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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0764

B.J. Johnson Partners, LLC,
Appellant,

vs.

Koss Paint & Wallpaper, Inc., et al.,
Respondents.

Filed April 7, 2009
Reversed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-07-3868

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

SHUMAKER, Judge

In this commercial-lease dispute, appellant-lessor argues that the district court erred in ruling that respondent James R. Koss did not personally guarantee the debts of his lessee-corporation, and in failing to award double-rent damages as required by the lease agreement. Because we find that, despite the absence of a separate signature line for a guarantor, respondent James R. Koss objectively manifested an intention to be bound by the personal guaranty provision of the lease, and the plain language of the lease provides for double-rent in the case of a tenant holdover, we reverse.

FACTS

Under a written agreement, respondent Koss Paint & Wallpaper, Inc. (Koss Paint) leased commercial real estate from appellant B.J. Johnson Partners, LLC (B.J. Johnson). The body of the lease contained lease guaranty language and designated "the undersigned, as Guarantor . . . ." The "undersigned" was respondent James R. Koss. There was no written guaranty separate from the lease and there was no separate signature block for the guarantor. Rather, the signature block for the "undersigned" was:

> LESSEE: KOSS PAINT & WALLPAPER, INC.
> By _____
> Its _____

James R. Koss signed for the lessee, designating himself as the lessee's president.

Koss Paint defaulted on its rental obligation and other charges required by the lease and remained in possession of the property after B.J. Johnson terminated the lease. B.J. Johnson sued both Koss Paint and James R. Koss as guarantor.

Contending that he had no personal liability on the lease guaranty because he signed only in his representative capacity, James R. Koss moved for summary judgment. The district court ruled that the guaranty was ambiguous and that parol evidence was necessary to determine the intent of the guaranty, denied the motion, and held a bench trial.

At the outset of the trial, the parties stipulated that Koss Paint owed $60,133.33 on the lease and that Koss Paint held over for four months after the lease was terminated and owed at least $24,053.92 for the holdover rent. The parties disagreed, however, as to whether the holdover rent should be doubled under a lease addendum.

After the trial, the district court found that, before the parties entered the lease, B.J. Johnson's leasing agent "advised . . . James R. Koss that the lease . . . would have a personal guarantee," and delivered to James R. Koss a copy of the lease before a meeting at which James R. Koss signed the lease. When James R. Koss reviewed the lease, he noted that it did not contain "a signature line for him in an individual capacity; therefore, he concluded that there was no personal guarantee," and he testified that he did not raise the issue of the guaranty with the leasing agent. He also testified that, had the lease contained a separate guaranty signature line, he would not have signed it.

Noting that B.J. Johnson drafted the lease and failed to include "a signature line for James R. Koss as guarantor," the district court held that "James R. Koss did not individually guarantee the . . . Lease."

The court also found that Koss Paint owes $60,133.33 for unpaid rent during the lease period; $2,211.98 for utilities; $95 for furnace repair; but that Koss Paint is entitled

to deductions for certain utility payments in the sum of $6,369.65 and for its damage deposit of $3,720.

The court found that Koss Paint was evicted on June 14, 2006, but that Koss Paint "did not remove all of the paint stored on the premises and repair the light fixtures until August, 2006." The court calculated holdover damages to be $24,053.32.

This appeal followed.

D E C I S I O N

Guaranty Provision

Neither party challenges the district court's determinations that the guaranty language in the lease is ambiguous and that parol evidence is admissible to resolve the ambiguity. B.J. Johnson argues that the court misapplied the parol evidence that it received at trial. Furthermore, the parties disagree as to the standard of review to be applied on appeal. B.J. Johnson urges that the clearly-erroneous standard applies to the district court's findings of fact but that the court's application of the parol evidence rule raises a question of law that is reviewable de novo. Koss Paint and James R. Koss contend that the controlling standard is that of clear error and that no issue in the appeal is reviewable de novo.

A district court's findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation

omitted). However, the construction of a contract raises an issue of law subject to de novo review. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979).

When there is an ambiguity in a contract and extrinsic evidence is needed for construction of the contract, the extrinsic evidence raises questions of fact. *Id.* It is to the facts found from that evidence that we apply the clearly-erroneous standard of review. *Id.* Once the facts have been found and considered, the construction of the contract raises an issue of law to which the de novo standard applies. *Id.*

B.J. Johnson does not contend that the district court's factual findings were erroneous, but rather argues that, upon the facts adduced at trial, the court's construction of the guaranty was error. Koss Paint and James R. Koss argue that the court was obliged to construe the guaranty provision against B.J. Johnson as the drafter and that, accordingly, the court's construction was not erroneous.

