COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 95-3506

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

VULCAN MATERIALS COMPANY,

PLAINTIFF-RESPONDENT,

v.

STRIPE-N-SEAL CORPORATION,

DEFENDANT,

KENNETH M. NEIMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Kenneth M. Neiman appeals from a money judgment that Vulcan Materials Company obtained against him on a personal

guaranty. Neiman guaranteed payment of purchases his company made from Vulcan. Neiman contends that the trial court improperly denied a continuance of the trial, that the court erroneously denied his motion *in limine* to prohibit evidence regarding certain invoices issued by Vulcan, and that the court failed to strictly construe the terms of the guaranty. His arguments lack merit, and we affirm the judgment.

Neiman was the sole officer and shareholder of Stripe-N-Seal Corp. As president of the company, he submitted a credit application to Vulcan to allow the company to purchase gravel and other materials on account. Vulcan required that Neiman personally guarantee payment, and Neiman signed Vulcan's standard guaranty form after altering it. Neiman signed the guaranty in May 1992, and he testified that Stripe-N-Seal began purchasing from Vulcan at that time.

In September, October, and November 1992, Vulcan issued invoices to Stripe-N-Seal for materials picked up at Vulcan's quarry and for materials delivered to a Stripe-N-Seal job site. Vulcan claims that the invoices, totaling $3,531.93, were not paid.

Richard Mossey, credit manager for Vulcan, testified that efforts to collect for the invoices included monthly statements to Stripe-N-Seal and a demand letter, which was returned unclaimed. In addition, he testified that numerous telephone calls were made to discuss the matter with Neiman by either Mossey or his assistant. Mossey admitted, however, that he personally was not successful in reaching Neiman by telephone. Additional facts will be presented as necessary to the opinion.

DENIAL OF CONTINUANCE

Vulcan filed this collection action against both Stripe-N-Seal and Neiman. Early in the pre-trial stage, the court stayed proceedings when an involuntary bankruptcy petition was filed against Stripe-N-Seal. The case continued when the petition was dismissed. The court also adjourned the first trial date based on a physician's letter that Neiman was "advised not to participate in any physical [sic] or psychological [sic] stressful activities" for ten weeks. Counsel for Neiman and Stripe-N-Seal then withdrew, and Neiman was unable to obtain new counsel for himself or his company. The trial court later granted a second short adjournment to allow Neiman to secure counsel for the company. Shortly before the third trial date, Stripe-N-Seal filed bankruptcy, and Neiman's doctor sent another letter regarding Neiman's health. The court severed the claims against Stripe-N-Seal to allow the trial against Neiman to go forward.

Neiman moved for a continuance at the start of trial. In support of his motion, he argued that he was not capable of moving forward because of medical reasons and noted that the court had honored the physician's previous letter about his condition. The trial court denied the continuance, noting that the case had been pending for two years and litigation ought to be concluded. The court also indicated that Neiman had been advised of his role and responsibilities and that he appeared to be a knowledgeable litigant capable of representing himself and of engaging in discovery had he desired to do so. The court noted that a brief continuance had been granted to allow Stripe-N-Seal time to obtain counsel and that there had been no indication at that time of any lingering medical problems.

Essentially, Neiman argues that it was unfair for the trial court to force him to go to trial without counsel. A decision to grant or deny a continuance lies within the sound discretion of the trial court and will be set aside only if the

trial court erroneously exercised its discretion. ***Robertson-Ryan & Assocs., Inc. v. Pohlhammer***, 112 Wis.2d 583, 587, 334 N.W.2d 246, 249 (1983). An erroneous exercise of discretion occurs if the trial court fails to exercise its discretion or if it has no reasonable basis for its decision. ***Id.*** Here, the court properly exercised its discretion and presented a reasonable basis for its decision. There was no erroneous exercise of discretion.

Additionally, Stripe-N-Seal's voluntary bankruptcy did not stay the proceedings against Neiman. While Neiman argues correctly that the bankruptcy court may, "in unusual circumstances," enter an injunction against the non-bankrupt co-defendant of a bankrupt debtor in a Chapter 11 reorganization, *see* ***A.H. Robins Co. v. Piccinin***, 788 F.2d 994, 999 (4th Cir. 1986), he does not claim that Stripe-N-Seal obtained such an order. Therefore, the trial court was not precluded from severing the action and going forward as to Neiman.[1]

MOTION *IN LIMINE*

Counsel filed a motion *in limine* that, if granted, would have prevented Vulcan from presenting evidence to prove the amounts owed by Stripe-N-Seal. Immediately prior to trial, the trial court denied the motion.

