STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1839

Roger Gerlach,
Respondent,

vs.

Clarence J. Kurowski, et al.,
Appellants.

Filed August 3, 2010
Affirmed
Connolly, Judge

Morrison County District Court
File No. 49-C7-06-000863

Michael P. Perry, Michael P. Perry Law Office, Little Falls, Minnesota (for respondent)

John R. Koch, Reichert, Wenner, Koch & Provinzino, P.A., St. Cloud, Minnesota (for appellants)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and Willis, 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

CONNOLLY, Judge

Appellants contend that the district court abused its discretion in denying their motion for a new trial, or alternatively amended findings, when it concluded that the term "feed bill" encompassed all purchases made on a single account, not just those for animal feed. Because we agree that the term "feed bill" is not ambiguous and that the district court did not abuse its discretion in denying appellants' motion, we affirm.

FACTS

Around 1995, appellants Clarence J. and Isabell Kurowski entered into a contract for deed to sell 37.5 acres of farmland to Clarence's son, Mark Kurowski. The son raised beef cattle. The son subsequently mortgaged the property to Community Federal Savings and Loan Association of Little Falls, Minnesota (bank), and appellants were asked to sign the mortgage note because they still owned fee title to the land. During this time, the father kept approximately six head of cattle on the property along with some hay and machinery.

In 2002, the son began doing business with Old West Feed Company, Inc. (Old West), purchasing both feed and farm equipment. The son first purchased items from an Old West dealer, but later became an Old West dealer himself. As an Old West dealer, he purchased items at wholesale prices and either used them on his own farm or resold them to third parties at retail prices, keeping the difference between the wholesale and retail prices as profit. He did not sign a dealer contract with Old West.

In 2004, the son was in default on his mortgage and the bank threatened foreclosure. He was also in default on his Old West account. Old West agreed to purchase the mortgage from the bank. As part of the transaction, Old West required the son and appellants to sign a supplemental agreement. The agreement required (1) monthly payments on the mortgage; (2) a payment of $10,000 from the proceeds of an upcoming cattle sale, which would be applied to the outstanding "feed bill"; and (3) the entire unpaid balance of the mortgage and the feed bill to be paid when the property was sold.

Approximately a year later, the mortgage and supplemental agreement were assigned to respondent Roger Gerlach when he purchased the son's account.[1] Respondent is an attorney and has an ongoing relationship with Old West. Respondent has engaged in approximately 20 to 30 similar financial transactions with Old West. At the time the mortgage assignment was recorded, the unpaid balance on the mortgage was $18,524.99, plus interest. It appears that there was no written assignment of the supplemental agreement involving the feed bill. Respondent was given a copy of the agreement as part of the transaction with Old West and considered it to be part of the assignment of the accounts receivable he purchased. The mortgage was subsequently paid in full.[2] The son has since filed for bankruptcy.

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[1] In the interim, it appears that the son's account receivable was initially assigned with recourse to AR Systems, Inc. (AR), which handled some of Old West's accounts. AR went out of business and "bad" accounts receivable were charged back to Old West, including the son's account.

[2] It appears that the property was sold through a foreclosure sale to the United States Department of Agriculture, acting as the Farm Service Agency (FSA), and respondent

Respondent filed suit in order to collect the unpaid balance of the feed bill. A bench trial was held by the district court. Respondent, the father, and the son all testified at trial as well as Robert McGuire, president of Old West. One of the purchases that McGuire identified was a 32-foot, flatbed trailer. McGuire agreed on cross-examination that the trailer purchase did not qualify as a sale of feed, but that Old West sold trailers; the son wanted a trailer; and so McGuire got him a trailer and added it to his feed bill. The son testified that Old West billed him on a single bill for both feed and equipment purchases, and, when he completed the bankruptcy petition, he did not know the balance of the feed bill.[3]

The father testified that he has been farming all of his life, primarily raising hogs. He testified that he had a few cows, between six and ten, that he kept with his son "as a tax deduction." The father said that it was his understanding that a feed bill was what "the animals ate." He also testified that, after signing the supplemental agreement, he paid $5,000 on a check the son had written to Old West that had bounced. Acknowledging he had been given the opportunity to read the supplemental agreement, the father testified that he did not read it before he signed it.

In order to establish the balance due on the feed bill, various documents were introduced at trial, including copies of adding-machine tapes showing purchases made and payments credited; Old West invoices detailing the son's purchases; copies of cashed checks; and a $5,000 check made out to Old West that was returned for insufficient

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received payment for the mortgage. The son then purchased ten acres of the property from the FSA. The remaining 27.5 acres are still involved in litigation with the FSA.

