IN THE COURT OF APPEALS OF IOWA

No. 0-406 / 09-1780
Filed July 14, 2010

BANK OF THE WEST, Successor-In-Interest to Commercial Federal Bank,
Plaintiff-Appellee,

vs.

RANDALL L. SHIMA and REBECCA A. SHIMA,
Defendants-Appellants.

Appeal from the Iowa District Court for Dallas County, Darrell J. Goodhue, Judge.

Randall L. Shima and Rebecca A. Shima appeal from the district court's grant of summary judgment to Bank of the West. **AFFIRMED.**

Jerrold Wanek of Garten & Wanek, Des Moines, for appellants.

Thomas Burke of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

In this mortgage foreclosure action, guarantors Randall and Rebecca Shima appeal from the district court's order granting summary judgment in favor of Bank of the West, as successor-in-interest to Commercial Federal Bank. The Shimas contend summary judgment was inappropriate because they raised a genuine issue of material fact as to whether their guaranties were still in existence. Because we agree that no genuine issue of material fact was raised, we affirm the district court's ruling.

I. Background Facts and Proceedings

Viewing the record in the light most favorable to the Shimas, we discern the following facts from the summary judgment record: Meridian Homes, L.C., executed the following four promissory notes to Bank of the West:

Note 42	December 27, 2004	$217,500.00
Note 109	January 13, 2005	$315,000.00
Note 125[1]	January 13, 2005	$421,500.00
Note 322	August 15, 2005	$279,000.00.

Each note was secured by a mortgage on property owned by Meridian.[2] In addition to these notes and mortgages, the Shimas personally executed five unlimited commercial guaranties on the following dates:

Randall Shima	August 13, 2002 April 27, 2004 June 8, 2005
Rebecca Shima	April 27, 2004 June 8, 2005.

[1] This note was originally in the amount of $315,000, but was subsequently increased by "Change in Terms Agreements" dated June 1, 2005, and August 31, 2005.

[2] The mortgages are not at issue in this appeal.

According to the explicit terms of the guaranties, they were unlimited and applied to both existing and future debt:

> The indebtedness guaranteed by this Guaranty includes any and all of [Meridian's] indebtedness to [Bank of the West] and is used in the most comprehensive sense and means and includes any and all of [Meridian's] liabilities, obligations and debts to [Bank of the West], now existing or hereinafter incurred or created, including, without limitation, all loans, advances, interest, costs, debts, overdraft indebtedness, credit card indebtedness, lease obligations, other obligations, and liabilities of [Meridian], or any of them . . . .

Further, the guaranties were continuing and could only be revoked by a written notice sent by certified mail:

> This Guaranty will take effect when received by [Bank of the West] without the necessity of any acceptance by [Bank of the West], or any notice to [the Shimas] or to [Meridian], and will continue in full force until all Indebtedness incurred or contracted before receipt by [Bank of the West] of any notice of revocation shall have been fully and finally paid and satisfied and all of [the Shimas'] other obligations under this Guaranty shall have been performed in full. If [the Shimas] elect[] to revoke this Guaranty, [the Shimas] may only do so in writing. [The Shimas'] written notice of revocation must be mailed to [Bank of the West], by certified mail, at [Bank of the West's] address listed above or such other place as [Bank of the West] may designate in writing. Written revocation of this Guaranty will apply only to advances or new indebtedness created after actual receipt by [Bank of the West] of [the Shimas'] written revocation.

On April 27, 2009, Bank of the West filed a "Suit on Promissory Notes and Guaranties and Mortgage Foreclosure Petition without Redemption" against Meridian and the Shimas, among others. The petition alleged defaults under all of the notes and further alleged the Shimas were personally liable to the bank on their guaranties. On August 19, 2009, the bank filed a motion for summary judgment, specifically seeking judgment against the Shimas under the

guaranties.[3] Bank of the West included as exhibits copies of the signed, original guaranties.

The Shimas' resistance to the bank's motion did not dispute the defaults under the notes dated December 27, 2004, January 13, 2005, and August 15, 2005. However, the Shimas argued the guaranties were executed for the purpose of guarantying certain other promissory notes dated August 13, 2002, April 27, 2004, and June 8, 2005; those particular notes had been paid in full and returned to the customer marked "paid"; and thus, according to the Shimas, the accompanying guaranties were *ipso facto* terminated.

In its reply, Bank of the West conceded the Shimas' guaranties may have been executed at the same time as the three promissory notes dated August 13, 2002, April 27, 2004, and June 8, 2005, and further conceded those notes may have been paid off. However, the bank pointed out that the guaranties by their plain language were not limited to any particular loan or indebtedness of Meridian, but rather were unlimited and continuous.

