

STATE OF MICHIGAN
COURT OF APPEALS

FLAGSTAR BANK, F.S.B.,

Plaintiff-Appellee,

v

VINCENT DILORENZO and ANGELA
TINERVIA,

Defendants-Appellants.

UNPUBLISHED

July 6, 2010

No. 289856

Macomb Circuit Court

LC No. 2007-003381-CK

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order granting partial summary disposition in plaintiff's favor and the later order granting summary disposition in plaintiff's favor on the issue of damages. We affirm.

On appeal, defendants first contend that the trial court erred in granting partial summary disposition in plaintiff's favor where plaintiff failed to provide any admissible evidence in support of its motion. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). When deciding a motion under MCR 2.116(C)(9) (which tests the sufficiency of a defendant's pleadings) the trial court accepts as true all well-pleaded allegations, and properly grants summary disposition only where a defendant fails to plead a valid defense to a claim. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. In reviewing a motion brought pursuant to MCR 2.116(C)(10), the trial court examines the pleadings, affidavits, and other documentary evidence, viewing the same in a light most favorable to the nonmovant to determine whether a genuine issue of material fact exists to warrant a trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden*, 461 Mich at 121; MCR 2.116(G)(6). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We would first note that while defendants spend a significant amount of time addressing whether summary disposition was appropriate under MCR 2.116(C)(9), plaintiff's motion was brought pursuant to both MCR 2.116(C)(9) and (10). Contrary to defendants' assertion, plaintiff did not "declare that it was seeking summary disposition under MCR 2.116(C)(9) and that damages only were to be determined pursuant to MCR 2.116(C)(10)," nor was the MCR 2.116(C)(10) motion "unfiled." Plaintiff specifically stated in its motion that it was seeking summary disposition pursuant to both MCR 2.116(C)(9) and (10) "because there is no genuine issue of material fact other than the amount of damages." Plaintiff then argued that the undisputed facts established that defendants guaranteed payment of a loan made by plaintiff, and defendants were now obligated to comply with the guaranties. In response to the motion, defendants specifically acknowledged, "[h]ere plaintiff has moved for summary disposition pursuant to MCR 2.116(C)(10)." And, in ruling on plaintiff's motion, the trial court referred to and relied upon documents outside of the pleadings. The motion thus appears to have been granted pursuant to MCR 2.116(C)(10). The first issue for our consideration, then, is whether summary disposition was appropriately granted under that subrule.

Plaintiff asserted in its motion for summary disposition that defendants signed personal guaranties for payment of a loan obtained in the name of a company jointly owned by defendants, Bayside Mall, LLC. According to plaintiff, Bayside Mall, LLC defaulted on its loan, thus prompting plaintiff to make an immediate demand to defendants for the outstanding loan balance pursuant to their guaranties. Plaintiff attached several documents to its motion, including the loan agreements purportedly signed by defendants as members of Bayside Mall, LLC, and the guaranties concerning the loan that appears to bear defendants' individual signatures. Plaintiff also attached an October 30, 2006 letter it sent to defendant Dilorenzo detailing that the subject loan was in default and making demand to the guarantors (defendants) for payment of the loan in full, as well as a printout showing the principal amount that Bayside Mall LLC had paid on the loan and the outstanding balance. While defendants assert that plaintiff's motion should have been denied because the submitted documentation did not contain an affidavit and was otherwise inadmissible, we find this argument without merit.

First, defendants have not identified any court rule or other authority *requiring* the submission of an affidavit in support of a (C)(10) motion. In fact, MCR 2.116(G)(3) provides that "[a]ffidavits, depositions, admissions *or* other documentary evidence in support of the grounds asserted in the motion are required" when the motion is brought pursuant to MCR 2.116(C)(10)(emphasis added). An affidavit, then, is but one of the identified forms of evidence that may be submitted. Second, the trial court was free to consider the submitted documentation as long as there was a plausible basis for its admission. MCR 2.116(G)(6) provides:

Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance *would be* admissible as evidence to establish or deny the grounds stated in the motion. (emphasis added).

