

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JOHN and MARGARET MEURENS,) CASE NO. BK96-81457
)
DEBTOR) A97-8069
_____)
JOHN and MARGARET MEURENS,)
) CH. 13
Plaintiff)
vs.)
)
UNITED STATES SMALL BUSINESS)
ADMINISTRATION,)
)
Defendant)

MEMORANDUM

Hearing was held on April 27, 1998, on a Motion for Summary Judgment filed by the Small Business Administration. Appearances: David Hicks for the debtors and Gregg Stratman for the SBA.

Decision

The motion for summary judgment is denied.

Background and Undisputed Facts

In 1993, Platte Haven, Inc., (hereafter "Platte Haven") and the Small Business Administration, an agency of the United States, (hereafter "SBA") had an ongoing business relationship. Platte Haven was developing a piece of real property in Cass County, Nebraska, as a resort. Platte Haven had been approved for financial assistance by the SBA. In November, 1993, the SBA and Platte Haven executed two loan authorization agreements and promissory notes (hereafter collectively "Loans"). The Loans were personally guaranteed by the principals of Platte Haven.

In December of 1993, prior to the majority of the Loan funds being disbursed, two of the principals of Platte Haven, Frank and Virginia Karpinski, wished to be released from their

personal guaranties. The SBA informed them that in order for the Loans to proceed, replacement guarantors would need to be located. (Fordyce Affidavit, ex. 15) Platte Haven then requested John and Margaret Mary Meurrens (hereafter "Meurrenses") to be replacement guarantors and new principals.

After involved negotiations, the Meurrenses became replacement guarantors on the Loans and were to receive stock in Platte Haven (Fordyce Affidavit, exs. 7 and 8). The Meurrenses signed the personal guaranties on February 18, 1994. The SBA formally amended the Loans documents by letter dated March 3, 1994, which added the Meurrenses as replacement guarantors, as well as other amendments. The SBA began disbursing the majority of the Loans funds on and after March 11, 1994. The Loans are currently in default and the SBA seeks to collect from the Meurrenses pursuant to their personal guaranties.

The efforts of the SBA to collect on the personal guaranties caused the Meurrenses to file for relief under Chapter 13 of the Bankruptcy Code. The Meurrenses filed an adversary proceeding to obtain a determination of their liability on the personal guaranties, asserting that the SBA violated a condition precedent, thus limiting their liability. The SBA filed this motion for summary judgment.

Analysis

A. Standard for Motion for Summary Judgment

The United States Supreme Court, in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), addressed the requirements for summary judgment under Federal Rule of Civil Procedure 56. The Court stated that "[u]nder Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue to any material fact and that the moving party is entitled to summary judgment as a matter of law.'" Id. at 322. Furthermore, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. Rule 6 is applicable in bankruptcy proceedings. Fed. R. Bankr. P. 7056.

B. Contract Interpretation

Construction of a contract is a matter of law. Estate of Stine v. Chambanco, Inc., 251 Neb. 867, 873, 560 N.W.2d 424, 428 (1997). The first step in interpreting a contract is for the court to determine, as a matter of law, whether the contract is ambiguous. Id. citing Daehnke v. Nebraska Dept. of Soc. Servs., 251 Neb. 298, 557 N.W.2d 17 (1996); C.S.B. Co. v. Isham, 249 Neb. 66, 541 N.W.2d 392 (1966). "A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." Id. citing Daehnke v. Nebraska Dept. of Soc. Servs., *supra*; Winfield v. CIGNA Cos., 248 Neb. 24, 532 N.W.2d 284 (1995). The determination as to whether ambiguity exists in the contract is to be made by the court on an objective basis, not by the subjective contentions of the parties and "the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous." Id. citing Daehnke v. Nebraska Dept. of Soc. Servs., *supra*; Murphy v. City of Lincoln, 245 Neb. 707, 515 N.W.2d 413 (1994).

C. Condition Precedent

The existence of a condition precedent depends upon the intent of the parties, as determined from the words they have used. Estate of Stine, 251 Neb. at 875, *citing Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995). "Terms such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' 'subject to,' 'on condition that,' and similar phrases are evidence that performance of a contractual provision is a condition. Id., *citing Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

The Loan documents were amended, by letters dated March 3, 1994, to add paragraph 12(d), which states:

Prior to the disbursement of SBA loan funds in excess of \$5,000.00, Borrower will provide evidence satisfactory to SBA of the transfer of stock ownership from Frank D. Karpinski and Virginia E. Karpinski to John M. Meurrens and Margaret-Mary R. Meurrens.

(Fordyce Affidavit, exs. 16 and 17) (emphasis added).

While the record before the court is not clear, it appears that the SBA did not verify that the stock ownership was transferred prior to disbursing loan funds in excess of \$5,000.00. The record is also not clear concerning whether the stock transaction ever closed, but the SBA has demanded payment from the guarantors, the Meurrenses. Debtors argue that their liability is limited by the fact that SBA did not comply with the terms of the loan agreement.

