COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP694 **Cir. Ct. No. 2014CV7236**

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

REINHART FOODSERVICE LLC,

PLAINTIFF-RESPONDENT,

V.

PAUL BOURAXIS INDIVIDUALLY, F/D/B/A OMEGA RESTAURANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Paul Bouraxis appeals from a money judgment, entered in favor of Reinhart Foodservice, LLC, after the circuit court denied Bouraxis's motion for summary judgment and granted Reinhart's cross-motion. Bouraxis contends there is no valid contract with Reinhart on which he could be held liable, competing inferences exist regarding agency, and a personal guaranty is not enforceable. We reject Bouraxis's arguments and affirm the judgment.

BACKGROUND

¶2 The basic facts are undisputed. In April 2012, Bouraxis signed a credit application from Reinhart, listing Omega Restaurant (Omega) as the ship-to address. The credit application included a personal guaranty, which Bouraxis also signed. Reinhart then began fulfilling orders from Omega.

¶3 Bouraxis does not have a present ownership interest in Omega. He had owned Omega V, Inc., which previously owned and operated Omega, but sold his entire Omega V interest on December 31, 2005, to three buyers, including Konstantinos Maltezos. Maltezos and the others had financed the purchase of Bouraxis's Omega V interest with bank loans on which they subsequently defaulted. The bank thus sued Maltezos and the other buyers for the default. While the suit was pending, the bank assigned its interests in the defaulted loans to Bouraxis via Bouraxis Investments, a sole proprietorship through which Bouraxis did business, making Bouraxis the successor plaintiff in the default suit. Maltezos, now operating Omega via Omega on Twenty Seven, LLC, with a new partner, settled the loan default suit in April 2012 by guaranteeing the debt with Omega's assets, including its lease. This was around the same time Bouraxis completed the credit application.

¶4 Maltezos's partner then assigned his interests and obligations in Omega on Twenty Seven to Kostas Koutroumanos, who became the sole owner of Omega on Twenty Seven in January 2013. Omega on Twenty Seven was subsequently replaced by GK&D Enterprises, Inc. According to Bouraxis, Omega on Twenty Seven did all the ordering from Reinhart for supplies for Omega.

¶5 When Omega on Twenty Seven or GK&D, which had both paid some of the invoices, failed to pay for $58,715.48 of supplies delivered in March and April 2014, Reinhart sued Bouraxis himself to recover the outstanding invoices, noting that Bouraxis had signed both the credit application and the personal guaranty therein.

¶6 The parties filed cross-motions for summary judgment. Bouraxis claimed the credit application was incomplete and insufficient to constitute a binding contract; even if it was a valid contract, it bound him only for purchases made by him, not purchases by Omega or someone else, and the personal guaranty was not binding for similar reasons. Reinhart asserted that Bouraxis had represented himself in the application as the sole proprietor of Omega, making him liable for its purchases, and that the guaranty was clearly valid.

¶7 The circuit court stated the case "boils down to two main issues: 1) whether Bouraxis had the authority to enter into this contract; and 2) whether the contract binds Bouraxis to pay for any purchases made by the restaurant." To the extent Bouraxis claimed he had no authority to contract on behalf of Omega on Twenty Seven, the circuit court concluded he did not need any express authority to do so because he had "apparent authority." To the extent Bouraxis claimed he could not be personally liable on the contract, the circuit court determined that he had contracted on behalf of a partially disclosed principal, meaning he could be

held personally liable for the breach of the credit agreement. The circuit court also concluded that Bouraxis was personally liable under the plain language of the personal guaranty. The circuit court thus denied Bouraxis's motion for summary judgment and granted Reinhart's cross-motion. Bouraxis appeals.

