2014 IL App (1st) 113643-U

SIXTH DIVISION
January 31, 2014

No. 1-11-3643

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

REBECCA R. MORRISSEY, as Trustee of the Rebecca R. Morrissey Trust dated January 16, 1996,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10 L 001296
ROBERT W. HARTE,	)	
Defendant-Appellant,	)	
and	)	
PRM HANS LOLLIK DEVELOPMENT, LLC, a Delaware Limited Liability Company,	)	Honorable Joan E. Powell_
Defendant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

ORDER

HELD: Circuit court did not err in granting summary judgment in favor of plaintiff Rebecca R. Morrissey, as Trustee of the Rebecca R. Morrissey Trust dated January 16, 1996. There are no genuine issues of material fact regarding defendant Robert W. Harte's liability under the guaranties and therefore plaintiff is entitled to judgment as a matter of law.

¶ 1 In this breach of contract action, defendant Robert W. Harte appeals from an order of the circuit court of Cook County granting summary judgment in favor of plaintiff, Rebecca R. Morrissey, as Trustee of the Rebecca R. Morrissey Trust dated January 16, 1996. For the reasons that follow, we affirm.

¶ 2 Plaintiff brought this action against defendant PRM Hans Lollik Development, LLC (Hans Lollik) as the issuer of two secured notes executed in her favor. Plaintiff also brought this action against defendant Harte as a guarantor of the notes.

¶ 3 The parties executed the first note on or about October 14, 2004, in the principal amount of $100,000. Pursuant to the note, Hans Lollik agreed to pay the Trust $100,000, on October 14, 2007, along with interest at the rate of 13%, in the manner specified in the note. Harte is the president of PRM Management of Illinois, Inc., the manager of Hans Lollik. Harte later executed an amendment to the note, extending it's maturity date to October 14, 2008. On or about July 21, 2006, Hans Lollik executed a second note in the principal amount of $200,000. Under this note, Hans Lollik agreed to pay the Trust $200,000, on July 21, 2009, together with interest at the rate of 13%, in the manner specified in the note.

¶ 4 In conjunction with the execution of the two secured notes, Harte executed a guaranty for each note in the amount of 50% of the principal. Hans Lollik eventually defaulted on the two notes, and after it was served with notice of default, this breach of contract action was initiated by plaintiff

against Hans Lollik and Harte.

¶ 5 When Hans Lollik failed to answer or otherwise plead in the lawsuit, plaintiff obtained a default judgment against it in the amount of $432,900.15. Plaintiff subsequently moved for summary judgment against Harte as guarantor of the secured notes. Plaintiff asserted that, on the undisputed facts, Hans Lollik was in default on the secured notes and that pursuant to the clear and unambiguous terms of the guaranties she was entitled to the amount of $150,000, which represented 50% of the principal amount of the 2004 note ($50,000) and 50% of the principal amount of the 2006 note ($100,000), along with prejudgment interest.

¶ 6 The circuit court granted summary judgment in favor of plaintiff and against Harte in the amount of $169, 138.90. In doing so, the court rejected Harte's argument that the guaranties were unconscionable and therefore unenforceable. The court also rejected his assertion that the plaintiff was not entitled to an award of prejudgment interest.

¶ 7 ANALYSIS

¶ 8 The primary issue on appeal is whether the circuit court erred in finding that the guaranties executed by Harte were not unconscionable and were therefore enforceable. We find the circuit court did not err in this regard.

¶ 9 "A guaranty is a third party's promise to answer for payment of an obligation if the person primarily liable fails to make payment or perform the obligation." *McCracken v. Olson Companies, Inc.*, 149 Ill. App. 3d 104, 112 (1986). "In becoming a guarantor, one promises to pay a debt in the event another fails to do so." *Town & Country Bank of Quincy v. E & D Bancshares, Inc.*, 172 Ill. App. 3d 1066, 1073 (1988).

