STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0728

Mary Eischens, et al.,
Appellants,

vs.

Marriott International, Inc.,
a foreign corporation,
Respondent.

Filed March 24, 2009
Affirmed
Stauber, Judge

Ramsey County District Court
File No. 62C307003885

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Robyn N. Moschet, Cheryl Hood Langel, Minard M. Halverson, McCollum, Crowley, Moschet & Miller, Ltd., 7900 Xerxes Avenue South, 700 Wells Fargo Plaza, Minneapolis, MN 55431-1141 (for respondent)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Stauber, Judge.

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

STAUBER, Judge

In this appeal from summary judgment in a negligence action arising out of a slip-and-fall accident involving guests at an Egyptian hotel, appellants Mary and Richard

Eischens contend that the district court erred by dismissing their claims against respondent Marriott International, Inc. (MII), whose subsidiary, Marriott Hotels International, B.V. (MHI), manages the hotel. Appellants acknowledge that MII does not own or manage the hotel, but claim that MII assumed a duty of care to hotel guests under the provisions of the hotel's operating and management agreement. Because the plain language of the contract in question only obligated MII to act as a guarantor or surety for performance of MHI's contractual duties, rather than to assume tort liability to hotel guests, we affirm.

FACTS

In December 2004, appellant Mary Eischens sustained injuries after she slipped and fell on a stairway during her stay at the Marriott Cairo Hotel in Cairo, Egypt. The hotel is owned by the Egyptian General Company for Tourism and Hotels ("Egyptian General Company"), an Egyptian company, and managed by MHI, a Netherlands corporation. MHI is a wholly-owned subsidiary of respondent MII, a Delaware corporation authorized to conduct business in Minnesota. The hotel is managed pursuant to an operating and management agreement between MHI and Egyptian General Company.

In November 2005, Eischens and her husband, Richard Eischens, brought suit against MII, alleging that it was negligent in maintaining the hotel premises and failing to warn of unsafe conditions. MII subsequently moved for summary judgment, claiming that it owed no duty of care to appellants because it neither owned nor managed the hotel, and that it was immune from liability for the torts of a subsidiary, absent a piercing of the

corporate veil. Appellants opposed the motion, alleging that MII owed them a duty because MII had agreed, as a signatory to the operating and management agreement, to guaranty and incur joint and several liability for MHI's maintenance of the hotel. The district court granted summary judgment, concluding that MII did not owe a duty to appellants because: (1) MII did not own or manage the hotel and, therefore, was not responsible for "the maintenance, upkeep, or construction of stairs where [Mary] Eischens claims she fell" and (2) the operating and management agreement only obligated MII to act as a guarantor or surety for MHI's financial obligations to the Egyptian General Company. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court determines whether the evidence, when "viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted); *see also* Minn. R. Civ. P. 56.03 (setting forth summary judgment standard).

In a negligence case, the defendant is entitled to summary judgment when there is a complete lack of proof on any of the four elements necessary for recovery, including, as relevant to this case, the existence of a duty. *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005). Whether a duty exists depends on the relationship among the parties, the foreseeability of harm to others, and public policy concerns. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989). The existence of a duty is

generally an issue of law reviewed de novo. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

Appellants concede that MII did not own or manage the property, but contend that the district court erred in granting summary judgment because the terms of the operating and management agreement as to the obligations of MII are ambiguous and must be decided by a jury. Appellants claim that the agreement could be reasonably interpreted to mean that MII agreed to assume liability to hotel guests for any negligence arising out of the management and operation of the hotel.

"The construction and effect of a contract presents a question of law, unless an ambiguity exists." *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a legal determination. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982). A contract is ambiguous if its terms are reasonably susceptible to more than one interpretation. *Id.* Unambiguous language must be accorded its plain and ordinary meaning. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995).

In claiming that a material issue of fact exists, appellants focus their argument on a clause in the agreement providing that "MII shall irrevocably and unconditionally guarantee, jointly and severally, the proper performance of all of [MHI's] obligations hereunder, financial, operational or otherwise, during the [t]erm [of the agreement]." Appellants claim that this clause, when viewed in a light most favorable to them, supports the conclusion that MII contractually assumed a duty of care to third parties by

guarantying that MHI, as manager of the hotel, would fulfill its obligations under the agreement, including necessary maintenance of the premises.

