FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-144 / 90-1458

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COUNCIL BLUFFS SAVINGS BANK,

Plaintiff-Appellee,

vs.

SPETMAN HARDWOODS, INC. and **THOMAS M. SPETMAN,**

Defendants-Appellants.

Appeal from the Iowa District Court for Pottawattamie County, Leo Connolly, Judge.

Defendants appeal from a district court order granting the bank's motion for summary judgment and awarding the bank a recovery from both defendants on certain overdrafts and promissory notes. **AFFIRMED.**

Scott H. Peters of Peters Law Firm, Council Bluffs, for appellants.

Charles L. Smith of Telpner, Smith, Sawatzke & Ruesch, Council Bluffs, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

PER CURIAM

The focal issue in this appeal is personal responsibility of a corporate officer to a lending institution for corporate debt.

Plaintiff-appellee Council Bluffs Savings Bank sued defendants-appellants Spetman Hardwoods Inc. and Thomas Spetman for overdrafts in a Spetman Hardware Inc. checking account with the bank, and on a promissory note given the bank by the corporation and signed by Thomas as an officer. Defendants filed a counterclaim. The trial court granted summary judgment for the plaintiff on both defendants' claim and defendants' counterclaim. Defendants appeal. We affirm.

The defendant corporation was formed by defendant Thomas Spetman and Howard Moldauer in November 1981. A corporate checking account was opened at plaintiff bank. No personal guaranty was requested or given. Thomas' father was a long-time president and chief operating officer of plaintiff bank. In 1982 the corporation wished to purchase a vehicle. It sought to finance the vehicle through an installment loan with plaintiff bank. In connection with the vehicle loan, Thomas was requested to sign a personal guaranty. Thomas signed the requested guaranty. The guaranty was a continuing and inexhaustible guaranty that covered any sums the defendant corporation might owe. The vehicle loan was paid off. Defendant

corporation continued a banking relationship with plaintiff.

The problems leading to this litigation began in December 1989, and continued through March 1990. Moldauer wrote a series of checks to defendant corporation. The checks were written on a corporate account for a business Moldauer had in Canada. The checks were endorsed by Moldauer on behalf of the corporation and deposited in the defendant corporation's account at plaintiff bank. Moldauer then wrote a series of checks on the corporate account in plaintiff bank. On the basis of the Canadian checks Moldauer had deposited, plaintiff honored the checks Moldauer wrote. The checks on the Canadian bank were dishonored (payment was stopped on them). The result was an overdraft of nearly $90,000. Plaintiff sought to recover the overdraft from defendant corporation and from Thomas on the strength of the guaranty Thomas gave the bank in 1982. Plaintiff sued defendants for the overdraft, and on a $5,000 promissory note Thomas had signed as a corporate officer. Defendants answered the petition with a general denial and filed a counterclaim against plaintiff for negligence and breach of contract. Discovery followed. Defendants subsequently withdrew the counterclaim.

Plaintiff then filed a motion for summary judgment. Hearing on plaintiff's motion for summary judgment was

scheduled for August 6, 1990. On August 3, 1990, the defendant filed a new counterclaim. The trial court ultimately sustained the motion for summary judgment, entering judgment for plaintiff and dismissing the defendants' counterclaim. Defendants appeal.

Our review on a motion for summary judgment is well established. Summary judgment is properly granted only when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Froning & Deppe, Inc. v. South Story Bank & Trust Co., 327 N.W.2d 214, 215 (Iowa 1982); Neoco, Inc. v. Christenson, 312 N.W.2d 559, 560 (Iowa 1981).

The first question we need address is whether the trial court was correct in determining the guaranty could not be limited or varied by parol evidence. Defendants resisted the summary judgment and filed Thomas's affidavit alleging, among other things, that: (1) Thomas was told by the loan officer when he financed the vehicle the guaranty only applied to the financing of the vehicle; (2) Thomas was never advised the guaranty would apply to any other transactions or that it was a continuing or blanket guaranty; (3) the vehicle loan had been paid off for some time, and Thomas was not aware of the continued existence of the guaranty; (4) Thomas trusted the loan officers because at the time they were employees of his father; and (5) Thomas had incorporated the business to limit personal

liability and such a guaranty was clearly contrary to this purpose.

The trial court did not consider this affidavit in ruling on the motion for summary judgment. The trial court found the guaranty was clear and could not be altered by other evidence.

This issue is controlled by the decision of Wellman Sav. Bank v. Adams, 454 N.W.2d 852, 856 (Iowa 1990). In Wellman, a guarantor attempted to introduce evidence that her guaranty was only intended by the parties to secure one loan. That loan was not the loan on which suit was brought. The supreme court affirmed the trial court's granting a motion in limine, excluding testimony of the guarantor that she did not read the instrument closely when she signed it, and she did not intend the continuing agreement provided for in the guaranty in signing it. The court went on in Wellman, 454 N.W.2d at 856, to explain the guarantor had an opportunity to negotiate the terms of the guaranty when she signed it and, had she read the papers more carefully, they might have been rewritten to reflect her intent.

The next question is whether it was error for the trial court to grant summary judgment and enter judgment against defendants on the counterclaim. The trial court did not rule on the issue of the counterclaim but rather decided defendants were not entitled to assert the counterclaim,

because an earlier counterclaim had been withdrawn and because of other circumstances of the case. The other circumstances were not defined. At the time of the ruling, there were no orders precluding the filing of other pleadings.

We will, however, affirm the trial court if any reason for affirmance appears in the record. See Hewitt v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981); Kelly v. Brewer, 239 N.W.2d 109, 113 (Iowa 1976).

In adding the counterclaim, the defendant sought to amend a responsive pleading for more than the second time. The trial court did not abuse its discretion in not allowing the amendment. See Iowa R. Civ. P. 88.

We affirm.

AFFIRMED.

Oxberger, C.J., concurs; Donielson, J., specially concurs.

DONIELSON, J. (specially concurring)

Because the doctrine of unconscionability was not pleaded, I concur in the result.