With a proper foundation, the documents *would be* admissible as records of regularly conducted activity. See MRE 803(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373-374; 775 NW2d 618 (2009). The trial court properly determined that the documents were sufficient to support plaintiff's motion with regard to its breach of contract claims.

Moreover, defendants do not challenge the authenticity or truth of the documents. Attached to defendants' response to plaintiff's summary disposition motion is the affidavit of defendant Dilorenzo, who swore that he and defendant Tinervia executed commercial guaranties in favor of plaintiff as part of a loan plaintiff executed in favor of Bayside Mall, LLC. Defendants, then, admitted signing the guaranties and defendants have provided no supportable argument that the guaranties or copies of the same were not or would not be inadmissible.

Additionally, in its response to plaintiff's motion for summary disposition, defendants relied upon the very documentation that they now claim is inadmissible to support their assertion that summary disposition was inappropriate because the documents were, for example, ambiguous and contained no default provision. For defendants to now challenge the trial court's reliance on documents they themselves directed the court to review in determining the summary disposition motion is disingenuous. We thus turn our attention to whether, as suggested by defendants, summary disposition was inappropriate due to the lack of a default provision in the guaranties and/or ambiguities as to whether the guaranties were collateral to the loan or, instead, formed suretyships.

The proper interpretation of a contract is a question of law that this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear and unambiguous, it reflects the parties' intent as a matter of law and courts must interpret and enforce the contract as written. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Michigan courts honor parties' bargains, and do not rewrite them. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). However, if contractual language is ambiguous, its meaning is a question of fact for the jury to decide. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

With respect to defendants' claim of a lack of default provision, it is unclear why defendants appear to believe that such a provision is necessary for the guaranties to be effective. A guaranty is, after all, "[a]n agreement in which the guarantor agrees to satisfy the debt of another (the debtor), only if and when the debtor fails to repay . . . [a]n undertaking or promise that is collateral to primary or principal obligation and that binds guarantor to performance in event of nonperformance by the principal obligor." *Blacks Law Dictionary* (abridged 6th ed). By its very definition, a guarantor's obligation is triggered by nonperformance of the principal debtor. Where, as here, the guarantor was bound to perform in the event that the primary debtor failed to repay its debt, and the primary debtor did fail to make repayment, the subsequent failure of performance on the guarantor's part renders the guarantor in breach of the guaranty contract, regardless of any specific default provision.

Moreover, the guaranties at issue provide for several waivers by the guarantors (defendants). Specifically, by signing the guaranties, defendants waived any right to require the lender (plaintiff) to, among other things: to make any demand or notice of any kind of any nonpayment on the part of the borrower, "to resort for payment or to proceed directly or at once against any person, including borrower," or "to pursue any other remedy within Lender's power." Defendants also waived "any and all rights and defenses arising by reason of. . .(F) any

defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness.” Pursuant to the clear, unambiguous language of the guaranty contracts, defendants cannot rely on the defense of “lack of a default provision.”

Defendants’ argument that the guaranty contracts may actually be suretyships also fails. As indicated in *Bandit Industries, Inc v Hobbs Intern, Inc*, 463 Mich 504, 508; 620 NW2d 531 (2001) while guaranty contracts and suretyships bear some resemblance:

The main distinction between a contract of suretyship and of guaranty, however, is that while the surety assumes liability as a regular party to the primary undertaking, the guarantor does not, as his or her liability depends on an independent collateral agreement by which he or she undertakes to pay the obligation if the primary payor fails to do so.

