CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

HASTINGS STATE BANK, APPELLEE, V. MIRIAM MISLE, IN HER CAPACITY AS TRUSTEE OF THE JULIUS MISLE REVOCABLE TRUST, APPELLANT.

804 N.W.2d 805

Filed August 5, 2011. No. S-10-549.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

James B. Cavanagh and Adam E. Astley, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Richard P. Jeffries and Megan S. Wright, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HEAVICAN, C.J., GERRARD, STEPHAN, and MILLER-LERMAN, JJ., INBODY, Chief Judge, and MOORE, Judge.

GERRARD, J.

Hastings State Bank (the Bank) sought to enforce a commercial guaranty against Miriam Misle in her capacity as trustee of the Julius Misle Revocable Trust. The Bank claimed that Julius Misle had signed a guaranty in favor of the Bank, which guaranteed debt owed by NOVI, LLC. The district court determined that Julius' trust was liable for up to $500,000 in principal on the commercial guaranty and granted partial summary judgment in favor of the Bank. After trial, the district court found in favor of the Bank and entered judgment in the amount of $500,000. Miriam appeals. For the following reasons, we affirm the judgment of the district court.

BACKGROUND

Julius and Miriam's daughter and son-in-law are the sole members of NOVI. On October 18, 2006, their son-in-law, Jeffrey Mellen, acting on behalf of NOVI, signed a promissory note with the Bank in the amount of $500,000 payable to the Bank on April 18, 2007. On the same day that Jeffrey signed the note, Julius executed a commercial guaranty, guaranteeing payment of the indebtedness of NOVI on the $500,000 note. The face of the note reflects that it is payable on demand. However, the guaranty treats the note as a line of credit. The guaranty states that Julius authorized the Bank to extend additional loans to the borrower and to change the time for payment without notice or demand and without lessening Julius' liability under the guaranty.

After the execution of the guaranty, over a period of 2 years, Jeffrey and the Bank executed several change-in-terms agreements, which increased Jeffrey's maximum line of credit and extended the maturity date of the loan. The undisputed evidence established that $1,900,000 was advanced on the note and subsequent change-in-terms agreements and that the maturity date was extended to April 18, 2008. The record reflects that some of the moneys advanced after execution of the change-in-terms agreements were deposited into an account owned by EDM

Corporation (EDM). EDM manages NOVI, and Jeffrey is the president of EDM.

On October 10, 2007, Julius died. When the promissory note became due, NOVI failed to pay on its obligation. On October 8, 2008, the Bank issued a written demand to Miriam in her capacity as the trustee for payment of the amount the Bank claimed was due on the note guaranteed by Julius: $1,999,579.38. On October 10, the Bank filed a complaint in the county court, later transferred to the district court, against Miriam, claiming that the trust was liable for the $500,000 initial loan as well as the amounts loaned pursuant to the subsequent change-in-terms agreements, in the total amount of $1,999,579.38.

Both parties moved for summary judgment. Miriam asserted that the Bank failed to provide sufficient notice of its claim pursuant to Neb. Rev. Stat. § 30-3850 (Reissue 2008), that the Bank failed to state a claim for relief, that the Bank did not give valuable consideration for Julius' guaranty, that the Bank had a duty to disclose certain information about NOVI and Jeffrey, that the extension of additional credit to NOVI released Julius from the obligation of the guaranty, and that the Bank breached the implied covenant of good faith and fair dealing. The district court found Miriam's defenses and counterclaims were without merit and refused to grant summary judgment in her favor.

In support of the Bank's motion for summary judgment, it asserted that the trust was liable for the entire amount due under the promissory note and its amendments and sought partial summary judgment on the amount of the original note, $500,000. The district court noted that the language of the guaranty did not permit the Bank to increase the maximum principal amount of the indebtedness guaranteed by Julius, so it determined that Julius was not bound by the subsequent change-in-terms agreements. The court determined that the maximum amount for which Julius could be liable under the guaranty was $500,000, and it granted partial summary judgment in the Bank's favor.

Trial was then held to determine for what amount, up to $500,000, the trust was liable under the guaranty. The Bank

entered into evidence an affidavit of its former vice president, who attached copies of the loan history and payoff statement for the note at issue. Ultimately, the district court determined that the amount due under the note underlying the guaranty exceeded $500,000 and found that the trust was liable in the amount of $500,000. Miriam appeals.

