STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1337

First Choice Bank,
an Illinois Banking Corporation,
Respondent,

vs.

Riverview Muir Doran, LLC,
a Minnesota Limited Liability Company,
Appellant.

Filed June 1, 2010
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File No. CV-08-25664

Stephanie A. Ball, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for respondent)

George R. Serdar, Messerli & Kramer, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

The dispute of the parties arises out of an intercreditor agreement, entered into by two creditors of the same debtor, which prohibits the subordinate lender from accepting payments during any period of default by the debtor on the senior loan. On appeal from summary judgment for the senior lender, appellant Riverview Muir Doran, the subordinate lender, argues that the payments it received, although otherwise coming within the terms of the agreement, were not in fact from the debtor. Because the unambiguous contract language prohibits appellant's acceptance of the payments, we affirm.

FACTS

Respondent First Choice Bank and appellant Riverview provided financing to JADT Development Group, LLC for a development project. Respondent disbursed more than $5 million to JADT under a 2005 loan agreement that provided for financing in an amount up to $19,125,000. The same day, appellant agreed to provide secondary financing of $1,233,550 to JADT.

JADT provided respondent with various security; Timothy O. Baylor and Doris P. Baylor also executed a personal guaranty securing JADT's obligations under respondent's loan. On the same date as the loans, the parties entered into an intercreditor agreement that lists respondent as senior lender and appellant as subordinate lender. Under the intercreditor agreement, respondent permitted JADT to borrow $1,233,550 from appellant, secured by a second mortgage on property on which respondent had a

mortgage, without triggering a default, on the condition that JADT's promissory note and mortgage to appellant were subordinate to JADT's promissory note and mortgage to respondent.

The intercreditor agreement subordinates the secondary debt "in right of payment . . . to the prior payment in full" of the senior debt. Paragraph 3(d) sets forth the borrower's agreement that, during any period of default on the senior loan, borrower "will not make any payments under or pursuant to the Subordinate Loan Documents (including but not limited to principal, interest, additional interest, late payment charges, default interest, attorney's fees, or any other sums secured by the Subordinate Security Instruments) without Senior Lender's prior written consent." Paragraph 3(d) also sets forth the subordinate lender's agreement that, during any period of default, the subordinate lender "will not accept any payments under or pursuant to the Subordinate Loan Documents (including but not limited to principal, interest, additional interest, late payment charges default interest, attorney fees, or any other sums secured by the Subordinate Security Instruments) without Senior Lender's prior written consent." Any such payments to the subordinate lender are to be held in trust for the senior lender. Finally, paragraph 6(b) sets forth the agreement by the borrower and the subordinate lender "that until the principal of, interest on and all other amounts payable under the Senior Loan Documents have been paid in full, it will not, without the prior written consent of Senior Lender . . . take additional collateral that is not presently provided for in the Subordinate Loan Documents[.]"

The intercreditor agreement defines "Subordinate Loan Documents" as "the Subordinate Note, the Subordinate Security Instruments and that certain Environmental Indemnification Agreement dated as of the date of the Subordinate Note made by Borrower in favor of Subordinate Lender." "Subordinate note" is defined as "the Second Promissory Note dated as of March 18, 2005, made by Borrower to Subordinate Lender, or order, to evidence the Subordinate Loan." "Subordinate debt" is defined as "the indebtedness evidenced by the Subordinate Loan Documents."

JADT and the Baylors defaulted on their obligations to respondent. On November 10, 2006, respondent provided JADT and the Baylors with notice of the default. On November 13, respondent provided appellant with notice of the default.

Two weeks later, appellant brought an action against JADT and the Baylors. In that action, appellant named respondent as a party in recognition of respondent's status as a senior lender. One month after this suit, JADT and the Baylors entered into a forbearance-and-workout agreement that required JADT to deliver to appellant "an Accommodation Mortgage executed by JADT Development Group II ('JADT II') in favor of appellant granting a mortgage lien in the amount of up to $650,000.00 against real property" owned by JADT II. The accommodation mortgage contains a clause stating that JADT "has agreed to provide additional collateral to secure repayment of the [2005 promissory note]."

