STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1311

Kurt Benson, et al.,
Respondents,

vs.

Aydan Holding,
Defendants,

Frank Chrz, et al.,
Appellants.

Filed June 30, 2009
Affirmed
Hudson, Judge

Beltrami County District Court
File No. 04-CV-07-1829

Darrell Carter, Carter Law Office, 622 Bemidji Avenue North, Bemidji, Minnesota 56601 (for respondents)

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Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

HUDSON, Judge

This is an appeal following a court trial and posttrial order awarding respondents judgment on a promissory note personally guaranteed by appellants. On appeal,

appellants have raised several arguments challenging the enforceability of the guaranty. Appellants first claim that the guaranty is not enforceable because respondents are both the makers and the payees of the note and that, having failed to collect from themselves as the makers, they may not collect against appellants. Appellants next claim that respondents accepted shares that constituted an accord and satisfaction of any obligations owed by appellants to respondents under the guaranty. Finally, appellants argue that a resignation letter signed by one appellant and by one respondent released both appellants from any obligations owed under the note and guaranty. We conclude that respondents may enforce the personal guaranty against appellants, that the district court did not err by concluding that there is no evidence to support the claim that respondents received shares from appellants, and that the resignation letter did not release either appellant from their obligations under the note and guaranty. Therefore, we affirm.

FACTS

Appellants Frank Chrz and Justin Chrz formed Aydan Holding Company, LLC, as a holding company for several businesses, including Bemidji Entertainment. Frank Chrz was the president of Aydan Holding and Justin Chrz was the vice president. Aydan Holding, through Bemidji Entertainment, promoted a country music festival, which was held in Beltrami County in June 2006.

Respondents Kurt Benson and Mark Benson were among the individuals who invested money in Aydan Holding and the music festival. Kurt Benson invested in and received shares from Aydan Holding in January 2006 and in May 2006. Similarly, Mark Benson invested in and received shares from Aydan Holding in May 2006.

On June 8, 2006, Mark Benson and Kurt Benson each wrote a check for $75,000 to Aydan Holding. In exchange for their $75,000 checks, each of the Bensons received a check, postdated to June 26, 2006, in the amount of $84,000, and a promissory note, which included a personal guaranty from the Chrzes. The postdated checks were from Bemidji Entertainment, and when the Bensons tendered their checks in July 2006, each check was returned for "Not Sufficient Funds."

The promissory note, which was dated June 8, 2006, stated, "FOR VALUE RECEIVED, the undersigned hereby jointly and severally promise to pay to the order of Kurt and Mark Benson the sum of $168,000." Under the terms of the note, a lump sum payment was due on June 26, 2006. Mark Benson and Kurt Benson each signed as "Borrower." The note also contained a personal guaranty, which provided, "We the undersigned jointly and severally guaranty the prompt and punctual payment of all moneys due under the aforesaid note and agree to remain bound until fully paid." Frank Chrz and Justin Chrz each signed as "Guarantor."

In the wake of the unsuccessful music festival, both Justin Chrz and Frank Chrz sought to resign from Aydan Holding. Although both claimed to have signed and submitted resignation letters to Aydan Holding, only Justin Chrz's letter was produced. The lone resignation letter was dated August 2, 2006, and stated that Justin Chrz was resigning from Aydan Holding. It contained two signature lines: one for Justin Chrz and another for Aydan Holding. Justin Chrz signed the letter on behalf of himself, and Mark Benson purported to sign the letter on behalf of Aydan Holding. At trial, Mark Benson claimed that he signed the letter because Justin Chrz was crying and wanted out of Aydan

Holding. He also testified that he had no authority from the corporation, as an agent or officer, to sign on its behalf.

The body of the resignation letter contained several paragraphs. One of the paragraphs most relevant to this appeal provided that "[u]pon signing this document, the following Promissory Notes are to be null and void: –Mark Benson, Kurt Benson, Charles Worms, Brian Pierce[.]" According to the Chrzes, the references to the Bensons' promissory notes referred to the $168,000 note stemming from the Bensons' loans of $75,000 each. The resignation letter also contained a paragraph that provided that "the previous .097 units/certificate rights now held by Justin Chrz" would become "null and void" upon the signing of the letter by both Justin Chrz and Aydan Holding.

