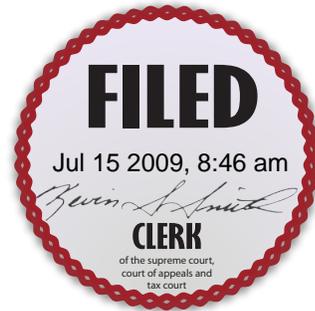


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JEFFREY A. HOKANSON
J. BRADLEY SCHOOLEY

Hostetler & Kowalik, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

BRYCE H. BENNETT, JR.
KEVIN N. THARP

Riley, Bennett, Egloff, LLP
Indianapolis, Indiana

JAMES L. ALLEN
Miller, Canfield, Paddock & Stone, PLC
Troy, Michigan

**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN IVANKOVICH,)
)
Appellant-Defendant,)

vs.)

No. 49A02-0901-CV-72

PAMI GRAND LAKE, LLC,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Thomas Carroll, Judge
Cause No. 49D06-0711-MF-48331

July 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Steven Ivankovich challenges the trial court's grant of summary judgment in favor of Pami Grand Lake, LLC.

We affirm.

ISSUE

Whether the trial court erred in granting summary judgment because a genuine issue of material fact exists as to the meaning and effect of the underlying Guaranty agreement.

FACTS

Ivankovich is the chief executive officer and executive vice president of Alliance SH 2 GP, Inc. ("Alliance SH 2"). He is also the president and chief executive officer of Alliance Holdings Investments, LLC, Alliance Holdings Investments II, LLC, and Alliance Holdings Investments III, LLC (hereinafter collectively referred to as "Alliance Investments").

On October 28, 2004, Alliance SH 2 entered into a loan agreement with Column Financial, Inc. ("Column") for the extension of a commercial loan. Alliance SH 2 also executed a promissory note ("Note") payable to Column in the amount of \$38,000,000.00, secured by mortgages and deeds of trust encumbering the following real property ("the Properties"): Whisper Creek I Apartments in Dallas, Texas; Grand Oaks Apartments in Charlotte, North Carolina; and Lakewood Lodge Apartments in Indianapolis, Indiana.

On or about October 9, 2006, Alliance SH 2 defaulted on the Loan. Alliance SH 2 and Column discussed entering into a forbearance agreement wherein Column would

forgo accelerating the amount due under the Note and Loan and foreclosing on the mortgages encumbering the Properties. Later, on November 7, 2006, Alliance SH 2 and Column entered into a Forbearance Agreement. Thereafter, Alliance SH 2 failed to make payments in violation of the Loan and the Forbearance Agreement, and the parties executed a First Amendment to the Forbearance Agreement, dated May 7, 2007.

Subsequently, the parties discussed and entered into a Second Amendment to the Forbearance Agreement dated June 19, 2007. Alliance SH 2 and Column agreed that the Whisper Creek Apartments (Texas property) would be sold and that \$9,500,000.00 of the sale proceeds would be applied toward the Loan.¹ They agreed further that the mortgage loans on the Grand Oaks (North Carolina) and Lakewood Lodge (Indiana) properties would be refinanced, and that a minimum of \$25,500,000.00 of the Refinance Loan proceeds would be applied against the original Loan. In exchange, Column agreed to forgo accelerating the Loan and foreclosing on the mortgages until July 10, 2007, providing that Alliance SH 2 did not violate any provisions of the Second Amendment to the Forbearance Agreement.

In order to persuade Column to extend the “Forbearance Outside Date” to July 10, 2007, as provided in the Second Amendment to the Forbearance Agreement, Alliance SH 2 agreed to pay \$500,000.00 to Column. Also, “to induce finalization of the Second Forbearance Agreement,” Ivankovich executed a Payment Guaranty Agreement (“the

¹ Extending the forbearance period was meant to give Alliance SH 2 more time to close on the sale of the Texas property. The sale closed on June 27, 2007, and Alliance SH 2 was given credit on the Loan from the proceeds of the sale of the Texas property. Apparently, the outstanding balance of the original Loan was approximately \$35,000,000.00.

Guaranty”), dated June 25, 2007, wherein he personally guaranteed “payment of the difference between \$35,000,000.00 and the amount of principal prepaid on the Loan in connection with the Refinancing Loan.” (App. 523, 210).

