FILED
DEC 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FARMERS STATE SAVINGS BANK, INDEPENDENCE, IOWA,

Appellee,

vs.

LLOYD ARNOLD,

Appellant.

Filed December 28, 1977

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2-59806

Appeal from Floyd District Court - J.W. Frye, Judge.

Defendant guarantor appeals trial court's summary judgment that he remained liable to the plaintiff bank under the guaranty to the extent of $48,000 so long as any part of his tenant's indebtedness remained unpaid. - Affirmed.

Pattee and Pattee, of Independence, for Appellee.

James D. O'Connor, of O'Donohoe, O'Connor & O'Donohoe, of New Hampton, for Appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Lloyd Arnold appeals the summary judgment granted plaintiff Farmers State Savings Bank. We affirm.

The sole ground urged by Arnold for reversal is that he guaranteed only the first $48,000 of the Faist total indebtedness of $76,318.34. The bank applied the $32,329.54 proceeds from the sale of the Faist farm assets to the total indebtedness and sought then under the guaranty to collect the remaining unpaid balance of $45,929.42 from Arnold. The trial court ruled such application to the total Faist indebtedness was as a matter of law provided for by the guaranty agreement.

By its terms Arnold's guaranty remained fully effective until two conditions occurred: 1) the bank received actual notice of discontinuance and 2) any and all of the "said" indebtedness, liabilities, and obligations created before discontinuance was fully paid. Arnold argues "said" indebtedness refers to the $48,000 guaranteed amount. The bank, of course, argues "said" indebtedness refers to the amount of indebtedness incurred by the Faists under the terms of the guaranty agreement--that is, the full $76,318.34 amount.

In interpretation of the guaranty agreement, our objective is to ascertain the meaning and intention of the parties as expressed in the language used. Union Trust & Savings Bank v. State Bank, 170 N.W.2d 674, 677 (Iowa 1969). "Where, as here, there is no conflict in the evidence and the terms of the agreement are admitted, the intent becomes a question of law for the court." **Union Trust,** supra. We agree with Arnold that by delivery of notice to the bank he terminated the continuing nature of the guaranty--the bank could not look to him for satisfaction of any debt created <u>after</u> receipt of notice. We cannot, however, agree with Arnold that the second condition for termination of the guaranty would be satisfied by full payment, from whatever source, of $48,000.

Under Arnold's theory he merely assured the bank that the Faists would repay the bank to the extent of $48,000. The guaranty provided:

1) Arnold guaranteed full and prompt payment to the bank at maturity "of any and all indebtedness, liabilities and obligations" of the debtors Faists to

the bank to the extent of $48,000.

2) Liability under the guaranty was to remain unaffected by the sale or release of any security or collateral.

3) The bank was granted exclusive right to determine the application of payments and credits on "said indebtedness, liabilities and obligations or any part of them."

4) Arnold expressly waived any right to insist that the bank go against the Faists before it looked to him for payment.

5) The agreement expressly granted the bank the right to extend credit beyond the limits of the guaranty without notice to Arnold and without impairing or affecting the guaranty.

We note that generally the guarantor cannot control the application of payments to require that they be applied to the part of the indebtedness covered by his guaranty. 38 C.J.S., **Guaranty**, §78 at 1247. **Accord**, Cain v. Vogt, 138 Iowa 631, 116 N.W. 786 (1908). Here, Arnold's contention that the bank should be instructed to apply the $32,329.54 to the first $48,000 of the indebtedness is completely undercut by his bargain. He agreed the bank should have exclusive right to determine such application. Likewise, his contention that the "said indebtedness, liabilities and obligations" language of the second condition for discontinuance referred to a Faist indebtedness of $48,000 is without support in the agreement. The "said indebtedness" throughout the agreement has referred to "any and all indebtedness" of the debtor Faists which Arnold agreed could rise above the amount of the guaranty without notice to him and without in any way jeopardizing his liability under the guaranty. Here the bank merely disposed of collateral, as it could do under the agreement, and applied it to the total indebtedness, as it could do under the agreement.

It is clear that the whole purpose of the arrangement was to benefit the Faists and enable them to obtain credit for contemplated expenditures required in fulfillment of their farm tenancy with Arnold. See Bankers Trust Co. v. Hill, 207 Iowa 1375, 1380, 221 N.W. 916, 918 (1929). Arnold entered into the contract of guaranty for the sole purpose of obtaining such credit for the Faists. He

guaranteed he would pay any indebtedness on which the Faists defaulted with the upper limit of his liability set at $48,000. He did not, thereby, limit the bank funds to be made available to the Faists to the $48,000. Nor did he, thereby, guarantee the Faists would repay $48,000. Rather, we conclude Arnold remained liable under the guaranty to the extent of $48,000 so long as any part of the $76,318.34 indebtedness remained unpaid. To hold otherwise would be to create a new contract for the parties by arbitrary judicial construction. This we may not do. **Union Trust & Savings Bank**, supra, 170 N.W.2d at 677.

We affirm the trial court's summary judgment ruling in favor of the plaintiff bank.

Affirmed.