

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Nick Al-Farah a/k/a Nick Alfarah a/k/a Nidal Alfarah,
Appellant

v.

Southlake Indiana, LLC,
Appellee



July 26, 2024

Court of Appeals Case No.
24A-PL-420

Appeal from the Lake Superior Court
The Honorable John M. Sedia, Judge

Trial Court Cause No.
45D01-2302-PL-125

Memorandum Decision by Judge Bailey
Chief Judge Altice and Judge Mathias concur.

Bailey, Judge.

Case Summary

- [1] Nidal Alfarah¹ appeals an order granting summary judgment to Southlake Indiana, LLC (“Southlake”) upon Southlake’s complaint to enforce Alfarah’s 2008 guaranty of lease payments and denying Alfarah’s motion for summary judgment premised upon his claim that his guaranty had been discharged in 2018. We reverse and remand for further proceedings.

Issue

- [2] Alfarah presents two issues, which we consolidate and restate as the following issue: Whether summary judgment was improvidently granted because the trial court failed to consider lease amendments as contemporaneous documents or to consider parol evidence of negotiations pertaining to a guarantor discharge.

Facts and Procedural History

- [3] In 2008, Southlake and Nick Enterprises, Inc. d/b/a Taco Bell Express (“Nick Enterprises”) entered into a lease whereby Southlake rented store space located at the Southlake Mall in Hobart to Nick Enterprises. Alfarah signed the lease as President of Nick Enterprises and executed a personal guaranty providing in

¹ Alfarah has also been known as Nick Al-Farah and Nick Alfarah.

part: “The Guarantor hereby guarantees the full, faithful and timely payment and performance by Tenant of all the payments, covenants and other obligations of Tenant under or pursuant to the Lease.” (App. Vol. II, pg. 89.)

- [4] The lease was amended twice in 2018, once in 2020, and once in 2021. The first amendment included language to the effect that the guarantor was ratifying and confirming his obligation. Attached was Alfarah’s signed acknowledgement that he was not being discharged as guarantor. The second amendment did not include such language or attachment; nor did the third or fourth amendment do so.
- [5] Nick Enterprises became delinquent in the rent and in 2022, Southlake sued Nick Enterprises for eviction and damages. A default judgment was entered against Nick Enterprises for \$150,220.00. On February 7, 2023, Southlake filed a complaint against Alfarah as guarantor of the lease.
- [6] Subsequently, the parties each filed a motion for summary judgment. In support of his motion for summary judgment, Alfarah submitted an affidavit in which he averred in pertinent part: “In or around August of 2018, I, through counsel, negotiated removing the Guaranty with Starwood Retail Property Management, LLC (“Starwood”), acting as an agent for Southlake, based upon the then-ten-year Taco Bell Express operation.” (App. Vol. III, pg. 18.) He also designated a series of e-mail communications purportedly negotiating Alfarah’s release as guarantor upon the execution of the second amendment to the lease.

[7] On January 30, 2024, the trial court conducted a hearing at which argument of counsel was heard on a motion to strike designations and the cross-motions for summary judgment. The parties disputed whether the 2018 second amendment to the lease – silent as to guarantor obligations – released Alfarah as a guarantor. They also disputed the admissibility of the e-mail communications, which Southlake described as settlement negotiations. Alfarah argued that, if the trial court examined the documents as a whole and in the context of the e-mail communications, the court should conclude that he had been discharged and was entitled to summary judgment. Southlake argued that Alfarah remained liable as guarantor under the plain and unambiguous terms of the guaranty, notwithstanding subsequent amendments.

[8] On January 31, the trial court entered an order denying summary judgment to Alfarah and granting summary judgment to Southlake. The trial court did not specifically rule upon the motion to strike. In relevant part, the order provides:

The elements of a novation ... are not present. Moreover, none of the written agreements between Southlake and Alfarah are ambiguous so as to justify the consideration of extrinsic evidence, ... regardless of whether or not the Court strikes Alfarah's Designated Evidence. The Original Lease referred to a Guaranty, and the Guaranty itself, to which Southlake and Alfarah agreed, is unambiguous and was not modified in any way. The Guaranty, by its own terms, remains "...in full force and effect notwithstanding any ... amendment ... under the Lease." It does not matter that the Second Amendment to the Lease did not refer to it. For Alfarah to be relieved of his responsibility as a Guarantor, the Guaranty itself would either have had to be amended or the Second Amendment would have

had to have a specific, written provision relieving him of his obligation under the Guaranty.

