COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2587 **Cir. Ct. No. 2014CV31**

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

LSREF2 COBALT (WI) LLC,

PLAINTIFF-RESPONDENT,

V.

KARMA, INC., JEFFREY D. SCHREIBER, CHRISTOPHER W. GORSKI, AND PETER OGDEN,

DEFENDANTS,

JOSEPH P. WEBSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: DAVID J. WAMBACH, Judge. *Affirmed.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Joseph Webster appeals a judgment awarding LSREF2 Cobalt (WI) LLC approximately $900,000 in unpaid principal and interest on a loan made to Karma, Inc., and guaranteed by Webster among others, as well as Cobalt's attorneys' fees and costs.[1]

¶2 After Karma defaulted on its loan, Cobalt sought to collect on the debt from Karma and the guarantors of Karma's debt, including Webster. In the Webster guaranty that is directly at issue in this appeal, Webster personally guaranteed 51% of Karma's total indebtedness. This 51% guaranty provided that, in the event of Karma's default on the loan, Cobalt "shall determine" Webster's share of Karma's total indebtedness and make "demand on" Webster for that amount. The guaranty further provided that, after Cobalt determined Webster's share of the indebtedness, this share would be reduced only by sums that Webster paid Cobalt and would not be offset by any money paid to Cobalt by any other source. Separately, Karma's debt was also guaranteed in part by two other guarantors and secured by real property owned by Karma, which was later foreclosed.

¶3 Webster makes the following preserved arguments on appeal: (1) Cobalt should not be deemed to have made a "determination" of Webster's share of Karma's indebtedness until after the foreclosure sale of Karma's real property, which would entitle Webster to an offset against his share of the debt equal to the fair value of the foreclosed property; (2) regardless of when Cobalt's "determination" of Webster's share of the debt should be deemed to have

[1] The Honorable William F. Hue initially presided over the proceedings in this action. However, the judgment Webster appeals from was entered by the Honorable David J. Wambach after the case was re-assigned.

occurred, Webster's share of the debt was capped, and could not grow based on factors such as interest accrued, after Cobalt made its "determination"; and (3) Webster is obligated to pay only those attorneys' fees of Cobalt directly related to Cobalt's collection efforts against Webster, and not those fees related to Cobalt's collection efforts against Karma or the other guarantors. We reject Webster's preserved arguments for the following reasons and, accordingly, affirm.[2]

BACKGROUND

¶4 The following facts are undisputed, as of the pertinent time period. Karma was a Wisconsin corporation. Webster was a Karma principal and one of three guarantors of loans that Karma took out from Southwest Bank. Karma's debt to Southwest was secured by a mortgage on real property in Watertown, Wisconsin, owned by Karma. At some point prior to this litigation, Southwest assigned its interest in Karma's debt and the guarantees to Wells Fargo, which later assigned its pertinent rights to Cobalt.

¶5 Turning to Webster in particular, over the life of Karma's loans, Webster executed one guaranty for $250,000, one guaranty for $100,000, and one

[2] We do not address one set of arguments that Webster raises on appeal because he forfeited these arguments by failing to preserve them before the circuit court and he provides us with no good reason not to deem them forfeited. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-29, 539 N.W.2d 897 (Ct. App. 1995) (A failure to raise a specific challenge before the circuit court generally forfeits the right to raise that challenge on appeal.). More specifically, we conclude that Webster forfeited his arguments that Cobalt is equitably estopped from enforcing, or that Cobalt waived its right to enforce, the "no offset" provision in Webster's guaranty. Cobalt argues on appeal that we should deem these arguments forfeited, and Webster concedes the point by failing either to explain how he in fact preserved the issue, or in the alternative explain why we should address these arguments even if they were not preserved.

pledging to pay 51% of Karma's indebtedness. The "51% guaranty" is the only guaranty directly at issue in this appeal.

¶6 In order to address the arguments raised on appeal, we now briefly walk through the pertinent provisions of the 51% guaranty.[3] The provision that we refer to as the "absolute guarantee provision" provides that Webster "absolutely and unconditionally guarantees full and punctual payment" of Webster's share of Karma's indebtedness. Webster's "Share of the Indebtedness" is defined in the guaranty as "51.000% of all the principal amount, interest thereon to the extent not prohibited by law, and all collection costs, expenses and attorneys' fees whether or not there is a lawsuit, and if there is a lawsuit, any fees and costs for trial and appeals." "Indebtedness" is also a defined term, meaning "all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees ... now existing or hereafter arising or acquired ...."

