2015 IL App (1st) 142000-U
No. 1-14-2000

Fourth Division
August 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RONALD S. MANGUM, Plaintiff-Appellant, v. EUGENE W. BEELER, JR.; BEELERLAW P.C. (DISSOLVED), Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11L3988 Honorable James N. O'Hara, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Attorney's failure to file a response in an appeal was not the proximate cause of plaintiff being held liable for a loan he guaranteed. There was no assignment of the guaranty to absolve plaintiff of his obligation. Lender did not act in bad faith where guaranty expressly authorized lender's conduct. `

¶ 2 Plaintiff, Ronald Mangum, filed this legal malpractice claim against Eugene Beeler and Beelerlaw P.C. Beeler represented Mangum in litigation arising from a loan guaranty to a bank. The trial court ruled in Mangum's favor, and the bank appealed. Beeler neglected to file an appellee's brief on behalf of Mangum, and the appellate court reversed the judgment in favor of

the bank. Mangum filed a legal malpractice action against Beeler in which he claimed that but for Beeler's failure to file a response brief, the trial court ruling in his favor would have been affirmed. Beeler filed a motion for summary judgment, arguing that the lack of a response brief was not a proximate cause of the appellate court finding Mangum liable. The trial court granted summary judgment, and Mangum appeals.

¶ 3 BACKGROUND

¶ 4 D.S.I. Management Services, Inc. (DSI), a nursing home management company, had four shareholders: Ronald Mangum, Jerry Neal, Sherry Neal, and Lester Robertson. DSI adopted a corporate resolution granting Jerry Neal, who was president, authority to execute any agreements to borrow money on behalf of DSI. On June 29, 1998, plaintiff, Community Bank of Galesburg (Galesburg) extended a $150,000 line of credit to DSI. All four of DSI's shareholders executed a personal guaranty of the loan. Mangum's guaranty provided the following:

> "[Mangum] guarantees to [Galesburg] the payment and performance of each and every debt, liability and obligation of every debt, liability and obligation of every type and description which [DSI] may now or at any time hereafter owe to [Galesburg] (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several.
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> The liability of [Mangum] hereunder shall be limited to a principal amount of $150,000 *** plus accrued interest thereon and all attorneys' fees, collections costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of [Mangum] hereunder.

* * *

> [Galesburg] may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by [Mangum] and without notice to [Mangum]."

¶ 5 DSI renewed the line of credit with Galesburg in 2003. The Neals and Robertson were shareholders of another corporation, Nursing Home Management, Inc. (NHM). Galesburg extended a $600,000 line of credit to NHM on October 7, 2003. Although the Neals and Robertson signed personal guaranties of the NHM loan, Mangum did not.

¶ 6 DSI and NHM sold their assets to Beatrice Knowlson. In exchange, Knowlson made monthly payments to DSI and NHM, which they in turn applied towards the balance of their respective loans from Galesburg. Knowlson stopped making payments in 2005, resulting in DSI and NHM failing to make timely payments to Galesburg. Subsequently, Galesburg's president, Patrick Blake, had Jerry Neal, on behalf of DSI, execute a guaranty of NHM's debt. In exchange, Galesburg reduced the monthly payments on both company's loans by half. Eventually, both DSI and NHM defaulted on their loans.

¶ 7 On May 27, 2007, Galesburg filed a complaint in the circuit court of McHenry County for $177,817.19 against Mangum for the $101,418 remaining balance due on the DSI loan, in addition to $48,582 of the $400,000 balance of the NHM loan for the total $150,000 principal that Mangum guaranteed, plus accrued interest, expenses, and attorney fees. Galesburg alleged that Mangum was liable for the NHM loan by way of DSI's guarantee, since Mangum guaranteed all of DSI's debts, including DSI's secondary debts. After trial, on February 2, 2009, the circuit court entered judgment in favor of Mangum. The court found that DSI's guaranty of NHM's debts materially increased Mangum's guaranty, which in turn, discharged his obligation. The

court also found that neither DSI nor Mangum received consideration for DSI's guaranty of NHM's debts.

¶ 8 Galesburg's successor in interest, Tompkins State Bank appealed. Eugene Beeler agreed to represent Mangum in the appeal. However, he failed to file a response brief. On December 22, 2009, the Second District appellate court reversed the McHenry County circuit court and remanded the case for entry of judgment against Mangum in the amount of $101, 418 on the DSI loan and $48, 582 on the NHM loan, plus interest computed at the applicable rates. *Community Bank of Galesburg v. Mangum*, No. 2-09-0207 (2009) (unpublished order under Supreme Court Rule 23).

