

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2013

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. 2011AP2278

Cir. Ct. No. 2010CV2273

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PARK BANK,

PLAINTIFF-RESPONDENT,

v.

EDWARD R. POPE,

DEFENDANT-APPELLANT,

DEXM AEROSPACE, LLC,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Edward R. Pope appeals from a summary judgment arising out of an action to collect on a personal guaranty he executed on

loans made by Park Bank to DexM Aerospace, LLC. Pope contends that he presented evidence establishing genuine issues of material fact about the enforcement of his personal guaranty and the appropriate amount of his liability. We reject Pope's claim and affirm the judgment of the circuit court.

¶2 In 2006, DexM entered into a number of loan arrangements with Park Bank. Those loans were secured by DexM's assets. Pope, the sole owner of DexM, also executed a personal guaranty.

¶3 By 2008, DexM was having trouble meeting its obligations to Park Bank. Rather than immediately commence collection proceedings, DexM and Park Bank entered into a forbearance agreement, which was extended, via amendment, on seven subsequent occasions. Pope signed these documents as a principal of DexM and personally as a guarantor of DexM's obligations.

¶4 In 2010, after DexM's financial condition had deteriorated significantly, Park Bank requested and was granted the appointment of a receiver over DexM pursuant to WIS. STAT. ch. 128 (2009-10).¹ The receiver held an auction and liquidated DexM's assets.

¶5 Park Bank also sued Pope on his personal guaranty. Pope answered, asserting various affirmative defenses and counterclaims. Park Bank then moved for summary judgment, arguing that the express terms of the personal guaranty and the subsequent forbearance agreement precluded Pope's defenses and counterclaims as a matter of law. Park Bank also argued that Pope lacked legal standing to assert his defenses and counterclaims.

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

¶6 Following a hearing on the matter, the circuit court granted Park Bank’s motion for summary judgment. In doing so, the court dismissed some of Pope’s defenses based on the record, others based on standing, and granted judgment to Park Bank for the full amount of its deficiency claim. This appeal follows.

¶7 We review a grant of summary judgment using the same methodology as the circuit court. *Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. We need not recount this well-known methodology in full. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See id.*; *see also* WIS. STAT. § 802.08(2).

¶8 On appeal, Pope contends that he presented evidence establishing genuine issues of material fact about the enforcement of his personal guaranty and the appropriate amount of his liability. He accuses Park Bank of misconduct in its handling of DexM’s assets. Additionally, he maintains that he has standing to assert his claims based on damages to DexM because he is doing so in a defensive posture.

¶9 We need not address the issue of Pope’s standing to resolve this case. That is because we view Pope’s personal guaranty and the forbearance agreement he signed as dispositive.

¶10 As noted, Pope executed a personal guaranty of DexM’s loans with Park Bank. In it, Pope agreed to “guarantee payment of the Obligations defined below when due.” The “Obligations defined below” included “all loans, ... notes, and all other debts, obligations and liabilities of every kind and description, whether of the same or a different nature, arising out of credit previously granted,

credit contemporaneously granted or credit granted in the future by Lender to any Debtor.” The guaranty identified Park Bank as the Lender and DexM as the Debtor.

¶11 Pope also signed the forbearance agreement (and subsequent amendments) both as a principal of DexM and personally as a guarantor of DexM’s obligations. That agreement reaffirmed Pope’s guaranty “without offsets, deductions, counterclaims or defenses of any kind and character.” It also contained a release provision whereby Pope and DexM released, acquitted and discharged Park Bank for any liability arising from an act or omission on the part of the bank.

¶12 Reviewing these documents, we agree with the circuit court that Park Bank was entitled to judgment as a matter of law. To begin, we view Pope’s personal guaranty as a guaranty of payment.² By executing it, Pope made an absolute promise of payment to Park Bank for DexM’s loan obligations that was enforceable on its own right, pursuant to the express terms of the guaranty. Moreover, we conclude that Pope waived any defense he had for the liability of

² Wisconsin law distinguishes between guaranties of payment and guaranties of collection. With a guaranty of payment, a creditor is “not under any legal obligation to first enforce collection from the maker or any other guarantor, or to first resort to securities given by the principal debtor.... Under (a) guaranty of payment, and not merely of collection, plaintiff was entitled to immediate recovery from the sureties, and his right to immediate recovery from them could not be postponed for their benefit until after efforts to recovery by foreclosure or otherwise were exhausted.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 677-78, 273 N.W.2d 279 (1979) (quotation omitted). A guaranty of payment is as an absolute, not collateral, promise. *Id.* at 678.

his promise by agreeing to the language in the forbearance agreement. For these reasons, we affirm the judgment of the circuit court.³

By the Court.—Judgment affirmed.

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

³ Park Bank concludes its brief by asking that it be awarded its actual costs and disbursements, including actual attorney fees, incurred on appeal. We decline to award any attorney fees to Park Bank, as we follow the American Rule and there is no statute or enforceable contract providing for such an award. See *Reid v. Benz*, 2001 WI 106, ¶2, 245 Wis. 2d 658, 629 N.W.2d 262 (“[U]nder the ... American Rule, parties to litigation are generally responsible for their own attorney fees incurred with respect to the litigation.”). However, Park Bank is free to seek reimbursement of other costs pursuant to WIS. STAT. RULE 809.25.