[3] The 51% Guaranty specifically provides as follows:

> Guarantor absolutely and unconditionally guarantees full and punctual payment in satisfaction of Guarantor's Share of the Indebtedness of Borrower to Lender ....
>
> ….
>
> Lender shall determine Guarantor's Share of the Indebtedness when Lender makes demand on Guarantor. After a determination, Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guarantee, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the indebtedness or this Guarantee, or payments by anyone other than Guarantor, or reductions by operation of law, judicial order or equitable principles.

¶7 The 51% guaranty further provides, in what we refer to as "the determination provision," that Cobalt will "determine" Webster's "Share of the Indebtedness" when Cobalt "makes a demand on [Webster]."

¶8 In what we refer to as the "offset provision," the 51% guaranty provides that, after Cobalt has made its "determination," Webster's share of the debt "will only be reduced by sums" paid by Webster, and will not be offset by collateral securing the loan or by sums from any other source. In addition, the guaranty provides that Webster "waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff ... or similar right, whether such claim, demand or right may be asserted by [Karma], [Webster], or both[.]"

¶9 Returning to the background facts, Cobalt filed this action against Karma and the individual guarantors, alleging default by Karma. Shortly thereafter, Cobalt filed an amended complaint seeking to foreclose on the Watertown property under Karma's mortgage and seeking money judgments against Webster and the two other guarantors.[4] As pertinent to the issues in this appeal, Cobalt alleged: that a particular amount represented Karma's total indebtedness up to that point; that interest on this amount would accrue daily

[4] As stated in ¶4 above, Wells Fargo was Southwest Bank's successor-in-interest and the holder of the pertinent notes and guarantees when this action was initiated. After the circuit court granted summary judgment in favor of Wells Fargo against Karma and the other two guarantors besides Webster, but while its claims against Webster remained in dispute, Wells Fargo assigned to Cobalt its judgment against Karma and the two other guarantors. Cobalt was also substituted for Wells Fargo with respect to the remaining claims against Webster. For ease of reference, we refer to Southwest Bank, Wells Fargo, and Cobalt collectively as "Cobalt" for the remainder of this opinion.

going forward; and that, under the terms of the 51% guaranty, Webster is liable for 51% of Karma's total indebtedness.

¶10 After the circuit court determined that Cobalt was entitled to a foreclosure judgment against Karma on the Watertown property and to a money judgment against Karma and the other two guarantors, Cobalt moved for confirmation of the sale of the Watertown property. At the same time, Cobalt sought to amend the money judgment against Karma to include additional accrued interest and fees and to provide an offset in favor of Karma in the amount of the sale of the Watertown property, and to enter a money judgment against Webster for his share of Karma's indebtedness in light of the new accrued interest and attorneys' fees totals.

¶11 In the motion and corresponding proposed order, Cobalt provided a calculation for Webster's obligation under the 51% guaranty, which Cobalt based on Karma's "remaining" indebtedness after the sheriff's sale. In other words, Cobalt's proposed order initially gave Webster the benefit of an offset against his indebtedness for the proceeds from the sale of the Watertown property. Cobalt subsequently asserted that its initial proposed order providing Webster with an offset was erroneous, because pursuant to the terms of the guaranty Webster was not entitled to an offset, and Cobalt changed its position in a brief and revised proposed order.

¶12 Pertinent to this appeal, the court determined the total amount of Karma's indebtedness to Cobalt to be $1,580,986.26, including Cobalt's attorneys' fees and costs of approximately $94,000. The court further determined that Karma was entitled to reductions in the amount of its indebtedness of $595,000 (the fair value of the Watertown property) and $3,298.74 (proceeds held by the court-

appointed receiver for Karma). Pursuant to the 51% guaranty, the court ordered Webster to pay $906,302.99—an amount equal to 51% of Karma's total indebtedness, with no offsets to Webster.[5] Separately, the court found that Webster's indebtedness included 51% of the $94,000 in fees for Cobalt's attorneys, and that the fee amount was reasonable. Webster appeals. We supply additional facts as necessary to discussion below.

DISCUSSION

¶13 This case involves the proper interpretation of the language of the 51% guaranty as it pertains to both the offset provision and the inclusion of 51% of the full amount of Cobalt's attorneys' fees in the amount of Webster's total indebtedness. Both issues require contract interpretation, which the parties agree is a question of law that we review de novo.