Neiman challenges the trial court's decision. He claims that Vulcan should have sought recovery of the amounts owed on invoices from 1992 by filing a counterclaim in litigation in Illinois in which an entity related to Stripe-N-Seal

[1] Neiman's claim that a prior determination of Vulcan's claim against Stripe-N-Seal is a predicate to his liability goes to the merits of the claim against him, not to the court's ability to try the case.

sued Vulcan for amounts owed under a separate and distinct contract.[2] He argues that estoppel by record now prevents Vulcan from litigating any claim against Stripe-N-Seal for amounts owed from 1992. Although Neiman was not a party to the Illinois litigation, he argues that Vulcan should also have filed a third-party complaint naming him as a defendant.

Neiman's argument relies on a case that concludes the identity of parties and the identity of issues required for estoppel by record are met when a corporate employer is sued in one case and the principal employee is sued in a second case if the individual defendant actively participates in the first litigation. *See* ***Great Lakes Trucking Co. v. Black***, 165 Wis.2d 162, 170-71, 477 N.W.2d 65, 68 (Ct. App. 1991) (employee was president, licensed agent, custodian of business records, and signatory of all documents at issue). Neiman, however, overlooks the limitation on estoppel by record: it does not apply when a claim is asserted against an individual defendant that cannot be asserted against the employer. ***Id.*** at 172, 477 N.W.2d at 69. In the present case, liability under the guaranty rested only with Neiman; Vulcan had no action against Stripe-N-Seal on the guaranty. Therefore, the trial court did not err when it denied the motion *in limine*.

[2] Because the present case was pending and because of inadequate pleadings, the Illinois court specifically denied Vulcan an offset for the invoices involved in the present litigation and did not address the validity of Vulcan's claims under the invoices.

CONSTRUCTION OF THE GUARANTY

Neiman crossed out language from Vulcan's form guaranty before signing it. As printed, the guarantor promised to reimburse Vulcan for expenses of collection, including attorney fees, "with or without notice or demand." Neiman crossed out "or without" and capitalized "notice." He then wrote "out" over the change. He claimed that, as a result, personal notice was a condition precedent to his liability for the expenses of collection. Mossey testified, however, that he read the change to be "without Notice." The court's findings of fact did not resolve this ambiguity.

Neiman also struck the following language:

> [T]he undersigned waive(s) any right to require that any action be brought against the Borrower by Vulcan, and understands that the liability of the undersigned is direct and unconditional.
>
> The undersigned hereby waives formal acceptance of this guaranty, notice of the maturity of payments, notice of default of the Borrower and any and all other notices required by statute or otherwise.

He did not, however, strike the language that "[t]his instrument is a guarantee of payment and not of collection." In addition to the language discussed by Neiman, we also note that the document also contained the following language:

> Neiman personally guarantee(s) to Vulcan, … absolutely and unconditionally, the prompt and full payment of all of Borrower's liabilities, obligations and indebtedness to Vulcan whether past, present or future, direct or indirect, absolute or contingent, including, but not limited to all sums due to Vulcan on open account, accrued interest, and finance charges (hereinafter collectively called "Liabilities").

Neiman contends that Vulcan failed to establish that all conditions precedent to his liability on the guaranty were met. He argues that Vulcan had to prove its debt against Stripe-N-Seal before proceeding against him personally, that the guaranty required Vulcan to give him notice of the debt, that the guaranty was limited to the credit limit initially approved for Stripe-N-Seal, i.e., $2500, and that the invoices covered purchases by individuals who were not identified on the credit application as authorized to bind Stripe-N-Seal.[3]

Neiman is correct that Vulcan was required to prove the amounts owed by Stripe-N-Seal. It did so by introducing copies of the unpaid invoices and evidence that the invoices were for materials sold and that they were not paid. Thus, we interpret Neiman's argument to mean that he believes Vulcan was required to establish the claim in an action against Stripe-N-Seal. He bases this argument on the language he struck, i.e., he struck the waiver of the right to require a prior action against the borrower and the acknowledgment that liability was direct and unconditional.