Neither Kurt Benson nor Mark Benson received the $168,000 lump sum payment from Aydan Holding, Bemidji Entertainment, or the Chrzes. In May 2007, they commenced this action against Frank Chrz and Justin Chrz, seeking to collect on the promissory note personally guaranteed by the Chrzes.

Following the bench trial, the district court concluded that any promise to discharge the Chrzes was unenforceable for lack of consideration; that the evidence did not support the Chrzes' claim that the Bensons had received additional shares of stock; and that there was no documentation indicating that Mark Benson was authorized to act on behalf of Aydan Holding. Accordingly, the court ordered that judgment in the amount of $168,000 be entered against the Chrzes, jointly and severally, together with costs and disbursements. The district court denied the Chrzes' posttrial motion for a new trial or amended findings.

This appeal by the Chrzes follows.

D E C I S I O N

On appeal from the judgment against them and an order denying their motion for amended findings or a new trial, the Chrzes raise several arguments challenging the enforcement of the guaranty. First, the Chrzes argue that the Bensons may not enforce the guaranty against them, because the Bensons are both the "makers" and "payees" of the note and as such, the Bensons must first seek payment from the makers of the note, i.e., themselves, before they can seek repayment from the guarantors. By not attempting to collect from themselves (as the makers), the Chrzes claim that the Bensons have extended the time for repayment, and thereby released the Chrzes from the guaranty. Second, the Chrzes claim that the Bensons accepted shares from the Chrzes and that those shares constituted an accord and satisfaction on the promissory note. Third, the Chrzes argue that when Mark Benson signed the resignation letter, he released Justin Chrz from any obligations owed to Mark Benson or Kurt Benson under the promissory note and that by releasing Justin Chrz, he also released Frank Chrz. We address each argument in turn.

I

The Chrzes argue that the Bensons may not enforce the guaranty against them because the Bensons are both the "makers" and "payees" of the note and that, as such, the Bensons must first seek payment from the makers of the note, i.e., themselves, before they can seek repayment from the guarantors, i.e., the Chrzes. But the Chrzes cite no authority supporting this claim and their argument is contrary to the guaranty's terms,

which do not require the Bensons to seek payment from themselves or some other source, and which guarantee payment by the Chrzes.

Absolute or Conditional Guaranty

A 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). "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); *see also Holbert v. Wermerskirchen*, 210 Minn. 119, 121, 297 N.W. 327, 328 (1941) ("Parties are at liberty to contract for an absolute or conditional guaranty."). "An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform the obligation or obligations under the principal obligation, the guarantor will perform some act (such as the payment of money) to or for the benefit of the creditor." 38 Am. Jur. 2d *Guaranty* § 18 (1999). In contrast, a conditional guaranty makes the guarantor "liable only upon the happening of the stated contingency[.]" *Charmoll Fashions*, 311 Minn. at 219, 248 N.W.2d at 720. "In the absence of language clearly indicating that the guaranty is conditional, it is usually treated as absolute." *Id.*

Here, the Chrzes guaranteed payment of a note. Minnesota caselaw indicates that "[a] guaranty of a note is a guaranty of payment," and that a guaranty of payment is absolute. *Holbert*, 210 Minn. at 121–22, 297 N.W. at 328 (stating that a guaranty is absolute and one of payment unless it is by its terms made conditional). Moreover, the

language of the guaranty provides that the Chrzes "guarant[eed] the prompt and punctual payment of all moneys." "The words 'guarantee payment' or their equivalent are generally used to express a guaranty of payment." *Holbert*, 210 Minn. at 121, 297 N.W. at 328. Here, there are "no words of condition or qualification" in the guaranty itself. *See id.* As a result, we conclude that the guaranty signed by the Chrzes is a guaranty of payment and is absolute.