¶14 A guaranty is a contract, and, therefore, the rules governing construction of contracts generally apply to the construction of a guaranty. ***The Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 434 (Mo. 2003); ***Jamieson-Chippewa Inv. Co., Inc. v. McClintock***, 996 S.W.2d 84, 87 (Mo. Ct. App. 1999).[6] "The primary rule in interpretation of contracts is to ascertain the parties' intent and give effect to that intent." ***Kansas City Univ. of Med. & Biosciences v. Pletz***, 351 S.W.3d 254, 261 (Mo. Ct. App. 2011) (quoted source omitted). Courts are to consider the document as a whole and give the words their

[5] In addition, the court included $100,000 pursuant to a separate Guaranty. Webster does not challenge the $100,000 amount.

[6] We rely on Missouri law for principles of contract interpretation, because the 51% Guaranty includes a Missouri choice-of-law provision, and neither party explains why this provision would not govern our analysis.

plain and ordinary meaning. ***Id.*** Additionally, each term of a contract is construed to avoid rendering other terms meaningless. ***Dunn***, 112 S.W.3d at 428 ("A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense.").

I. The 51% Guaranty and the Determination of Webster's Share of the Indebtedness

¶15 Webster makes two preserved arguments based on Webster's interpretation of the determination and offset provisions of the 51% guaranty. Webster argues that, under the terms of the guaranty: (1) Cobalt should not be deemed to have made a "determination" of Webster's share of Karma's indebtedness until after the foreclosure sale of Karma's real property, which would entitle Webster to an offset against his share of the debt equal to the fair value of the foreclosed property; and (2) regardless of when Cobalt's "determination" of Webster's share of the debt should be deemed to have occurred, Webster's share of the debt was capped, and could not grow based on factors such as interest accrued, after Cobalt made its "determination."

A. Date of "Determination"

¶16 Webster's argument has no substance that we are able to discern. Webster begins with a premise that we assume is correct. The premise is that the 51% guaranty is "conditional," in the sense that, in order to trigger Webster's obligation to pay on the guaranty, Cobalt was obligated to make a demand on Webster containing Cobalt's "determination" of Webster's share of the indebtedness. Purportedly from this premise, Webster proceeds to argue that Cobalt's "determination" did not occur when Cobalt filed the amended complaint

setting forth the amount Karma owed and Webster's obligation to pay 51% of this amount, but instead Cobalt's "determination" did not occur until the date of the confirmation of the foreclosure sale of the Watertown property. Under this interpretation of the guaranty, Webster would be entitled to an offset for the proceeds of the foreclosed property. However, Webster provides no coherent rationale for his "date of determination" argument. He alludes to the fact that, as described above, Cobalt's initial proposed order submitted after the foreclosure sale provided Webster with an offset based on the fair value of the foreclosed Watertown property, before Cobalt quickly corrected its position, asserting that its submission had been made in error. But Webster fails to explain why Cobalt's initial position fixes the date of the "determination."

¶17 Moreover, Webster cites no legal authority in support of his "date of determination" argument. We reject the argument on the ground that it is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments). However, we briefly explain below why, even if we did not reject the argument on this ground, it would fail on the merits.

¶18 Cobalt fails to come to grips with the plain language of the absolute guarantee provision, establishing that the 51% guaranty is an unconditional and absolute guarantee of *payment upon demand*, and that Cobalt made a demand when it filed its amended complaint, and therefore Webster is not entitled to any offset.

¶19 We conclude that Cobalt should be deemed to have made a "determination" of Webster's share of the indebtedness when it filed its amended complaint. As stated above, the amended complaint set forth the amount Cobalt

claimed that Karma owed up to that point and further alleged that Webster was liable for 51% of Karma's total indebtedness pursuant to the 51% guaranty. We see no meaningful difference between Webster's own statement, in a brief filed with the circuit court, that Cobalt's amended complaint "could be construed as a demand" for Webster to pay the debt, and Cobalt's current position that the amended complaint should be deemed a "determination" of that debt.

¶20 Regarding Webster's asserted entitlement to an offset, his argument is foreclosed by both the offset provision cited above and a provision that Webster "waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff ... or similar right, whether such claim, demand, or right may be asserted by [Karma], [Webster], or both." Webster fails to convince us that this language has any other meaning than as an absolute guarantee of payment without any entitlement to an offset. Pursuant to the terms of the 51% guaranty, the allegations in the amended complaint were sufficient to establish Webster's share of the indebtedness and to trigger the offset provision in the clause, cited above, that Webster relies on.

B. Alleged Cap on Indebtedness

¶21 Webster argues that, regardless of whether we conclude that Cobalt "determined" Webster's share of the indebtedness when Cobalt filed the amended complaint or at some other time, Webster's liability under the 51% guaranty was capped or fixed as of the date of determination. Webster specifically takes issue with the circuit court's decision that Webster's liability (as a function of Karma's liability) continued to increase after Cobalt filed its amended complaint due to interest and mounting attorneys' fees and costs. We see no merit in Webster's argument.