The Refinancing Loan was never consummated and no principal was ever paid on the Loan. On October 17, 2007, Column assigned the Note and Loan Agreement to Pami Grand Lake LLC. On October 26, 2007, Pami Grand Lake exercised its option to declare the monies owed² under the Note due and payable on or before November 2, 2007. On November 9, 2007, Pami Grand Lake filed a complaint against Alliance SH 2, Alliance Investments, and Ivankovich. On January 11, 2008, Pami Grand Lake filed a Second Amended Complaint; Count V therein pertains to Ivankovich’s personal liability and alleges:

56. On or about June 25, 2007, Defendant Ivankovich executed a Payment Guaranty Agreement (“Payment Guaranty”) whereby he guaranteed the full and prompt payment of certain guaranteed obligations, as defined in the Payment Guaranty. * * *

57. Among other guaranteed obligations, the Payment Guaranty provides that Defendant Ivankovich ‘irrevocably and unconditionally covenants and agrees to be liable for . . . the difference between \$35,000,000.00 and the amount of principal prepaid on the Loan in connection with the Refinancing Loan.’ * * *

58. Column assigned the Payment Guaranty to Plaintiff by virtue of the General Assignment. * * *

59. No amount of principal was prepaid on the Loan pursuant to the Refinancing Loan as defined in the Payment Guaranty, thereby leaving a \$35,000,000.00 Guaranteed Obligation as defined in the Payment Guaranty.

² As of July 16, 2008, Alliance SH 2 owed \$12,611,727.98 to Pami Grand Lake.

WHEREFORE, Plaintiff, PAMI Grand Lake, LLC, by and through its counsel, respectfully request this Court to enter Judgment against Defendant Ivankovich

(App. 31-32).

On April 29, 2008, Pami Grand Lake filed a Motion for Summary Judgment on Count V of Second Amended Complaint and memorandum, wherein it alleged that

[b]ecause the Loan was never refinanced, Ivankovich [wa]s liable ‘for up to the full \$35,000,000 in Guaranteed Obligations under the Guaranty; that is the difference between \$35,000,000 and \$0 (because no refinancing ever occurred) is \$35,000,000.’

(App. 52-53).

On August 6, 2008, Ivankovich filed a response, designation of evidence, and memorandum, wherein he asserted that Pami Grand Lake’s assessment of his obligation under the Guaranty was inconsistent with a reading together of the Guaranty and Second Amendment to the Forbearance Agreement. Specifically, he argued that the Guaranty was “never intended to impose or represent personal liability on [him] for the entire indebtedness,” but rather was executed “only as security to Column in the improbable event that an indebtedness remained after both the Whisper Creek Sale *and* the Refinancing Loan were consummated”; thus, he argues, that because the Refinancing Loan was never consummated, no proper basis exists for the imposition of personal liability upon him. (App. 526), (emphasis in original).

On October 10, 2008, the trial court conducted a hearing on the motion for summary judgment. Thereafter, it granted summary judgment in favor of Pami Grand Lake, and entered a judgment against Ivankovich in the amount of \$12,611,727.98 plus attorney’s fees and interest. Ivankovich now appeals.

DECISION

Ivankovich argues that the trial court erred in granting summary judgment in favor of Pami Grand Lake because “a specific term of [the Guaranty] is ambiguous and readily susceptible to more than one reasonable construction”; thus, he argues, a genuine issue of material fact exists as to the nature of his obligations under the Guaranty. Ivankovich’s Br. at 1. We disagree.

Our standard of review for summary judgment appeals is well established. An appellate court faces the same issues that were before the trial court and follows the same process. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having its day in court.

Summary judgment is appropriate only if the pleadings and evidence sanctioned by the trial court 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.’ On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper.

Asbestos Corp. v. Akaiwa, 872 N.E.2d 1095, 1096 (Ind. Ct. App. 2007) (citing *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 908 (Ind. 2001)).

We initially note that by agreement of the parties, the laws of the state of Illinois shall govern the construction of the Guaranty. The interpretation of a guaranty is governed by the same rules applicable to other contracts. *T.C.T. Bldg. Partnership v. Tandy Corp.*, 751 N.E.2d 135, 139-140 (Ill. App. 2001).

[A] guaranty is to be strictly construed in favor of the guarantor such that the guarantor is accorded the benefit of any doubt that arises from the contract language. The guarantor is entitled to such benefit, however, only

where some doubt arises as to the meaning of the guaranty language. Where the terms of a guaranty contract are clear and unambiguous, they must be given effect as written, and under such circumstances, the meaning of a guaranty is a question of law.