[3] On the advice of his attorney, the son figured the balance "strong" at $23,000.

funds. The district court found that, by signing the supplemental agreement, appellants became the guarantors of the son's feed-bill debt and co-debtors with him to Old West. After making adjustments to correct invoice balances, payments and credits, and a payment made to respondent from the bankruptcy proceedings, the district court concluded that appellants owed $8,214.67 on the feed bill, plus interest.

Appellants moved for a new trial or, alternatively, amended findings. The district court denied appellants' motion and reaffirmed its prior judgment. This appeal follows.

D E C I S I O N

The decision to grant a new trial lies within the sound discretion of the district court and will not be disturbed on appeal absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A guaranty is "[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." *Black's Law Dictionary* 773 (9th ed. 2009). "[A] guaranty is construed the same as any other contract, the intent of the parties being derived from the commonly accepted meaning of the words and clauses used, taken as a whole." *Am. Tobacco Co. v. Chalfen*, 206 Minn. 79, 81, 108 N.W.2d 702, 704 (1961). Contract interpretation is a question of law. *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). "The plain and ordinary meaning of the contract language controls, unless the language is ambiguous." *Id.* Ambiguity exists only if the document "is susceptible to more than one construction." *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979). "Intent is ascertained, not by a process of dissection in which words

or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract as a whole." *Id.* (quotation omitted). "[O]nce the intent of the parties has been ascertained, the guarantor has the right to insist upon strict compliance with the terms of his obligation." *Chalfen*, 206 Minn. at 81, 108 N.W.2d at 704. A guaranty "is not to be unduly restricted by technical interpretation nor enlarged beyond the fair and natural import of its terms." *Id.*

According to the supplemental agreement, Old West was the "First Party" and appellants and the son were the "Second Parties." Paragraph five, the guaranty provision regarding the feed bill, reads: "The entire unpaid balance of the [bank's] mortgage, which has been assigned to First Party, and *the unpaid balance of the First Party's feed bill* will be paid in full when the [property], or any part thereof, is sold . . . ." (Emphasis added.) The district court concluded that paragraph five's reference to the "First Party's feed bill" was a scrivener's error based on paragraph three, which made clear that payment of the feed bill was the responsibility of the Second Parties: "Second Parties acknowledge that they are selling cattle on April 8th, and they will pay First Party $10,000.00 from the proceeds to apply *on the feed bill that Second Parties have with the corporation*." (Emphasis added.) This "correction" does not appear to be in dispute.

On appeal, appellants contend that the plain and ordinary meaning of the term "feed bill" only included purchases of food for animals and not other items, including equipment that the son purchased from Old West, such as the trailer. Appellants fault the language of the agreement, asserting that Old West knew the amount due on the son's

account, but only described the debt as "a 'feed bill'" instead of "the 'dealer's account balance.'" Appellants argue that the language gave Old West "the double benefit of disguising the full extent of the claimed obligation, and of getting an expansive interpretation consistent with Old West's thinking that 'feed bill' comprised [the son's] entire account." We disagree.

"Feed bill" is not defined within the supplemental agreement, and we have not been able to locate a definition in any dictionary. *But see Sec. Bank of Pine Island v. Holst*, 298 Minn. 563, 564, 215 N.W.2d 61, 62 (1974) ("The feed bill apparently included charges for feed other than that furnished to the subject calves."); *Farmers State Bank of Delavan v. Easton Farmers Elevator*, 457 N.W.2d 763, 764 (Minn. App. 1990) (discussing outstanding feed bill at grain elevator which debtors bought feed from and sold their grain to), *review denied* (Minn. Sept. 20, 1990); *Mitchell Feed & Seed, Inc. v. Mitchell*, 413 N.W.2d 847, 847-48 (Minn. App. 1987) (distinguishing the feed bill from other operating losses of hog-raising operation). Nevertheless, the term "feed bill" in this case does not appear to be ambiguous. As respondent points out, Old West only sent a single bill to the son for his purchases. And although it is not entirely clear from the record how the son received all of his bills,[4] he testified that he received a single bill for all purchases made with Old West. Furthermore, when denying appellants' motion for a new trial, the district court stated:

> No evidence was offered at trial that either Old West or [the son] kept the amount of the bill for feed purchased by [the

[4] McGuire testified that he generally prepared invoices for AR, who serviced the account receivables, including the son's, but also sometimes sent invoices directly to the son.

> son] for his cattle separate and distinct from other charges to his account. Even at the time of the hearing on this motion, [appellants'] attorney was unable to identify the portion of the bill that was solely for feed purchased by [the son] for his cattle.
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> [Appellants'] inability to separate feed for [the son's] cattle from other charges to his account evidences the parties' intent that the feed bill was considered a single bill. [Appellants] guaranteed payment of the bill in the supplemental agreement, and for them to claim ignorance as to their responsibility for non-feed purchases in the bill, such as the gooseneck trailer, is dubious given their familial and close business relationship with [the son].

