COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1544 **Cir. Ct. No. 2012CV1624**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

OLIVE PORTFOLIO, LLC, AS SUBSTITUTED PLAINTIFF FOR BMO HARRIS BANK, N.A., SUCCESSOR BY MERGER TO M & I MARSHALL & ILSLEY BANK,

PLAINTIFF-RESPONDENT,

V.

JEFFREY W. HARRILL, LORI HARRILL, MICHAEL T. HARRILL AND MELANIE HARRILL,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jeffrey Harrill, Michael Harrill, Lori Harrill and Melanie Harrill appeal a summary judgment entered against them in connection

with guaranties of payment. The Harrills argue the circuit court erroneously rejected their affirmative defenses of failure to mitigate damages and equitable estoppel. We agree with the circuit court that both defenses fail as a matter of law, and affirm.

BACKGROUND

¶2 Jeffrey Harrill and Mike Harrill (hereinafter, the Harrills)[1] were members of two limited liability corporations (collectively, the Golf Club). In June 2001, pursuant to two promissory notes, the Golf Club borrowed money from M&I Bank to purchase real estate and operate a golf course. The original amounts of the notes were approximately $3,334,470 and $100,000. In addition to the promissory notes, the Harrills and six other members of the Golf Club executed personal guaranties of $500,000 each.

¶3 Between 2001 and 2011, the notes were renewed on an annual basis. In early 2011, M&I had the Golf Club's real estate appraised and it was valued at $1,500,000. The outstanding balances of the two notes in June 2011 were approximately $3,280,743 and $97,912. At that time, M&I requested an escrow payment to renew the notes for another year. The Harrills and others agreed, but the notes matured on June 30 without renewal. The Golf Club continued making its regular monthly payments for July through October believing the notes would be renewed, and M&I accepted the payments. M&I also accepted a $20,000 principal reduction payment in mid-July.

[1] The Harrills' spouses are named in the case only because their marital property interests are at stake.

¶4 In July 2011, M&I had merged with BMO Harris, which became M&I's successor in interest to the notes and personal guaranties. In November, BMO rejected the Golf Club's monthly payments and refused to renew the notes. In December, the Harrills and a group of investors, including some of the other guarantors, offered BMO $2,700,000 for the Golf Club's real estate. The group further indicated they may be able to offer more money, but BMO responded that it intended to pursue a receivership instead.

¶5 At the time the offer was extended, Michael Harrill told BMO officer Sean Mullarkey that four of the guarantors were going to file bankruptcy and the remaining four were not collectable to the extent of their guaranties. BMO's Mullarkey told another guarantor that by refusing to accept the guarantors' proposal, BMO would be in a worse position and likely lose one million dollars. BMO proceeded with a receivership and received only $950,000 in net proceeds when the property was liquidated.

¶6 BMO sued the Harrills on the personal guaranties and moved for summary judgment. The Harrills asserted numerous defenses, including failure to mitigate damages and equitable estoppel. The circuit court rejected the defenses as a matter of law and entered judgment against the Harrills.[2] The Harrills now appeal.

[2] BMO transferred all interest in the notes and guaranties to Olive Portfolio, LLC, during pendency of the case. Although Olive is the named party on appeal, for ease of discussion we refer to BMO throughout this decision.

DISCUSSION

¶7 The Harrills argue the circuit court erroneously granted BMO summary judgment. Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08.[3] When deciding a summary judgment motion, we must view the facts in the light most favorable to the nonmoving party. ***Kraemer Bros. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We review grants of summary judgment de novo. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

Failure to mitigate

¶8 The Harrills first argue BMO failed to mitigate its damages. "The law is well established in this state that a plaintiff must do all that is reasonable to minimize damages after a breach of contract has occurred." ***Sprecher v. Weston's Bar, Inc.***, 78 Wis. 2d 26, 42, 253 N.W.2d 493 (1977). Thus, "'[d]amages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation.'" ***Id.*** at 44 (quoting ***Monroe Cnty. Fin. Co. v. Thomas***, 243 Wis. 568, 571, 11 N.W.2d 190 (1943)).

¶9 The Harrills argue that after they breached their guaranties by failing to pay upon BMO's demand, BMO should have mitigated its damages by

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

accepting the investors' offer to purchase the Golf Club's real estate for $2.7 million. Specifically, they contend:

> The fact that the Harrills' payment proposal included additional investors and the purchase of the underlying collateral of the [Golf Club] is beside the point. The Harrills were offering funds to satisfy their guarant[i]es. The inclusion of the real estate and a new investor group was the method in which the Harrills could obtain the refinancing to complete the transaction. …
>
> The Harrills' proposal amounted to a proposal of payment of the guarant[y] contracts and BMO would have avoided or minimized its damages had it accepted.

¶10 The Harrills' argument is unpersuasive. It is not remotely "beside the point" that the investors' proposal would have required BMO to both release the Harrills' guaranties and take a loss on its collateral on the notes. As the Harrills concede, their guaranties of payment stand as separate contracts from the notes. *See* ***Bank Mutual v. S.J. Boyer Constr., Inc.***, 2010 WI 74, ¶¶53-54, 326 Wis. 2d 521, 785 N.W.2d 462 ("[A] guarantor's liability arises not from the debt itself, but from a separate guaranty contract."). Because the guaranties are separate contracts, any losses on the notes do not constitute damages in this case for breach of contract. Thus, BMO could not reduce its contract damages on the guaranties by forgoing its rights to full payment; BMO could merely reduce the Harrills' liability at its own expense. As the circuit court properly held, "as to a guaranty of payment, the creditor is not obligated to proceed against the principal debtor or to resort to securities given by the principal debtor prior to proceeding against the guarantor."[4] *See* ***id.***, ¶56 (discussing ***First Wis. Nat'l Bank of Oshkosh v. Kramer***, 74 Wis. 2d 207, 246 N.W.2d 536 (1976)).