"The fundamental approach to construing contracts is to allow the intent of the parties to prevail." *Id.* Although contract terms are to be construed most strongly against the drafter, that principle "does not . . . ineluctably lead to the conclusion that the drafter is to lose." *Id.* at 67. "Another applicable rule is that the language found in a contract is to be given its plain and ordinary meaning." *Id.*

The evidence at trial consisted of the lease itself and the testimony of Eric Johnson, B.J. Johnson's managing partner; Ed Hanlon, B.J. Johnson's leasing agent and employee of Edina Realty; and James R. Koss, president of Koss Paint.

Article 6 of the lease contains the language at issue. It provides in part as follows:

> It is understood that the undersigned Guarantor is a substantial shareholder of said tenant and that Lessor has entered into this Lease in reliance on this Guaranty. Therefore, in consideration of the premises and for other consideration, the receipt of which is hereby acknowledged, the undersigned, as Guarantor, agrees:
>
> 1. The undersigned does hereby unconditionally, absolutely and continually guarantee the full and faithful payment and performance by the Lessee under this Lease of all the terms, conditions and covenants contained in said Lease which are to be by Lessee kept and performed.
>
> . . . .
>
> 3. Death of Guarantor hereto shall not affect any terms hereof, and this Guaranty shall continue to be binding upon Guarantor's heirs, executors, administrators and assigns, and shall inure to the benefit of Lessor, its successors and assigns.

This language is followed by a signature block for B.J. Johnson as lessor—signed by Eric Johnson, partner—and a signature block for Koss Paint & Wallpaper, Inc. as lessee, signed by James R. Koss, "Its President."

The uncontroverted testimony revealed, as the district court found, that prior to the execution of the lease, Hanlon showed the premises to James R. Koss and told him that the lease would contain a personal guaranty. Hanlon delivered a copy of the lease to James R. Koss before the parties met to sign it. James R. Koss met with Johnson and Hanlon to sign the lease. He reviewed the lease either before or at the meeting, noticed that there was no signature line for him as an individual, concluded that there was no personal guaranty in the lease, and signed it. James R. Koss admitted that he "did not raise the issue of lack of a personal guarantee signature line" with Johnson at the

execution meeting, and he testified that, had there been such a signature line, he would not have signed the lease.

Noting that the lease "does not have a signature line for James R. Koss as guarantor," the court found that "James R. Koss did not individually guarantee the . . . Lease." Implicit in these findings are two conclusions. First, before an individual may be held to be a guarantor he must expressly sign on a line showing that capacity. Second, because the lease did not include a separate signature line for the guarantor, the parties must have intended that there be no personal guaranty. We reject the first implicit conclusion as contrary to law and the second as contrary to both the language of the lease and the extrinsic evidence adduced at trial.

Generally, an officer of a corporation is not liable to its creditors for corporate debts. *Haas v. Harris*, 347 N.W.2d 838, 840 (Minn. App. 1984). "Where an agent, acting for a disclosed principal, enters into a contract with third persons for and on account of his principal and in [the principal's] name, the contract is that of the principal and does not give rise to any contractual obligation running to the agent." *Kost v. Peterson*, 292 Minn. 46, 49, 193 N.W.2d 291, 294 (1971); *see also Froelich v. Aspenal, Inc.*, 369 N.W.2d 37, 39 (Minn. App. 1985). The general rule that an agent is not obligated does not apply, however, if the agent and the contracting third-party have "otherwise agreed." Restatement (Second) of Agency § 320 (1958), *cited with approval in Froelich*, 369 N.W.2d at 39; *Haas*, 347 N.W.2d at 840. Here, the question was whether the parties "otherwise agreed" to bind James R. Koss individually for the debts of Koss Paint.

"The manner in which an agent's name appears in a contract is often relevant to establishing whether the agent agreed to become a party to the contract . . . ." Restatement (Third) of Agency § 6.01 cmt. d (2006). An agent's name accompanied by words such as "by," "per," "for," "on behalf of," would appear to indicate that the agent is acting only as an agent. *Id.* The lease named Koss Paint as lessee, and was signed "by" James R. Koss "its" president. This demonstrates that James R. Koss signed the lease in a representative capacity, but the inquiry does not end there, for "[a]n executive's agreement to become a party to a contract made on behalf of the organization may be shown by language in the agreement itself that names the officer individually as a party." *Id.* at cmt. d(2).

The lease clearly states that the lessor has entered into the lease in reliance on the guaranty given by the guarantor. The lease describes the guarantor as "a substantial shareholder of said tenant," refers to the guarantor as "the undersigned," and makes the guaranty binding on the guarantor's "heirs." Thus far, the language is not ambiguous. It refers to a person other than the lessor, namely, a shareholder of the lessor. It refers to an individual when it indicates that the guarantor's heirs shall be bound because a corporation cannot have heirs. It designates the guarantor to be a signatory to the lease. There were two signatories, Eric Johnson on behalf of the lessor and James R. Koss on behalf of the lessee. It would be absurd to conclude that Eric Johnson, a partner of the lessor, was intended as the guarantor of the lease. From the plain language of the lease, the parties intended James R. Koss to be the guarantor.