Appellant's member-manager, Kelly Doran, testified in a deposition that appellant received three payments totaling $873,790.01 in January and April 2007 that were used to reduce the amount owed on appellant's loan to JADT: $487,998.22 from the sale of

assets of JADT II on January 19, 2007; $186,537.79 on April 10, 2007; and $199,254 on April 11, 2007. The forbearance-and-workout agreement was then amended to state that "Riverview hereby acknowledges that [JADT] has paid Riverview the amount of $873,790.01 ($487,998.22 on January 19, 2007 and $385,791.79 on April 10, 2007) toward the Settlement Amount" and that the accommodation mortgage had become null and void as a result of the payments.

During discovery in an action against JADT and the Baylors, respondent learned of the January and April 2007 payments. The district court granted respondent leave to assert claims against appellant for breach of contract, breach of fiduciary duty, constructive trust, and fraud and misrepresentation. In appellant's answer, it admitted "that it loaned $1,233,550.00 to JADT and that the promissory note and second mortgage from JADT to . . . Riverview was subordinate to JADT's promissory note and mortgage in favor of First Choice." Appellant also admitted that "it was made aware that JADT defaulted on the Note between JADT and First Choice," "that it received certain funds from third parties with respect to the loan from . . . Riverview to JADT," and "that such funds were applied to the debt owed by JADT to . . . Riverview and that . . . Riverview did not seek First Choice Bank's approval prior to receiving such funds."

On these undisputed facts, the district court granted summary judgment for respondent and denied appellant's cross motion.

D E C I S I O N

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment

as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"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).

Appellant argues that the unambiguous contract language prohibits it only from receiving payments from JADT and does not prohibit accepting payments from the Baylors as guarantors or collateral from JADT II, a separate entity. The district court concluded:

> First, the prohibition contained in Section 3(d) of the Intercreditor Agreement is framed in terms of Riverview Muir Doran's acceptance of payments on the subordinate debt. The prohibition on acceptance of payments is not tied to or dependent on the source of payments. Thus, even assuming the payments were made on the guaranty, the payments were accepted on the subordinate debt and are in violation of the Intercreditor Agreement.

The district court properly stated the meaning of paragraph 3(d). Paragraph 3(d) applies to "any payments" and expressly prohibits the acceptance of "any payments under or pursuant to the Subordinate Loan Documents (including but not limited to principal,

interest, additional interest, late payment charges default interest, attorney's fees, or any other sums secured by the Subordinate Security Instruments) without Senior Lender's prior written consent."

Appellant attempts an alternative reading of paragraph 3(d), arguing that the "payments under or pursuant to" language necessarily suggests that the source of the payment must be the borrower and omits the prospect of the guarantor making the payment. Appellant argues that the intercreditor agreement was not drafted to prohibit it from receiving any payments whatsoever because the agreement contains no specific prohibition against payment from the guarantor and the definition of subordinate loan documents does not include guaranties. But the subordinate loan documents are those under which payments were required and were made, and a guaranty is a source of payment. Appellant's argument fails because it rests on a distorted reading of the contract language.

Also, when a guarantor makes payments following a default by the borrower, the guarantor steps into the borrower's shoes. "[A] contract of guaranty is an undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another and which binds the obligor to performance in the event of nonperformance" by the one primarily bound to perform. *Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 275, 64 N.W.2d 517, 522 (1954).

Appellant also argues that the first sentence in paragraph 3(d), stating the debtor's obligations, should be read to establish limits on the breadth of the second sentence,

which states appellant's obligations. But the two sentences are independently stated and create separate obligations.

The district court also concluded that appellant breached the intercreditor agreement by accepting the accommodation mortgage. Appellant argues that the accommodation mortgage did not violate the intercreditor agreement because JADT II owned the property and the proceeds were transferred to appellant. Again, appellant's argument rests on a distorted reading of the contract language. The intercreditor agreement prohibits the taking of "additional collateral" and contains no language to suggest that this includes only items given on the debt by the borrower and not by a third party.

The district court properly granted summary judgment for respondent.

Affirmed.