IN THE COURT OF APPEALS OF IOWA

No. 7-869 / 07-0535
Filed August 13, 2008

HILLS BANK & TRUST COMPANY,
Plaintiff/Counterclaim Defendant-Appellee,

vs.

CYNTHIA J. CONVERSE,
Defendant/Counterclaim Plaintiff/
Third-Party Plaintiff-Appellant,

vs.

DAVID E. MOORE and JOHN MOORE,
Third-Party Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

A co-guarantor appeals from a district court ruling granting summary judgment in favor of the bank, borrower, and co-guarantor and denying her motion for summary judgment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

Gregg Geerdes, Iowa City, for appellant.

Gregory J. Epping of Terpstra, Epping & Willett, Cedar Rapids, for appellee Hills Bank & Trust Company.

Matthew L. Preston of Brady & O'Shea, P.C., Cedar Rapids, for appellees David E. Moore and John Moore.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Cynthia Converse appeals from a district court ruling granting summary judgment in favor of Hills Bank & Trust Company (Hills Bank), David Moore, and John Moore and denying her motion for summary judgment. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record reveals the following undisputed facts. On November 14, 1996, David Moore and Lewis Converse, individually and on behalf of Daverse, Inc., d/b/a The Fieldhouse (Daverse), executed a promissory note in the amount of $30,000 payable to Hills Bank. The "customer number" on the note was 5080338-05, and the "loan number" was 29:151:16. The note was secured by the "Continuing (limited) Guaranties of Cynthia Converse and John E. Moore," which were also executed on November 14, 1996.

The guaranty agreement signed by Cynthia Converse, Lewis's wife, on November 14 stated, "Guarantor's liabilities and obligations under this Guaranty . . . shall be limited to" the above-described November 14 promissory note executed by Daverse, David, and Lewis, "including any amendments, extensions, modifications, renewals, replacements or substitutions thereto." The guaranty also contained the following relevant provisions:

> LIMITED TO AN AMOUNT: Guarantor's liabilities and obligations under this Guaranty ("Obligations") shall include all present or future written agreements between Borrower and Lender (**whether executed for the same or different purpose**), but shall be limited to the principal amount of Thirty Thousand and No/100 Dollars together with all interest and all of Lender's expenses and costs, incurred in connection with the indebtedness . . . .
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> . . . .
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> **4. ABSOLUTE AND CONTINUING NATURE OF GUARANTY.** Guarantor's Obligations are absolute and continuing and shall not

> be affected or impaired if Lender amends, renews, extends, compromises, exchanges, fails to exercise, impairs or releases any of the indebtedness owed by any Borrower, Co-guarantor or third party or any of Lender's rights against any Borrower, Co-guarantor, third party, or collateral. In addition, the Obligations shall not be affected . . . by . . . [t]he . . . release . . . of any or all of the Obligations, . . . of the Borrower under the promissory note . . . or of any party named as a Guarantor under this Guaranty . . . . [or by] [t]he loss, release, sale, exchange, surrender or other change in any collateral . . . .
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> **5. DIRECT AND UNCONDITIONAL NATURE OF GUARANTY.** Guarantor's Obligations are direct and unconditional and may be enforced without requiring Lender to exercise, enforce, or exhaust any . . . security or collateral.
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> . . . .
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> **6. WAIVER.** Guarantor hereby waives notice of . . . the obtaining or release of any guaranty. . . . The Guarantor hereby waives the right to require that any action be brought first against the Borrower or any other Guarantor, or any security, or to require that resort be made to any security. . . . The Guarantor will not assert against the Lender any defense of . . . release . . . which may be available to Borrower or any third party, whether or not on account of a related transaction.

The November 14, 1996 promissory note was marked "paid" on June 5, 1997. That same day, David and Lewis, individually and on behalf of Daverse, executed another promissory note, for $50,000 payable to Hills Bank. The June 5, 1997 promissory note contained a new customer number of 5080338-06, but it had the same loan number, 29:151:16, as the November 14, 1996 note. The June 5, 1997 note also indicated it was secured by the "Continuing Limited Guaranties of Cynthia Converse and John E. Moore dated 11/14/96."

On February 7, 2002, after "go[ing] many months without payments," Hills Bank sent Daverse, David, and Lewis a letter captioned, "Refinancing Proposal . . . ." The letter stated Daverse, David, and Lewis owed Hills Bank $45,000, which was the "approximate remaining balance on Note #5080338-06. It

remains secured and backed by . . . the limited guarantees (limited to $30,000 each) dated 11-14-96 and signed by John E. Moore and Cynthia J. Converse." Converse signed the letter as "Limited Guarantor to extent [o]f $30,000 on note #5080338-06." An extension and amendment to the June 5, 1997 promissory note was executed on February 7, 2002.[1] It was signed by David and Lewis, individually and on behalf of Daverse, and included the terms set forth in the letter.