(Appealed Order at 5.) (internal citation omitted.) The trial court set a date for a damages hearing but directed the entry of the summary judgment order as a final and appealable order, pursuant to Indiana Trial Rule 54(B).

Discussion and Decision

Standard of Review

[9] Each of the parties moved for summary judgment. We review a grant or denial of a motion for summary judgment under the same standard used by the trial court; that is,

[t]he moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. In determining whether summary judgment is proper, the reviewing court considers only the evidentiary matter the parties have specifically designated to the trial court. *See* Ind. Trial R. 56(C), (H). We construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party. The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.

Reed v. Reed, 980 N.E.2d 277, 285 (Ind. 2012) (case quotations and citations omitted). The construction of a written contract presents a question of law for which summary judgment may be particularly appropriate. *Terre Haute First Nat. Bank v. Pacific Employers Ins. Co.*, 634 N.E.2d 1336, 1337 (Ind. Ct. App. 1993). Summary judgment based upon the construction of a contract amounts to “a determination, as a matter of law, that the contract is unambiguous and that it is unnecessary to resort to the rules of contract construction in order to ascertain the contract’s meaning.” *Id.*

[10] The rules which govern the interpretation and construction of contracts generally apply to the interpretation and construction of a guaranty contract. *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007). The extent of a guarantor’s liability is determined by the terms of his or her contract, construed based upon the intent of the parties, “which is ascertained from the instrument itself read in light of the surrounding circumstances.” *Id.*

[11] Under Indiana common-law principles, “[g]uarantors and sureties are exonerated if the creditor, by any act done without their consent, alters the obligation of the principal in any respect, or impairs or suspends the remedy for its enforcement.” *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260, 7 N.E. 881 (1886). A “material alteration” which will cause a guarantor discharge includes that which “puts the surety in a different position.” *Yin v. Society Nat’l Bank of Indiana*, 665 N.E.2d 58, 64 (Ind. Ct. App. 1996), *trans. denied*.

Analysis

[12] The parties do not dispute that in 2008 Alfarah executed an enforceable guaranty. In the context of cross-motions for summary judgment, the dispositive issue before the trial court was whether the guaranty survived subsequent amendments to the original lease to which the guaranty pertained. Alfarah designated materials indicating that, prior to the second amendment, he and Southlake had been engaged in negotiations for his removal as guarantor and had exchanged documents with stricken guaranty terms and clean copies consistent with guarantor removal. Southlake has not directly disputed that such negotiations or exchanges of proposed language took place. Rather, Southlake contends that the matter of intent does not present a genuine issue of material fact precluding summary judgment in its favor because the language of the guaranty prohibits extinguishment of the guaranty despite amendments to the lease.

[13] In contrast to the common law pertaining to guaranty extinguishment, the language under consideration here provides:

This Guaranty shall remain and continue in full force and effect and shall not be discharged in whole or in part notwithstanding (whether prior to or subsequent to the execution hereof) any alteration, removal, extension, modification, amendment or assignment of, or subletting, concession, franchising, licensing or permitting under the Lease.

(App. Vol. II, pg. 89.) The trial court determined that, based upon the foregoing language, the guaranty necessarily survived any lease amendments.

[14] On appeal, Alfarah argues that the contemporaneous document doctrine required the trial court to consider as one writing certain “related writings,” specifically the first and second amendments to the lease. Appellant’s Brief at 13. He points to a glaring difference between the amendments: the first includes a “Consent of Guarantor” paragraph and an attachment signed by Alfarah to “ratify and confirm” his obligation while the second amendment omits any reference to a guaranty and has no attached reaffirmation. (App. Vol. II, pg. 93.)