DISCUSSION

I. Standard of Review

¶8 "We review a circuit court's grant of summary judgment de novo." ***Otterstatter v. City of Watertown***, 2017 WI App 76, ¶19, 378 Wis. 2d 697, 904 N.W.2d 396. We apply the same standards as those used by the circuit court. *See* ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 852, 470 N.W.2d 888 (1991). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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) (2015-16).[1]

¶9 The moving party has the burden of showing the absence of genuine issues of material fact. *See* ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178. A "'material fact' is one that is 'of consequence to the merits of the litigation.'" ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party." ***Id.***

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶10 Once the moving party has satisfied the initial burden, the nonmoving party must set forth specific facts to establish the existence of genuine issues of material fact. WIS. STAT. § 802.08(3). If there are no genuine issues of material fact, "then summary judgment is appropriate where 'only one reasonable inference can be drawn'" from the facts. ***Benjamin Plumbing***, 162 Wis. 2d at 852 (citation omitted). When "the parties have filed cross-motions for summary judgment, it is generally the equivalent of a stipulation of facts permitting the [circuit] court to determine the case on the legal issues presented." ***BMO Harris Bank N.A. v. European Motor Works***, 2016 WI App 91, ¶15, 372 Wis. 2d 656, 889 N.W.2d 165. As noted, the material facts are not seriously contested; rather, it is the legal significance of the facts that the parties dispute.

II. Whether the Credit Application is a Valid Contract

A. Agreement on Terms

¶11 Bouraxis contends he is not liable under the credit application because it is merely an agreement to agree at a later date—specifically, when he places an order, thereby making a purchase agreement. He also notes that the credit agreement contains no specific payment terms.

¶12 "Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms." ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶26, 348 Wis. 2d 631, 833 N.W.2d 586. Here, the credit application provides, in relevant part:

> 1. All amounts due for goods and services … are payable at the Seller's distribution facility …. Purchaser acknowledges that such amounts … are payable in full as stated herein.
>
> ….

> 3. All amounts due Seller … are payable in accordance with the payment terms granted by Seller's credit department ….
>
> 4. Credit terms are subject to final approval by Seller's credit department ….

While Bouraxis claims no payment terms are specified in the application, he in fact specified the terms—thirty days and the ability to pay by check. While the application further provides that "[i]f purchasers are not provided written terms Seller reserves the right to change credit terms without notification," this is not an agreement to agree at a later date but, rather, a reservation of rights to the seller to which Bouraxis agreed by signing the application.

¶13 However, even if the credit application could be characterized as a non-actionable request for credit at the time Bouraxis signed it, it became an actionable contract after Omega ordered, and Reinhart provided, goods on credit. *See, e.g.*, ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 571-72, 538 N.W.2d 849 (Ct. App. 1995) (credit application was not actionable at its inception because any binding activity had not yet been undertaken; obligation arose once buyer ordered materials and seller supplied them).

B. Application as an "Unaccepted" Offer

¶14 Bouraxis contends his application was, at best, an unaccepted offer because while he requested credit terms, those terms are not repeated elsewhere on the application and a line labeled "Approved Credit Terms" was left blank. Bouraxis also argues that Reinhart "did not otherwise manifest any intent" to him to enter an agreement because it never notified him of its acceptance of the application, he never ordered goods from Reinhart himself, and he had no contact

with Reinhart about or participation with Omega in Omega's subsequent ordering from Reinhart.

¶15 It is not necessary to the contract's validity for Reinhart to have memorialized in writing its approval of the credit application by countersigning the application. "'[P]arties may become bound by the terms of a contract even though they do not sign it[.]'" ***Chudnow Constr. Corp. v. Commercial Discount Corp.***, 48 Wis. 2d 653, 657, 180 N.W.2d 697 (1970) (citation omitted); *see also* ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis. 2d 589, 599, 451 N.W.2d 456 (Ct. App. 1989) ("A written agreement need not be signed by both parties to be effective."). Similarly, we ascribe no significance to the blank "Approved Credit Terms" line. Not only is it in a section of the document labeled "for office use only," which indicates it is not part of the parties' agreement, the agreement itself does not require that section to be completed. *See, e.g.*, ***Chudnow***, 48 Wis. 2d at 657 (signature not required unless mandated by terms of agreement); *see also* ***Consolidated Papers***, 153 Wis. 2d at 599 (countersignature requirement was for defendant's protection; failure to countersign meant only that defendant waived right to contest plaintiff's oral acceptance).

¶16 Even if the application was not a valid contract at the time Bouraxis signed it because inaction by Reinhart at the time failed to signify acceptance, that acceptance was later provided—and a contract thereby fully formed—once Reinhart provided Omega with goods on credit. *See* ***First Wis. Nat'l Bank of Milwaukee v. Oby***, 52 Wis. 2d 1, 7-9, 188 N.W.2d 454 (1971) (executory contract becomes valid when executed); *see also* ***Stan's Lumber***, 196 Wis. 2d at 571-72.

C. Identity of the Purchaser

¶17 Bouraxis also contends that the application applies only to purchases that he made himself, not Omega's purchases. He points out that he signed with his own name as the "Purchaser," so he is only responsible for purchases he made, not those made by Omega.

¶18 As we will discuss further below, Bouraxis indicated on the credit application that Omega was operated by him as an individual proprietor. A sole proprietorship has no legal identity separate from the individual who owns it. *See* ***Acuity Ins. Co. v. Whittingham***, 2007 WI App 210, ¶13, 305 Wis. 2d 613, 740 N.W.2d 154. Thus, for purposes of the credit application and purchasing, Bouraxis indicated he and Omega were one and the same, and he does not dispute that Omega actually made the purchases for which he has been sued.[2]

III. Apparent Authority and Agent Liability

A. Apparent Authority

¶19 Bouraxis's brief in support of summary judgment asserted that he was neither the owner nor the operator of Omega, and he therefore had no authority to bind Omega on Twenty Seven to any contract. The circuit court concluded Bouraxis had acted with apparent authority, but Bouraxis claims there were reasonable inferences to be drawn in his favor. We are satisfied that the

[2] Bouraxis makes an additional claim that we wish to briefly address. Specifically, he claims at least twice in his appellant's brief that he neither reads nor writes English. What he does not do is cite any authority or develop any argument establishing his supposed illiteracy as a defense. We do not consider inadequately briefed arguments lacking citation to authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

pleadings establish that Bouraxis acted with the apparent authority to bind Omega on Twenty Seven.

¶20 Under the doctrine of apparent authority, an agent can bind a principal if the agent "reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced in them, to be authorized to act as an agent for the principal." ***Pamperin v. Trinity Mem. Hosp.***, 144 Wis. 2d 188, 203, 423 N.W.2d 848 (1988). "For liability to exist, three elements must be present: '(1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.'" ***Id.*** (citation omitted). Bouraxis contends a "reasonable jury could (and should) conclude that the first and third elements" are missing. We disagree.

¶21 Bouraxis and Omega on Twenty Seven both engaged in acts "justifying belief in the agency"—Bouraxis when he completed the credit application and provided Omega as the ship-to location, and Omega on Twenty Seven when it ordered and paid for supplies for Omega from Reinhart.[3] Omega's ordering also satisfies the second knowledge element. *See* ***id.*** at 210-11; *see also* ***Haas v. City of Oconomowoc***, 2017 WI App 10, ¶25, 373 Wis. 2d 737, 892 N.W.2d 324. Finally, Reinhart clearly relied on the apparent authority, as it shipped ordered goods to Omega based on the credit application.

[3] Bouraxis argues that a credit application "does not establish that the applicant is acting as an agent for" the ship-to entity. He posits that "credit relationships may be entered" in anticipation of future events that may or may not occur, like one business acquiring another, or that the applicant and the ship-to business may have a vendor-customer relationship. Bouraxis does not, however, assert that any of his hypotheticals were the reality here.

B. Agent Liability

¶22 The follow-up question, if Bouraxis was acting with apparent authority as Omega on Twenty Seven's agent, is whether Bouraxis is personally liable for the unpaid debts incurred. Here, the answer is "yes" because Bouraxis failed to fully disclose the corporate organization behind Omega.

¶23 The general rule is that "where an agent merely contracts on behalf of a disclosed principal, the agent does not become personally liable to the other contracting party." ***Benjamin Plumbing***, 162 Wis. 2d at 848. "[H]owever, an agent will be considered a party to the contract and held liable for its breach where the principal is only partially disclosed." ***Id.*** "A principal is considered partially disclosed where, at the time of contracting, the other party has notice that the agent is acting for a principal but has no notice of the principal's corporate or other business organization identity." ***Id.*** at 848-49. The agent who seeks to escape liability has the burden of proving the principal's corporate status was disclosed. *See* ***id.*** at 851. The contracting party has no duty to inquire into the principal's corporate status, even though that party may be fully capable of doing so. *See* ***id.***

¶24 Here, the credit application lists "Omega Restaurant" as the ship-to address. Under "business facts," the "proprietorship" box is checked and there is an indication that the previous business name was "Omega." The application indicates that the business is subject to a mortgage, held by Bouraxis Investments. In the section for listing "all Corporate Officers, Partners or an Individual Proprietor," only Bouraxis is listed. His cell phone number in this section is the same number listed for Bouraxis Investments and for the restaurant. There is no mention of Omega on Twenty Seven.

¶25 The only reasonable interpretation of the information on this application is that Bouraxis was completing the application on behalf of Omega Restaurant, which was operated as a sole proprietorship by Bouraxis, either directly or through Bouraxis Investments. Listing Omega partially identifies a principal, and by representing the restaurant as a sole proprietorship instead of disclosing Omega on Twenty Seven's then-ownership, Bouraxis failed to give notice "of the principal's corporate or other business organization identity." *See* ***id.*** at 848-49. Accordingly, the principal was only partially disclosed, and Bouraxis, as the agent, may be held liable on the contract formed by the credit application.

IV. The Personal Guaranty

¶26 Bouraxis also signed an individual personal guaranty in which he "personally guarantee[d] prompt payment of any obligation of the Purchaser to Reinhart[.]" He also "agree[d] to bind [him]self to pay on demand any sum which is due by the Purchaser to the Seller whenever the Purchaser fails to pay same."

¶27 Bouraxis contends that this was only a guaranty for purchases where he was the purchaser, but he made no purchases. Bouraxis also argues that there was no consideration for this guaranty, and that he was not notified that his guaranty was accepted.

¶28 For reasons already stated, Bouraxis represented that he was contracting for Omega, not himself personally, to be the purchaser. Indeed, it would make the guaranty redundant and superfluous for him to guaranty purchases he was already obligated to pay under the original contract. We avoid such constructions of contracts. *See* ***DeWitt, Ross & Stevens, S.C. v. Galaxy Gaming and Racing L.P.***, 2004 WI 92, ¶44, 273 Wis. 2d 577, 682 N.W.2d 839. Further,

the consideration was, as stated in the guaranty, the extension of credit. *See* ***Electric Storage Battery Co. v. Black***, 27 Wis. 2d 366, 369, 134 N.W.2d 481 (1965). Finally, although it is true that guarantors are generally entitled to notice that their guaranty has been accepted, *see* ***id.*** at 370, *see also* ***Miami Cty. Nat'l Bank v. Goldberg***, 133 Wis. 175, 179-80, 113 N.W. 391 (1907), the giving of a guaranty "contemporaneous with the execution of the primary contract" makes notice of acceptance a mere formality, *see* ***Electric Storage Battery***, 27 Wis. 2d at 372. The guaranty was executed with the main contract; it is on the second page of the credit application. Further notice of acceptance of the guaranty was not required.

By the Court.—Judgment affirmed.

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