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IN THE
COURT OF APPEALS OF INDIANA

DAVID W. GARRETT	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 82A05-0810-CV-578
	)	
FIFTH THIRD BANK,	)	
Successor in Interest to	)	
Fifth Third Bank (Southern Indiana),	)	
	)	
Appellee-Petitioner.	)	
	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne Trockman, Judge
Cause No. 82D03-0710-CC-05408

April 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David W. Garrett, *pro se*, appeals the trial court's grant of summary judgment in favor of Fifth Third Bank, successor-in-interest to Fifth Third Bank (Southern Indiana) ("Fifth Third"). Specifically, Garrett contends that there are genuine issues of material fact that preclude the entry of summary judgment in favor of Fifth Third. Concluding that Garrett has failed to prove that a genuine issue of material fact exists regarding whether he was contractually liable for the debts of his company pursuant to a guaranty he signed in his own name, we affirm the trial court's entry of summary judgment on this issue. However, concluding that Garrett has established that a genuine issue of material fact exists regarding whether the assets of his company were liquidated in a commercially reasonable manner and then applied to reduce the amount of money for which he was held personally liable pursuant to the guaranty, we remand for a trial on this issue.

Facts and Procedural History

Garrett operated a business called Ice Cream Distributors of Evansville, LLC ("ICDE"). On June 15, 2004, ICDE and Fifth Third Bank executed a Commercial Term Promissory Note ("Note"). According to the Note, ICDE promised to pay Fifth Third $1,190,000 plus interest according to certain terms and conditions. Specifically, ICDE's monthly payments were $13,500.00, with a final balloon payment due on June 15, 2009. The Note was modified by agreement of the parties on March 30, 2007, to adjust the monthly payment to $8,100.00, still leaving the balance due on June 15, 2009.

In addition to the Note, Garrett, as agent for ICDE, executed a Fifth Third Commercial Card Company Agreement ("Card Agreement") on April 2, 2004.

According to the Card Agreement, Fifth Third established a commercial card account for ICDE, and ICDE promised to pay on demand all indebtedness incurred by the use of such card.

On March 30, 2007 (the same date the Note was modified), Garrett and Fifth Third executed a Personal Guaranty of Fifth Third ("Personal Guaranty"). According to this absolute and unconditional Personal Guaranty:[1]

> In consideration of the making of the within described extensions of credit to the Borrower [ICDE], Guarantor [Garrett] hereby absolutely and unconditionally guarantees to the Lender [Fifth Third] the prompt and complete payment when due and payable (whether at the stated maturity or by required prepayment, acceleration, or otherwise) of all Obligations[2] of

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[1] "Guaranty" is defined under Indiana law as:

> a promise to answer for the debt, default, or miscarriage of another person. The guarantor is required to pay only if the principal debtor fails to pay. We interpret a guaranty using the rules governing the construction and interpretation of contracts generally. The terms of the guaranty determine the extent of a guarantor's liability and should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within its terms.

Hepburn v. Tri-County Bank, 842 N.E.2d 378, 385 (Ind. Ct. App. 2006) (quotation and citations omitted), *reh'g denied*, *trans. denied*. In addition:

> An absolute guaranty is an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or will perform, and such a guarantor is liable immediately upon default of the principal without notice. . . . An absolute guaranty, unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor. . . . Both presuppose default by the principal.

Kruse v. Nat'l Bank of Indianapolis, 815 N.E.2d 137, 141 n.2 (Ind. Ct. App. 2004) (quotation omitted).

[2] The Personal Guaranty defines "Obligations" as:

> any and all indebtedness, obligations, and liabilities of the Borrower to the Lender, and all claims of the Lender against the Borrower, now existing or hereafter arising, direct or indirect (including participations or any interest of the Lender in indebtedness of the Borrower to others), acquired outright, conditionally, or as collateral security from another, absolute or contingent, joint or several, secured or unsecured, matured or not matured, monetary or nonmonetary, arising out of contract or tort, liquidated or

> the Borrower to the Lender (notwithstanding the fact that from time to time there may be no indebtedness outstanding), and the performance of the Borrower's covenants under all loan agreements, documents, and instruments evidencing any Obligations or under which any Obligations may have been issued, created, assumed or guaranteed including, without limitation, that certain Commercial Term Promissory Note date June 15, 2004 in the original principal amount of **One Million One Hundred Ninety Thousand Dollars and No Cents ($1,190,000.00)**, as modified ("Note 1") . . . and all expenses incurred in collecting the same, as set forth below, all of which shall conclusively be deemed to have been incurred in reliance upon this Guaranty.

Appellee's App. p. 4-5.

On October 18, 2007, Fifth Third filed a Complaint on Guaranty ("Complaint") against Garrett. According to the Complaint, "As of October 16, 2007, ICDE [was] indebted . . . on [the] Promissory Note in the principal amount of [$921,635.25] together with interest accrued through said date in the amount of [$32,080.90] and late charges of [$1,858.71] with interest continuing to accrue thereafter until the date of judgment herein." *Id.* at 2. Fifth Third alleged that Garrett had failed to pay the sums due under the Personal Guaranty and that pursuant to the guaranty, Garrett was also liable for attorney and consulting fees.

On May 5, 2008, Fifth Third filed a motion for summary judgment. In support of its motion, Fifth Third designated, among other things, the affidavit of Jeanna McWilliams, an Assistant Vice-President with Fifth Third. In her affidavit, McWilliams averred that ICDE was in default on the Note because it had failed to make payments as

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> unliquidated, arising by operation of law or otherwise, and all extensions, renewals, refundings, replacements, and modifications of any of the foregoing.

Appellee's App. p. 4.

required by the Note's terms. McWilliams then specified how much ICDE owed on the Note, including principal, interest, late charges, and other fees. McWilliams averred that ICDE was also in default on the Card Agreement for failing to make payments as required by the agreement's terms and that the amount owed on the Commercial Card was $27,067.29. *Id.* at 41.[3] Finally, McWilliams averred that Garrett had failed to pay the sums due under the Personal Guaranty. McWilliams then detailed the attorney, liquidation, and consulting fees that Fifth Third had incurred in this case.

Garrett filed a *pro se* response in opposition to Fifth Third's motion for summary judgment. Garrett designated, among other things, an affidavit of himself as well as numerous emails between himself and McWilliams that discussed a third party buying the Note at a reduced amount. Following a hearing on Fifth Third's summary judgment motion, on June 23, 2008, the trial court issued a Final Judgment, which includes the following findings:

> 1. Garrett executed and delivered unto Fifth Third a Personal Guaranty dated March 30, 2007 ("Garrett Guaranty"), guarantying the indebtedness of all monies due or owing from Ice Cream Distributors of Evansville, LLC to Fifth Third.
>
> * * * * *
>
> 3. As of June 20, 2008, ICDE is indebted to Fifth Third in the amount of [$1,008,230.24] with interest accruing thereafter at the rate $155.99133 per day until the date of judgment.
>
> 4. Garrett has failed to pay Fifth Third the sums due under the Garrett Guaranty.

[3] Garrett appears to argue that Fifth Third's Complaint did not put him on notice that it was also seeking to recover for the amount due under the Card Agreement. Fifth Third alleged in its Complaint that Garrett failed to pay it the sums due under the Personal Guaranty, and the Personal Guaranty, as detailed in footnote 2, covers "any and all indebtedness, obligations, and liabilities of the Borrower [ICDE] to the Lender [Fifth Third]." Garrett does not contest that ICDE owed Fifth Third nearly $30,000 under the Card Agreement. In addition, Fifth Third designated McWilliams' affidavit at the summary judgment stage, and her affidavit makes clear that Fifth Third is also pursuing the amount due under the Card Agreement.

> 5. Pursuant to the terms of the Garrett Guaranty and the documents evidencing the underlying indebtedness, Fifth Third is entitled to its reasonable attorneys' fees. Fifth Third has incurred attorneys' fees and costs in the amount of [$20,503.49] which fee is reasonable.
>
> 6. Pursuant to the terms of the Garrett Guaranty and the documents evidencing the underlying indebtedness, Fifth Third is entitled to its liquidation and consulting fees. Fifth Third has incurred liquidation and consulting fees in the amount of [$47,821.24].

Appellant's App. p. 52. As such, the court ordered that Fifth Third

> is hereby granted judgment against Garrett on the Garrett Guaranty in the amount of [$1,008,340.24] as of June 20, 2008; plus interest accruing thereafter at the rate $155.99133 per day until the date of judgment, plus reasonable attorneys fees and costs in the amount of [$20,503.49], plus liquidation and consulting fees in the amount of [$47,821.24], plus post judgment interest, all without relief from valuation and appraisement laws.

Id. at 52-53. Garrett, *pro se*, now appeals the trial court's grant of summary judgment in favor of Fifth Third.