¶ 10 A guaranty is also a legally enforceable contract that must be construed according to its terms, provided they are clear and unambiguous. *Bank of Benton v. LaBuwi*, 194 Ill. App. 3d 489, 495 (1990); *T.C.T. Building Partnership v. Tandy Corporation*, 323 Ill. App. 3d 114, 118-19 (2001). When construing a contract, the contractual terms are given their plain and ordinary meaning. *Reaver v. Rubloff-Sterling, L.P.*, 303 Ill. App. 3d 578, 581 (1999). Construing the language of a contract is a question of law appropriate for summary judgment unless the contract is ambiguous. *Id*. Here, there are no allegations that the terms of the guaranties are ambiguous.

¶ 11 Our review of the trial court's order granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171 (2003). Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). Where, as here, a question of law is determinative of a case, summary judgment is a proper remedy. *Reynolds v. Decatur Memorial Hospital*, 277 Ill. App. 3d 80, 84 (1996); see also *Marshall v. City of Centralia*, 143 Ill. 2d 1, 6 (1991) ("Where the record only presents a question of law, a trial court may properly enter a motion for summary judgment").

¶ 12 In opposing plaintiff's action to enforce the guaranties, Harte raises the affirmative defense that the guaranties are unenforceable because they are unconscionable. The determination of whether a contract provision is unconscionable is a matter of law subject to *de novo* review. *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 22 (2006). The "issue of unconscionability should be

examined with reference to all the circumstances surrounding the transaction." *Kinkel*, 223 Ill. 2d at 24.

¶ 13 Unconscionability can be either procedural, substantive, or a combination of both. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99 (2006). Harte maintains the guaranties at issue in this case are both procedurally and substantively unconscionable. The burden of producing sufficient evidence that a contract provision is unconscionable rests upon the party raising the issue. *Reuben H. Donnelley Corporation v. Krasny Supply Company, Inc.*, 227 Ill. App. 3d 414, 418-19 (1991). Harte fails to carry this burden.

¶ 14 Harte first argues the guaranties are procedurally unconscionable. "Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice." *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989 (1980). Some of the factors to consider in making this determination include the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print. *Id* at 989-90.

¶ 15 Harte claims the guaranties are procedurally unconscionable due to his lack of bargaining power in that he was not represented by counsel with respect to the preparation or execution of the guaranties. As a matter of law under the circumstances presented in this case, this is not sufficient grounds to render the guaranties procedurally unconscionable.

¶ 16 The uncontradicted facts in the record establish that the transactions at issue were business deals between sophisticated parties and there is nothing about the circumstances of this case that

would indicate that the formation of the guaranties was procedurally unconscionable. Harte is a sophisticated businessman. He is the president of PRM Management of Illinois, Inc., which is the sole manager of Hans Lollik, the issuer of the secured notes. Harte worked with plaintiff multiple times over a period of years (October 2004 through July 2006), entering into and modifying the secured notes.

¶ 17 Although Harte claims he did not seek the advice of counsel in conjunction with the preparation or execution of the guaranties, he does not allege he was unaware of, or did not understand the terms of the guaranties. Moreover, he presented no evidence of an inability to negotiate the terms of any of these documents. In fact, Harte's execution of an amendment extending the 2004 note's maturity date to October 14, 2008, indicates that the terms of the guaranties were open to negotiation. There is no evidence Harte lacked the business sophistication or bargaining power to knowingly and fairly enter into the guaranties. The guaranties are not procedurally unconscionable.

¶ 18 Harte also contends the guaranties are substantively unconscionable. Substantive unconscionability concerns the actual terms of the contract and examines whether those terms are inordinately one-sided in one party's favor. *Kinkel*, 223 Ill. 2d at 28; *Razor*, 222 Ill. 2d at 100. Harte claims the terms of the guaranties are substantively unconscionable because they prohibited him from asserting any defenses no matter how meritorious. He also contends the guaranties removed any obligation on plaintiff's part to seek collection from Hans Lollik in the first instance. Again, as a matter of law, these are not sufficient grounds to render the guaranties substantively unconscionable.

