COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1203 **Cir. Ct. No. 2008CV17253**

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

THE MARK S. GLAZER AND BARBARA E. GLAZER TRUST, DATED 6/3/98, BY ITS TRUSTEE MARK GLAZER, ADAM J. GLAZER AND VICTOR M. GLAZER, INDIVIDUALLY,

PLAINTIFFS-APPELLANTS,

V.

DAVID I. FLORSHEIM,

DEFENDANT-RESPONDENT,

RUVIN DEVELOPMENT, INC. AND ROBERT C. RUVIN,

DEFENDANTS,

V.

MAURICE P. COLLINS, JR., GATEHOUSE CAPITAL CORPORATION, GATEHOUSE PARTNERS, LLC, GATEHOUSE MILWAUKEE DEVELOPMENT, L.P., GATEHOUSE MILWAUKEE BLOCK 7 GP, LLC, GATEHOUSE MILWAUKEE HOLDINGS I, LLC, GATEHOUSE HOLDINGS, LP, GATEHOUSE MILWAUKEE HOLDINGS I, L.P. AND GATEHOUSE MILWAUKEE HOLDINGS GP I, LLC,

DEFENDANTS-THIRD-PARTY PLAINTIFFS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

Before Fine, Kessler and Neubauer, JJ.

¶1 KESSLER, J. The Mark S. Glazer and Barbara E. Glazer Trust, Victor Glazer and Adam Glazer (collectively, "the Glazers") appeal a circuit court order granting summary judgment in favor of David I. Florsheim. The Glazers contend that the circuit court erroneously concluded that Florsheim did not personally guarantee the repayment of loans granted from the Glazers to Ruvin Development, Inc. ("RDI"). We conclude that the promissory note[1] at issue ("the 2008 Note") does not make Florsheim a Payor or a personal guarantor of the loans to RDI. Because we also conclude that there is no evidence in the record supporting a finding of disputed material facts as to whether there was a mutual mistake necessary to permit a court to reform the existing contract, we affirm the circuit court.

BACKGROUND

¶2 In 2005, Florsheim began working on a real estate development project with his then brother-in-law, Robert Ruvin. Ruvin and Florsheim became equal partners in Sydney Hih Development, LLC, which bought the Sydney Hih Building, located in downtown Milwaukee. Ruvin was a real estate developer who was also involved in other real estate projects through his company, Ruvin

[1] There were three identical notes—one signed by Dr. Glazer, as a representative of his trust, one signed by Adam Glazer, and one signed by Victor Glazer. Because the language of the notes is identical, except for the amount loaned and the name of the Holder, we refer to the "Note" in the singular to avoid confusion.

Development, Inc. (n/k/a RDI of Wisconsin, Inc.). Florsheim was not an employee, stockholder, or owner of RDI of Wisconsin, Inc.

¶3 In early 2007, Dr. Mark Glazer, an acquaintance of Ruvin's, and Ruvin discussed Dr. Glazer's interest in investing in one or more of RDI's real estate projects. Ruvin informed Florsheim of Dr. Glazer's interest, and also told Florsheim that both Dr. Glazer's father, Victor, and brother, Adam, were interested in the investment. After negotiations between Ruvin and the Glazers, promissory notes were signed reflecting the Glazers' agreement to loan RDI a total of $600,000. None of the Glazers had any conversations with Florsheim before signing the Note. The Note was signed on March 1, 2007 and matured on February 28, 2008. It promised interest at twenty percent per year until due, and thirty percent at default. The 2007 Note was eventually replaced by a Note signed on March 1, 2008, which had a maturity date six months later, described as principal the amount in the 2007 Note plus the prior unpaid interest, and bore interest during the loan term and at default at the same rates previously agreed.

¶4 The parties accepted the 2008 Note as a replacement of the 2007 Note. All parties signed the 2008 Note. Both Notes allowed the Glazers to "roll-in" the amount due under the Note to an equity position in an RDI real estate venture, one of which was identified as Sydney Hih Square Development. As discussed below in more detail, Florsheim, a partial owner in the Sydney Hih venture, signed the 2008 Note under the roll-in provision.

¶5 RDI defaulted on the 2008 Note. The Glazers filed a complaint on November 19, 2008, alleging, as relevant to this appeal, that Florsheim was a "personal guarantor" for all amounts due under the 2008 Note.