The district court's implicit conclusion that James R. Koss did not guarantee the lease either nullifies all of the guaranty language or has the effect of the debtor guaranteeing its own debt. "[N]o purpose would be served by a corporation guaranteeing its own debt" for it is already primarily liable for any debt it has assumed. *Johnson Bros. Wholesale Liquor Co. v. Otto's Liquor, Inc.*, 292 Minn. 481, 481, 194 N.W.2d 592, 592 (1972).

A corporate officer is not prohibited from personally guaranteeing the obligations of a corporation. *Universal Lending Corp. v. Wirth Cos., Inc.*, 392 N.W.2d 322, 326 (Minn. App. 1986). And, although the confusion generated by this lease could have been avoided by the inclusion of a separate signature line for the guarantor, we are aware of no authority that such a signature line is an absolute prerequisite to the creation of a binding personal guaranty or that an individual may not serve the dual purpose of binding the principal and creating a personal guaranty as well. *See Robert C. Malt & Co. v. Carpet World Distribs., Inc.*, 763 So. 2d 508, 510 (Fla. Dist. Ct. App. 2000) (holding that personal liability may be imposed where a lease contains language indicating personal liability despite president's signature in a representative capacity, because to hold otherwise would nullify the guaranty provision of the lease).

Not only does the lease guaranty language compel the conclusion that the parties intended James R. Koss to be the guarantor, the uncontroverted evidence does so as well. "An intent to be contractually bound is determined by the objective manifestations of the parties' words, conduct, and documents, and not by their subjective intent." *Norwest Bank Minnesota N., N.A. v. Beckler*, 663 N.W.2d 571, 578 (Minn. App. 2003) (citing

Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 695 (Minn. 1983)). In ascertaining the parties' intentions, the court places itself in the parties' positions at the time they formed the contract. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1979). What the parties intended is based on the contract as a whole, its plain language, and the surrounding circumstances. *Capital Warehouse Co., Inc. v. McGill-Warner-Farnham Co.*, 276 Minn. 108, 114, 149 N.W.2d 31, 35 (1967). Furthermore, to be valid and enforceable, a contract "does not require a *subjective* mutual intent to agree on the same thing in the same sense . . . ." *Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958) (emphasis added). Additionally, where a party has a duty to deny or object to a term, his silence can become an objective manifestation of his assent to the term. *Rosenberg v. Townsend, Rosenberg & Young, Inc.*, 376 N.W.2d 434, 437 (Minn. App. 1985); *Sonnesyn v. Hawbaker*, 127 Minn. 15, 20, 148 N.W. 476, 478 (1914).

James R. Koss was twice informed of the requirement of a personal guaranty of the lease. When Hanlon showed the premises to James R. Koss, he told him that a personal guaranty of the lease would be required. James R. Koss said nothing in response. When James R. Koss reviewed the lease, he saw the guaranty language, but he did not object or question it because he thought and subjectively intended that he would not be bound as a guarantor without a separate signature line. The lease language coupled with the objective, manifested intent of the parties compels the conclusion that James R. Koss was considered the personal guarantor of the lease. To conclude

otherwise would be to allow his subjective, secret intent to defeat the product of his objectively demonstrated intent.

The district court erred in construing the lease to be devoid of James R. Koss's personal guaranty and its conclusion on that issue must be reversed.

Damages

The district court found that Koss Paint defaulted on the rent and other obligations; determined the amount of the defaults; calculated setoffs and deductions; and found that the lease provided for "doubling of rent if the tenant holds over the premises after expiration of the term of the Lease." These findings are not challenged on appeal. The court also found that Koss Paint "did not remove all of the paint stored on the premises and repair the light fixtures until August, 2006" and that the rent due after April 2006 through August 2006 was in the sum of $24,053.32. This period was the holdover period; and by finding rent due, the court necessarily implicitly found that Koss Paint held over beyond the lease termination. Although Koss Paint stipulated to that sum, it contends that "the double-rent for 'holdovers' applies only to tenants that maintain possession after the *expiration* of the Lease term . . . ."

The lease provides in Addendum A that "Lessee will promptly surrender the leased premises at the expiration or sooner termination of this Lease . . . ." This language is part of the "Holdover" provision of the lease. As the court implicitly found, Koss Paint did not surrender the premises at the termination of the lease but rather left personal property on the premises and failed to make repairs required upon surrender. This was a holdover for which the court found damages. We will not reverse a district court's award

of damages absent a clear abuse of discretion. *W. St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. App. 2006). Under the terms of the lease, those damages must be doubled. Thus, for rent through August 2006, B.J. Johnson's damages were $48,106.64, and B.J. Johnson is entitled to judgment in that amount together with the other damages found by the district court, less the deductions found by the court. The court's determination that B.J. Johnson's damages for the holdover are limited to $24,053.32 was an abuse of discretion and must be reversed.

Reversed.