court properly granted summary judgment for Plaintiff on the issue of Defendant's liability to Plaintiff for payment of the outstanding debts.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).