¶6 Both the Glazers and Florsheim moved for summary judgment. Relying on the language of the 2008 Note, the circuit court denied the Glazers' motion and granted Florsheim's motion. The circuit court found that the 2008 Note reflected a loan agreement between the Glazers and RDI and that nothing in the note identified Florsheim as a guarantor of that loan. This appeal follows. Additional facts are discussed as necessary.

DISCUSSION

¶7 The Glazers argue that the circuit court erroneously granted summary judgment in favor of Florsheim because: (1) Florsheim was a guarantor of the loan; (2) a mutual mistake of fact regarding the 2008 Note warrants reformation of the contract to mirror the 2007 Note which the Glazers claim unambiguously reflects the parties' intent that Florsheim act as a guarantor; and (3) the circuit court selectively relied on the parol evidence rule.[2] We disagree.

¶8 Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2009-10).[3] "'Whether the circuit court properly granted summary judgment is a

[2] Because we conclude that the language of the 2008 Note unambiguously fails to identify Florsheim as a guarantor, and thus we do not consider extrinsic evidence in analyzing that agreement alone, we decline to further address the Glazers' parol evidence argument. *See* ***Schmitz v. Grudzinski***, 141 Wis. 2d 867, 872 n.4, 416 N.W.2d 639 (Ct. App. 1987) (The parol evidence rule "prohibits a … court from inquiring into the intent of parties to an unambiguous written agreement."). *See also* ***Patrick Fur Farm***, ***Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds). We do, however, consider extrinsic evidence in addressing the Glazers' reformation claim.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

question of law that this court reviews de novo.'" ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶7, 318 Wis. 2d 681, 768 N.W.2d 552 (citation omitted). We apply the same standards as those used by the circuit court, which are set forth in § 802.08. ***Hocking***, 318 Wis. 2d 681, ¶7.

¶9 Construction of contractual language presents a question of law that we review independent of the circuit court. *See* ***Osborn v. Dennison***, 2008 WI App 139, ¶10, 314 Wis. 2d 75, 758 N.W.2d 491. "Contracts are construed to achieve the parties' intent." ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. "The terms used in a contract are to be given their plain or ordinary meaning." ***Id.*** "The analysis ends if the words convey a clear and unambiguous meaning." ***Id.*** "'If [the parties'] intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence.'" ***Id.*** (citation omitted; brackets in ***Lindner***).

¶10 Our supreme court noted in ***Marion v. Orson's Camera Ctrs., Inc.***, 29 Wis. 2d 339, 345, 138 N.W.2d 733 (1966), quoting ***The Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin***, 95 Wis. 111, 115, 69 N.W. 354 (1897), that:

> It must be borne in mind that the office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use.

(Quotation marks omitted.)

¶11 A guaranty is a form of contract, the formation of which is "governed by the principles of mutual assent, adequate consideration, definiteness, and meeting of the minds." 38 AM. JUR. 2D *Guaranty* § 1 (2000) (footnotes omitted). "For an instrument to be enforceable as a guaranty, it must show, with

reasonable clarity, an intent to be liable on an obligation in case of default of the primary obligor, and the agreement must contain the express conditions of that liability and the obligations of each party within the four corners of the document." ***Id.***, §5 (footnotes omitted). "That undertaking must be clear and explicit." ***Id.*** Consistent with these principles, Wisconsin requires that a guaranty contract be in writing, express the consideration to the guarantor, and be signed by the person who is making the guaranty. *See* WIS. STAT. § 241.02(1)(b).

¶12 With these principles of contract construction in mind, along with the requirements of a guaranty contract, we address the Glazers' arguments.

The 2008 Note.

¶13 On or about March 1, 2008, the 2008 Note was drafted by Ruvin. It changed (increased) the amount of principal and extended the maturity date of the loan by six months, as compared to the 2007 Note. The 2008 Note provided:

> FOR VALUE RECEIVED, the undersigned, RUVIN DEVELOPMENT, INC., a Wisconsin corporation ("Payor"), promises to pay to the order of [the Glazers] … ("Holder"), the principal sum of Four Hundred Thousand Dollars ($480,000) (sic) plus interest accrued thereon, in accordance with the terms set forth herein.
>
> ….
>
> Upon the occurrence of an Event of Default hereunder, … Holder may at his option: … exercise any and all rights and remedies available to it under this Note or under applicable law, including, without limitation, the right to collect from Payor or the undersigned guarantors all sums due under this Note. Payor and the undersigned guarantors shall pay all reasonable costs and expenses incurred by or on behalf of Holder in connection with Holder's exercise of any or all of his rights and remedies under this Note, including without limitation, reasonable attorneys' fees.
>
> ….