¶ 9 On review, the court initially noted that Mangum had failed to file a response. Thus, the court limited its review to the question of whether the plaintiff established *prima facie* error. In its analysis, the court cited to express language in the guaranty which provided that Mangum would be liable for any debt, whether it "now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary***." Based upon the express language in the guaranty, the court held that Mangum could not raise the modification of DSI's obligations as a defense to his liability. The court also reviewed Mangum's trial court briefs and considered his argument that Galesburg violated the covenant of good faith and fair dealing by obtaining DSI's guaranty. However, the court rejected Mangum's argument and held that Galesburg merely acted under its rights authorized by the guaranty. Finally, the court held that Galesburg's reduction of DSI's monthly payments was adequate consideration for its guaranty of NHM's liability. Following appeal, Mangum eventually settled with Galesburg for $150,000.

¶ 10 On April 15, 2011, Mangum filed a legal malpractice claim in the Circuit Court of Cook County against Eugene Beeler, Jr. and Beelerlaw P.C. for having failed to file an appellee's brief

in the appeal of the underlying action. Defendants filed a motion for summary judgment, arguing that even if Beeler breached a duty to Mangum, by failing to file a response brief, the failure was not a proximate cause of Beeler's injuries, as the appellate court would have ruled against Mangum regardless. The trial court granted defendant's motion on June 17, 2014. Mangum appeals. For the reasons that follow, we affirm.

¶ 11 ANALYSIS

¶ 12 A trial court's ruling on a motion for summary judgment presents a question of law, which we review *de novo*. 735 ILCS 5/2-1005(a) (West 2012); *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2012). Summary judgment is appropriate when "the pleadings, depositions, 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Summary judgment "is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt." *Purtill v. Hess*, 11 Ill. 2d 229, 240 (1986). To survive a motion for summary judgment, a plaintiff must provide a factual basis that would entitle him to judgment if proven true. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12 (2014).

¶ 13 A legal malpractice claim requires the plaintiff prove that the defendant owed plaintiff a duty of care, that the defendant breached its duty, and that defendant's breach proximately caused plaintiff's injury. *TRI-G, Inc. v. Bufke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006). "In a legal malpractice action alleging that an attorney failed to perfect an appeal, the client must prove that he or she would have been successful on appeal if the appeal had properly been perfected. [citations.]" *Governmental Interinsurance Exch. v. Judge*, 221 Ill. 2d 195, 200 (2006). Thus, the plaintiff in a legal malpractice claim must prove a "case within a case." *Id.*

¶ 14 In this appeal, Mangum argues that the circuit court erred in granting defendant's motion for summary judgment. He asserts that Beeler had a duty to file a response to the bank's appeal in the underlying action, and Beeler breached this duty. Further, Beeler proximately caused his liability to the bank, because the Second District would have upheld the McHenry County trial court's ruling had a response been filed. He maintains that on appeal, Beeler should have argued in a response that DSI's guaranty of NHM's debt was an assignment that materially changed Mangum's obligation. Moreover, he contends that he would have been successful on appeal had Beeler argued that Galesburg breached its duty of good faith and fair dealing.

¶ 15 Defendants do not dispute that they owed a duty to Mangum, or that they breached that duty by failing to file a response to the appeal. However, defendants argue that the failure to file a response was not a proximate cause of Mangum's injury, as the Second District would have overturned the trial court's ruling regardless. Defendants contend that DSI never assigned Mangum's guaranty. Further, the Second District expressly found that Galesburg acted in good faith when obtaining DSI's guaranty. Accordingly, it was proper for the Cook County circuit court to grant defendants' motion for summary judgment.

¶ 16 Assignment of Mangum's Guaranty

¶ 17 Mangum first argues that DSI assigned his guaranty to NHM and thereby discharged his liability, as the assignment materially changed his obligation. Defendants respond that there was no assignment of Mangum's guaranty. Rather, Mangum guaranteed all of DSI's debts, including any debts DSI guaranteed.

¶ 18 A guarantor's obligation will be released if the assignment of the guaranty changes the essentials of the original contract such that the performance required of the guarantor is materially different from what was first contemplated. *Southern Wine and Spirits of Illinois, Inc., v. Steiner*, 2014 IL App (1st) 123435, ¶ 18. Mangum argues that this case is similar to

Southern Wine, where the defendants guaranteed their company's indebtedness to a distributor, Morand. *Id.* ¶ 4. Defendants began purchasing wine on credit from another distributor, Southern Wine. *Id.* ¶ 5. Southern Wine acquired Morand. *Id.* Defendants continued to purchase goods on credit from Southern Wine after the sale of Morand, without ever knowing of the acquisition. *Id.* When defendants' company defaulted on its obligation to Southern Wine, Southern Wine sued defendants in their individual capacity. *Id.* Southern Wine argued that defendants should be personally liable because it acquired Morand and all its assets, including defendants' personal guaranty. *Id.*

¶ 19 The court first considered the plain language of the guaranty, and found it silent on whether Morand could transfer the guaranty. *Id.* ¶17. The court then held that the transfer of defendants' guaranty to Southern Wine was a material change that released defendants from their obligation. *Id.* ¶ 21. Though Southern Wine argued that the only change was the party to whom they were obligated, the court noted that every time defendants' company purchased goods from Southern Wine, it unknowingly increased the defendants' personal guaranty. *Id.*

¶ 20 Unlike *Southern Wine*, DSI never assigned Mangum's guaranty. Rather, the guaranty secured whatever DSI's debt might be, including any possible debts that DSI itself might guarantee. The plain language of the guaranty here can only be read to provide that Mangum guaranteed all of DSI's debts, "whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary." The guaranty covered any of DSI's future debts, and did not require Mangum's consent. Therefore, when DSI guaranteed NHM's loan, Mangum automatically became personally liable based on the broad language of the guaranty. Mangum's principal liability of $150,000 never changed, only the type of debt DSI owed to Galesburg.

¶ 21 Further, the court in *Southern Wine* first considered whether the defendants' guaranty permitted an assignment, and only engaged in an analysis of whether there was a material change

in the obligation after finding the guaranty was silent on the matter. Here, the plain language of Mangum's guaranty expressly permitted DSI to take on additional debts for which it was secondarily liable. Thus, Beeler's failure to argue that DSI's alleged "assignment" discharged Mangum from his obligation, was not a proximate cause of Mangum's injury.

¶ 22 Duty of Good Faith and Fair Dealing

¶ 23 Mangum next argues that had Beeler filed a response arguing that Galesburg violated the implied duty of good faith and fair dealing by obtaining his guaranty on NHM's loans through DSI's guaranty, the Second District would have upheld the trial court's ruling. Beeler responds that Galesburg did not violate the duty of good faith because the extension of DSI's debts was expressly authorized by Mangum's guarantee and the DSI corporate resolution giving Jerry Neal authority to sign agreements on behalf of DSI.

¶ 24 "Every contract implies good faith and fair dealing between the parties to it." *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1059 (1999). Parties may enforce the terms of a contract "to the letter, and an implied covenant of good faith cannot overrule or modify the express terms of a contract." *Id.* at 1060.

¶ 25 In *Bank One*, the defendant executed an unconditional personal guaranty on the obligor's $300,000 note to the plaintiff bank. *Id.* at 1051. The original note matured, but the bank continued to advance additional funds to the obligor, who eventually defaulted on the loans and left a balance of over $500,000. *Id.* at 1052. The bank sued defendant on the guaranty. *Id.* The defendant argued that it was a breach of the duty of good faith and fair dealing for the bank to loan the obligor more than the original amount of $300,000, and for it to continue to advance funds past the maturity date of the note. *Id.* at 1061. The court found that the bank did not breach of the duty of good faith because the express terms of the guaranty stated that the defendant's liability would be unlimited, not for $300,000. *Id.* at 1062. Further, the defendant's

guaranty was absolute and continuing, and it provided that the defendant's obligation would not be impaired if the bank "amends, renews, extends, [or] compromises" the obligor's obligations. *Id.* at 1061.

¶ 26 Similar to *Bank One*, the Mangum guaranty expressly allowed Galesburg to obtain DSI's guaranty on the NHM loan. Mangum's guaranty provided that Mangum would guarantee DSI's future liabilities to Galesburg, including secondary liabilities, without requiring notice to Mangum. The plain language of the guaranty indicates that the parties contemplated that DSI would not only incur its own debt, but also might guarantee the debts of others. Galesburg obtaining DSI's guaranty on the NHM loan is precisely the situation provided for in the guaranty. We do not find that Galesburg acted in bad faith, as Galesburg merely took advantage of its rights under the guaranty, just as the bank did in *Bank One*.

¶ 27 Mangum argues that this case is similar to *Hentze v. Unverfehrt*, 237 Ill. App. 3d 606 (1992). In *Hentze*, the court found that the defendant distributor breached the duty of good faith and fair dealing by attempting to run one of its dealers out of business. *Id.* at 611. The distributor threatened to terminate the dealer's contract if the dealer did not change his prices, and told customers that the dealer was incompetent. *Id.* We fail to see any similarities between this case and *Hentze*. Galesburg did not make any threats or attempt to run anyone out of business like the distributor in *Hentze*.