The language used in the contract clearly creates a condition precedent. An event was required to occur before SBA was to disburse funds in excess of \$5,000.00. The phrase "prior to" is analogous to "after," "as soon as," "subject to," or "on condition that". The phrase means that before the SBA disbursed the loan proceeds, the SBA was to receive evidence that the contemplated stock transfer had been completed.

The SBA argues that paragraph 12(d), which created the condition precedent, is in the loan documents and that the SBA is attempting to collect on the guaranties, which do not contain the condition precedent. SBA's position, if accepted, would render the condition precedent absolutely meaningless as to the Meurrenses.

While the Meurrenses are not named borrowers on the loan documents, it is clear that they are intended third party beneficiaries of the condition precedent contained in the loan document. In order for a party to be an intended third party beneficiary, it "must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them." Properties Investment Group of Mid-America v. Applied Communications, Inc., 242 Neb. 464, 470, 495 N.W.2d 483 (1993). The provision in question, the condition precedent contained in paragraph 12(d), specifically names the Meurrenses and contemplates further actions involving them. The rights and interests of the Meurrenses were contemplated and provision was made for them in paragraph 12(d) of the loan document. As third party beneficiaries of the condition precedent, the Meurrenses have the right to insist that the condition precedent be honored. Their liability on the personal guaranties is limited if the condition precedent was

not satisfied and if the Meurrenses did not waive the condition precedent.¹

D. Waiver of the Condition Precedent

"The nonoccurrence of a condition precedent cannot be excused if occurrence of the condition was a material part of the agreed exchange." Lee Sapp Leasing, 248 Neb. at 836. However, a condition precedent may be waived. Pearce v. ELIC Corp., 213 Neb. 193, 201, 329 N.W.2d 74, 79 (1982) (citations omitted). The Nebraska Supreme Court explained the elements of waiver in Katske v. Nevada Bob's Golf of Nebraska, Inc., 238 Neb. 654, 472 N.W.2d 372 (1991). The Court stated:

[W]aiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, or conduct which warrants an inference of relinquishment of such a right. To establish waiver of a legal right, there must be clear, unequivocal, and decisive action by the party which demonstrates such purpose, or acts amounting to estoppel. Wheat Belt Pub. Power Dist. v. Batterman, 234 Neb. 589, 452 N.W.2d 49 (1990); Jelsma v. Scottsdale Ins. Co., 231 Neb. 657, 437 N.W.2d 778 (1989). A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to

¹If the condition precedent was neither satisfied nor waived, SBA's action may have provided a defense to the principal obligor and impaired the Meurrenses' ability to "step into the SBA's shoes" and proceed against the principal obligors. The general rule is "that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and, therefore, in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right." Custom Leasing, 195 Neb. at 298, 237 N.W.2d at 649. Alternatively, the Meurrenses may assert that the actions of the SBA, as creditor, were negligent, which could result in a release of the guarantors obligations. Id.

act as to induce the belief that it was the party's intention to waive. Jelsma, supra; Pearce v. ELIC Corp., 213 Neb. 193, 329 N.W.2d 74 (1982).

Katske, 238 Neb. at 372, 472 N.W.2d at 376.

The SBA, in its Motion for Summary Judgment, contends the Meurrenses waived any condition precedent. The Meurrenses dispute that a waiver occurred. Whether or not a waiver occurred is a question fact. Furthermore, as to this case, it is a material fact in dispute, which prevents summary judgment.

At trial, the Meurrenses will have the burden to establish the facts surrounding their assertion that the condition precedent did not occur. Thereafter, the burden will shift to the SBA to establish that the Meurrenses waived the non-occurrence of the condition precedent.

Conclusion

Since genuine issues of material fact exist, the Small Business Administration's Motion for Summary Judgment is denied. The clerk of the bankruptcy court shall set the matter for trial.

Separate journal entry to be filed.

DATED: June 10, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

HICKS, DAVID	444-1724
STRATMAN, GREGG	221-3680

Copies mailed by the Court to:

Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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DEBTOR(S))
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JOHN and MARGARET MEURRENS,) CH. 13
) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
)
UNITED STATES SMALL BUSINESS)
ADMINISTRATION,)
)
Defendant(s)) DATE: June 10, 1998
HEARING DATE: April 27,
1998

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion for Summary Judgment.

APPEARANCES

David Hicks, Attorney for debtors
Gregg Stratman, Attorney for SBA

IT IS ORDERED:

Since genuine issues of material fact exist, the Small
Business Administration's Motion for Summary Judgment is
denied. The clerk of the bankruptcy court shall set the
matter for trial. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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STRATMAN, GREGG 221-3680

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