Each of Payor (sic) and each of the undersigned guarantors represents and warrants that it or he, as applicable, has the full legal right, power and authority to execute and deliver this Note, and that this Note constitutes a valid, binding and enforceable obligation of it or him, as applicable.

….

This Note may not be changed orally, but only by an agreement in writing signed by Holder and Payor.

….

IN WITNESS WHEREOF, Payors jointly and severally have executed and delivered this Note as of the date first stated above.

PAYOR:

RUVIN DEVELOPMENT, INC.

BY: _____

Robert C. Ruvin, President

HOLDER:

_____

Mark S. Glazer and Barbara E. Glazer

Trust Agreement

As discussed, the Payor will give the Holder, not later than 8/31/08, the option to roll his principle (sic) and accrued interest into the Sydney Hih Square Development as an equity owner, or other mutually agreeable development project, subject to the terms and conditions of the respective equity contribution agreement entered into between the equity owners of such project….

_____

Robert C. Ruvin, Individually

_____

David I. Florsheim, Individually

(Some spacing altered.)

¶14 The Glazers argue that Florsheim was a guarantor under the 2008 Note based on language in the Note making reference to the "undersigned guarantors." The Glazers argue that the language of the 2008 Note is ambiguous because of the reference to "undersigned guarantors." This reference, they argue, creates ambiguity as to whether the parties intended to make Florsheim a guarantor and, combined with the Glazers' stated understanding that the parties did, precludes summary judgment. We disagree.

¶15 As the circuit court noted, Florsheim is not identified in the initial paragraph identifying the parties to the Note, he is not identified in the body of the agreement, nor is he identified as a signatory of the Note. The only provision applicable to Florsheim is the roll-in provision that follows. Nothing identifies Florsheim as a guarantor. In short, the 2008 Note clearly and unambiguously *does not* make Florsheim a guarantor of the Glazers' loan to RDI.

Reformation based on the 2007 Note.

¶16 Alternatively, the Glazers seek reformation. They contend that Ruvin drafted the 2008 Note using a prior template but that his intention was to use the 2007 Note, changing only the dates and amounts. The Glazers contend that the language of the 2007 Note more accurately reflects the parties' intent that

Florsheim guarantee the loan to RDI because Florsheim's name and signature block appeared with Ruvin's as individuals under the heading "Payors." As we have seen, this did not occur in the 2008 Note, which all agree is the operative contract. The Glazers contend, however, that the rearrangement of signature blocks was a mutual mistake because both parties intended for the 2008 Note to replicate the 2007 Note. Therefore, according to the Glazers, summary judgment was precluded because the 2008 Note should be "reformed" to reflect the arrangement of the signature blocks as they were in the 2007 Note.[4] The Glazers benefit from this argument if, and only if, the Glazers establish that the 2007 Note sets forth a guaranty agreement between the Glazers and Florsheim that was not incorporated into the 2008 Note due to mutual mistake.

¶17 A contract may be reformed by the court based on a mutual mistake by the contracting parties. ***St. Norbert College Found., Inc. v. McCormick***, 81 Wis. 2d 423, 432, 260 N.W.2d 776 (1978). The burden is on the party seeking reformation to prove mutual mistake by clear and convincing evidence. ***Willett v. Stewart***, 227 Wis. 303, 310, 277 N.W. 665 (1938). "'[A] court, even in an equitable action seeking reformation, cannot make for the parties a contract upon which there has been no meeting of the minds[.]'" ***Frantl Indus., Inc. v. Maier Constr., Inc.***, 68 Wis. 2d 590, 594, 229 N.W.2d 610 (1975) (citation omitted). "'To justify reformation the evidence must be clear and convincing … that both [parties] had agreed upon facts which were different than those set forth in the instrument.'" ***Samuels Recycling Co. v. CNA Ins. Cos.***, 223 Wis. 2d 233, 244,

[4] Florsheim contends that because the Glazers did not include a claim for contract reformation in their pleadings, the issue was not properly raised for summary judgment and we should not consider it. However, because Florsheim raised reformation as a counterclaim, reformation is an issue as to which all parties had notice. The circuit court did not address the Glazers' reformation argument. We do not decide whether the issue was properly pled because even with a proper pleading, the Glazers' argument fails on the merits for reasons we explain.