Additionally, respondent correctly asserts that Old West was not required to state the guaranty in terms of a sum certain. *See Peoples State Bank of Plainview v. Muir*, 386 N.W.2d 321, 324 (Minn. App. 1986) (concluding that guarantor's argument that debt would not have been incurred if bank had not extended credit over the amount of the guaranteed note was unpersuasive when "[t]he line of credit contract showed expectations for borrowing and for payment and reborrowing, and the note called for payment of $24,903.39 'or so much thereof as may from time to time have been advanced' under the contract" and that the balance due and owing was within the amount guaranteed), *review denied* (Minn. June 30, 1986). The very nature of the relationship between Old West and the son appears to be one of financial fluidity, revolving around an expectation that products would be delivered on credit to the son with payment to follow.

Moreover, although the father testified that he did not read the agreement at the time it was signed, this does not relieve appellants of their obligation under the agreement. *See Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982) ("In the absence of fraud or misrepresentation, a person who signs a contract may not avoid it on the ground

that he did not read it or thought its terms to be different."); *Currie State Bank v. Schmitz*, 628 N.W.2d 205, 210 (Minn. App. 2001) ("Parties who sign plainly written documents must be held liable, otherwise such documents would be entirely worthless and chaos would prevail in our business relations." (quotation omitted)). And, as noted by the district court, the father's subsequent behavior suggests he understood the import of the agreement: "[The father's] redemption of [the son's] $5,000.00 worthless check, after signing the agreement, is a clear acknowledgement that [the father] understood his responsibility under the agreement."

Finally, as a seeming variant to their argument for a narrow interpretation of "feed bill," appellants argue that they should not be responsible for certain charges relating to equipment, including the trailer and some feeding troughs. Respondent contends that appellants' argument that they are responsible only for part of the feed bill is an affirmative defense that needed to be pleaded in appellants' answer, and, because it was not, it is therefore waived. *See* Minn. R. Civ. P. 8.02 (requiring a party to state any defenses to claims asserted), 8.03 (requiring a party to state affirmative defenses in a responsive pleading); *Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 919 (Minn. App. 1996) ("A reviewing court will generally not consider affirmative defenses not raised in [district] court pleadings and not considered by the [district] court."), *review denied* (Minn. Feb. 26, 1997).

While it does not appear that appellants specifically pleaded this argument as part of their answer, the parties submitted memoranda to the district court addressing the issue before the district court's ruling. Appellants also argued it as part of their motion for a

new trial, and the parties submitted their respective positions to the district court through letter arguments in connection with appellants' posttrial motion. It is also readily apparent that the district court considered the issue both at trial and on appellants' motion. In its original judgment, the district court expressly stated that it

> did not adjust the unpaid balance downward in response to [appellants'] counsel's argument that [appellants] only guaranteed the "feed" portion of the feed bill. The feed bill described in the supplemental agreement was a generic term used to describe [the son's] obligation to Old West for all purchases. [Appellants] were too closely tied to [the son's] business dealings through land, cattle, and feed-sharing operations to not know that Old West also sold farm equipment and machinery. It is not unreasonable to hold them responsible for all purchases, whether for feed, equipment, or even the gooseneck trailer.

The district court again rejected appellants' argument when denying their motion for a new trial, stating: "[Appellants'] argument that the Court enlarged the scope of their guaranty to Old West, and subsequently [respondent], is unconvincing. The Court, in its original decision, squarely rejected [appellants'] argument that they only guaranteed the feed portion of the feed bill [the son] had with Old West." Moreover, as respondent argued to the district court, there does not appear to be any indication that payments made on the account were applied to specific charges instead of the feed bill as a whole. *See Muir*, 386 N.W.2d at 324 (concluding that previous payments by debtor did not relieve guarantor of obligation on original loan absent evidence showing that payments were directed toward any particular advances and that present debt obligation was within the amount guaranteed).

Without question, the language in the supplemental agreement is sparse, and we agree with appellants that Old West certainly could have been more precise in its drafting. But Old West was not required to do so. This court will not "read a limitation into the guaranty that may have been intended but is neither expressly stated nor reasonably implied." *Loving & Assocs., Inc v. Carothers*, 619 N.W.2d 782, 787 (Minn. App. 2000), *review denied* (Minn. Feb. 13, 2001). Because Old West sent a single "feed bill" to the son for all of his purchases and the supplemental agreement was not ambiguous, the district court did not abuse its discretion in denying appellants' motion for a new trial, or alternatively new findings, on grounds that the feed bill only encompassed purchases for animal feed and not equipment purchases from Old West.

Affirmed.