[4] Our supreme court has explained guaranties of payment as follows:

(continued)

¶11 Any lingering doubt concerning whether a failure-to-mitigate defense could defeat a guaranty-of-payment claim was resolved in a case decided after the circuit court's decision. In ***Park Bank v. Westburg***, 2013 WI 57, ¶58, 348 Wis. 2d 409, 832 N.W.2d 539, the court addressed guaranties of payment similar to those at issue here. Suffice it to say, the court held that the failure-to-mitigate affirmative defense is unavailable to a guarantor of payment. *See* ***id.***, ¶¶28, 62-63, 65 (citing ***Bank Mutual***, 326 Wis. 2d 521, ¶53).

¶12 Moreover, the Harrills expressly agreed BMO could do as it pleased with its rights in the Golf Club's real estate without affecting BMO's guaranty rights. As the circuit court explained:

> [The guaranties] each specifically state that [BMO] may "without affecting the liability of the undersigned (a) surrender, release, impair, sell or otherwise dispose of any security or collateral, [and] … (i) determine what, if anything, may at any time be done with reference to any security or collateral." … Therefore, [the Harrills] essentially waived the defense they now assert when they signed their respective guaranties.

> Guaranties of payment are different from other guaranties such as guaranties of collection. A guaranty of payment binds the guarantor to pay the debt according to the terms and conditions of the guaranty. In contrast, a guaranty of collection is a promise that if the principal creditor cannot collect the claim with due diligence, generally following suit against the principal debtor, the guarantor will pay the creditor.
>
> Unlike a guaranty of collection, a guaranty of payment does not condition liability upon the creditor exhausting remedies against the debtor.

Park Bank v. Westburg, 2013 WI 57, ¶¶59-60, 348 Wis. 2d 409, 832 N.W.2d 539 (citation omitted).

Accordingly, the Harrills' assertion, that the "contracts do not specifically waive mitigation as a defense," rings hollow.

¶13 Because the failure-to-mitigate defense is unavailable to guarantors of payment generally, and the guaranties here explicitly waived any claim based upon action or inaction regarding the collateral, the circuit court properly rejected the Harrills' defense as a matter of law.

Equitable estoppel

¶14 The Harrills alternatively argue BMO should be equitably estopped from recovering on the guaranties. Equitable estoppel requires that the party asserting it demonstrate the following elements: (1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or nonaction, and (4) which is to his or her detriment. ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

¶15 The Harrills argue BMO's course of dealing in annually renewing the notes, representations regarding their renewal in June 2011, and continued acceptance of payments from the Golf Club induced the Harrills to inject additional cash into the Golf Club in order to make the payments. The Harrills contend this was to their detriment because they could have instead used that money toward satisfying their guaranties.

¶16 The equitable estoppel affirmative defense fails for essentially the same reasons as the Harrills' failure-to-mitigate defense. Because the notes and guaranties are separate contracts, any action or inaction by BMO with regard to the Golf Club is irrelevant. If the Harrills have an equitable estoppel claim, it is

via their interest in the Golf Club. Further, the Harrills' cash infusions were not to their detriment, because the payments were due and were credited to the principal balance on the notes, thereby reducing the guarantors' collective liability.

¶17 Additionally, the guaranties expressly permitted the action of which the Harrills complain. The guaranties stated BMO "may from time to time … and without affecting the liability of the undersigned … (h) determine the allocation and application of payments and credits and *accept partial payments* …." (Emphasis added.) The Harrills could not have been reasonably induced to their detriment by conduct expressly permitted by the contract.

¶18 Finally, the Harrills' equitable estoppel argument fails because it, too, is precluded by ***Park Bank***. There, the court held that the equitable estoppel affirmative defense is unavailable to a guarantor of payment.[5] ***Park Bank***, 348 Wis. 2d 409, ¶¶28, 62-63, 65. Indeed, the court held that once it is established that payment is due and outstanding, there are generally no affirmative defenses available to guarantors of payment.[6] *See* ***id.***, ¶¶63-65.

¶19 Because the Harrills failed to demonstrate detrimental reliance, the equitable estoppel defense is unavailable to guarantors of payment generally, and the guaranties here explicitly permitted BMO's actions, the circuit court properly rejected the Harrills' defense as a matter of law.

[5] The Harrills reply that ***Park Bank*** defeats neither of the Harrills' affirmative defenses. They contend ***Park Bank*** is distinguishable because there the court concluded the affirmative defenses were derivative of the underlying debtors. The Harrills are mistaken. ***Park Bank*** held the *counterclaims* failed because they were derivative. ***Park Bank***, 348 Wis. 2d 409, ¶3.

[6] In ***Park Bank***, 348 Wis. 2d 409, ¶28, the defendants raised numerous affirmative defenses. The court rejected them as a whole, not addressing any individually. *See* ***id.***, ¶¶57-66.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.