Here, the parties undisputedly signed “Commercial Guaranty” agreements separate and distinct from the promissory note executed by Bayside Mall, LLC and plaintiff. Under the guaranties, defendants’ liability depends on whether the primary payor fails to pay its own indebtedness to plaintiff. Defendants were not liable as regular parties to the loan transaction, but promised to pay Bayside Mall, LLC’s indebtedness to plaintiff only if Bayside Mall, LLC failed to do so. The unambiguous contract language supports a finding that the contracts are precisely what they are entitled—guaranties. And, given that plaintiff properly supported its (C)(10) motion with unambiguous guaranty contracts, and defendants have not contested that they received notice of Bayside Mall, LLC’s failure to pay under the terms of the promissory note, that they signed the guaranties at issue, or that they failed to pay for Bayside Mall, LLC’s indebtedness pursuant to the terms of the guaranties, summary disposition was appropriately granted in plaintiff’s favor.

While defendants also claim that the trial court erred in failing to apply the election of remedies doctrine, we see no error under the circumstances before us. The purpose behind the election of remedies doctrine is to prevent one from obtaining a double recovery for a single injury. *Riverview Co-op, Inc v First Nat’l Bank & Trust Co of Michigan*, 417 Mich 307, 311-312; 337 NW2d 225 (1983). The rule requires “(1) [t]he existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them.” *Id.* at 313. However, a plaintiff may simultaneously pursue all available remedies regardless of legal consistency, as long as the plaintiff is not awarded a double recovery. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 92; 443 NW2d 451 (1989), quoting *Walraven v Martin*, 123 Mich App 342, 348; 333 NW2d 569 (1983).

Here, plaintiff alleged that Bayside Mall, LLC breached its agreement with plaintiff to repay a loan. Defendants do not dispute that they received notice of this breach. Plaintiff thereafter apparently began foreclosure proceedings on real property serving as collateral for the loan, and also proceeded against defendants for their breach of the guaranty agreements. Notably, the loan and promissory note in Bayside Mall, LLC’s name is separate and distinct from the guaranty contracts executed by defendants. Thus, even where plaintiff foreclosed upon the property, so long as the amounts received from the foreclosure are set off against the total amount of indebtedness owed by Bayside Mall, LLC, as they were here, there is no double recovery.

Moreover, the guaranties specifically provide that guarantor waives “any and all rights and defenses arising by reason of (A) any “one action” . . . or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender’s commencement or completion of any foreclosure action. . . . (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness.” As specified in the guaranties, defendants also waived any right to require plaintiff to proceed directly against Bayside Mall, LLC or to exhaust any rights and responsibilities associated with the collateral securing the loan prior to proceeding against defendants under the guaranty contracts. Defendants having failed to raise and support any issue of material fact, the trial court did not err in granting summary disposition in plaintiff’s favor on its breach of contract claims against defendants.

Defendants next contend that the trial court erred in granting summary disposition in plaintiff’s favor on the issue of damages. According to defendants, damages are not available against defendants because when plaintiff sought foreclosure on the property serving as collateral for the loan, it elected its remedy and the remainder of the contract between plaintiff and Bayside Mall, LLC was forfeited. Defendants contend that because the plaintiff/Bayside Mall, LLC contract was forfeited, it is not possible (under Michigan law) to recover anything against the guarantors of that contract. We disagree.

As previously indicated, because the purpose of the election of remedies doctrine is to prevent double recovery and there was and is no double recovery here, there is no election of remedies issue. In addition, the cases relied upon by defendants to support their proposition that forfeiture of a contract precludes any action against a guarantor of the contract, involve the sale of land pursuant to land contracts. The sale of land involves statutes and law not applicable to basic money loans supported by guaranties, as is the case here. For example, in *Mazur v Young*, 507 F 3d 1013, 1017 (CA 6, 2007), cited by defendants, the court noted, “when a seller of property seeks redress against a recalcitrant buyer, the seller must make an election of remedies. The seller can choose to pursue either foreclosure or forfeiture, but not both.” The *Mazur* court also cites to MCL 600.5750, which provides, in part, “[A] judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial.” The court does note that, “as a general rule, a judgment for possession after forfeiture releases a guarantor from liability” (*Mazur*, 506 F 3d at 1018), but not only have defendants failed to establish that a forfeiture of the loan contract at issue occurred, its reliance on cases that involve a statutory scheme applicable solely to land sale contracts is misplaced.