On September 9, 2009, the district court held its initial hearing on Bank of the West's summary judgment motion. Thereafter, by minute entry, the court granted Randall Shima the opportunity to supplement his affidavit to support an assertion made by defense counsel during the hearing that the *guaranties* at issue had been returned to the Shimas and marked cancelled, satisfied, or paid. The summary judgment hearing was continued until September 18, 2009.

[3] The court granted a default judgment against the other defendants. That judgment and the mortgage foreclosures are not at issue on this appeal.

Following the continuance, Bank of the West filed a supplemental reply, which included signed extension agreements for the January 13, 2005, and August 15, 2005 promissory notes at issue in this case. The last group of these extension agreements, executed as of November 20, 2008, had deferred the maturity date of the notes to April 30, 2009. More significantly, each extension agreement included an "Acknowledgment and Consent by Guarantor" signed individually by the Shimas. All the acknowledgments in turn contained the following the language:

> We specifically acknowledge and agree that each guaranty executed by the undersigned in favor of [Bank of the West] covers all of the obligations of [Meridian] under the Credit Agreement as so amended. The undersigned represent and warrant to [Bank of the West] that we remain fully aware of [Meridian's] financial condition and performance. The undersigned acknowledge that our consent to amendment(s) is not required, nor is [Bank of the West] obligated to provide us with notice of or obtain our consent to any future amendments.

Thus, as late as November 20, 2008, the Shimas were acknowledging in writing that each guaranty they had executed covered the January 13, 2005 and August 15, 2005 promissory notes.

On September 16, 2009, Randall Shima filed a supplemental affidavit, which stated:

> [I]f the bank wanted to have a particular promissory note personally guaranteed by myself and my wife, Rebecca, they would specifically have a personal guaranty document executed by us at the same time that we executed the promissory notes . . . . [W]hen those promissory notes are paid off, the original or a conformed copy of the promissory note, and the original or a conformed copy of the guarantees are marked, paid, terminated, or satisfied and returned to us when the note was paid off.

The court deemed this affidavit insufficient, but on September 28 gave the Shimas one further opportunity to supplement the record. In particular, the court stated:

> If the Shimas are going to avoid the Motion for Summary Judgment, the affidavit will need to assert that *all* of the personal guarantees or notes signed by Meridian which the plaintiff has set out in their affidavits have been returned in their original form or as confirmed copies and marked paid, terminated, or satisfied.

Following this ruling, Randall Shima filed a second supplemental affidavit on October 15, 2009, in which he stated:

> I have previously given Affidavits clarifying that the personal guaranties of my wife, Rebecca, and myself which were attached to the Petition have been released by having a conformed copy of same marked cancelled, terminated, or paid and returned to me. . . . I am aware of no guaranty that would be in effect to cover the obligations which are the subject matter of the Petition and dispute the validity of any such alleged guaranty for both my wife, Rebecca and myself.

On October 22, 2009, the district court granted summary judgment to Bank of the West. In its ruling, the district court noted the Shimas

> failed to state by affidavit that *all* of the comprehensive guaranties and the notes which they secure have been returned marked "paid," "terminated," or "satisfied." A single statement to that effect would have avoided the Motion for Summary Judgment, but it was not forthcoming.
>
> The material fact which is in issue is whether or not the guaranties are in existence or have been terminated. Whether or not Shima is "aware" of such a guaranty is not a material fact. He has failed to say under oath that no such guaranty exists or that the guaranties have been terminated.

The district court thus determined Randall's affidavits were insufficient to establish a dispute of material fact and found Bank of the West was entitled to summary judgment as a matter of law. The court subsequently entered a money

judgment in favor of Bank of the West and against the Shimas. The Shimas appeal.

II. Analysis

We review appeals of a ruling granting summary judgment for the correction of errors of law. *Bank of the West v. Kline*, 782 N.W.2d 453, 456 (Iowa 2010). "The purpose of summary judgment is to enable the moving party to obtain a judgment promptly and without the expense of trial when no genuine issue of material fact exists." *Liska v. First Nat'l Bank*, 310 N.W.2d 531, 534 (Iowa 1981).

> A motion for summary judgment should only be granted if, viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to an material fact and that the moving party is entitled to a judgment as a matter of law."

Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 27 (Iowa 2005) (quoting Iowa R. Civ. P. 1.981(3)). Although the moving party has the burden to show there are no genuine issues of fact, "[w]hen a motion for summary judgment is supported, the nonmoving party must respond with 'specific facts showing there is a genuine issue for trial.'" *Thorton v. Hubill, Inc.*, 571 N.W.2d 30, 32 (Iowa 1997) (quoting Iowa R. Civ. P. 1.981(5)). In order to meet this requirement, the nonmoving party "may not rely on the hope of the subsequent appearance of evidence generating a fact question." *Id.* Additionally, facts asserted in an affidavit arising from mere speculation, generalizations, or beliefs and conclusory statements are insufficient to successfully resist a motion for summary judgment. *Wemett v. Shueller*, 545 N.W.2d 1, 2-3 (Iowa Ct. App. 1995). "Speculation is not

sufficient to generate a genuine issue of fact." *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005). If the nonmoving party fails to assert specific facts to support the existence of a genuine issue for trial, the court may grant the motion for summary judgment. *Thorton*, 571 N.W.2d at 32.

There is no dispute in this case that the underlying December 27, 2004, January 13, 2005, and August 15, 2005 promissory notes between Meridian and Bank of the West were in default and were due and payable in full. There is also no dispute that the Shimas executed a number of continuing guaranties, any one of which would make them personally responsible for Meridian's unmet financial obligations. *See Union Trust & Sav. Bank v. State Bank*, 188 N.W.2d 300, 302 (Iowa 1971) (noting that a continuing guaranty "remains effective until revoked by the guarantor, or some rule of law, except as to any past transactions"). The only issue on appeal is whether all the guaranties had been cancelled or terminated so as to release the Shimas from any personal liability on the notes in question. We agree with the district court that the Shimas failed to establish a genuine issue of material fact on this score.

To begin with, the Shimas had the burden of proof on what amounts to an affirmative defense. In effect, the Shimas were arguing that the bank abandoned, waived and/or released its guaranties, even though they were continuing by their terms. *See Continental Cas. Co. v. G.R. Kinney Co.*, 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1966) (stating waiver of a contract provision is an affirmative defense as to which the party claiming waiver bears the burden of proof). As the district court pointed out, it could have granted

summary judgment at the initial September 9 hearing because the Shimas presented no evidence that anything had happened to the guaranties. As the court put it, "The state of the record could have supported the motion in favor of the plaintiff at that time."

However, the district court generously gave the Shimas two opportunities to supplement their summary judgment resistance, specifically advising the Shimas what they needed to avoid summary judgment, namely an affidavit stating that *all* the guaranties had been returned marked "paid," "terminated," or "satisfied." Randall Shima submitted two further affidavits, but both rested on mere generalizations, and neither contained the straightforward declarative statement the district court had requested.

We agree with the district court that this was not enough. Bank of the West provided copies of original, signed, continuing blanket guaranties, as well as acknowledgments signed by the Shimas as late as November 20, 2008, that several of the promissory notes at issue remained covered by "each guaranty executed by the undersigned in favor of [Bank of the West]." To avoid summary judgment in a situation where they bore the burden of proof, the Shimas should have provided "specific facts," *see* Iowa R. Civ. P. 1.981(5), such as particular dates, names, actions, and communications, as well as legal authority, to support their claim that the bank had actually relieved them from the stated effect of those guaranties. Instead, Randall's affidavits only set forth conclusory statements regarding the bank's alleged past practices and did not even meet the district court's minimum requirement of a definitive statement that they had

received back *all* of the executed guaranties marked paid, terminated, or satisfied. Having failed to meet the demands of rule 1.981(5), we believe the Shimas cannot complain of the summary judgment entered against them.

We note another potential flaw in the Shimas' general theory of defense. They appear to be arguing that the guaranties dated August 13, 2002, April 27, 2004, and June 8, 2005, although unlimited and continuing by their terms, were canceled in some way because the lender returned them as paid, terminated, or satisfied when the promissory notes of those same dates (not the notes that are the subject of this action) were paid off. However, a revocation of a guaranty typically does *not* extend to previously incurred indebtedness. *See Union Trust*, 188 N.W.2d at 302; *see also Beal Bank v. Siems*, 670 N.W.2d 119, 127 (Iowa 2003) (stating that "[a] guaranty contract may be abandoned by the creditor so far as it relates to future transactions"). Consistent with the overall conclusory nature of their defense, the Shimas do not say when copies of the continuing guaranties were supposedly returned. They concede, as they must, that the original guaranties were never returned, since Bank of the West attached them to its summary judgment motion. Nonetheless, the indebtedness represented by the December 27, 2004, and January 13, 2005 notes had to have been incurred *before* the June 8, 2005 guaranties were even executed, let alone allegedly returned to the Shimas. Hence, a revocation or abandonment of the June 8, 2005 guaranty would not have eliminated the Shimas' personal responsibility for that indebtedness. It is legally possible, we assume, for a creditor to agree to

relieve a guarantor from even preexisting liability, but that would require proof of specific facts supporting such an agreement, which the Shimas never provided.

For the foregoing reasons, we affirm the ruling of the district court.

AFFIRMED.