Discussion and Decision

Garrett, *pro se*, raises several issues on appeal, which we condense and restate as follows. First, Garrett contends that a genuine issue of material fact exists regarding whether he is personally liable for the debts of ICDE pursuant to the Personal Guaranty because a third party purchased the Note, thus releasing his liability under the guaranty. Second, he contends that there is a genuine issue of material fact regarding whether the assets of ICDE were liquidated in a commercially reasonable manner and then applied to reduce the amount for which he was held liable pursuant to the guaranty.

We review a summary judgment order *de novo*. *Jackson v. Scheible*, 902 N.E.2d 807, 809 (Ind. 2009). When reviewing the grant or denial of summary judgment, we apply the same standard as the trial court. *Herron v. Anigbo*, 897 N.E.2d 444, 448 (Ind.

2008), *reh'g denied*. Therefore, summary judgment is to be affirmed only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.* All facts established by the designated evidence, and all reasonable inferences from them, are to be construed in favor of the nonmoving party. *Id.*

The trial court entered an order containing findings of fact. This, however, does not change the nature of our review on summary judgment. In a summary judgment context, the entry of specific facts and conclusions aids our review by providing us with a statement of reasons for the trial court's decision, but it has no other effect. *Spears v. Blackwell*, 666 N.E.2d 974, 976 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*.

I. Is Garrett Liable for ICDE's Debts Under the Personal Guaranty?

As Fifth Third points out, the issues before the trial court on summary judgment were "simple": (1) is ICDE indebted to Fifth Third; (2) is Garrett contractually obligated for the debts of ICDE pursuant to the Personal Guaranty; and (3) if "yes" to both, then what is the amount of Garrett's liability pursuant to the Personal Guaranty? Appellee's Br. p. 11. Garrett's first argument touches on the first two inquiries. That is, Garrett contends that there is a genuine issue of material fact regarding whether he is contractually liable for the debts of ICDE pursuant to the Personal Guaranty because a third party purchased the Note, thus releasing his personal liability under the guaranty. In support of his response in opposition to Fifth Third's motion for summary judgment, Garrett designated his own affidavit and numerous emails.[4] On appeal, Garrett relies

[4] On appeal, Fifth Third argues that Garrett's affidavit is inadmissible pursuant to Trial Rule 56(E) because it contains hearsay and legal conclusions. Fifth Third filed a motion to strike Garrett's affidavit and some of his other exhibits in the trial court, but the court never ruled on the motion. For the

mainly on Exhibits 2 and 5 as evidence that a Loan Buyout Agreement in fact exists, thus releasing his personal liability.

Exhibits 2 and 5 are email communications between Garrett and Jeanna McWilliams from Fifth Third:

> Jeanna, two offers:
>
> Offer 1:
> $700,000 for the loan and all releases (including Daily's); 5/3 loans a fresh $300,000 to ICD as permanent working capital (funds into existing DDA account). SBA-backed loan OK. Daily to clean up OD at Closing.
>
> Offer 2:
> $400,00 for the loan and all releases (including Daily's). Daily to clean up OD at Closing.
> Financing to be provided by Community First Bank, with an investor guaranty to ensure completion of transaction.
>
> Thank you,
> Dave G.

Appellant's App. p. 15 (Ex. 2).

> Dave,
>
> Thank you for the update. I spoke with Robert and he is available tomorrow to meet with you. The Bank will need a firm answer from Rick by Friday as to whether or not he is going to buy the note. Also, have you been able to get any interim financial information together for ICD?
> Thanks!
>
> Jeanna

Id. at 18 (Ex. 5). Without reaching the issue of the admissibility of these emails under Trial Rule 56, we conclude that they do not establish that a Loan Buyout Agreement exists, that is, that a third party purchased the Note from Fifth Third. At best, the emails

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purposes of this appeal, we assume that the trial court considered Garrett's exhibits, and thus we consider them on appeal.

show that there were ongoing negotiations between Garrett and McWilliams for a third party to buy the Note but that a deal was never reached. These exhibits (and the other exhibits Garrett points to in his reply brief) do not establish an offer and acceptance or that Fifth Third received money from the third party to pay off the Note. Accordingly, Garrett has failed to prove that a genuine issue of material fact exists regarding whether he was contractually obligated for the debts of ICDE pursuant to the Personal Guaranty. We affirm the trial court's entry of summary judgment on this issue.