ASSIGNMENTS OF ERROR

Miriam assigns that the district court erred in (1) concluding that the Bank's notice to the trust was sufficient under § 30-3850; (2) finding that the Bank's material alteration of the note did not void the purported guaranty; (3) finding that the Bank had no legal duty to make disclosures to Julius concerning the terms of the transaction, the Bank's history with the borrower, or the circumstances surrounding the note; (4) granting partial summary judgment in favor of the Bank; (5) denying Miriam's motion for summary judgment; (6) finding that the outstanding liability on the note subject to the purported guaranty was $500,000; and (7) entering judgment for the Bank in the amount of $500,000.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.[1]

[2,3] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

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[1] See *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[2] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[3] *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 786 N.W.2d 902 (2010).

[4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[4] The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[5]

ANALYSIS

Notice Under § 30-3850

Miriam argues that the Bank failed to provide sufficient notice to the trust pursuant to § 30-3850. Miriam argues that because the Bank issued a written demand requesting payment of $1,999,579.38, rather than the $500,000 amount of the guaranty, she, as the trustee, was not provided with sufficient notice of the claim against the trust. We disagree. Section 30-3850(a)(3) states, in relevant part:

> A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after the death of the decedent.

The notice provision contained in § 30-3850 merely required the Bank to issue to Miriam written notice of the claim against the estate before commencing the proceeding. Section 30-3850 does not require that the amount requested match the amount ultimately recovered. It is undisputed that the Bank sent notice before commencing the proceeding and that such proceeding was commenced within 1 year. The Bank's timely notice to Miriam of the amount claimed due under the guaranty, $1,999,579.38, put her on notice of the claim against the estate and complied with the notice requirements of § 30-3850. The

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[4] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[5] *Id.*

district court therefore did not err when it denied Miriam summary judgment after determining that notice was sufficient.

Extension of Additional Credit to NOVI

Miriam claims that when the Bank extended additional credit to NOVI, those extensions materially altered the note and voided Julius' obligation on the guaranty. Miriam argues that under Nebraska law, "'[a]ny material change in the terms of [the] principal contract which is covered by the guaranty agreement, made without the consent of the guarantors will release them from the obligation of the guaranty.'"[6] Miriam also cites authority that "'[w]here the principal contract, which is described and covered by the guaranty agreement is, without the consent of the guarantors, materially changed or varied from such contract as it is described in such agreement, the guarantors will be released.'"[7] Miriam also cites other sources which generally state that a guarantor is discharged when a creditor has unilaterally increased the amount of the underlying obligation.

However, unlike the authority cited by Miriam, here, the guaranty specifically stated that the guarantor authorized the lender, without notice or demand and without lessening the guarantor's liability under the guaranty, to extend additional loans to the borrower and change the time for payment without notice to the guarantor. As the district court correctly noted, when Julius signed the guaranty, he acknowledged that the Bank's additional loans would not lessen his obligation under the guaranty.

Miriam notes that the guaranty authorized the Bank "'to make one or more additional secured or unsecured loans to the Borrower.'"[8] Miriam argues that the Bank's subsequent advances to NOVI were not "'additional loans'" as contemplated by the guaranty, but were in fact modifications of the existing note

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[6] Brief for appellant at 23, quoting *Bash v. Bash*, 123 Neb. 865, 244 N.W. 788 (1932).

[7] *Id.*, quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922).

[8] Reply brief for appellant at 6.

which discharged Julius' liability under the guaranty.[9] But Julius specifically acknowledged that fluctuations in the aggregate amount of the indebtedness would occur.

The guaranty states that it "covers a revolving line of credit and it is specifically anticipated that fluctuations will occur in the aggregate amount of the Indebtedness. Guarantor specifically acknowledges and agrees that fluctuations in the amount of the Indebtedness . . . shall not constitute a termination of this Guaranty." Thus, it does not matter whether the subsequent amounts loaned to NOVI were viewed as additional loans under the guaranty or were advanced under the revolving line of credit guaranteed by Julius for the purpose of determining whether the subsequent loans terminated Julius' obligation under the guaranty. Julius agreed that additional loans could be made without reducing his obligation and agreed that fluctuations in the aggregate amount of the indebtedness did not terminate the guaranty. The fact that the Bank subsequently loaned additional moneys to NOVI does not discharge Julius' obligation under the guaranty, and the district court did not err when it so found.