Id. at 139-40 (internal citations omitted).

Ivankovich argues that the Guaranty and the Second Amendment to the Forbearance Agreement must be construed together. Pami Grand Lake counters that because the Guaranty is unambiguous as to Ivankovich's obligations and contains an integration clause, Illinois law precludes us from straying beyond the four corners of the Guaranty in construing Ivankovich's obligations therein.

The relevant provisions of the Guaranty provide as follows:

NOW, THEREFORE, to induce the Lender to enter into the Second Amendment, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged the Guarantor does hereby become surety to Lender, and otherwise unconditionally, absolutely and irrevocably guarantee to Lender, its successors and assigns, the due payment, fulfillment and performance of the Guaranteed Obligations, as that term is herein defined, as and when due. The Guarantor hereby irrevocably and unconditionally covenants and agrees to be liable for the Guaranteed Obligations (as hereinafter defined) as primary obligor, this Guaranty being upon the following terms and conditions:

1. **Definitions.** * * *

“Guaranteed Obligations” shall mean the payment of the difference between \$35,000,000.00 and the amount of principal prepaid on the Loan in connection with the Refinancing Loan (as hereinafter defined).

* * *

“Refinancing Loan” shall mean the refinancing of the portion of the Loan secured by the Grand Oaks Property and Lakewood Property by a new loan funded by Tremont NetFunding I, LLC pursuant to its loan application dated June 7, 2007.

2. **Continuing Guaranty.** This is an irrevocable, absolute, continuing guaranty of payment and not a guaranty of collection. This

Guaranty may not be revoked by the Guarantor and shall continue to be effective with respect to the Guaranteed Obligations arising or created after any attempted revocation by the Guarantor and after Guarantor's death (in which event this Guaranty shall be binding upon the Guarantor's estate and the Guarantor's legal representation and heirs). It is the intent of the Guarantor and Lender that the obligations and liabilities of the Guarantor hereunder are absolute and unconditional under any and all circumstances and that until the Guaranteed Obligations are fully and finally satisfied, such obligations and liabilities shall not be discharged or released in whole or in part, by any act or occurrence which might, but for the provisions of this Guaranty, be deemed a legal or equitable discharge or release of Guarantor.

* * *

5. **Payment by the Guarantor.** If the Guaranteed Obligations, or any part thereof, are not punctually paid or performed, as the case may be, when due, the Guarantor shall, upon seven (7) Business Days' prior written notice and without protest or notice of protest, pay the amount due thereon to the Lender Such demands may be made at any time coincident with or after the time for payment or performance of all or part of the Guaranteed Obligations. * * *

* * *

14. **Benefit.** This Guaranty is for the benefit of the Lender, its successors and assigns, and in the event of an assignment by Lender, its successors and assigns, of the indebtedness evidenced by the Note, or any part thereof, the rights and benefits hereunder, to the extent applicable to the indebtedness so assigned, may be transferred with such indebtedness.

* * *

22. **Prior Agreements.** This Guaranty contains the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, between Borrower and Lender are superseded by the terms of this Guaranty. THIS GUARANTY MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. NO COURSE OF PERFORMANCE, NO TRADE PRACTICES, AND NO EXTRINSIC EVIDENCE OF ANY NATURE MAY BE USED TO CONTRADICT OR MODIFY ANY TERM OF THIS GUARANTY. THERE ARE NO ORAL AGREEMENTS BETWEEN GUARANTOR AND LENDER.

(App. 181-82, 184, 190).

Ivankovich argues that the Guaranty is ambiguous as to the nature of his obligations and that the ambiguity warrants the consideration of extrinsic evidence. We cannot agree.

The question of whether the language of a contract is ambiguous and requires additional evidence for interpretation is a question of law. *River's Edge Homeowners' Ass'n v. City of Naperville*, 819 N.E.2d 806, 809 (Ill. App. 2004). Where an ambiguity exists, parol or extrinsic evidence may be considered to interpret the contract. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 869 N.E.2d 310, 316 (Ill. App. 2007).

