# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-16-00054-CV**

**Bruce Rampick, Appellant**

**v.**

**ZDS Holdings, LLC, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT**
**NO. D-1-GN-14-004208, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

Bruce Rampick appeals the trial court's summary judgment in favor of ZDS Holdings, LLC, on its breach-of-guaranty claim against him. Rampick and the sole member and manager of ZDS, Zach Strief, had each executed personal guaranties on a small-business loan that their restaurant business (SRBR) obtained from American Bank of Commerce. After SRBR defaulted, the bank accelerated the note; foreclosed on the note; and then sued SRBR, Rampick, and Strief to recover the remaining balance on the note. While that litigation was pending, the bank assigned and sold all of its right, title, and interest in the note, including the Rampick guaranty, to ZDS for consideration equaling the amount of the outstanding indebtedness. On appeal, Rampick contends that instead of an assignment of the note and guaranty, the ZDS payment to the bank constituted an extinguishment of the note and that he is, therefore, no longer personally liable on it. We will affirm the trial court's final summary judgment.

## DISCUSSION[1]

In his sole appellate issue, Rampick contends that the trial court erred in granting ZDS summary judgment. He argues that: (1) the summary-judgment evidence established that his guaranty to the bank was non-assignable; (2) because ZDS, wholly owned by Strief, was not a "stranger" to the assignment transaction, it was not entitled to any presumption that the transaction was, indeed, an assignment rather than a payment of the debt; and (3) the evidence created a fact issue on whether the note obligation had been extinguished prior to its assignment to ZDS. We will address each argument in turn.[2]

In support of his first argument, Rampick cites one sentence of his guaranty agreement with the bank (which was submitted as summary-judgment evidence): "[Rampick] unconditionally guarantees *payment to Lender* of all amounts owing under the Note." (Emphasis added.) He contends that this statement necessarily means that the guaranty was non-assignable and that it obligated Rampick to pay *only* the bank and no other party, such as ZDS. However, further on in the same guaranty agreement the following language appears: "Under this Guarantee, Guarantor includes heirs and successors, and *Lender includes its successors and assigns*." (Emphasis added.) There are no provisions in the guaranty agreement expressly prohibiting assignment thereof. The general rule in Texas is that all contracts are freely assignable unless the contract expressly provides otherwise. *See In re FH Partners, L.L.C.*, 335 S.W.3d 752, 761 (Tex. App.—Austin 2011,

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[1] Because the parties are familiar with the facts, procedural background, and relevant standards of review, we dispense with a recitation of them here except as necessary to explain the reasons for our decision. *See* Tex. R. App. P. 47.4.

[2] We address Rampick's sub-issues in an order different than that of his brief.

no pet.); *see also State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 705–07 (Tex. 1996) (noting that right to receive payment on debt has long been considered among types of rights that Texas law deems freely assignable). Because the guaranty agreement provides that "Lender" includes its "assigns" and does not expressly prohibit assignment of the agreement, the summary-judgment evidence conclusively establishes that Rampick's guaranty *was* assignable. *See In re FH Partners*, 335 S.W.3d at 761. We overrule Rampick's first sub-issue.

In his second sub-issue, Rampick contends that because ZDS is wholly owned by Strief, it was not a "stranger" or third party to the note and, therefore, ZDS is entitled to no presumption that the assignment transaction was a purchase rather than a payment and discharge of the note. *See Anderton v. Cawley*, 378 S.W.3d 38, 49 (Tex. App.—Dallas 2012, no pet.) (noting applicable rule of law that "when a third party pays the holder of a note, the transaction is presumed to be a purchase and not a payment and discharge of the note unless evidence shows the parties to the payment intended otherwise"). However, even assuming that ZDS would not be considered a true "third party," the presumption in *Anderton* would only apply in instances where the evidence did not conclusively establish an assignment (as is the case here); otherwise, there would be no need for a court to rely on a presumption. Furthermore, Rampick's apparent additional argument that a guarantor or one with whom he is in privity—i.e., someone who is not a "stranger" to a guaranty agreement—cannot purchase the note that he has guaranteed is plainly at odds with Texas law. *See Byrd v. Estate of Nelms*, 154 S.W.3d 149, 163–64 (Tex. App.—Waco 2004, pet. denied) (holding that guarantor can purchase underlying note and assert cause of action against co-guarantors

as assignee but is limited in recovery to each co-guarantor's contributive share). We overrule Rampick's second sub-issue.

With respect to his third argument, Rampick claims that a particular statement in Strief's affidavit is an admission that he or ZDS "paid off the note in full" *prior* to the assignment and that, therefore, the guaranty agreement at issue is unenforceable because it stated that it "shall remain in effect until the Note is paid in full." Rampick cites the following statement in Strief's affidavit: "Prior to trial, all of ABC Bank's right, title, and interest in and to the Note and all security and other documents executed in connection therewith, including, without limitation, the personal guaranty of Bruce Rampick, *were assigned to ZDS*, *for an amount equal to $431,015.32 (the then-outstanding balance due under the Note*). A true and correct copy of the February 19, 2014 Assignment of Promissory Note and Related Instruments . . . is attached hereto." (Emphasis added.) He contends that this statement at the very least creates a material fact issue about whether the note has been paid off and, therefore, whether such payment extinguished his guaranty and rendered it no longer enforceable. *See Commercial Servs. of Perry, Inc. v. Wooldridge*, 968 S.W.2d 560, 564 (Tex. App.—Fort Worth 1998, no pet.) (stating that necessary element of claim for breach of promissory note is that "a certain balance is due and owing on the note"); *see also Gold's Gym Franchising LLC v. Brewer*, 400 S.W.3d 156, 160 (Tex. App.—Dallas 2013, no pet.) (listing elements that plaintiff asserting breach-of-guaranty claim must establish). Rampick also contends that, although the statement conflicts with other statements in the affidavit, it is sufficient to create a fact issue. *See Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (holding that

conflicting statements in summary-judgment evidence made by same witness can raise fact issue). We disagree.

The statement that Rampick cites does not create a fact issue on whether ZDS's payment in consideration for the assignment "paid off" or extinguished the note prior to the assignment. Rather, the only reasonable inference to be drawn from the statement, as well as the exhibits attached to the affidavit, is that the note was assigned to ZDS for valid consideration, which consideration happened to be equal to the then-outstanding balance due on the note. There can be no reasonable conclusion from Strief's affidavit or any of the other evidence in the record that ZDS's payment to the bank *in consideration for the bank's assignment of the note* and its rights thereunder to ZDS constituted a payment of the note rather than an assignment for valid consideration. *See Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (noting that fact issue exists when reasonable and fair-minded people could differ in their conclusions drawn from evidence). There is no evidence in the record from which reasonable minds could conclude that the bank and ZDS intended anything other than for the transaction to be an assignment. *See Anderton*, 378 S.W.3d at 49. We overrule Rampick's third sub-issue.

## CONCLUSION

Having overruled Rampick's issues on appeal, we hold that the trial court did not err in granting ZDS's motion for summary judgment and, accordingly, affirm its final summary judgment.

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David Puryear, Justice

Before Chief Justice Rose, Justices Puryear and Pemberton

Affirmed

Filed: July 8, 2016