When a guaranty is absolute, the guarantor "becomes liable merely upon the failure of performance by the debtor." *Charmoll Fashions*, 311 Minn. at 219, 248 N.W.2d at 720; *cf. Currie State Bank v. Schmitz*, 628 N.W.2d 205, 208 (Minn. App. 2001) (defining a "guarantor" as "'[o]ne who guarantees payment of a negotiable instrument when it is due without the holder first seeking payment from another party'" (quoting *Black's Law Dictionary* 711 (7th ed. 1999))). The guarantor of an absolute guaranty is not entitled to require the guarantee to first proceed against the principal debtor. *Holbert*, 210 Minn. at 122, 297 N.W. at 329.

Here, the Chrzes admit that they signed the guaranty and thereby agreed to "jointly and severally guaranty the prompt and punctual payment of" $168,000 to the Bensons and that the checks received by the Bensons bounced. There is no dispute that the principal obligation—that is, to pay to the Bensons $168,000—was not performed (though the Chrzes do claim that the Bensons agreed to take additional shares in lieu of payment—a claim we address and reject in section II below). In light of the undisputed default, the Chrzes are liable under the guaranty. The Chrzes' claim that the Bensons

may not seek payment from the guarantors, but must first seek payment from the maker of the note, is without merit.

Extension of time

The Chrzes contend, nonetheless, that by failing to seek payment from themselves first, the Bensons have "waived collecting against themselves," and thereby unreasonably extended the time for repayment, which releases the Chrzes. In support of their claim, the Chrzes cite two cases: *Clark*, 241 Minn. at 276, 64 N.W.2d at 523, and *Farmers & Merchants Nat'l Bank of Cannon Falls v. Doffing*, 171 Minn. 53, 213 N.W. 375 (1927). Both cases recognize "[t]he general rule" that "a valid agreement between the principal debtor and creditor by which the time of payment or performance of the principal obligation is extended without the consent of the guarantor releases and discharges the guarantor from liability on the contract of guaranty." *Clark*, 241 Minn. at 276, 64 N.W.2d at 523; *Doffing*, 171 Minn. at 56, 213 N.W. at 376 (concluding that the time of payment was extended and released the guarantors). For instance, in *Clark*, new agreements were added to the guaranty that changed the due date of the balance. 241 Minn. at 276, 64 N.W.2d at 523. In *Doffing*, there were repeated renewals of the notes that extended the time for repayment. 171 Minn. at 56, 213 N.W. at 376.

The Chrzes do not explain how the time for repayment was extended here. There were no new agreements or renewals that extended the time for repayment without the Chrzes' consent. By the terms of the promissory note, payment of $168,000 was due on June 26, 2006. After the checks were returned for "Not Sufficient Funds" in early July 2006, the Bensons sought to enforce this agreement by filing this action less than one

year later, in May 2007. Any passing of time in this case has not materially changed the Chrzes' underlying obligation, that is, to pay $168,000 to the Bensons. *Cf. Currie State Bank*, 628 N.W.2d at 210 (concluding that a guarantor could not take advantage of the rule that an extension of the time for repayment releases the guarantor where the guarantor was being held liable for the original notes that he specifically agreed to pay).[1]

II

The Chrzes also argue that the Bensons accepted shares from them, which constituted an accord and satisfaction of the Chrzes' obligation under the guaranty. The district court rejected this claim, concluding that it was not supported by the evidence.

"The purpose of accord and satisfaction is to allow parties to resolve disputes without judicial intervention by discharging all rights and duties under a contract in exchange for a stated performance, usually a payment of a sum of money." *Webb Bus. Promotions, Inc., v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 73 (Minn. 2000). "An accord is a contract in which a debtor offers a sum of money, or some other stated performance, in exchange for which a creditor promises to accept the performance in lieu of the original debt." *Id.* at 72. The satisfaction is the performance of the accord—generally the acceptance of money—that "operates to discharge the debtor's duty as agreed to in the accord." *Id.* An enforceable accord and satisfaction arises where a party against whom a breach of contract is claimed proves the following:

[1] Because we conclude that the Bensons are entitled to enforce the unambiguous, absolute guaranty, we do not address the Chrzes' corollary argument that the guaranty may not be reformed by parol evidence. We note that the district court likewise did not address this claim.