Duty to Disclose

Miriam argues that the Bank had a duty to disclose to Julius the terms of the transaction, the Bank's history with the borrower, and the circumstances surrounding the note. We first note that the terms of the guaranty do not impose a duty on the Bank to disclose to Julius information regarding either NOVI or Jeffrey. Rather, the guaranty specifically states that Julius had asked to sign the guaranty, that the Bank made no representations as to the creditworthiness of NOVI or Jeffrey, and that Julius had adequate means of knowing and keeping abreast of NOVI's financial condition.

Though the guaranty itself did not impose a duty on the Bank to disclose information regarding NOVI or Jeffrey, we have previously held:

> A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being

[9] *Id.* at 7.

> deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the surety's acceptance of the undertaking.[10]

However, deception or ignorance of the facts is not presumed; there must be some evidence that would put the lender on notice that the surety was being deceived or was ignorant of the facts.[11] Miriam had the burden of producing such evidence, and no such evidence is contained in the record.

Though Miriam states that the Bank had knowledge that Jeffrey and his other corporation, EDM, had "massive" outstanding loans,[12] that the Bank's directors were concerned about Jeffrey and EDM's ability to repay, and that EDM had an overdrawn checking account at the time of the $500,000 loan, Miriam did not present evidence that the Bank knew or had grounds to know that Julius was being deceived or misled, or that Julius was induced to enter the guaranty in ignorance of the facts. And again, Julius represented that he requested the guaranty, that the Bank made no representations to him as to the creditworthiness of NOVI or Jeffrey, and that he had adequate means of knowing and keeping abreast of NOVI's financial condition. Accordingly, we conclude that the district court did not err when it determined that the Bank did not owe Julius a duty to disclose the financial condition of NOVI or Jeffrey.

Consideration

Miriam also argues that Julius did not receive valuable consideration to support the guaranty, because the amounts loaned to NOVI exceeded the legal lending limit of the Bank. But whether the amounts loaned exceeded the legal lending limit of the Bank is not relevant to the issue of valuable consideration.[13]

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[10] *Bock v. Bank of Bellevue*, 230 Neb. 908, 917, 434 N.W.2d 310, 316 (1989).

[11] See *id.*

[12] Brief for appellant at 28.

[13] See *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988).

Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other.[14] It is undisputed that the Bank agreed to, and in fact did, advance at least $500,000 on the note which Julius guaranteed. That served as a detriment to the Bank and constituted consideration sufficient to support the agreement. And though Miriam argues that no valuable consideration exists because the advances on the loan were not deposited in accounts belonging to NOVI, the "'benefit rendered need not be to the party contracting but may be to anyone else at [the contracting party's] procurement or request.'"[15]

Miriam also argues that the officer who made the loan did not have the authority to do so. However, Miriam does not explain or cite authority for the proposition that a loan officer who grants a loan without authority from the officer's superior somehow transforms valuable consideration into insufficient consideration. The Bank's promise and subsequent advance of $500,000 on the note underlying the guaranty served as a detriment to the Bank, and as such, Julius received consideration for the detriment he incurred when he guaranteed the loan.

Summary Judgment

Miriam argues that the district court erred when it denied summary judgment in Miriam's favor and instead granted partial summary judgment in the Bank's favor. Miriam argues that the facts, viewed in a light most favorable to her, demonstrate that a material issue of fact existed as to whether the Bank knew or had grounds to know that Julius was being deceived or misled or that he had been induced to enter into the guaranty in ignorance of the facts. However, as discussed, it was Miriam's burden to produce evidence that the Bank knew or had reason to know that Julius was being deceived or was ignorant of the facts. No such evidence is contained in the record. Therefore the evidence, even when viewed in a light most favorable to

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[14] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

[15] *Bock, supra* note 10, 230 Neb. at 914, 434 N.W.2d at 314, quoting *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

Miriam, reveals that there exists no genuine issue of material fact as to whether the Bank knew or should have known that Julius was being deceived or misled or that he had been induced to enter the guaranty in ignorance of the facts.