¶ 19 Harte executed a waiver of affirmative defenses. A guaranty's waiver of defenses is enforceable under Illinois law. See *City National Bank of Murphysboro, Illinois v. Reiman*, 236 Ill. App. 3d 1080, 1090 (1992); *Morris v. Columbia National Bank of Chicago*, 79 B.R. 777, 782 (N. D. Ill. 1987). In addition, our review of the guaranties show Harte executed a waiver authorizing plaintiff to demand payment from him prior to demanding payment from the primary debtor. The guaranties are not substantively unconscionable.

¶ 20 Finally, we reject Harte's contention that the circuit court erred in awarding plaintiff prejudgment interest under section 2 of the Illinois Interest Act (Act) (815 ILCS 205/2 (West 2006)). "The basic purpose of prejudgment interest is to put a party in the position it would have been in had it been paid immediately." *American National Fire Insurance Co. v. Yellow Freight Systems Incorporated*, 325 F. 3d 924, 935 (7th Cir. 2003); *Milligan v. Gorman*, 348 Ill. App. 3d 411, 416 (2004) (prejudgment interest is awarded to fully compensate the injured party for the monetary loss suffered). The decision to award prejudgment interest is within the sound discretion of the circuit court whose decision will not be disturbed absent an abuse of discretion. *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 425 (2009). In this case, there was no abuse of discretion by the circuit court in awarding prejudgment interest.

¶ 21 Section 2 of the Act provides in relevant part: "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing ***." 815 ILCS 205/2 (West 2006). Our court has determined that a guaranty is within the definition of an "other instrument of writing" under section 2 of the Act. See *Claude Southern Corporation v. Henry's Drive-In, Inc.*, 51 Ill. App. 2d 289, 306-07

(1964).

¶ 22 Prejudgment interest may be recovered from the time the money becomes due, or after the lapse of a reasonable time for paying the amount due, provided the amount due is liquidated or subject to an easy determination by calculation or computation. *Couch v. State Farm Insurance Co.*, 279 Ill. App. 3d 1050, 1054-55 (1996). Harte argues the guaranties do not provide a due date upon which he was required to perform. He maintains that plaintiff failed to make demand upon him or provide him with notice of Hans Lollik's default. This is an incorrect assessment of the facts.

¶ 23 The terms of the guaranties refer to the terms of the notes for the manner of payment; the guaranties contain identical language, stating: "In consideration of each Purchaser purchasing the Notes, the Guarantors hereby guarantee, irrevocably, absolutely and unconditionally, to the Purchasers the full and prompt payment in the manner specified in the Notes of 50% of the principal amount of the Notes ***." And both notes contain identical language providing: "This Note shall immediately become due and payable without any act or declaration on the part of any Payee upon the occurrence of any Event of Default ***." Consequently, prejudgment interest began to accrue from the date Hans Lollik defaulted under each of the notes.

¶ 24 Harte also contends that plaintiff "was not entitled to an award of prejudgment interest because the parties expressly agreed that the provisions of the [guaranties] set forth the entirety of Harte's obligations." Harte claims the terms of the guaranties limit his obligation to 50% of the principal amount of the notes. We disagree.

¶ 25 Although the guaranties represent the full agreement of the parties, this does not preclude application of the Act. Section 2 of the Act specifically provides for its application "[i]n the absence

of an agreement between the creditor and debtor governing interest charges *** " Harte acknowledges that the terms of the guaranties do not contain an agreement pertaining to interest charges. Consequently, there is no question regarding application of the Act to the instant case.

¶ 26 In conclusion, the circuit court did not err in granting summary judgment in favor of plaintiff. There are no genuine issues of material fact regarding Harte's liability under the guaranties and therefore plaintiff was entitled to judgment as a matter of law.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.