[15] The contemporaneous document doctrine “provides that ‘[i]n the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract.’” *Geico Ins. Co. v. Rowell*, 705 N.E.2d 476, 482 (Ind. Ct. App. 1999) (quoting *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998)). When the documents are part of the same transaction, joint construction of the documents is not prohibited notwithstanding different execution times. *Id.* Because the documents under consideration here reflect multiple transactions years apart, application of the doctrine is not readily apparent, and we need not remand to the trial court for review under the contemporaneous document doctrine. Rather, Trial Rule 56 requires the trial court and this Court to examine the designated materials and determine whether they give rise to a genuine issue of material fact and whether one party is entitled to judgment as a matter of law. Here, such materials include the lease, guaranty, amendments,

affidavit, and an exhibit detailing alleged communications and document exchanges between the parties.

[16] The 2008 guaranty purports to prohibit discharge of the guarantor regardless of subsequent modification of the lease. However, the second amendment asserts that inconsistencies between that document and the lease are to be resolved with the latter agreed upon terms controlling. Also, the second amendment contains integration language. It provides in pertinent part:

WHEREAS, the Lease by its terms shall expire on June 30, 2019 (“Prior Expiration Date”), and the parties desire to extend the Lease, *all on the terms and conditions hereinafter set forth.*

This Agreement sets forth the entire agreement between the parties with respect to the matters set forth herein. The mutual obligations of the parties as provided herein are the sole consideration for this Agreement, and no representations, promises or inducements have been made by the parties other than as appear in this Agreement. ... Except as extended and amended herein, the Lease between the parties shall remain unamended and in full force and effect. In case of any inconsistency between the provisions of the Lease and this Agreement, the latter provisions shall govern and control.

(App. Vol. II, pgs. 98, 100.) (emphasis added.)

[17] Even an “unconditional and absolute guaranty” may be rendered unenforceable if the debt being guaranteed has been “materially” altered. *Shoaff v. First*

Merchants Bank, 201 N.E.3d 646, 654 (Ind. Ct. App. 2022). The crucial inquiry is whether the legal relationship of the parties has been altered. *See id.*

[18] In his affidavit, Alfarah averred that negotiations for his discharge as a guarantor took place in 2018, based upon his ten-year relationship with Southlake, and that negotiations culminated with the second amendment to the lease which omitted any reference to a guarantor. The e-mail communications, which have not been stricken for purposes of summary judgment proceedings, indicate that concessions requested by Alfarah had been agreed to by Southlake's agent. In oral argument before the trial court, Southlake appeared to concede that some negotiations took place but characterized such as inadmissible settlement negotiations. According to Southlake, the inclusion of guarantor language in the first amendment was a superfluous act and its omission in the second, third, and fourth amendments is irrelevant.

[19] As Southlake observes, “[g]enerally, where parties have reduced an agreement to writing and have stated in an integration clause that the written document embodies the complete agreement between the parties, the parol evidence rule prohibits courts from considering extrinsic evidence for the purpose of varying or adding to the terms of the written contract.” *Wind Wire, LLC v. Finney*, 977 N.E.2d 401, 405 (Ind. Ct. App. 2012). But the intent of parties, to which this Court must give effect, is “ascertained from the language of the contract *in light of the surrounding circumstances.*” *Kruse v. Nat’l Bank of Indianapolis*, 815 N.E.2d 137, 144 (Ind. Ct. App. 2004) (emphasis added). We agree with Alfarah that he has designated materials sufficient to raise an issue as to whether an agreement

was reached to extinguish his guaranty following a successful ten-year relationship between Southlake and the company of which Alfarah was the president.

- [20] The designated materials – inclusive of Alfarah’s affidavit – reveal an unresolved factual dispute; that is, what is the motivation for striking guaranty language and the omission of a signed reaffirmation following the parties’ e-mail communications and exchange of documents. Whether the parties agreed to discharge Alfarah as a guarantor of the lease, to be reflected in the second amendment to the lease, is material because, if so, this altered the legal relationship between the parties. The existence of a genuine issue of material fact precludes the entry of summary judgment for Southlake or for Alfarah.

Conclusion

- [21] The trial court improvidently granted summary judgment to Southlake. We reverse the summary judgment order and remand for further proceedings.
- [22] Reversed and remanded.

Altice, C.J., and Mathias, J., concur.

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