COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2101 **Cir. Ct. No. 2011CV1328**

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

TRI CITY NATIONAL BANK,

PLAINTIFF-RESPONDENT,

V.

JOSEPH E. BORZYNSKI, NANCY BORZYNSKI, DANIEL R. HINTZ AND GINNY M. HINTZ,

DEFENDANTS,

DR. THOMAS WOOD AND RAE WOOD,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Spouses Dr. Thomas Wood and Rae Wood appeal a judgment granting summary judgment in favor of Tri City National Bank. Tri City sought a money judgment jointly and severally against the Woods and others pursuant to personal guaranties they signed for a loan to Legacy D.C., Inc. Like the circuit court, we reject the Woods' claim that their guaranty was unenforceable against them. We affirm.

¶2 In June 2004, Tri City loaned $457,000 to Legacy to purchase a property for a condominium development. The loan was guaranteed by two Legacy shareholders and their spouses, and the Woods, who were not shareholders. Thomas went to the office of John Helding, Legacy's president, and executed a Continuing Unlimited Guaranty by signing his and Rae's names.

¶3 The guaranty allowed Tri City to "renew or extend the time of payment" and to "increase or decrease the rate of interest or the amount of the Obligations." It also provided that a guarantor "expressly consents to and waives notice of" such events and waives notice of the acceptance of the Guaranty. The guaranty further advised each guarantor:

> You are being asked to guarantee the past, present and future Obligations of Debtor [Legacy]. If Debtor does not pay, you will have to. You may also have to pay collection costs. Lender can collect the Obligations from you without first trying to collect from Debtor or another guarantor.
>
> ….
>
> Any renewal, extension or increase in the interest rate of any such Obligation, whether made before or after revocation [by written notice or actual death of Guarantor], shall constitute an Obligation contracted for or incurred before revocation.

¶4 Tri City renewed the Legacy loan five times between November 2005 and May 2010, but added only accrued interest rather than increasing the

principal balance of the amounts owed. Legacy defaulted. Tri City commenced this action seeking an order against the guarantors, jointly and severally, for a money judgment in the amount of $471,321.58 plus attorney fees.

¶5 Tri City moved for summary judgment. Only the Woods opposed it. At the hearing on the motion, the circuit court concluded that there was no genuine issue that Thomas executed the guaranty on his and Rae's behalf and waived notice of future transactions, that the guaranty was delivered, and that the Woods had not been released from the guaranty. The court granted summary judgment in Tri City's favor. The Woods appeal.

¶6 We review a decision on summary judgment using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[1]

¶7 The Woods argue that whether the guaranty was properly delivered presents a genuine issue of material fact. Thomas testified at deposition that he had "no idea" how Tri City came into possession of the guaranty because he or Rae personally did not transfer possession to Tri City or expressly authorize anyone else to do so. Accordingly, they deduce, the guaranty can be of no legal effect. We disagree.

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

¶8 Thomas, a physician, testified that he read the guaranty, understood its nature, and signed both his and Rae's names. While he did not recall taking the endorsed document with him when he left the office of Legacy's president, the Woods proffered no evidence that the guaranty did not reach Tri City according to the normal customs and practices in any commercial loan transaction. Further, by signing on his and Rae's behalf, Thomas "expressly waive[d] … notice of" the guaranty's acceptance.

¶9 The cases the Woods cite in their support are to no avail because they refer to conditional delivery. *See* ***Rehbein v. Rahr***, 109 Wis. 136, 141, 85 N.W. 315 (1901) (noting that a "paper" delivered contrary to mutually understood conditions is of no force or effect); *see also* ***New Home Sewing Mach. Co. v. Simon***, 104 Wis. 120, 124, 80 N.W. 71 (1899) (holding that the party for whose benefit a surety bond is given cannot enforce liability if given notice of conditional delivery). Here, there is no evidence that either side placed any condition or contingency upon the delivery of the guaranty to Tri City. Therefore, as the evidence is not such that a reasonable jury could return a verdict for them on the issue of delivery, a genuine issue does not exist. *See* ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991).

¶10 In the alternative, the Woods assert that if the guaranty was delivered, Tri City either "terminated" the guaranty by failing to relist them as guarantors each time the loan renewed or "abandoned" it by failing to notify them of the loan extensions. We are not persuaded.

¶11 John Kis, the Tri City official in charge of the loan, testified in his deposition that the original loan would not have been made but for Thomas's personal guaranty, the guaranty was for the original loan and any extensions

thereof, Tri City's practice is to get additional guaranties from those corporate signators present when closing on an extension of credit, the Woods did not sign again because they were not present, and the Woods did not withdraw their guaranty at any point.

¶12 Moreover, contract construction rules also apply to a guaranty. ***Harris v. Metropolitan Mall***, 112 Wis. 2d 487, 503, 334 N.W.2d 519 (1983). We construe an unambiguous contract as it stands. ***Kreinz v. NDII Sec. Corp.***, 138 Wis. 2d 204, 216, 406 N.W.2d 164 (Ct. App. 1987). The construction of a written contract presents a question of law that we decide de novo. ***Id.***

¶13 The guaranty that Thomas acknowledges having read and signed put the Woods on notice that it was a continuing guaranty guaranteeing Legacy's "past, present and future" obligations. It gave notice that it would remain in full force and effect until Tri City received either the Woods' written revocation or actual notice of their death and that each guarantor "expressly consents to and waives notice of" any loan renewal or extension. Such notice was sufficient to bind the Woods. *See* ***John Deere Co. v. Babcock***, 89 Wis. 2d 672, 674, 278 N.W.2d 885 (1979).

¶14 The Woods next assert they should be relieved of the guaranty because Tri City materially increased their obligation without their knowledge or consent by "loan[ing] millions of additional dollars to Legacy." They direct us to cases that draw a distinction between the obligations of "compensated" and "uncompensated" guarantors. This whole argument is utterly without merit. Tri City seeks to hold the Woods responsible only for the obligation they agreed to on the initial loan. Subsequent unrelated loans do not undo that obligation.

¶15 Finally, the Woods contend that Tri City should be equitably estopped from enforcing the guaranty against them because Tri City did not request new guaranties on the Legacy loan extensions or notify them of loan closings, and it submitted a privileged settlement communication from their attorney to two other guarantors, upon which the circuit court relied. We disagree that the facts show a need to equitably deny the guaranty's enforcement.

¶16 "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, 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). The party asserting the defense must prove those elements by clear, satisfactory, and convincing evidence. ***Village of Hobart v. Brown Cnty. Solid Waste Mgmt. Bd.***, 2007 WI App 250, ¶21, 306 Wis. 2d 263, 742 N.W.2d 907.

¶17 The Woods are correct that "[e]vidence of conduct or statements made in compromise negotiations is … not admissible" to prove liability of a disputed claim or its amount. WIS. STAT. § 904.08. If it was part of the circuit court's consideration, it should not have been. Regardless, the settlement document plays no part in our analysis. The Woods fail to show why, in equity, the plain language of the guaranty should not obligate them.

By the Court.—Judgment affirmed.

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