FILED
MAR 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BENNETT STATE BANK,

Plaintiff-Appellee,

vs

HARRY SHERWOOD,

Defendant,

CHESTER SHERWOOD and MARVELLA M. SHERWOOD, Husband and Wife,

Defendants-Appellants.

Filed March 26, 1985

5-31
84-569

Appeal from the Iowa District Court for Cedar County - Max R. Werling and Margaret S. Briles, Judges.

Defendants appeal from summary judgment granted to plaintiff in an action to enforce a surety agreement. REVERSED AND REMANDED.

David L. Scieszinski, Wilton, Iowa, for defendants-appellants.

L E Dendinger of Casterline, Hamiel & Dendinger, Tipton, Iowa, for plaintiff-appellee.

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

Defendants appeal from summary judgment granted to plaintiff in an action to enforce a surety agreement.

On April 7, 1980, defendants Chester and Marvella Sherwood signed a guaranty agreement covering the outstanding debts of their son and daughter-in-law, Harry and Helen Sherwood to the plaintiff bank. At that time the amount of the indebtedness was $70,183.95. The document stated that it was "an absolute and continuing guarantee" covering "indebtedness of whatsoever nature upon or for which the Debtor is or may hereafter become obligated to the Bank . . . ." It further provided: "My liability on this guaranty shall remain in full force and effect until written notice of revocation . . . shall have been actually received by said Bank, and such notice shall not affect my liability hereunder as to any and all obligations and indebtedness of the Debtor created before the receipt of such notice, and any renewals thereof." The guaranty specified a $72,000 limit on liability. Defendants never gave a notice of revocation.

Harry signed a note for $67,981.10 on January 28, 1982, and a note for $13,823.27 on May 18, 1983. These two notes were substituted for the prior notes which were cancelled. The new notes were for a farming operation. Harry defaulted on both notes. Plaintiff accelerated the debts and brought this action. Harry was released after he filed for bankruptcy.

Plaintiff moved for summary judgment which was granted by Judge Werling after a hearing. A second hearing was held on the issue of damages and judgment was entered by Judge Briles against defendants for $60,680.32 plus interest and costs.

Defendants appeal the summary judgment asserting: (1) the trial court erred in not finding that a factual issue existed as to whether the guaranty was continuing or restricted; (2) the trial court erred in finding that the promissory note of January 28, 1982, was not a consumer credit transaction; (3) the trial court

erred in not finding that a factual issue existed as to whether there was a material alteration of the promissory note of January 28, 1982; (4) the trial court erred in not finding that a factual issue existed as to whether the guaranty agreement had been materially altered; and (5) the trial court erred in not finding that a factual issue existed as to whether the guaranty agreement applied only to the joint debts of Harry and Helen Sherwood or would also include the individual debts of Harry Sherwood. Plaintiff has applied for attorney fees on appeal.

Our review of this action at law is on assigned error. Iowa R. App. P. 4. Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). In considering the motion the court considers the evidence in the light most favorable to the party opposing the motion. Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979). The burden is upon the party moving for summary judgment to show the absence of any genuine issue of material fact. Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974).

I. Application of the Agreement to Future Obligations of the Debtor. Defendants argue that the agreement was intended to guarantee only those debts which were outstanding and unpaid on the date the agreement was executed and did not apply to the two subsequent notes. Defendants contend the trial court erred in not allowing extrinsic evidence of the intention of the parties concerning whether the guaranty was continuing or restricted.

The document in this case clearly stated that it was a continuing guarantee applicable to present and future debts until revoked. Extrinsic evidence was properly excluded since it would have been an attempt to vary the clear language of the agreement rather than an attempt to interpret the language used. Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 276 (Iowa 1982). The only restriction upon the surety's liability was the $72,000 limit which has no relevance to the argument made by defendants in this issue. The trial court properly concluded there was no

genuine issue of material fact concerning whether the guaranty applied to future obligations of the debtor.

II. Consumer Credit Code. Defendants claim they are not liable under the guaranty agreement because no notice was given them in accordance with Iowa Code section 537.3208. That section provides that a guarantor is not liable with respect to a consumer credit transaction unless before or contemporaneously with signing any separate agreement of obligation the guarantor receives written notice identifying the debt he may have to pay. It is undisputed that no such notice was given in this case.

By its terms section 537.3208 only applies to consumer credit transactions. The issue, therefore, is whether the two notes on which defendants' liability is based constituted consumer credit transactions invoking the notice requirement.