Miriam also argues that the district court erred when it granted partial summary judgment in the Bank's favor after determining that the guaranty was supported by consideration. As discussed, the Bank provided consideration to support the agreement, so the district court did not err when it granted partial summary judgment in the Bank's favor after it determined that the undisputed facts, taken in a light most favorable to Miriam, indicated that the parties' agreement was supported by consideration.

Miriam also argues the district court erred when it refused to grant summary judgment in her favor. However, Miriam fails to cite any evidence adduced at the hearing which would tend to show that summary judgment in Miriam's favor was appropriate. And, for the reasons previously discussed, the district court did not err when it determined that Miriam was not entitled to summary judgment as a matter of law.

District Court's Determination After Trial

The sole issue at trial was what amount was due on the $500,000 guaranty. At trial, an affidavit from the Bank's assistant vice president noted that the principal amount due under the note was $1,598,594.37 and that the total amount of principal and interest due on the note was $1,933,280.56. An accounting of the note was also entered into evidence, which indicated that a principal payment of $490,000 had been made on June 30, 2009. Miriam's counsel specifically stated that the trust did not claim to have made the $490,000 payment. The Bank did not identify the source of the payment, and Miriam did not present any evidence that the payment was made by Julius, his estate, or the trust. The district court ultimately determined that the evidence adduced at trial established that the underlying debt exceeded $500,000 and that Julius' trust was liable to the Bank in the full amount of the guaranty, $500,000.

Miriam argues that even if Julius was liable for $500,000 under the guaranty, there exists a question whether the $490,000

payment was applied to the guaranteed portion of the loan or to the unguaranteed portion. Again, Miriam does not assert that the payment was made by Julius, his estate, or the trust.

As discussed, the guaranty specifically states that it encompasses a line of credit and that the guarantor understands and agrees that it shall be open and continuous until the indebtedness is paid in full. The guaranty also states that the lender was authorized "to determine how, when and what application of payments and credits shall be made on the Indebtedness." Miriam cites no authority in support of her argument that the $490,000 payment should be credited against the $500,000 ceiling of the guaranty. In fact, there is authority to the contrary—that a guaranty that contains only a ceiling on the guarantor's aggregate liability requires the guarantor to answer for deficiencies up to the specified ceiling without respect to the amount of proceeds received by the creditor from the debtor.[16]

On appeal, we do not disturb the trial court's factual finding unless clearly wrong.[17] The only evidence adduced at trial indicated that the total amount of principal and interest due on the note underlying the guaranty was $1,933,280.56, so the district court was not clearly wrong when it determined that the evidence established that the amount due under the note underlying the guaranty exceeded $500,000. And because we determine that Julius was liable under the guaranty to answer for deficiencies up to the $500,000 specified ceiling without respect to the $490,000 payment received by the Bank, the district court did not err when it determined that Julius was liable for the full amount which he guaranteed. Miriam's claims to the contrary are without merit.

CONCLUSION

The district court did not err when it granted partial summary judgment in the Bank's favor and denied Miriam's motion for summary judgment. The district court's factual determination

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[16] See *Woodruff v. Exchange Nat. Bank of Tampa*, 392 So. 2d 285 (Fla. App. 1980).

[17] See *Davenport Ltd. Partnership, supra* note 4.

that the trust was liable for the full amount of the guaranty, $500,000, is supported by the evidence and not clearly wrong. We therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, CONNOLLY, and MCCORMACK, JJ., not participating.

THE CHICAGO LUMBER COMPANY OF OMAHA, A NEBRASKA CORPORATION, APPELLANT, V. JOANN SELVERA, AN INDIVIDUAL, ET AL., APPELLEES.

809 N.W.2d 469

Filed August 5, 2011. No. S-10-741.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory construction is a question of law that an appellate court decides independently of the trial court.
4. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. **Mechanics' Liens: Intent: Words and Phrases.** Under Neb. Rev. Stat. § 52-157(2) (Reissue 2010), one acts in "bad faith" if the claimant either knows its lien is invalid or overstated or acts with reckless disregard as to such facts.
7. **Mechanics' Liens: Notice.** Sending a copy of a recorded lien to a contracting owner under Neb. Rev. Stat. § 52-135(3) (Reissue 2010) is a prerequisite for foreclosing the lien.
8. **Attorney Fees: Appeal and Error.** On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.
9. **Actions: Attorney Fees.** Attorney fees can be awarded when a party brings an action that is without rational argument based on law and evidence.