588 N.W.2d 385 (Ct. App. 1998) (citation omitted; second set of brackets in ***Samuels Recycling***).

¶18 In language identical to the 2008 Note, the 2007 Note contained an agreement that the Glazers could convert their loan into an equity interest in an RDI project by allowing them to "roll-in" the money they were owed to an ownership interest. Unlike the 2008 Note, that language appears *before* the closing and signature blocks in the 2007 Note, arguably making Florsheim a party to the terms of the Note, and not just the roll-in provision. The 2007 Note ended with:

> As discussed, the Payor will give the Holder, not later than 2/29/08, the option to roll his principal and accrued interest into the Sydney Hih Square Development as an equity owner, or other mutually agreeable development project, subject to the terms and conditions of the respective equity contribution agreement entered into between the equity owners of such project….
>
> IN WITNESS WHEREOF, Payors named below jointly and severally have executed and delivered this Note as of the date first stated above.
>
> PAYORS:
>
> RUVIN DEVELOPMENT, INC.
>
> BY: _____
>
> Robert C. Ruvin, President
>
> ---
>
> Robert C. Ruvin, Individually
>
> _____
>
> David I. Florsheim, Individually

HOLDER:

_____

Mark S. Glazer and Barbara E. Glazer Trust Agreement

¶19 As previously discussed, the 2008 Note ended with:

IN WITNESS WHEREOF, Payors jointly and severally have executed and delivered this Note as of the date first stated above.

PAYOR:

RUVIN DEVELOPMENT, INC.

BY: _____

Robert C. Ruvin, President

HOLDER:

_____

Mark S. Glazer and Barbara E. Glazer

Trust Agreement

As discussed, the Payor will give the Holder, not later than 8/31/08, the option to roll his principle and accrued interest into the Sydney Hih Square Development as an equity owner, or other mutually agreeable development project, subject to the terms and conditions of the respective equity contribution agreement entered into between the equity owners of such project….

_____

Robert C. Ruvin, Individually

_____

David I. Florsheim Individually

(Some spacing altered.)

¶20 The only other differences between the two notes are changes in the dates and amounts due. While Florsheim is identified as a Payor in the signature line, the 2007 Note does not identify Florsheim as a Payor at the outset, and the Glazers do not contend that he is in fact obligated as a Payor. More to the point, Florsheim is not identified as a guarantor in either the body or the signature line of the 2007 Note. There are no terms of guaranty specifically applicable to Florsheim in the body of the agreement, and there is no consideration to Florsheim identified or receipt thereof acknowledged in return for a guaranty. The 2007 Note does not provide clear and convincing evidence that the parties intended to obligate Florsheim as a guarantor and then mistakenly failed to include the same in the 2008 Note. The 2007 Note simply does not evidence a meeting of the minds as to a guaranty obligation.

¶21 Indeed, even if we look beyond the 2007 Note for evidence of an agreement upon a guaranty by Florsheim, the Glazers' own documentary evidence of intent at the time the language was agreed upon indicates that the Glazers requested *deletion* of the language obligating Florsheim as a guarantor along with the Payors. The initial draft of the promissory note, drafted in 2007 before any note was signed by any party, contained the following language:

> IN WITNESS WHEREOF, Payor and the undersigned guarantors have executed and delivered this Note as of the date first stated above.
>
> PAYOR:
>
> RUVIN DEVELOPMENT, INC.

BY: _____

Robert C. Ruvin, President

HOLDER:

_____

Mark S. Glazer, M.D.

By their signature below, Robert C. Ruvin and David I. Florsheim co-sign this note and unconditionally agree that they are jointly and severally responsible with payor for the payment and performance of all of payor's obligations under this note.

As discussed, we will give the Holder the option to roll their Principle and Interest into this and other development projects, subject to the terms and conditions of those future equity contributions. See the attached preliminary financing structure for the Sydney Hih Square Development.

