STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0381

Kittson County,
Respondent,

vs.

River Ridge Dairy, LLP,
Respondent,

Border State Bank,
Appellant.

Filed December 16, 2008
Affirmed
Worke, Judge

Kittson County District Court
File No. 35-CV-07-62

Roger C. Malm, Kittson County Attorney, Jeffrey W. Hane, Assistant County Attorney, Karen M. Foss, Assistant County Attorney, P.O. Box 790, Hallock, MN 56728 (for respondent Kittson County)

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Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent, arguing that the district court erred in finding that there were no genuine issues of material fact and that appellant failed to satisfy the terms of a conditional guaranty as a matter of law. We affirm.

D E C I S I O N

In December 2002, appellant Border State Bank and respondent Kittson County entered a Limited Continuing Loan Guaranty (LCLG). The purpose of the LCLG was to induce appellant to enter into a loan agreement with respondent River Ridge Dairy, LLP (Dairy). The county's duty to perform was contingent upon appellant satisfying a number of conditions. One of the conditions of the LCLG required appellant to make an unsecured loan to Dairy in the amount of $600,000. The loan was to be repaid over a period of seven years, with interest-only payments in the first year. Importantly, the LCLG expressly stated "[T]he breach or failure of any of the conditions . . . shall be deemed to be material breaches, the result of which shall excuse performance." Appellant contends that this condition was satisfied because appellant and Dairy entered into an unsecured loan agreement for $600,000 on November 15, 2002.

Appellant argues that, because it entered into a loan with Dairy that complied with the terms of the conditional loan agreement, the district court erred by finding that appellant failed to enter a loan that complied with the terms of the LCLG and granting summary judgment to Kittson County.

On appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence is viewed in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the party resisting summary judgment may not rest on mere averments; it must produce evidence of specific facts sufficient to raise a jury issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985). If there are no genuine issues of material fact, we will review the district court's application of the law de novo. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

A contract of guaranty is an undertaking or promise to pay on the part of one person that is collateral to a primary obligation and that binds the guarantor to performance in the case of the default of the one primarily bound to perform. *Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 64 N.W.2d 517 (1954). A contract of guaranty may be either conditional or absolute. *Charmoll Fashions, Inc. v. Otto*, 311 Minn. 213, 219, 248 N.W.2d 717, 720 (1976). In an absolute guaranty, "the obligor becomes liable merely upon the failure of performance by the debtor," while a conditional guarantor "is liable only upon the happening of the stated contingency[.]" *Id.* In Minnesota, a guarantor has the right to "insist that he is bound to the extent, in [the] manner, and under the circumstances pointed out in his obligation, and no further." *Schmidt v. McKenzie*, 215 Minn. 1, 9, 9 N.W.2d 1, 5 (1943) (quotation omitted).

Appellant's contention that the November 15 loan satisfies the LCLG fails because the November 15 loan does not comply with the requirements set forth in the LCLG, which expressly states and details the loan terms, including a principal amount of $600,000, a term of seven years, interest-only payments in the first year, and the balance amortized over the remaining 72 months. The only loan produced by appellant was the November 15 loan. Not only was this loan entered into prior to the LCLG, but it had a term of one year instead of the required seven years. Appellant concedes that this loan did not conform to the LCLG requirements, but argues that a problem with its computer software prevented it from preparing a note that conformed to the LCLG requirements. But the terms of the loan agreement were typed on the promissory note, and appellant could have used any terms that it desired; even terms that appellant's computer software prevented from being entered into its computer system. Appellant, however, did not do so.

Notably, appellant could have avoided this litigation by demanding that the LCLG reference the November 15 loan. The LCLG contemplates that Dairy "is entering into a loan with [appellant]." Because appellant had already entered into a loan with Dairy, appellant could have insisted that the LCLG reflect as much. Instead, the LCLG uses prospective language rather than retrospective language to describe the loan agreement.

Appellant suggests that the terms of the LCLG are ambiguous and that the intention and understanding of the parties was that the loan was granted on the terms and conditions of the LCLG. Unless an agreement is ambiguous, appellate courts determine the parties' intent from the language used. *Travertine Corp. v. Lexington-Silverwood*,

683 N.W.2d 267, 271 (Minn. 2004). The terms of the LCLG are unambiguous and clearly state that the loan was to be payable over a period of seven years. Because the language of the LCLG is unambiguous, and there is no proof in the record that the parties ever executed a note that complied with the LCLG terms, we conclude that appellant failed to satisfy this condition. Failure of any condition in the LCLG relieves respondent of its duty to perform. Therefore, the district court did not err in granting summary judgment in favor of Kittson County. Finally, even though appellant's failure to satisfy the loan condition justifies a grant of summary judgment, we have reviewed appellant's other arguments and find them to be without merit.

Affirmed.