¶22 Webster fails to point to any language in the guaranty that supports his position. Webster argues that "the unambiguous language in Webster's 51% guaranty provides that [Webster's] percentage or variable amount liability becomes fixed when [Cobalt] makes the required determination of [Webster's] share of [Karma's] indebtedness." In purported support, Webster cites the offset provision, which, to repeat, states that "[a]fter a determination, [Webster's] share of the indebtedness will only be reduced by sums actually paid by [Webster] under this Guaranty ...." However, by its unambiguous terms, this provision addresses limitations on *reductions* to Webster's liability, and not limitations on *additions* to his liability. And, other provisions within the 51% guaranty clearly indicate that Webster would be on the hook for additional amounts under the circumstances presented here after Cobalt is deemed to have made a "determination."

¶23 Further, Webster's cap-on-liability interpretation would conflict with other provisions in the agreement, rendering them meaningless. By way of example, it is clear that Webster's "Share of the Indebtedness" includes 51% "of all the principal amount, interest thereon ... all collection costs, expenses and attorneys' fees whether or not there is a lawsuit, and if there is a lawsuit, any fees and costs for trial and appeals." If Webster were correct in his assertion that a "determination" by the lender fixes maximum guarantor liability as of the moment of "determination," and Cobalt's initial demand on Webster was the "determination," then, contrary to the language in the guaranty, Cobalt would not be able to recover 51% of all principal, interest, costs, expenses, and fees from Webster.

II. Attorneys' Fees

¶24 Webster argues that the circuit court erred in awarding Cobalt $94,000 in attorneys' fees and in failing to distinguish between fees that Cobalt incurred in pursuing Karma and the other guarantors from those it incurred in pursuing Webster in particular. We disagree.

¶25 The court determined that, pursuant to the plain language of the 51% guaranty, Karma's "[i]ndebtedness" included "all" of the collection costs and attorneys fees—approximately $94,000—and that that amount was reasonable and would be included in the judgment against Karma. Further, the court determined that Webster was liable for 51% of Karma's indebtedness and, therefore, that Webster is liable for 51% of the attorney fees—approximately $48,000 through the date of final judgment.

¶26 Webster argues that, under Missouri law, the court was required to determine the reasonableness of the attorneys' fees and apportion them among the prevailing claims. *See* ***Wooten v. DeMean***, 788 S.W.2d 522, 529 (Mo. Ct. App. 1990). However, as Cobalt correctly observes, ***Wooten*** involved contract language governing a claim for attorneys' fees that is readily distinguishable from the pertinent language of the 51% guaranty. The contract in ***Wooten*** awarded "the prevailing party" "all of its reasonable attorneys' fees and litigation expenses." ***Id.*** (emphasis added). On appeal, the court slightly reduced the amount that Wooten sought for attorney's fees to account for the facts that Wooten failed to prevail on counterclaims against the opposing party and that Wooten's proposed attorneys' fees award failed to account for the fact that he was not the prevailing party on those claims. ***Id.***

¶27 Unlike in ***Wooten***, here no language in the 51% guaranty requires apportionment. Instead, the guaranty here provides that Webster is liable for 51% of Karma's indebtedness including "*all* collection costs, expenses, and attorneys' fees" and "*any* fees and costs for trial and appeals." (Emphasis added.) "If a contract provides for the payment of attorneys' fees and expenses incurred in the enforcement of a contract provision, the trial court must comply with the terms of the contract ...." ***WingHaven Residential Owners Association, Inc. v. Bridges***, 457 S.W.3d 383, 385 (Mo. Ct. App. 2015) (citation omitted). In sum, Webster fails to demonstrate why he is not responsible under the guaranty for 51% of Cobalt's fees incurred in enforcing its entitlement, under the guaranty, to the fees and costs it incurred in attempting to collect on the debt.

¶28 To the extent Webster intends to challenge the reasonableness of the fee amount, we reject this argument. In reviewing Cobalt's claim for attorneys' fees, the circuit court considered the reasonableness of the attorneys' fees in light of Webster's arguments and concluded that Cobalt's proposed fees were reasonable. Under Missouri law, the amount of the attorneys' fees awarded "is within the sound discretion of the [circuit] court" and will only be disturbed on appeal if the amount is arbitrary or "is so unreasonable as to indicate indifference and a lack of proper judicial consideration." ***Id.*** at 385-86 (citation omitted). Webster fails to suggest any manner in which the circuit court did not properly consider the evidence before it, or otherwise improperly exercised its discretion, in awarding attorneys' fees and costs.

CONCLUSION

¶29 For the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).