_____

Robert C. Ruvin

_____

David I. Florsheim

¶22 At the specific email request of Dr. Glazer, who acted on instructions from Adam, a Chicago-based attorney, the "undersigned guarantors" was deleted from "IN WITNESS WHEREOF, Payor and the undersigned guarantors have executed and delivered this Note as of the date first stated above," which preceded the signatures. Moreover, Dr. Glazer requested deletion of the above language creating joint and several liability for the obligations of the Payor—to be signed by Florsheim and Ruvin. In short, the documents show that the Glazers requested deletion of the guaranty language preceding the signatures

and the joint and several obligation applicable to Florsheim. The Glazers' rejection of this language runs directly counter to any suggestion that Florsheim agreed to a guaranty, or that the absence of such security was a mutual mistake.

¶23 Finally, the Glazers attempt to create an issue of material fact as to a mutual mistake by pointing to deposition testimony in which they state that they always understood Florsheim and Ruvin to personally guarantee the loans.[5] However, their own subjective understanding, without more, cannot create a disputed issue of material fact as to whether there was a meeting of the minds; they have provided no extrinsic evidence establishing agreement, much less agreement by clear and convincing evidence, with Florsheim at the time of contracting.

¶24 After Florsheim moved for summary judgment, it was the Glazers' burden to come forward with evidence showing that Florsheim agreed to a guaranty, *i.e.*, that clear and convincing evidence of a meeting of the minds and mutual mistake requires reformation. *See* ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 227-28, 522 N.W.2d 261 (Ct. App. 1994) ("[W]hile a party seeking summary judgment must establish a record sufficient to demonstrate that there are no triable issues of fact, '[t]he ultimate burden … of demonstrating that there is sufficient evidence … to go to trial at all … is on the party that has the burden of proof on the issue that is the object of the motion.'") (citation omitted; second set of brackets and all ellipses in ***Kenefick***). Here, there can be no genuine issue as to any material fact, because the Glazers have failed to prove an essential element of their case—a meeting of the minds (and mutual mistake in documenting that

[5] Florsheim provided an affidavit stating the contrary; he stated that he would never have signed the Note if he understood that he was potentially obligated to repay over $600,000.

agreement). Florsheim is entitled to judgment as a matter of law. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 317-18 (1986) (the moving party is entitled to a judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof).

CONCLUSION

¶25 We conclude that there is no evidence in the record supporting a finding of disputed material facts as to whether there was a mutual mistake necessary to permit a court to reform the existing contract. Because the 2007 Note does not include any specific identification of a guarantor, does not identify any consideration specific to Florsheim, and does not set forth terms of a guaranty applicable to Florsheim, and because the Glazers failed to produce any disputed material evidence showing that Florsheim agreed to a personal guaranty in either the 2007 or the 2008 Notes, we conclude that summary judgment dismissing their complaint against Florsheim was proper.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶26 FINE, J. (*dissenting*). I agree with the Majority's acknowledgment of the summary-judgment analysis we must follow. I disagree, however, that either the circuit court or the Majority have followed it.

¶27 As the Majority opinion relates, the operative 2008 note refers to the "undersigned guarantors." Yet, the signature line does not use the word "guarantor." There are several explanations for this anomaly: (1) the phrase "undersigned guarantors" was overlooked by all the parties (highly unlikely, especially for our analysis on summary judgment, because they are all experienced investors), or (2) the word "guarantor" was omitted on the signature line either by mistake or because the scrivener believed it not necessary because the document indicated that the "guarantors" were "undersigned," or (3) the document is so muddled that we cannot ascertain its meaning from its face. I can think of no other possibilities.

¶28 By affirming the circuit court's grant of summary judgment, the majority ignores two established rules: (1) "that a contract is to be construed so as to give a reasonable meaning to each provision of the contract, and that courts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage," ***Goebel v. First Federal Sav. and Loan Ass'n of Racine***, 83 Wis. 2d 668, 680, 266 N.W.2d 352, 358 (1978), and (2) that "summary judgment should not be granted when the contract is ambiguous and the intent of the parties to the contract is in dispute," ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 467, 449 N.W.2d 35, 40 (1989). Accordingly, I respectfully dissent.