> (1) the party, in good faith, tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument.

Id. at 73 (citation omitted). Whether parties reached an accord and satisfaction is a question of fact. *Id.* Factual findings on accord and satisfaction "will not be reversed on appeal unless they are 'manifestly and palpably' contrary to the evidence." *Id.* (quoting *Butch Levy Plumbing & Heating, Inc. v. Sallblad*, 267 Minn. 283, 293, 126 N.W.2d 380, 387 (1964)).

The Chrzes were required to prove the existence of an accord and satisfaction. But they failed to offer any legal argument explaining how the elements of an accord and satisfaction were met or to identify facts clearly supporting an accord and satisfaction. On one hand, it appears from the trial transcript that the Chrzes claimed that, after the checks bounced, the Bensons decided to treat their loans as investments, and that they then received additional shares. On the other hand, the Chrzes also claim that, when they resigned from Aydan Holding, they "surrendered their allotted shares" and were released from the guaranty.

The district court concluded that the Chrzes' "claim that the Bensons received shares in exchange for discharging the guarantors is not supported by the evidence." At trial, the district court heard conflicting and, at times, inconsistent testimony on this point. Frank Chrz admitted that he had borrowed, on behalf of Aydan Holding, $75,000 from Mark Benson and $75,000 from Kurt Benson and that a promissory note had been

given to the Bensons in exchange for the loans. He claimed that when the checks bounced, the Bensons each decided to treat the loan as an investment in Aydan Holding and that they received additional stock, "basically, 10 percent of the company," in exchange for their decisions to turn the loan into an investment. Frank Chrz also claimed that when the additional stock was issued, the Bensons, along with two other shareholders, forced him and Justin Chrz out of Aydan Holding.

Additionally, both Justin Chrz and Frank Chrz claimed that they had signed a resignation letter. Justin Chrz testified that he had given back all of his shares, pursuant to the resignation letter. Frank Chrz asserted that he had signed a resignation letter like Justin's, but he also testified that after he was forced out, he did not "turn in [his] shares of Aydan Holding."

Although the Chrzes claimed that the Bensons received additional stock or shares and that this constituted an accord and satisfaction of the Chrzes' obligations under the guaranty, the Chrzes admitted that they did not have corporate documents indicating that the stock was issued or that meetings were held approving the issuance of the stock.

In sum, the Chrzes have not identified any evidence, other than Frank Chrz's testimony, to support their claim that the Bensons agreed to and did accept shares as an accord and satisfaction on the promissory note. "[I]t is axiomatic" that during a court trial, the district court "may balance the testimony as a whole and render a decision accordingly." *Naftalin v. John Wood Co.*, 263 Minn. 135, 143, 116 N.W.2d 91, 97 (1962). The district court clearly rejected Frank Chrz's testimony in favor of the Bensons' claim that the checks were loans and had not been converted to investments.

We will not disturb the district court's findings simply because the record could have provided a basis for contrary findings. *Naftalin*, 263 Minn. at 148, 116 N.W.2d at 100; *also see* Minn. R. Civ. P. 52.01 (requiring deference to the district court's credibility findings). On this record, we find no error in the district court's conclusion that the evidence did not support the Chrzes' claim that the Bensons received shares for discharging the Chrzes.

III

Finally, we turn to the Chrzes' claim that the resignation letter signed by Justin Chrz and Mark Benson, on behalf of Aydan Holding, released both Chrzes from their obligations to repay the Bensons. The resignation letter stated, "[u]pon signing this document, the following Promissory Notes are to be null and void: –Mark Benson, Kurt Benson, Charles Worms, Brian Pierce." The district court concluded that Mark Benson's promise to release Justin Chrz from his obligation was unenforceable due to a lack of consideration and that Mark Benson lacked authority to sign the letter on behalf of Aydan Holding.