¶ 28 Moreover, Beeler made this argument in a post-trial motion in the McHenry County circuit court. Despite Beeler's failure to file a response brief, the Second District reviewed the record, considered this very argument, and rejected it. Accordingly, Beeler's failure to file a response could not have been a proximate cause of the court finding that Galesburg did not breach the duty of good faith and fair dealing.

¶ 29 Issues of Material Fact

¶ 30 In his reply brief, Mangum argues for the first time, that the Cook County circuit court erred in granting defendants' motion for summary judgment because there is an issue of material fact as to whether Jerry Neal had authority to act as president of DSI. He alleges that DSI was "out of business" in 2005 and accordingly Neal no longer had authority to act as president.

¶ 31 We first note that an appellant cannot raise a new argument in its reply. "Points not argued are waived and shall not be raised in the reply brief." Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). See also *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 485 (2006) (The court "should ignore any new issues raised in the reply brief but not mentioned in the opening brief.").

¶ 32 Further, the record does not support Mangum's contentions. Mangum cites Beeler's deposition testimony that in October of 2003, Beeler "viewed" Lester Robertson as president of NHM, but not of DSI. Beeler testified that he viewed Robertson as DSI's "contact person." Beeler never stated Jerry Neal was not the president of DSI. Further, the McHenry County court found that Neal remained president in 2005, stating "[o]n April 15, 2005, after the Knowlson default, Bank arranged for Jerry Neal, as president of DSI to guarantee the debts of NHM." There is no evidence in the record to support Mangum's claim that Jerry Neal was not president of DSI in 2005.

¶ 33 Similarly, as evidence that DSI "was out of business," Mangum cites to the deposition testimony of Patrick Blake, who stated that in August of 2003, DSI sold all of its nursing homes. However, there is no evidence that DSI no longer existed in 2005. Blake did not testify that DSI was dissolved, but that it sold all of its nursing homes. The McHenry County court did find that "DSI was stripped of all its assets." However, that does not mean that the entity no longer existed and that it could no longer incur liabilities through Neal. As the Second District's order points out, the guaranty states that the "release modification, substitution, discharge, impairment

deterioration, waste or loss of any collateral security" shall not affect Mangum's liability. Thus, it is irrelevant whether DSI had any assets in 2005, and the record does not support a finding that the entity was "out of business."

¶ 34 Furthermore, the Cook County circuit court granted summary judgment on Mangum's legal malpractice claim. Whether Neal was president of DSI in 2005 creates no issue of material fact as to whether Beeler's failure to file a response was a proximate cause of Mangum's injury. Accordingly, we find the Cook County circuit court appropriately held that there was no genuine issue of material fact.

¶ 35 Expert Affidavit

¶ 36 Finally, Mangum argues that the affidavit of his legal expert, Edward Clinton, presents a genuine issue of material fact that defendants were a proximate cause of his injury. Clinton stated in his affidavit, that he "concluded to a reasonable degree of certainty that had Beeler filed an appellate brief on behalf of Mangum, Mangum would have prevailed in the appeal." An affidavit should not "consist of conclusions but of facts admissible in evidence." Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Conclusionary affidavits cannot help defeat a motion for summary judgment. *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 841 (1989) (citing *In re E.L.*, 152 Ill. App. 3d 25 (1987); See also *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100, 105 (1994) ("[A] court must disregard conclusions in affidavits when adjudicating a summary judgment motion."). Here, Clinton's statement that the appellate court would have ruled in Mangum's favor had Beeler filed a response is conclusionary and insufficient to create a genuine issue of material fact.

¶ 37 Standard of Review in the Second District Case

¶ 38 Mangum argues that the Second District would not have reversed the trial court's decision on a mere finding of "*prima facie* error" had Beeler filed a response. Mangum contends that the

court would have reviewed the appeal under the manifest weight of the evidence standard and upheld the McHenry County court's order. Defendants respond that the interpretation of a contract is a question of law, and the Second District would have reviewed the appeal under a *de novo* review. We agree.

¶ 39 The Second District's order reversing the McHenry County circuit court was not based on any findings of fact. Rather, the Second District found that DSI's guarantee of NHM's loans did not discharge Mangum's obligation or breach the duty of good faith based on the express language of Mangum's guaranty. The interpretation of contract language is an issue of law and is reviewed under a *de novo* standard. *Richard McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 534-35 (2011). Accordingly, even had Beeler filed a response, the Second District would have reviewed the appeal under a *de novo* standard.

¶ 40 CONCLUSION

¶ 41 For the reasons stated, we affirm the decision of the circuit court of Cook County granting defendants' motion for summary judgment.

¶ 42 Affirmed.