Daverse, David, and Lewis failed to make the payments required by the June 5, 1997 promissory note and February 7, 2002 extension agreement. The bank accordingly filed suit against Converse in March 2006, alleging she breached her obligation to pay the bank "the sum of $30,000.00 plus interest on Note No. 5080338-06." Converse answered, generally denying the allegations and setting forth a variety of affirmative defenses. She filed a counterclaim against Hills Bank, alleging the bank unreasonably liquidated the collateral of Daverse, failed to apply the proceeds from the collateral to the debt the bank was seeking to collect from her, and misrepresented the nature of the February 7, 2002 letter she signed. She also filed a crossclaim against David and John Moore, alleging that if she was found liable, she is entitled to contribution and reimbursement from them as the borrower and co-guarantor of the promissory note at issue.

On May 15, 2006, shortly after Converse filed her claims against Hills Bank and the Moores, the bank agreed to release the Moores from "their respective personal (in personam) obligations and liabilities as borrower/co-

[1] The loan number on the "Extension and Amendment to Promissory Note" was 5080338-06.

maker/guarantor, on all loans made by the Bank to Daverse, Inc." in consideration for payment of $50,000.

The Moores then filed a motion for summary judgment, asserting Converse could not recover contribution from them due to their release by the bank. Converse resisted the Moores' motion and filed a summary judgment motion, contending she was entitled to summary judgment against Hills Bank because the bank entered into the release agreement with the Moores without her knowledge or consent. Hills Bank resisted Converse's motion and filed a motion for summary judgment, arguing summary judgment should be entered in its favor because the undisputed facts established Converse was liable as a guarantor for the debt owed under the June 5, 1997 promissory note.

The district court granted the motions for summary judgment filed by the Moores and Hills Bank and denied the summary judgment motion filed by Converse.[2] "Based on the clear and unambiguous language of the Continuing Guaranty," the court determined the undisputed facts showed Converse was liable as a guarantor for the debt due on the June 5, 1997 promissory note. The district court also found Converse was not entitled to contribution from the Moores because "there is no common liability in this action between Converse and the Moores" due to the Moores' release agreement with the bank. The court accordingly dismissed Converse's counterclaim against Hills Bank and crossclaim against the Moores, and entered judgment in the amount of

[2] Converse does not raise the district court's denial of her motion for summary judgment as an issue on appeal. Therefore, we need not and do not address that portion of the district court's order. *See Aluminum Co. of America v. Musal*, 622 N.W.2d 476, 479 (Iowa 2001) ("Issues not raised in the appellate briefs cannot be considered by the reviewing court.").

$40,385.16 plus attorney's fees and court costs on Hills Bank's claim against Converse.

Converse appeals. She claims the district court erred in entering summary judgment in favor of Hills Bank and finding the June 5, 1997 promissory note was secured by the guaranty agreement she signed on November 14, 1996. In the alternative, she claims the court erred in determining the amount owed to Hills Bank in light of the bank's failure to reasonably dispose of collateral. Finally, she claims the district court erred in granting the Moores' summary judgment motion as to her crossclaim against them.

II. SCOPE AND STANDARDS OF REVIEW.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id*.

III. MERITS.

A. Hills Bank's Motion for Summary Judgment.

Converse first claims the district court erred in entering summary judgment in favor of Hills Bank and finding the undisputed facts established the June 5,

1997 promissory note was secured by the guaranty agreement she signed on November 14, 1996. We agree.

A guaranty is a contract by one person to another for the fulfillment of a promise of a third person. *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 86 (Iowa 2004). The obligation of the guarantor must be determined from the parties' written contract. *Bousquet v. Ward*, 116 Iowa 126, 128, 89 N.W. 196, 197 (1902); *see also Schoonover v. Osborn*, 108 Iowa 453, 457, 79 N.W. 263, 264 (1899) (stating a guarantor "is a favorite of the law" and has the right to stand on the strict terms of his or her obligation). The rules concerning parties to contracts generally are applicable for the purpose of resolving questions as to the parties to contracts of guaranty. 38 Am. Jur. 2d *Guaranty* § 23, at 890 (1999). We have accordingly recognized that guaranty contracts are to be construed according to the intention of the parties as ascertained from the language used in the contract and the circumstances under which the guaranty is given. *Williams v. Clark*, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987).