Authority to Bind

The parties dispute whether Mark Benson was president of Aydan Holding and whether he had authority to bind Aydan Holding. The record reflects inconsistent testimony as to both of these points. For example, Frank Chrz claimed that after he was forced out of Aydan Holding, Mark Benson became president and signed Justin Chrz's resignation letter as the president of Aydan Holding. Another witness testified that he was not sure whether Mark Benson was president of Aydan Holding when he signed the

resignation letter. But Mark Benson testified that he had never been elected an officer of Aydan Holding; rather, he explained that he was an officer of a new corporation, which was established so that investors could attempt to purchase a golf course. On this record, the district court did not err by concluding that the evidence did not support the conclusion that Mark Benson was authorized to act on behalf of Aydan Holding. *See* Minn. R. Civ. P. 52.01; *Johnson v. Lorraine Park Apts. Inc.*, 268 Minn. 273, 276, 128 N.W.2d 758, 761 (1964) (stating that appellate courts do not "determine the credibility of the evidence" or "resolve conflicts therein"). Furthermore, even if Mark Benson was authorized to sign the promissory note on behalf of Aydan Holding, it is unclear how Ayden Holding—as a corporation—could have released obligations owed to Mark and Kurt Benson—as individuals—under the promissory note and guaranty.

Consideration

The district court also found that the promise to release Justin Chrz from his obligations under the promissory note was unenforceable for lack of consideration. To be enforceable, an agreement or promise to release a guarantor requires consideration. *See Hale v. Dressen*, 76 Minn. 183, 186, 78 N.W. 1045, 1046 (1899) (concluding release of guarantor was unsupported by consideration); *see also Baehr v. Penn-O-Tex Oil*, 258 Minn. 533, 538–39, 104 N.W.2d 661, 665 (1960) (only promise supported by consideration constitutes contract and, thus, becomes enforceable). Consideration is the bargain at the core of a contract; it is the reciprocal exchange of value given and value received. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 463 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). "Consideration may consist of either a benefit

accruing to a party or a detriment suffered by another party." *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). The value or amount of consideration is not relevant as long as some benefit or detriment is established. *Estrada v. Hanson*, 215 Minn. 353, 356, 10 N.W.2d 223, 225–26 (1943). The existence of consideration presents a question of law, which we review de novo. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

The resignation letter, like so much in this case, is fraught with legal and practical irregularities. The evidence in the record relating to the resignation letter is in conflict, and even if we were to conclude that the parties intended for the letter to operate as a release, the terms of the release are ambiguous, at best. And, as we noted earlier, even if Mark Benson legitimately signed the resignation letter on behalf of Aydan Holding, it is not clear that he could, in that capacity, release obligations owed to himself and his brother as individuals. Moreover, the language of the resignation letter itself does not identify a specific bargained-for exchange relating to the promissory notes. We acknowledge that there is a cryptic statement in the resignation letter providing that the letter ". . . will null and void the previous .097 units/certificate rights now held by Justin Chrz." But in the absence of actual stock certificates or any corporate documentation evidencing that a stock transfer in fact occurred, we cannot say the district court erred in determining that the promise to release Justin Chrz was unenforceable for lack of consideration. In sum, the Chrzes have failed to specifically identify any consideration for the promise to release Justin Chrz. Given the Chrzes' failure to identify any

consideration and the fact that the Bensons testified that they never released the Chrzes from their obligations to repay the loans, we see no basis to reverse the district court's determination that the resignation letter's promise to release Justin Chrz was not supported by consideration.

The Chrzes also claim that, even though Frank Chrz's resignation letter is not in the record, under the terms of the promissory note, the release of one of them releases the other. In support of this claim, they point to language in the note indicating that they can enter into modifications on each other's behalf. We need not address this argument in detail. Even assuming that they correctly interpret the language of the note, we have concluded that the resignation letter from Justin Chrz did not release him from his obligations under the note and guaranty. Therefore, the resignation letter likewise could not have released Frank Chrz from his obligations.

Affirmed.