Defendants next contend that the trial court’s entry of a judgment in plaintiff’s favor in the amount of \$2,593,577.88, plus costs and interest, was in error given that the judgment was in an amount in excess of what plaintiff claimed it was owed. In support of this argument, defendants cite to a pleading purportedly submitted by plaintiff in a separate lawsuit whereby plaintiff allegedly indicated that the balance due to plaintiff on Bayside Mall, LLC’s debt after the collateral property was sold was only \$584,914.61. Defendants have not provided a copy of this pleading, nor did they attach a copy of the same to their response to plaintiff’s motion, such that this bare assertion is unreviewable by this Court.

Furthermore, in support of its motion for summary disposition as to damages, plaintiff provided the affidavit of Ronald Wagonis. Mr. Wagonis swore that he was plaintiff's assistant vice president and commercial workout loan officer. Mr. Wagonis further swore that he reviewed plaintiff's files and records with respect to the instant matter and found that, after applying the proceeds received from the sale of loan collateral, there remained an unpaid balance (inclusive of interest and collection costs) of \$2,514,025.62. Mr. Wagonis attached a copy of plaintiff's note payoff report and a copy of "seller's final settlement statement" concerning the sale of the loan collateral property to establish the balance owing. Defendants attached no contradictory documentation to their response to plaintiff's motion, and have not done so here.

Instead, defendants contend that the damages remain uncertain due to a lack of verification of the amounts owing, that the issue of damages is generally a jury issue, and because a jury question remains as to whether plaintiff acted reasonably in mitigating its damages, summary disposition was inappropriate as to the amount of damages. Defendants also contend that the waiver provisions contained in the guaranties, specifically those requiring defendants to waive the right to a trial by jury and virtually any and all rights or defenses it may have, essentially allowed plaintiff to disregard Michigan law and were, as such, contrary to public policy. Because defendants, in signing the guaranties, agreed to waive any and all defenses and the right to a jury trial, a resolution of whether any of the defenses asserted above are meritorious necessarily first requires a determination of whether the waivers were, in fact, contrary to Michigan law.

The guaranties at issue unquestionably contain broad and extensive waiver provisions. However, the guaranties specify that "[e]xcept as prohibited by applicable law, guarantor waives any right. . ." To the extent that the waivers would be contrary to law, then, they would be stricken from the guaranties. Defendants have not, however, supported their contention that the waivers are violative of law or policy. The bare assertion of a violation, without more, is insufficient to defeat a summary disposition motion, and this Court will not search for authority to support or reject a parties' position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Absent any support for an argument otherwise, then, the waivers stand. That being true, we need not consider defendants' remaining claims with respect to an error in granting plaintiff's motion for summary disposition as to damages.

Touching on them briefly, in any event, we first note that with respect to the alleged uncertainty of damages, plaintiff submitted an affidavit and records concerning the amount owing on the loan made to Bayside Mall, LLC in support of its motion for summary disposition as to damages. Having provided support for its motion, it was then incumbent upon defendants to, "by affidavits, or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Defendants have not submitted any documentary evidence to contradict that submitted by plaintiff. We also note that while the issue of damages is generally a jury question, there is nothing precluding a party from waiving the right to a jury trial, as defendants did here when they signed the guaranties at issue. Finally, concerning defendants' claim regarding plaintiff's mitigation of damages, defendants have failed to present any documentary evidence suggesting that the amount received for the sale of the collateral property was improper. Moreover, the sale occurred as a result of an order entered in a separate circuit court case before a different judge. To the extent that defendants challenge the

propriety of or the amount received from the sale, that issue would properly be addressed before the court having issued the sale order.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering