Affirmed and Memorandum Opinion filed September 13, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00597-CV

STEPHEN MICHAEL YAMIN, SR., Appellant

V.

CARROLL WAYNE CONN, L.P., Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2009-05065

MEMORANDUM OPINION

This appeal arises from a suit between landlord and guarantor. The landlord sued on a guaranty agreement when the tenant defaulted on the lease. The guarantor claimed that the suit was barred by the statute of limitations. Both parties moved for summary judgment, and judgment was ultimately granted in favor of the landlord. On appeal, the guarantor contends the trial court erred in finding (1) that the landlord's petition was timely, and (2) that the lease had been reinstated by the conduct of the parties. We affirm.

BACKGROUND

In November 2002, appellee Carroll Wayne Conn, L.P. ("Landlord") executed a lease of commercial property with Junior Motorcycles of Houston, LLC, d/b/a Yamin Motorcycles ("Tenant"). When Tenant defaulted on the lease, Landlord and Tenant entered into a Stipulation and Agreement, in which Tenant agreed to pay its arrearage under a prescribed schedule. Tenant defaulted under that schedule, and the lease was subsequently terminated.

In June 2004, Landlord and Tenant entered into a Letter Agreement that reinstated the lease on a month-to-month basis.[1] As a condition to the Letter Agreement, appellant Stephen Michael Yamin, Sr. executed a continuing guaranty to Landlord. Under the terms of the Guaranty Agreement, Yamin absolutely and unconditionally guaranteed all past and future obligations of Tenant arising out of the lease, including "any and all renewals, extensions, amendments, expansions and modifications thereof." The lease was terminated on September 30, 2004, when Tenant defaulted under the terms of the Letter Agreement.

On October 6, 2004, Landlord served Tenant with a Notice of Lease Termination and Demand to Vacate. In the demand letter, Landlord claimed a lien on all property located on the premises. The letter further stated that if Tenant did not vacate by the following day, Landlord would be forced to take "immediate legal action to gain possession of the leased premises and to enforce agreements guaranteeing the performance of the Lease Agreement." Tenant did not vacate. On October 8, 2004, a second letter was served informing Tenant that Landlord would take appropriate legal action to evict Tenant from the premises and to collect on the outstanding debt.

[1] Also listed as Tenant under the Letter Agreement were additional commercial entities owned by appellant, including Junior of Houston, LLC, and Junior Motorcycle of South Houston, LLC, both doing business as Yamin Motorcycles, S.M.J. of Houston, LLC.

Notwithstanding the threat of eviction, Tenant remained in possession of the premises and continued to make payments on the arrearage. Because of this ongoing relationship, Landlord and Tenant entered into a second Letter Agreement on May 2, 2005. Under the conditions of this agreement, Landlord agreed to reinstate the lease for the balance of its original term if, among other things, Tenant adhered to a strict repayment of rent by July 1, 2005. Tenant failed to timely make the required payments.

On July 28, 2005, Tenant filed a Chapter 7 bankruptcy case with the United States Bankruptcy Court for the Southern District of Texas. The bankruptcy filing stayed any action by Landlord to enforce the terms of the lease, allowing Tenant to remain in possession of the leased premises until May 2006. *See* 11 U.S.C. § 362 (West 2004).

On January 29, 2009, Landlord filed suit against Yamin in his capacity as guarantor. In his answer, Yamin did not deny his execution of the Guaranty Agreement, nor the amount of indebtedness claimed by Landlord. Instead, Yamin claimed that Landlord's suit was barred by the applicable four-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3) (West 2008). Both parties filed competing motions for summary judgment. The trial court granted judgment in favor of Landlord. Yamin timely appealed.

ISSUES PRESENTED

In his first issue, Yamin contends the trial court erred when it decided that Landlord's suit was not barred by the statute of limitations. In his second issue, Yamin contends the summary judgment evidence failed to show that the lease was reinstated as a matter of law. Yamin argues that he conclusively established his affirmative defense of statute of limitations, and therefore, he asks that we reverse and render judgment on his behalf.

STANDARD OF REVIEW

A party moving for summary judgment must conclusively prove all elements of its cause of action or defense as a matter of law. Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). When both parties move for summary judgment and the trial court grants one motion but denies the other, we review the evidence produced by each party, determine de novo all questions presented, and render the judgment the trial court should have rendered. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010); *U.S. Denro Steels, Inc. v. Lieck*, No. 14-09-01008-CV, 2011 WL 1252090, at *3 (Tex. App.—Houston [14th Dist.] Apr. 5, 2011, pet. denied). Moreover, a party moving for summary judgment on the basis of limitations carries the burden of proving when the cause of action accrued. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001); *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990)

LANDLORD'S MOTION FOR SUMMARY JUDGMENT

Landlord sued Yamin to collect a debt secured by a continuing guaranty. A guaranty is a promise to a creditor by a third party to pay a debt on behalf of a principal in the event that the principal defaults on the original obligation. *See Republic Nat'l Bank of Dallas v. Nw. Nat'l Bank of Fort Worth*, 578 S.W.2d 109, 114 (Tex. 1978). A continuing guaranty covers a series of transactions, rather than just a single liability. *See Sonne v. FDIC*, 881 S.W.2d 789, 793 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Mann v. NCNB Tex. Nat'l Bank*, 854 S.W.2d 664, 667 (Tex. App.—Dallas 1992, no writ). It contemplates a future course of dealing between creditor and principal, and generally continues for an indefinite amount of time or until revoked. *See Straus-Frank Co. v. Hughes*, 156 S.W.2d 519, 520 (Tex. 1941); *Blount v. Westinghouse Credit Corp*., 432 S.W.2d 549, 553 (Tex. Civ. App.—Dallas 1968, no writ). Thus, with a continuing guaranty, the guarantor becomes liable for successive obligations as they accrue. *Sonne*, 881 S.W.2d at 793.

To support a claim on a guaranty, a party must show proof of (1) the existence and ownership of a guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform by the guarantor. *Lee v. Martin Marietta Materials Sw., Ltd*., 141 S.W.3d 719, 720 (Tex. App.—San Antonio 2004, no pet.).

Attached to its motion for summary judgment, Landlord submitted the sworn affidavit of Mark Fertitta, property manager for Landlord. In his affidavit, Fertitta attested that Tenant was indebted to Landlord in the amount of $316,294.66, plus reasonable attorney's fees, for liabilities arising out of the non-payment of rent. Fertitta also attached as an exhibit the Guaranty Agreement between Landlord and Yamin. In pertinent part, the Guaranty Agreement contains the following provisions:

> FOR VALUE RECEIVED, Guarantor hereby unconditionally, irrevocably and absolutely guarantees to Landlord without demand the prompt and full payment and performance, when due, of all obligations and covenants of [Tenant], fixed or contingent, arising out of the Lease Agreement . . . .
>
> 1. CONTINUING GUARANTY. This is a continuing Guaranty and shall apply to any renewals, extensions, and modifications of the Lease, regardless of whether such renewals, extensions or modifications are made with or without Guarantor's prior written consent.
>
> 2. OTHER REMEDIES. Landlord shall not be required to pursue any other remedies before invoking the benefits of this Guaranty; specifically, Landlord shall not be required to take any action against Tenant or any other person, to exhaust its remedies against any other guarantor of the Obligations, any collateral or other security, or to resort to any balance of any deposit account or credit on the books of Landlord in favor of Tenant or any other person.
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> 4. MODIFICATION OR CONSENT. . . . No notice to or demand on Guarantor in any case shall, of itself, entitle Guarantor to any other or further notice or demand in similar or other circumstances. No delay or omission by Landlord in exercising any power or right hereunder shall

> impair any such right or power or be construed as a waiver thereof or any acquiescence therein . . . .
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> * * *
>
> 10. GUARANTY TO BE ABSOLUTE. Guarantor expressly agrees that until the Lease is performed in full and each and every term, covenant and condition of this Guaranty is fully performed, Guarantor shall not be released by or because of: (a) any act or event which might otherwise discharge, reduce, limit or modify Guarantor's obligations under this Guaranty; (b) any waiver, extension, modification, forbearance, delay or other act or omission of Landlord, or its failure to proceed promptly or otherwise as against Tenant, Guarantor or any security; (c) any act, omission or circumstance which might increase the likelihood that Guarantor may be called upon to perform under this Guaranty or which might affect the rights or remedies of Guarantor as against Tenant; or (d) any dealings occurring at any time between Tenant and Landlord, whether relating to the Lease or otherwise. Guarantor hereby expressly waives and surrenders any defense to his liability under this Guaranty based upon any of the foregoing acts, omissions, agreements, waivers or matters. It is the purpose and intent of this Guaranty that the obligations of Guarantor under it shall be absolute and unconditional under any and all circumstances.