Neiman's modification of the document was not sufficient, however, to create a requirement that Vulcan's claim against Stripe-N-Seal be reduced to

[3] Neiman also claims that the trial court should have dismissed Vulcan's claim because the guaranty failed to comply with § 241.27, STATS., by not including the following statement directly above the signature line: "Warning-this may obligate you to pay money." Section 214.27 applies to contracts benefiting a person or entity who furnishes goods, wares, or merchandise to "hawkers or peddlers." Neither "peddler" or "hawker' is defined in the statute, and we apply the common meaning of the terms. *See* ***State v. Ehlenfeldt***, 94 Wis.2d 347, 356, 288 N.W.2d 786, 790 (1980). The common meaning of "peddler" is one who travels about with goods or merchandise for sale or offers them for sale along the street or door to door. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1664, (Unabr. 3rd ed. 1976). Similarly, "hawker" is one who offers goods or merchandise for sale by calling out in the street. *See* ***id.*** at 1040, 2576. Neiman does not argue that Stripe-N-Seal is within the common meaning of either term. The trial court correctly rejected this argument.

judgment before Vulcan could sue on the guaranty. Neiman did not modify the language providing that payment, and not collection, was guaranteed. By its very nature, a guaranty of payment is an absolute promise to pay that entitles the creditor to recover immediately from the guarantor without first exhausting collection efforts against the debtor. ***First Wis. Nat'l Bank v. Kramer***, 74 Wis.2d 207, 212, 246 N.W.2d 536, 539 (1976). No effort to collect from the debtor is required, and the guarantor is liable regardless of any collateral pledged by the borrower as security. ***Id.*** Thus, Neiman's deletion did not change the nature of the guaranty, and Vulcan was free to sue on the guaranty without first pursuing a judgment against Stripe-N-Seal.

Regarding Neiman's claim that he was entitled to notice of Stripe-N-Seal's non-payment, the trial court found that Neiman was the sole shareholder and corporate officer of Stripe-N-Seal and that Vulcan told Neiman it would not provide the lien waivers he had requested because invoices had not been paid. The court also concluded that Neiman received actual notice that the invoices were not paid from mailings to Stripe-N-Seal's office and from the denial of the requested lien waivers. The findings and conclusion are supported by inferences that can be drawn from the evidence. Neiman controlled Stripe-N-Seal and signed its checks. It is reasonable to infer he was aware of the day-to-day operations of the company. The invoices and other mailings from Vulcan were addressed to him as president of Stripe-N-Seal. A creditor is not required to send written notice to the guarantor in his individual capacity when the guarantor, through his control of the debtor, has actual knowledge that the debtor was in default on its account, *See* ***Chicago Lock Co. v. Kirchner***, 199 Wis. 30, 34-35, 225 N.W. 185, 187 (1929) (liability exists where guarantor denied receiving letter of acceptance but admitted contents later were communicated to him).

Neiman's argument that the guaranty is limited to the $2500 line of credit initially approved for Stripe-N-Seal is contradicted by the guaranty itself. The document contained no limit on liability and expressly stated that Neiman guaranteed "full payment of all of Borrower's liabilities, obligations and indebtedness to Vulcan" and that the promise was absolute and unconditional.

Finally, Neiman is not relieved of liability because the individuals who signed for the materials were not identified on the credit application as authorized to make purchases for Stripe-N-Seal. As previously noted, the guaranty was absolute and unconditional. If a purchase, by whomever made, obligated Stripe-N-Seal to pay Vulcan, Neiman guaranteed payment.

Additionally, because the individuals who signed for the purchases had apparent authority to do so, Stripe-N-Seal could not have defended against the debt by claiming that the purchases were not authorized. Apparent authority requires acts by the agent or principal justifying a belief that an agency relationship exists, knowledge of the acts by the party sought to be charged, and reasonable reliance by the party claiming apparent agency. ***McDonald v. Century 21 Real Estate Corp.***, 111 Wis.2d 600, 604, 331 N.W.2d 606, 608 (Ct. App. 1983). The uncontroverted evidence established that the signatures were obtained as part of Vulcan's standard procedures for selling materials and that the individuals who signed for the materials on Stripe-N-Seal's behalf had done so previously. Further, Stripe-N-Seal had paid an earlier invoice for which the men had signed the supporting documents, and Neiman requested lien waivers on behalf of Stripe-N-Seal for the unpaid invoices. Additionally, there was no evidence that Neiman or anyone else at Stripe-N-Seal had ever advised Vulcan that the men were not authorized to make purchases on behalf of Stripe-N-Seal.

The trial court did not misconstrue the terms of the guaranty, and there were no conditions precedent that were not met. The trial court properly granted Vulcan judgment on the guaranty.

By the Court.–Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.