II. Amount of Garrett's Indebtedness?

Having established as a matter of law that Garrett is liable for the debts of ICDE pursuant to the Personal Guaranty, the question then becomes whether there is a genuine issue of material fact concerning the amount of Garrett's indebtedness pursuant to that guaranty. Garrett contends that there is a genuine issue of material fact regarding whether the assets of ICDE were liquidated in a commercially reasonable manner and then applied to reduce the amount for which he was held liable pursuant to the Personal Guaranty. Fifth Third does not assist us in our analysis of this issue because it *merely* responds that the issue of the liquidation of ICDE's assets is not material to the issue of the amount of debt. However, it plainly is. That is, when Fifth Third liquidated ICDE's assets, it should have then subtracted the amount of money it received from the liquidation from what ICDE owed under the Note, thereby reducing Garrett's indebtedness pursuant to the Personal Guaranty.

In any event, Garrett argues that the sale of ICDE's assets had to be conducted in a commercially reasonable manner. This standard comes from Indiana Code § 26-1-9.1-

610 (formerly, Indiana Code § 26-1-9-504), which applies to secured transactions. Specifically, Indiana Code § 26-1-9.1-610(b) provides that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." The Note, which was entered into by ICDE and Fifth Third on June 15, 2004, was secured by collateral described in a Security Agreement, which was also executed by ICDE on June 15, 2004. Unfortunately, the Security Agreement, though referenced in the Note, is not contained in the record on appeal; therefore, we do not know its specific terms.[5]

Where does this leave us? Fifth Third is a secured party by virtue of the Security Agreement executed by ICDE in favor of Fifth Third. Garrett, as a guarantor of ICDE's indebtedness, is considered to be a debtor along with ICDE. *See Walker v. McTague*, 737 N.E.2d 404, 409 (Ind. Ct. App. 2000), *trans. denied*. A debtor is entitled to notice of the disposition of the collateral as well as a commercially reasonable sale of the collateral. *Id.* Parties cannot waive these defenses in a guaranty before a default occurs. *Id.* at 409 n.3 (citing *McEntire v. Ind. Nat'l Bank*, 471 N.E.2d 1216 (Ind. Ct. App. 1984), *reh'g denied*, *trans. denied*); *see also* Ind. Code § 26-1-9.1-624 (providing that a debtor or secondary obligor may waive the right to notification of the sale of collateral as defined by Indiana Code § 26-1-9.1-611 only by a *post-default* authenticated agreement). The issue of the commercial reasonableness of a sale is a question of fact. *Walker*, 737 N.E.2d at 410.

[5] We note that guaranties can also be secured. *See Hepburn*, 842 N.E.2d at 385. The Personal Guaranty in this case, to which Garrett *is* a party, appears to be unsecured.

In order to prove that at least some of ICDE's assets were liquidated and that the amount for which the assets were sold was unreasonably low,[6] Garrett designated Exhibit 10, which is an affidavit from Joseph Monie, a former employee of ICDE who started his own company.[7] In his affidavit, Monie said that he purchased various items, including computers, from Fifth Third, who had repossessed them from ICDE in a bankruptcy case. Appellant's App. p. 25. Garrett averred in his own affidavit that Fifth Third did not provide an accounting to either ICDE or himself concerning how it applied the value of the liquidated assets, which Garrett claimed was unreasonably low, to reduce his guaranty balance. *Id.* at 9. In arriving at the ultimate figure for Garrett's indebtedness, Fifth Third used McWilliams' affidavit. McWilliams' affidavit does not specify how much Fifth Third received from the liquidation (though Fifth Third incurred nearly $50,000 in liquidation and consulting fees) or indicate whether that money was subtracted from Garrett's ultimate liability. Construing the evidence and reasonable inferences in favor of the nonmoving party, Garrett, we conclude that there is a genuine issue of material fact regarding whether the assets of ICDE were liquidated in a commercially reasonable manner and then applied to reduce the amount of money for which Garrett was held liable pursuant to the Personal Guaranty. We therefore reverse the trial court's entry of summary judgment on this issue and remand for a trial.

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[6] On appeal, Fifth Third seems to imply that there was no liquidation. "Garrett fails to provide evidence of the actual existence of liquidation . . . ." Appellee's Br. p. 11. However, Fifth Third has incurred nearly $50,000 in liquidation and consulting fees. This in itself implies that liquidation has occurred. *See* Appellee's App. p. 41 (McWilliams' affidavit stating that Fifth Third has incurred $47,821.24 in liquidation and consulting fees).

[7] Fifth Third does not specifically challenge Monie's affidavit on appeal, although Fifth Third did file a motion to strike his affidavit in the trial court on the ground that it was filed in the bankruptcy case. As noted above, the trial court never ruled on the motion to strike. Because Fifth Third does not challenge Monie's affidavit on appeal, it has waived any challenge to it.

Affirmed in part, reversed in part.

RILEY, J., and DARDEN, J., concur.