The November 14, 1996 guaranty agreement stated Converse's liability as co-guarantor was limited to the November 14, 1996 promissory note with a customer number of 5080338-05 and loan number of 29:151:16. The guaranty further provided Converse's liability extended to "any amendments, extensions, modifications, renewals, replacements, or substitutions" of the above-described promissory note. This note was marked "paid" on June 5, 1997. Hills Bank later sent Converse notice that the debt secured by the November 14 promissory note was "paid-in-full."

In general, payment of the debt "by the principal discharges the guarantor and terminates the obligation." *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388, 390 (Iowa 1988). The parties may, however, agree to a "continuing guaranty," which is ordinarily effective until revoked by the guarantor. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 277 (Iowa 1982). A continuing guaranty "'contemplates a future course of dealing during an indefinite period, or it is intended to cover a series of transactions or a succession of credits.'" *Id.* (quoting 38 Am. Jur. 2d *Guaranty* § 23, at 1023 (1968)); *see also Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 857 (Iowa 1990) (finding guarantor was liable for her son's multiple debts to the bank under a continuing guaranty agreement). A restricted guaranty, on the other hand, is limited to a single transaction or to a limited number of specific transactions. *Maresh Sheet Metal Works v. N.R.G., Ltd.*, 304 N.W.2d 436, 440 (Iowa 1981).

The language of the parties' guaranty contract as to its continuing or restricted nature is ambiguous. The contract is titled "Continuing Guaranty (Limited)" and contains a provision captioned, "Absolute and Continuing Nature of Guaranty." The terms of the agreement, however, limit Converse's guarantee to a specific promissory note and any subsequent variations of that note. The June 5, 1997 promissory note purported to be secured by Converse's November 14, 1996 guaranty. Although this note had the same loan number as the November 14, 1996 note, it had a different customer number of 5080338-06. The amount of the debt and the terms of the note were also different from the November 14 note.

Hills Bank argues that regardless of these ambiguities as to the continuing or restricted nature of Converse's November 14, 1996 guaranty, she later agreed the June 5, 1997 promissory note was secured by her guaranty. In support of its argument, Hills Bank relies on the February 7, 2002 letter it addressed to David, Lewis, and their company, Daverse, regarding their failure to pay various loans held by the bank. The letter was designated as a "Refinancing Proposal" and stated "note #5080338-06" remained secured by the November 14, 1996 guaranty agreement. Converse signed this letter as "Limited Guarantor to extent [o]f $30,000 on note #5080338-06." She did not sign another guaranty agreement securing the June 5, 1997 promissory note or the February 7, 2002 extension and amendment to that note.

Converse asserts that because her November 14, 1996 guaranty was limited to the promissory note executed that day, which was later satisfied in June 1997, the February 7, 2002 letter was of no effect. *See* Restatement (Third) of Suretyship & Guaranty § 19 cmt. a (1996) ("To the extent the underlying obligation is discharged by performance or other satisfaction by the principal obligor, the secondary obligation is also discharged."). She further asserts the letter was simply a proposal rather than an enforceable guaranty.

Viewing these facts in the light most favorable to Converse, *see Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998), we conclude reasonable minds could differ as to whether the June 5, 1997 promissory note and February 7, 2002 extension agreement were secured by the November 14, 1996 guaranty agreement. There is a factual dispute as to whether the November 14, 1996 guaranty agreement was continuing or restricted and as to whether the June 5,

1997 promissory note was an extension or amendment of the November 14, 1996 note. There are also disputed factual issues regarding the effect of the February 7, 2002 letter on Converse's alleged obligations as guarantor. We therefore conclude the district court's grant of summary judgment in favor of Hills Bank was in error. We accordingly need not and do not address Hills Bank's request for a limited remand to determine appellate attorney fees.

Converse next claims the district court erred in determining the amount owed to Hills Bank in light of the Bank's failure to reasonably dispose of the collateral. Although our above conclusion renders this issue moot, we will briefly address the claim because the issue may arise again on remand.

The guaranty agreement provided Converse's obligations as guarantor "may be enforced without requiring Lender to exercise, enforce, or exhaust any right or remedy against any . . . security or collateral." The agreement further provides Converse's obligations as guarantor "shall not be affected or impaired" by the "loss, release, sale, exchange surrender or other change in collateral." Converse further agreed to waive "the right to require that any action be brought first against . . . any security, or to require that resort be made to any security."

Converse argues these provisions do not affect her ability to challenge the reasonableness of the bank's disposition of the collateral pursuant to Iowa Code sections 554.9602 and 554.9624 (2005)[3] and our supreme court's opinion in *United States v. Jensen*, 418 N.W.2d 65 (Iowa 1988).

Section 554.9602 states:

[3] Neither party challenges the application of article 9 of Iowa's Uniform Commercial Code (UCC) to the guaranty agreement at issue in this case. We therefore accept the parties' apparent agreement as to the applicability of this statute and discuss the effect of its provisions on this case. *See Beal Bank v. Siems*, 670 N.W.2d 119, 127 (Iowa 2003).

> Except as otherwise provided in section 554.9624,[4] to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:
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> . . . .
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> 7. section 554.9610, subsection 2 . . . which deal[s] with disposition of collateral.

Section 554.9610(2) provides that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms must be commercially reasonable." We believe that these sections operate to prevent a debtor or obligor from waiving the requirement that a secured party dispose of collateral in a commercially reasonable manner.

B. Moores' Motion for Summary Judgment.

We now turn to Converse's final claim that the district court erred in granting the Moores' motion for summary judgment and dismissing her crossclaim against them for contribution. The district court found Converse could not recover contribution from the Moores because there is no common liability between them due to the bank's release agreement with the Moores. Converse argues that regardless of the common liability rule, she is entitled to reimbursement from the Moores if she is required to pay the debt owed under the June 5, 1997 promissory note.[5] We cannot agree.

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[4] This section states that a debtor or secondary obligor may waive the right to notification of disposition of collateral, the right to require mandatory disposition of collateral, or the right to redeem collateral only by an agreement to that effect entered into after default. Iowa Code § 554.9624; *see also Jensen*, 418 N.W.2d at 65-66 (holding a guarantor is considered a debtor and cannot waive notice of disposition of collateral prior to default).

[5] We decline to address the parties' arguments regarding sections 37 and 39 of the Restatement (Third) of Suretyship and Guaranty that address the effect of an obligee's release of a principal obligor from "its duties pursuant to the underlying obligation" on the duties of a secondary obligor because these arguments were neither presented to nor passed upon by the district court. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal.").

Converse is correct that ordinarily "a guarantor is entitled to reimbursement from the primary borrower" or co-guarantor "if the guarantor is required to pay under the guaranty." *See Halverson v. Lincoln Commodities, Inc.*, 297 N.W.2d 518, 522 (Iowa 1980) ("Where a guarantor, who has entered into a contract of guaranty . . . pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor . . . ."). "The right of one party, who has satisfied a claim, to seek reimbursement from another party can generally be pursued by three interrelated common law principles: indemnity, contribution, and subrogation." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 149 (Iowa 2001). These principles are equitable in nature and employed to correct or prevent unjust enrichment. *Id.* The idea of unjust enrichment "is deeply engrained in our law" and "cuts across many areas of the law." *Id.* A fundamental aspect of these principles "requires that the two parties to the claim be obligated to the third party." *Id.* at 150.

The doctrine of contribution accordingly rests on the equitable principle that the parties subject to common liability should contribute equally to the discharge of that liability. *Id.* at 152. Common liability exists when the injured party has a legally cognizable remedy against both the party seeking contribution and the party from whom contribution is sought. *Id.* at 153. Thus, in this case, the claim for contribution brought by Converse necessitates a showing that the Moores have a legal obligation to Hills Bank. Converse cannot make that

showing due to the release the Moores executed with the bank in consideration for payment of $50,000.[6]

Although we question the equity of a release effectuated after Converse filed her crossclaim for contribution and without notice to her, we must apply the dictates of the law and the terms of the parties' agreement. In the November 14, 1996 guaranty agreement, Converse waived notice of any release of the borrower or co-guarantor and agreed her obligations as guarantor were "direct and unconditional and may be enforced without requiring Lender to exercise, enforce, or exhaust any right or remedy against any Borrower, [or] Co-guarantor." She further agreed her obligations were "absolute and continuing and shall not be affected or impaired if Lender . . . releases any of the indebtedness owed by any Borrower, [or] Co-guarantor." We therefore affirm the district court's grant of summary judgment in favor of the Moores and dismissal of Converse's crossclaim for contribution.

IV. CONCLUSION.

Viewing the facts in the light most favorable to Converse, we conclude reasonable minds could differ as to whether the June 5, 1997 promissory note and February 7, 2002 extension were secured by the November 14, 1996 guaranty agreement. The district court's grant of summary judgment in favor of Hills Bank and dismissal of Converse's counterclaim against Hills Bank was therefore in error. However, we conclude the district court did not err in entering summary judgment in favor of the Moores on Converse's crossclaim for contribution. We have considered all issues presented on appeal, whether

[6] We note Converse does not argue that the release did not discharge the Moores' liability to the bank.

specifically addressed or not, and find any that are not specifically addressed to be without merit or rendered moot by our decision.

The judgment of the district court is accordingly affirmed in part, reversed in part, and remanded for further proceedings. Costs on appeal are assessed one-half to Hills Bank and one-half to Converse.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.