

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 3, 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. 2011AP1627  
STATE OF WISCONSIN**

**Cir. Ct. No. 2009CV712**

**IN COURT OF APPEALS  
DISTRICT II**

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**COMMUNITY BANK & TRUST,  
  
PLAINTIFF-RESPONDENT,**

**V.**

**KOENIG & VITS, INC.,  
  
DEFENDANT,  
  
TIMOTHY M. MARTINEZ,  
  
DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy Martinez appeals from damages awarded on summary judgment to Community Bank & Trust upon Martinez's guaranty of

debt incurred by Koenig & Vits, Inc. We affirm because there were no genuine issues of material fact barring summary judgment in favor of the bank.

¶2 We start with the circuit court's summary judgment ruling. In June 2005, Martinez, a former officer and principal owner of Koenig & Vits (K&V), guaranteed K&V's current debt to the bank and any further extensions of credit by the bank to K&V. K&V defaulted, and the bank accelerated the debt. As a result of K&V's default, Martinez was liable on his guaranty for amounts due the bank. As of October 27, 2010, the bank was owed \$536,739.40 plus interest at the contract rate of 7.5 percent. The court concluded that Martinez did not dispute any of these facts on summary judgment.

¶3 The court reviewed Martinez's guaranty. The guaranty stated that the bank could make loans to K&V and Martinez would unconditionally guarantee those amounts. Paragraph 8 of the guaranty stated that the bank was not required to seek payment of K&V's indebtedness from any other source in order to enforce the guaranty.

¶4 The court rejected Martinez's argument that the debt to the bank should have been paid out of the proceeds of the receiver's sale of K&V's assets or that the bank's debt should have had priority over other obligations of K&V. The court observed that in March 2010, K&V withdrew its objection, in Martinez's presence, to the appointment of the receiver and to the receiver's plan to sell K&V's assets and disburse the proceeds. The order approving the asset sale directed the disbursement of the proceeds; the bank was last on the list of entities to realize funds from the proceeds. The sale proceeds satisfied two of K&V's notes with the bank and left a balance due on a third note. The court concluded

that having withdrawn their objections, K&V and Martinez could not object to the distribution of proceeds previously ordered by the court.<sup>1</sup>

¶5 The court rejected Martinez’s claim that the balance due on the third loan should have been reduced by escrow funds held by the bank to address environmental issues at K&V. Paragraph 8 of the guaranty did not require the bank to exhaust other resources before collecting on Martinez’s guaranty. The court concluded that the bank properly established its claim on summary judgment, and Martinez did not create a factual issue relating to the amount due to the bank.

¶6 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat’l Bank v. Episcopal Homes Mgt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97. The circuit court properly applied the summary judgment methodology to this case.

¶7 At the outset we note that many of Martinez’s arguments on appeal are resolved by (1) the provisions of his guaranty and (2) K&V’s withdrawal, in Martinez’s presence, of various objections, including its objection to the order governing the distribution of the proceeds from the sale of K&V’s assets.

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<sup>1</sup> Martinez does not argue on appeal that, as an owner and officer of K&V, he was not bound by K&V’s withdrawal of its objections to the appointment of the receiver, the asset sale and the disbursement of sale proceeds. Martinez was present in court when K&V withdrew its objections.

¶8 Martinez argues, in various forms, that the bank could not enforce his guaranty while other funds were available to satisfy K&V's debt.<sup>2</sup> The terms of the guaranty compel us to reject all permutations of this argument. Paragraph 8 of Martinez's guaranty states, in pertinent part: "Lender shall not be required first to resort for payment of the indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for indebtedness, before enforcing this guaranty." Martinez also executed a Consent of Guarantor in which he agreed that his guaranty "shall remain in full force and effect, subject to no defense, counterclaim or offset of any kind." It is no defense to the guaranty that other funds may be available in the future to be applied to the bank's debt.

¶9 Martinez argues that the bank should have applied the asset sale proceeds to K&V's debt in a different fashion and order so that the amount due on his guaranty would have been reduced. We reject this argument for two reasons. First, paragraph 8 of Martinez's guaranty does not require the bank to look to other sources of funds once K&V defaulted. Second, K&V withdrew its objection to the circuit court's order governing distribution of the asset sale proceeds. For these reasons, Martinez cannot prevail on this argument.

¶10 Martinez next contests the strength of the bank's showing on summary judgment. He argues that the bank did not prove K&V's outstanding

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<sup>2</sup> Martinez points to funds escrowed from the proceeds of the sale of K&V and other funds Martinez claims should have been applied to K&V's debt to reduce his liability on his guaranty. The circuit court ordered the distribution of the sale proceeds, and K&V withdrew its objection to that order. That order required the satisfaction of numerous other obligations of K&V before funds could be applied to amounts due to the bank.

debt and that material factual disputes regarding the debt should have precluded summary judgment. We disagree.

¶11 Our review of the summary judgment record reveals the following. The bank submitted a calculation of the amounts due under the note and made a prima facie case of the amount due pursuant to Martinez’s guaranty. Martinez argued that the affidavit of a bank vice president, Jamie Rommelfaenger, was inadequate to support summary judgment. We disagree. The affidavit states that it was made upon personal knowledge by an officer of the bank involved in collecting and liquidating collateral and who is a custodian of the bank’s records. The bank made a prima facie case for summary judgment.

¶12 We turn to Martinez’s submission in opposition to the bank’s summary judgment motion. To counter the bank’s summary judgment motion, Martinez had to show more than the “mere existence of *some* alleged factual dispute between the parties ...; the requirement is that there be no *genuine* issue of *material* fact.” **Baxter v. DNR**, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247-48 (1986)). A factual issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” **Baxter**, 165 Wis. 2d at 312 (citation omitted).

¶13 Martinez complains that he was unable to obtain information from the bank regarding the amount due from K&V.<sup>3</sup> He further protests that the bank

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<sup>3</sup> We note that the discovery propounded by K&V sought the names of anyone who had contact with the bank and its counsel concerning K&V and Martinez. While K&V filed a motion to compel the bank to respond to the discovery, K&V never litigated the motion in the circuit court. Moreover, it does not appear that Martinez served any discovery designed to test and probe the bank’s calculations of the amount due from K&V and pursuant to his guaranty.

never responded to his request to clarify various entries on a print out of transactions relating to K&V's outstanding loan. In his reply brief, Martinez implies that the bank's failure to respond absolved him from making a proper showing in opposition to summary judgment. Martinez is wrong. The bank made a prima facie case of the amount due. Martinez had to counter that prima facie case with facts, not speculation and inferences. His summary judgment submissions asked the circuit court to draw inferences from his suppositions and complaints about how the bank applied payments to K&V's notes, the receiver's expenses and compensation, the actions of the receiver, and the failure of the bank and the receiver to respond to his requests for information. These submissions were not insufficient to counter the bank's summary judgment.<sup>4</sup>

¶14 Relying upon the settlement statement from the asset sale, Martinez argues that there were sufficient sale proceeds to satisfy all amounts due to the bank. The bank responds that the proceeds were subject to a reduction for expenses of the receivership for which the bank was responsible. We have already held that the bank made a prima facie case for summary judgment. After disbursement of the sale proceeds pursuant to a court order to which K&V withdrew its objection, the bank remained unsatisfied on the remaining note. Martinez did not create a genuine factual issue on the question of whether K&V's debt should have been satisfied without a need to resort to his guaranty.

¶15 Martinez argues that the bank did not provide any documentation regarding two other K&V loans that were satisfied from the asset sale proceeds.

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<sup>4</sup> We observe that Martinez did not ask the circuit court to hold the summary judgment motion in abeyance while he pursued discovery to enable him to counter the bank's submissions.

In the absence of submissions from Martinez in the summary judgment record establishing the relevance of this documentation, we deem this documentation issue not relevant to what Martinez owed on the outstanding note pursuant to his guaranty.

¶16 We conclude that Martinez's submissions in opposition to the bank's summary judgment motion did not raise material factual issues regarding the bank's calculations or create a factual dispute that he owed the bank less on his guaranty.

¶17 Finally, Martinez complains about the bank's interactions with Tramontina USA, Inc. and Tramontina US Cookware, Inc., and the receiver's settlement of that litigation. In March 2010, K&V, with Martinez present, withdrew its objection to the receiver's settlement. We fail to see the relevance of this issue to the bank's summary judgment motion on Martinez's guaranty.

*By the Court.*—Judgment affirmed.

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