The indebtedness of Harry and Helen Sherwood existing at the time the guaranty was executed would qualify as consumer credit transactions under the provisions of Iowa Code chapter 537 (1979). However, effective July 1, 1980, the legislature amended Iowa Code section 537.1301(14)(a)(3) eliminating debts incurred primarily for agricultural purposes from the definition of "consumer loan." The legislative history of the amendment indicates that the amendment does not apply to loans for agricultural purposes executed prior to July 1, 1980, provided that no additional loans, advances or extensions of credit are made on or after July 1, 1980 with respect to agreements made prior to that date. 1980 Iowa Acts ch. 1156 § 30. In this case the notes executed prior to July 1, 1980, were cancelled and returned to the borrower and new notes were executed in 1982 and 1983. We agree with the trial court's conclusion that these debts do not come within the statutory definition of consumer loans and, therefore, are not subject to the notice provision of section 537.3208.

Defendants argue that notwithstanding the change in the statute the January 28, 1982, obligation became a consumer credit transaction by agreement

between the debtor and plaintiff since printed at the bottom of the note is the statement "This is a consumer credit transaction." See First Northwestern National Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1981). Defendants claim that this language was stricken from the note by plaintiff after it was executed.

The argument is without merit. Regardless of when the language was stricken, the presence of this statement on a note which would not otherwise be a consumer credit transaction does not affect the remedies between the lender and the guarantor where the contract of guaranty does not adopt the remedies of the Consumer Credit Code. Union Story Trust & Savings Bank v. Sayer, 332 N.W.2d 316, 319 (Iowa 1983).

III. Alteration of the Promissory Note. Defendants maintain that the January, 1982, note was altered by striking from the bottom of the form the printed statement: "This is a consumer credit transaction." Defendants assert that they are relieved of liability if the note was altered.

Iowa Code section 554.3407 provides in part:

> 1. Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
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> * * *
>
> c. the writing as signed, by adding to it or by removing any part of it.
>
> 2. As against any person other than a subsequent holder in due course
>
> a. alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

As we have stated, this transaction did not fit the statutory definition of a consumer credit transaction. Therefore, any alteration of the instrument eliminating a contrary statement is not fraudulent and material. Furthermore, under the rationale of the Sayer case, defendants' contract is not affected by the change.

IV. Alteration of the Guaranty Agreement. The guaranty form contained the following printed material: "My liability hereon shall not exceed _____ Dollars ($_____) principal . . . ." Typed in the spaces are "Seventy Two Thousand & No/100——"and "72,000.00" respectively. Defendants claim that there is a factual issue as to whether the agreement was altered by the insertion of this limit on their liability. Defendants do not assert that the figure was changed but that the spaces were blank when they signed the form.

Under Iowa Code section 554.3407(1), this alleged alteration is material in that it does change the contract between the parties by adding to the writing as signed. However, under section 554.3407(2)(a) the alteration must be both material and fraudulent in order to discharge a party to the agreement. If defendants signed the agreement and the spaces above were blank, they would have unlimited liability as guarantors. The alleged insertion of the limit by plaintiff, beneficial to defendants and detrimental to plaintiff, cannot be considered a fraudulent act. Therefore, the alleged alteration is not a genuine issue of material fact which would preclude summary judgment.

V. Application of the Agreement to Individual Debts. The guaranty is for the debts of "Harry and Helen Sherwood" (emphasis added). However, only Harry executed the two notes at issue in this case. The language of the agreement is certainly not clear whether it was intended to cover only joint debts of Harry and Helen or would also cover individual debts of Harry or Helen. We hold that there is a genuine issue of material fact as to the intention of the parties when entering into this agreement. Defendants should be allowed to present extrinsic evidence on this issue. Therefore, we reverse the grant of summary judgment and remand this case to the district court for further proceedings consistent with this opinion.

VI. Attorney Fees on Appeal. The guaranty agreement obligates defendants to pay "all expenses, costs and attorney's fees incurred by the Bank in collecting or attempting to collect" the debt. See Iowa Code § 625.22. Since the

agreement does not limit the fees to those incurred by the district court, reasonable appellate attorney fees are also proper. Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982). On remand the district court should consider the reasonable amount of attorney fees plaintiff incurred in this appeal and make an award if plaintiff ultimately prevails in this case.

REVERSED AND REMANDED.