We disagree. By isolating this clause from the rest of the agreement, appellants ignore the overall purpose and scope of the instrument. *See Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 293, 135 N.W.2d 681, 685 (1965) (stating that the intention of the parties must be gathered from the entire instrument and not from isolated clauses). When considered in the context of the agreement as a whole, it is apparent that this clause refers to MII's obligation to act as a guarantor or surety for Egyptian General Company in the event of a default by MHI. The agreement expressly provides that MHI and Egyptian General Company are the sole parties to the agreement, and each page of the document was initialed by only these two parties. In addition, the overwhelming majority of the terms contained in the agreement concern the rights and obligations of Egyptian General Company, as owner of the hotel, and MHI, as manager of hotel operations. MII is referenced only six times in the 28-page agreement, and is consistently identified as a guarantor or surety. The clauses relevant to MII's obligations provide that MII shall guaranty to Egyptian General Company, that MHI "will be financially and technically competent to carry out and perform all of [its] obligations" and "will fully and faithfully perform in accordance with all the terms and conditions" of the agreement. In the event of MHI's default, MII agrees "to pay [Egyptian General Company], its successors and permitted assignees, all damages, costs and expenses to which [they] . . . may be entitled by reason of any such default."

A contract of guaranty is an undertaking or promise to perform 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, 275, 64 N.W.2d 517, 522 (1954). In other words, a guarantor is not a party to the primary agreement, and the guaranty is offered only as security for the obligee in the event that the principal obligor defaults on the primary agreement.[1] *See Fid. Bank & Trust Co. v. Fitzimons*, 261 N.W.2d 586, 590 (Minn. 1977) (explaining the purpose of a guaranty). Thus, unless otherwise provided, a guaranty is offered for the benefit of an obligee rather than a third party. *See Borg Warner Acceptance Corp. v. Shakopee Sports Ctr., Inc.*, 431 N.W.2d 539, 541 (Minn. 1988) (stating that a guaranty, as security for performance, is a "prudent business precaution" benefiting an obligee). Because the plain language of the agreement unambiguously provides that the guaranty is made for the benefit of Egyptian General Company, this clause does not create a genuine issue of material fact as to the duties of MII with respect to third parties.

Next, appellants claim that an issue of material fact exists because the terms of the agreement demonstrate a principal-agent relationship between MHI and MII that imposes

[1] MII is also identified as a "surety" in the operating and management agreement. We acknowledge that there are some critical distinctions between a guarantor and surety. *See Black's Law Dictionary* 1455 (7th ed. 1999) ("A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable."). However, these distinctions are inconsequential to our analysis of MII's liability to third parties because, unless otherwise provided, both a guarantor and a surety have a responsibility only to the creditor or obligee. *See id.* (indicating that both a surety and guarantor are liable to the creditor).

vicarious liability for MII in tort. Specifically, appellants contend that MII entered into an agency relationship with MHI by agreeing to become "jointly and severally" liable for the performance of MHI's obligations under the agreement. Appellants are correct that principals are jointly and severally liable for torts committed by an agent acting in the scope of the agency relationship. *Kellogg v. Woods*, 720 N.W.2d 845, 852 (Minn. App. 2006). But it does not automatically follow that a principal-agent relationship exists solely by virtue of contractual language providing that the parties agree to be jointly and severally liable. Rather, such a relationship arises "from the manifestation of consent by one [entity] to another that the other shall act on [its] behalf and subject to [its] control, and consent by the other so to act." Restatement (Second) of Agency § 1 (1958); *see also Plate v. St. Mary's Help of Christians Church*, 520 N.W.2d 17, 20 (Minn. App. 1994) (noting Minnesota courts have adopted the Restatement definition of agency), *review denied* (Minn. Oct. 14, 1994). Here, appellants failed to present any evidence that MHI was acting under the control or consent of MII in managing the hotel. As discussed above, the clause cited by appellants that includes the "joint and several liability" language relates to MII's responsibility to act as a guarantor or surety for Egyptian General Company.

Because the district court did not err in concluding that no genuine issues of material fact exist as to MII's duty to third parties under the operating and management agreement, we affirm.

Affirmed.