FILED
JUL 27 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

131

IOWA KITCHENS, LTD.,

Plaintiff-Appellant,

vs.

COUNTRY KITCHEN OF MERLE HAY ROAD, INC.; KITCHEN CONCEPTS, INC.; and JEFFREY MOEN,

Defendants,

EDMUND O. MOEN,

Defendant-Appellee.

8-187
87-119

Appeal from the Iowa District Court for Polk County (No. CL 65-3850), Glenn Pille, Judge.

Plaintiff appeals from a district court judgment granting Edmund Moen's motion for summary judgment. **REVERSED AND REMANDED FOR TRIAL.**

James H. Waters of Cook & Waters, Des Moines, for plaintiff-appellant.

John R. Hearn, Des Moines, for defendant-appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

Plaintiff appeals from a district court judgment granting defendant Edmund Moen's motion for summary judgment and rejecting plaintiff's motion for summary judgment. We reverse and remand for trial.

On May 1, 1978, a license agreement to operate a Country Kitchen franchise at Merle Hay Road in Des Moines was entered into between Country Investments, Inc., as licensor, and George and Sheryl Irish, doing business as Country Kitchen of Cedar Rapids, Inc., as licensees. The license agreement provided that the undersigned, their successors and assigns, personally guaranteed performance of the contract. On September 15, 1979, Country Kitchen of Cedar Rapids and the Irishes assigned their interest in the license agreement to Country Kitchen of Merle Hay Road, Inc. The assignment was signed by "Edmund O. Moen, Pres." for Country Kitchen of Merle Hay Road, Inc. Iowa Kitchens, Ltd. is the successor to Country Investments, Inc. and is now the licensor of Country Kitchens in Iowa.

In 1985, the license agreement of Country Kitchen of Merle Hay was terminated for nonpayment of franchise fees and other expenses. This case was filed seeking recovery from various individual and corporate interests for the losses.

Plaintiff sought to find Edmund O. Moen personally liable based on his signature on the assignment. Both par-

ties filed motions for summary judgment. Moen claimed that he signed the assignment on behalf of the corporation, Country Kitchen of Merle Hay, and not in his individual capacity. The district court agreed and sustained Moen's motion for summary judgment and rejected plaintiff's motion for summary judgment.

Our scope of review is for the correction of errors at law Iowa R. App. P. 4. Principles governing the granting of summary judgment were stated as follows in Amco Ins. Co. v Stammer, 411 N.W.2d 709, 711 (Iowa App. 1987) (citations omitted):

> The purpose of a summary judgment is to avoid a trial where no genuine issue of material fact exists. In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The resisting party must set forth specific facts showing there is a genuine issue for trial. The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying a denial of summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden.

Plaintiff supported its motion for summary judgment with three documents: the affidavit of Robert Jacobitz, President of Iowa Kitchens, Ltd.; the License Agreement for Merle Hay Road; and the Assignment by the Country Kitchen of Cedar Rapids (the Irishes) to Country Kitchen of Merle Hay Road.

The Jacobitz affidavit contained the following statements "I am personally aware that Edmund O. Moen personally guaranteed the obligations incurred by Country Kitchens of Merle Hay Road, Inc. as a part of the franchise agreement . . . . I have personal knowledge that Edmund O. Moen is aware of his individual responsibility upon that contract."

The license agreement (Exhibit C attached to plaintiff's petition) provided the following pertinent provision

> ARTICLE 22--PERSONAL GUARANTY AND AGREEMENT TO BE BOUND PERSONALLY BY THE TERMS AND CONDITIONS OF THE LICENSE AGREEMENT
>
> In consideration of the execution of this LICENSE AGREEMENT by LICENSOR and for other good and valuable considerations, the undersigned, for themselves, their heirs, successors, and assigns, do jointly, individually and severally hereby become surety and guaranty for the payment of all amounts and the performance of the covenants, terms and conditions in this LICENSE AGREEMENT, to be paid, kept and performed by the LICENSEE.
>
> Further, the undersigned, individually and jointly, hereby agree to be personally bound by each and every condition and term contained in this LICENSE AGREEMENT and agree that this PERSONAL GUARANTY should be construed as though the undersigned and each of them executed a LICENSE AGREEMENT containing the identical terms and conditions of this LICENSE AGREEMENT.
>
> If any default should at any time be made therein by the LICENSEE, then the undersigned, their heirs, successors and assigns, do hereby, individually, jointly and severally, promise and agree to pay unto LICENSOR or its assigns, all monies due and payable to LICENSOR in enforcing this GUARANTY or any terms and conditions of the LICENSE AGREEMENT.

> It is further understood and agreed by the undersigned that the provisions, covenants and conditions of this GUARANTY shall bind and inure to the benefit of the successors and assigns of LICENSOR.

The Irishes executed the license agreement.

The assignment of licensee Country Kitchen of Cedar Rapids (the Irishes) to Country Kitchen of Merle Hay Road, Inc. (Exhibit D attached to plaintiff's petition) states the following pertinent provision:

> 4. Merle Hay expressly assumes and accepts all of the terms, conditions, and provisions of said License Agreement and agrees to keep and perform the same from and after the date of this Assignment.

The assignment was signed by "Edmund O. Moen, Pres." under the caption "C.K. of Merle Hay Road, Inc."

In support of defendant Moen's motion for summary judgment, Moen attached his affidavit wherein he stated he intended to bind Country Kitchen of Merle Hay Road, Inc., as its president, and did not intend to personally or individually guarantee the assignment or any obligation thereunder. He also indicated that no one explained to him that he would be personally guaranteeing the assignment.

Based on the parties' competing motions for summary judgment and supporting documents, we agree with plaintiff's position that neither party can prevail on its motion. Whether Moen is personally liable is a material fact in dispute between the parties and thus granting of summary judgment was not the appropriate method to dispose

of this case We therefore remand this matter for trial on the merits to resolve the factual and evidentiary disputes raised by the competing motions.

REVERSED AND REMANDED FOR TRIAL.