The summary judgment evidence accordingly shows that (1) Yamin executed a guaranty; (2) under the terms of that guaranty, Landlord could seek relief from Yamin without first asserting an action against the principal debtor; (3) Tenant defaulted under the lease as modified and amended; and (4) the liability created by that default had not been paid at the time of suit. Yamin does not controvert or otherwise dispute any of these facts. Thus, Landlord was entitled to summary judgment unless Yamin raised some fact issue regarding his limitations defense.

YAMIN'S MOTION FOR SUMMARY JUDGMENT

Yamin moved for summary judgment on the basis of limitations. Because the statute of limitations is an affirmative defense, Yamin was required to prove when the cause of action accrued before being entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 94; *Holy Cross Church*, 44 S.W.3d at 566; *Burns*, 786 S.W.2d at 267.

A person must bring suit on a debt no later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3). When a cause of action accrues is normally a question of law for the court to decide. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). A cause of action generally accrues when facts come into existence that authorize a claimant to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003); *Gabriel v. Alhabbal*, 618 S.W.2d 894, 896 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Usually, a cause of action for the breach of a promise to pay arises when a demand for payment has been made and refused. *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

In determining when Landlord's cause of action began to accrue, we must look first to the terms of the guaranty. *See Hopkins v. First Nat'l Bank at Brownsville*, 551 S.W.2d 343, 345 (Tex. 1977) (per curiam); *Wiman v. Tomaszewicz*, 877 S.W.2d 1, 5 (Tex. App.—Dallas 1994, no writ). Under his agreement, Yamin promised "unconditionally, irrevocably and absolutely" to pay any debt arising out of the lease between Landlord and Tenant. Yamin assumed primary liability on the lease, and agreed that Landlord would not have to pursue any other remedy before invoking the benefits of the guaranty. The guaranty accordingly contains no terms prescribing when, or the method in which, Landlord must assert a claim for payment. In fact, no part of the agreement indicates that demand is an integral part of Landlord's right to relief. *Cf. Mid-South Telecomms. Co. v. Best*, 184 S.W.3d 386, 391 (Tex. App.—Austin 2006, no pet.) (construing a guaranty agreement with similar terms).

Yamin argues, however, that a demand on the guaranty was made, and that it triggered the accrual of the cause of action more than four years before the filing of Landlord's suit. Proceeding on two different theories, Yamin contends in his first issue that (a) the letter to vacate constituted a demand on the guaranty, and (b) in the

alternative, demand was automatic upon termination of the lease. We examine each of these arguments in turn.

With regard to his first argument, Yamin claims that Landlord made a demand on the guaranty in the letter dated October 6, 2004. That letter is entitled "Notice of Lease Termination and Demand to Vacate." In the letter, Landlord "demands that [Tenant] vacate immediately and turn over the keys to the leased premises." Landlord further advises that Tenant's failure to vacate "will result in immediate legal action to gain possession of the leased premises and to enforce agreements guaranteeing the performance of the Lease Agreement." The letter only alludes to the possibility of demand on the guaranty. It does not actually demand payment from Yamin in his capacity as guarantor. Therefore, we do not construe the letter as a demand on the guaranty.[2]

Regarding the second argument, Yamin contends that Landlord's cause of action accrued on September 30, 2004, the date of the lease termination, because, as he claims, demand is "automatic upon default of the Tenant." Yamin does not supply any authority for this proposition. Instead, he argues that demand was waived under the express terms of the Guaranty Agreement.

When construing a guaranty agreement, our primary goal is to ascertain and give effect to the intent of the parties. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Hasty v. Keller HCP Partners, L.P.*, 260 S.W.3d 666, 670 (Tex. App.—Dallas 2008, no pet.). The surest guide to the parties' intent is the language used in the guaranty, and where the language is clear and unambiguous, we may not look to the subject matter or attending circumstances in order to give it a different construction. *See Univ. Sav. Ass'n v. Miller*, 786 S.W.2d 461, 462 (Tex. App.—Houston [14th Dist.] 1990, writ denied);

[2] We do not consider the second letter dated October 8, 2004 a demand on the guaranty either. It makes no reference to the Guaranty Agreement, and merely states that Landlord will take legal action to evict Tenant from the premises and collect the outstanding debt.

Sw. Sav. Ass'n v. Dunagan, 392 S.W.2d 761, 767 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

Yamin argues that proof of waiver is evidenced by the following provision in the Guaranty Agreement: "Guarantor hereby unconditionally, irrevocably and absolutely guarantees to Landlord *without demand* the prompt and full payment and performance, when due, of all obligations and covenants . . . ." (emphasis added). We do not construe this language as effectuating an automatic demand upon the termination of the lease. The terms of the provision are unambiguous and demonstrate that the waiver of demand is acting solely upon Yamin's promise to pay, not Landlord's right to relief. No part of this provision indicates that Landlord is waiving demand as a condition precedent to the right to sue. Indeed, paragraph four of the guaranty establishes the opposite—that no delay or omission by Landlord in exercising a right under the guaranty should be construed as a waiver of such right. We overrule appellant's first issue.

In his second issue, Yamin argues that the statute of limitations began to run on September 30, 2004 because the lease was never reinstated by the conduct of the parties. For this proposition, Yamin relies on the terms of the 2005 Letter Agreement, which was the last contract that addressed the reinstatement of the lease. In the 2005 Letter Agreement, Landlord and Tenant agreed that the lease would be reinstated to the balance of its original term if Tenant signed the agreement and delivered a series of payments according to the following schedule: (a) $1,500 by May 3, 2005; (b) $20,000 by May 9, 2005; (c) half of the arrearage owed on the Lease Agreement, but not less than $65,000, by June 1, 2005; and (d) the remaining balance on the Lease Agreement, but not less than $65,000, by July 1, 2005. Because Tenant signed the agreement but failed to timely make the required payments in full,[3] Yamin argues that the lease was never reinstated, and

[3] The summary judgment evidence shows that Tenant paid $10,000 on May 25, 2005; $22,000 on June 23, 2005; and $22,000 on July 7, 2005.

therefore, that Landlord's cause of action necessarily accrued on the earlier date of termination.

Yamin's argument is unpersuasive for at least two reasons. First, it incorrectly assumes that the limitations on the Lease Agreement is concurrent with the limitations on the Guaranty Agreement. Whenever a creditor is permitted to sue a guarantor without first suing the principal, the guarantor cannot defend an action to recover on a promise to pay by showing that the claim against the principal is barred by the statute of limitations. *Ocean Transport, Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 267 (Tex. App.—Corpus Christi 1994, writ denied); *Beddall v. Reader's Wholesale Distribs., Inc.*, 408 S.W.2d 237, 240 (Tex. Civ. App.—Houston 1966, no writ). The operation of the statute of limitations on the principal obligation does not affect a guarantor's duty and is not a defense available to the guarantor unless it has also operated on his own promise of guaranty. *Wiman*, 877 S.W.2d at 5. But no provision in the Guaranty Agreement suggests that the statute of limitations against Tenant should also operate against Yamin's personal promise to pay. Thus, the failure of Tenant to reinstate the lease has no direct bearing on Landlord's right to pursue legal action against Yamin.

Second, even though the lease was never reinstated, Yamin's argument ignores that the 2005 Letter Agreement constituted a modification of the lease terms. Under his continuing guaranty, Yamin agreed to guarantee all obligations arising from "any and all renewals, extensions, amendments, expansions and modifications" of the lease. It is clear from the guaranty that Yamin intended for Landlord and Tenant to freely negotiate these future agreements in order to facilitate an ongoing business relationship: Yamin's guaranty extends to all future obligations, even those obtained without his consent as guarantor. The guaranty accordingly manifests Yamin's intent to guarantee all obligations arising under the 2005 Letter Agreement, which included payments on the arrearage. Because the 2005 Letter Agreement was executed within four years of

Landlord's original petition, Yamin cannot show as a matter of law that his affirmative defense applied. We overrule Yamin's second issue.

CONCLUSION

The judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Anderson, Brown, and Christopher.