A contract term is ambiguous if it “can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning.” *Clarendon America Ins. Co. v. B.G.K. Sec. Services, Inc.*, 900 N.E.2d 385, 394 (Ill. App. 2008). “A contract is not ambiguous, however, if a court can ascertain its meaning from the general contract language.” *Id.* Where no ambiguity exists, the court will ascribe the plain and ordinary meanings to the terms of the contract. *William Blair & Co. v. FI Liquidation Corp.*, 830 N.E.2d 760, 770 (Ill. App. 2005). “[T]he mere fact that the parties disagree as to the meaning of a term does not make that term ambiguous.” *Id.*

Here, the contract terms pertaining to Ivankovich’s personal liability under the Guaranty provide that he “irrevocably and unconditionally covenant[ed] and agree[d] to be liable for the Guaranteed Obligations . . . as primary obligor.” (App. 182). The Guaranty expressly defines “Guaranteed Obligations” as “the payment of the difference

between \$35,000,000.00 and the amount of principal prepaid on the Loan in connection with the Refinancing Loan.” (App. 182).

The terms of the Guaranty are neither subject to multiple interpretations nor do they contain any indefiniteness of language. *Clarendon*, 900 N.E.2d at 394. The plain and ordinary meaning of the Guaranty language evidences Ivankovich’s intention to provide Column with a personal guaranty for the difference between \$35,000,000.00 and the amount of the principal prepaid pursuant to the Refinancing Loan. The Guaranty contains no language contemplating the effect upon Ivankovich’s personal obligation to pay in the event that the Refinancing Loan is not consummated. Ivankovich does not dispute that the trial court’s finding that no monies were prepaid toward the principal owing on the Loan “in connection with the Refinancing Loan.” (App. 18). Accordingly, the trial court found that Ivankovich “is liable for up to the full \$35,000,000.00 in Guaranteed Obligations under the Guaranty.” (App. 18).

As no doubt arises as to the meaning of the Guaranty language, we must agree with Pami Grand Lake’s assertion that the Guaranty “means exactly what it says.” Pami Grand Lake’s Br. at 8. Accordingly, we restrict our determination of the parties’ intent to the four corners of the contract and decline Ivankovich’s invitation that we consider such extrinsic evidence as to the Second Amendment to the Forbearance Agreement. The Guaranty must be given effect as written.

We are also precluded from considering extrinsic evidence because the Guaranty is an integrated contract. A contract is integrated when the parties intend it to be a final

and complete expression of the agreement between them. *Koester v. Weber, Cohn & Riley, Inc.*, 550 N.E.2d 1004, 1006 (Ill. App. 1989).

The effect of integration is to preclude[] evidence of understandings, not reflected in a writing, reached before or at the time of its execution which would vary or modify its terms. Even the introduction of additional consistent terms is barred. As the Illinois Supreme Court has said, ‘[P]arol evidence cannot be admitted to add another term to the agreement although the writing contains nothing on the particular term to which the parol evidence is directed.’ This is sometimes referred to as the ‘four corners’ rule: when interpreting an integrated contract, courts are limited to considering material that lies within the four corners of the text, rather than resorting to extrinsic evidence.

Midwest Builder Distributing, Inc. v. Lord and Essex, Inc., 891 N.E.2d 1, 18-19 (Ill. App. 2007) (internal citations omitted).

The Guaranty contains the following integration clause:

This Guaranty contains the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, between Borrower and Lender are superseded by the terms of this Guaranty. THIS GUARANTY MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. NO COURSE OF PERFORMANCE, NO TRADE PRACTICES, AND NO EXTRINSIC EVIDENCE OF ANY NATURE MAY BE USED TO CONTRADICT OR MODIFY ANY TERM OF THIS GUARANTY. THERE ARE NO ORAL AGREEMENTS BETWEEN GUARANTOR AND LENDER.

(App. 190).

It is well-established under Illinois law that when two parties to a contract “have expressed it in a writing [] which they have both assented [i]s the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or

contradicting the writing.” *CFC Investment L.L.C. v. McLean*, 900 N.E.2d 716, 722 (Ill. App. 2008).

Here, inasmuch as the Guaranty is an integrated agreement, its terms “override any other prior or contemporaneous negotiations between the parties relating to their subject matter.” *Midwest*, 891 N.E.2d at 19.

Given that the plain language of the Guaranty is unambiguous as to the nature of Ivankovich’s “*unconditional*[], *absolute*[], and *irrevocabl[e]*” obligation therein; and, further, because the Guaranty is an integrated contract, we cannot stray beyond the four corners of the Guaranty in construing its meaning. (App. 181). We conclude that no genuine issue of material fact exists as to the plain and ordinary meaning of the Guaranty terms, and we find no error in the trial court’s grant of summary judgment.

Affirmed.

BAILEY, J., and ROBB, J., concur.