[Cite as *Jae Co. v. Heitmeyer Builders, Inc.*, 2009-Ohio-2851.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Jae Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-1127 (C.P.C. No. 08CVH-02-2132)
Heitmeyer Builders, Inc. et al.,	:	
Defendants-Appellees,	:	(REGULAR CALENDAR)
(Daniel Lee Heitmeyer,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on June 16, 2009

Carlile Patchen & Murphy LLP, Joseph M. Patchen and *Robert T. Castor,* for appellee The Jae Company.

Fisher, Skrobot & Sheraw, LLC, David A. Skrobot and *Brett R. Sheraw,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Daniel Lee Heitmeyer ("Heitmeyer"), appeals from the judgment of the Franklin County Court of Common Pleas granting partial summary

judgment in favor of plaintiff-appellee, The Jae Company ("Jae Company"), on its claim that Heitmeyer is personally liable as a guarantor for the amount Heitmeyer Builders, Inc. ("HBI") owed on its account with Jae Company. Timely appealing the judgment entry upon the trial court's express determination pursuant to Civ.R. 54(B) that there is "no just reason for delay," Heitmeyer assigns a single error:

> THE TRIAL COURT ERRED BY RENDERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE AND AGAINST APPELLANT ON THE GUARANTY AT ISSUE IN THIS LITIGATION BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE GUARANTY LAPSED AND, THEREFORE, WAS NOT ENFORCEABLE AGAINST APPELLANT.

Because Jae Company never was given written notice terminating or revoking Heitmeyer's continuing guaranty as its express terms require, the trial court properly found the continuing guaranty did not lapse and Heitmeyer therefore remained personally liable for HBI's debt to Jae Company.

{¶2} The material facts are undisputed. Heitmeyer is the owner and president of HBI, a residential home construction corporation in Ohio. On June 23, 1994, HBI submitted a credit application to Jae Company in order to purchase kitchen and bath materials on credit. As part of HBI's credit application, Heitmeyer executed a "Continuing Guaranty of Payment for Materials," which, in relevant part, provided that the guaranty was "a continuing guaranty for all sales heretofore and hereafter made by [Jae Company] to [HBI]." Although it could be terminated, the guaranty specified it "shall continue for all such sales and materials delivered or caused to be delivered prior to the time that notice of the termination of this guaranty shall be received, in writing, by personal mail at the principal office of JAE Company."

{¶3} Upon Jae Company's approval of the credit application, HBI purchased materials on credit and then paid Jae Company in full for the items. Thereafter, in 1998 and on several occasions in 2006 and 2007, HBI again bought materials on credit from Jae Company. Beginning in the spring of 2007, HBI failed to pay Jae Company when it was invoiced for the materials.

{¶4} On February 11, 2008, Jae Company filed a complaint against HBI and Heitmeyer claiming breach of contract and seeking to recover $59,094.58 that HBI owed on its account. The breach of contract claim against Heitmeyer alleged he was personally liable for HBI's debt as a result of the continuing guaranty he signed in 1994 as guarantor for the credit issued to HBI. Contemporaneously with filing its complaint, Jae Company also sought, and was granted, a prejudgment attachment of a "Parade of Homes" property, scheduled to be sold at auction, that HBI or Heitmeyer, or both, owned. Jae Company received $9,202.50 from the auction of the property, leaving a remaining balance due of $49,891.50, plus interest, on HBI's account.

{¶5} In June 2008, Jae Company moved for summary judgment on its claim against Heitmeyer, submitting in support (1) HBI's 1994 credit application that contained Heitmeyer's personal guaranty of payment for materials HBI purchased, and (2) the invoices Jae Company issued to HBI in 2007 reflecting HBI's outstanding obligations. Jae Company also submitted an affidavit of its Director of Business Development who authenticated the documents submitted with the summary judgment motion, attested that Jae Company relied on Heitmeyer's personal continuing guaranty in supplying HBI with materials on credit, and further attested that Jae Company never received any written notice that Heitmeyer wished to terminate or revoke the continuing guaranty. In July 2008,

Heitmeyer filed a memorandum and affidavit in opposition to summary judgment, contending that, due to the passage of time since it was executed, the continuing guaranty had lapsed and therefore was no longer valid and enforceable against him.

{¶6} In a November 7, 2008 decision, the trial court rejected Heitmeyer's arguments and granted Jae Company summary judgment on its breach of contract claim against Heitmeyer. The court found Heitmeyer's 1994 guaranty continued for all sales to HBI and, pursuant to its express terms, remained effective until written notice that Heitmeyer revoked or terminated it. Heitmeyer's response to the summary judgment motion did not dispute Jae Company's evidence that no written notice terminating his guaranty ever was provided to Jae Company. Accordingly, the trial court found the continuing guaranty was still valid and enforceable against Heitmeyer and thus rendered him personally liable for HBI's outstanding obligations to Jae Company in the amount of $49,891.50. The court journalized its decision in a December 3, 2008 judgment entry.

{¶7} Asserting the trial court improperly granted summary judgment, Heitmeyer contends on appeal that genuine issues of material fact exist as to whether the guaranty he executed in 1994 lapsed and was no longer valid and enforceable against him as a guarantor for HBI's debt to Jae Company.

{¶8} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to

the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶9} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Civ.R. 56(E); *Dresher,* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 1997-Ohio-259. See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

{¶10} In order to recover on a breach of contract claim, a plaintiff must demonstrate the existence of a contract, plaintiff's performance, defendant's breach, and damage or loss to the plaintiff. *Jarupan v. Hanna,* 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. Heitmeyer does not dispute plaintiff's performance, HBI's breach or the resulting damages in the breach of contract claim against him. Rather, his assignment of error relates solely to the first element of the breach of contract claim: whether the continuing guaranty he signed in 1994 was still a valid and enforceable contract at the time HBI incurred the obligations at issue.

{¶11} A "continuing guaranty" is generally defined as "a guaranty of future indebtedness uncertain as to amount or time." *Gen. Motors Acceptance Corp. v. Mercure,* 8th Dist. No. 88963, 2007-Ohio-5708, ¶22, appeal not allowed, 117 Ohio St.3d 1477, 2008-Ohio-1841. More particularly, it is a " 'contract pursuant to which a person agrees to

be a secondary obligor for all future obligations of the principal obligor to the [creditor].' " Id., quoting Restatement (Third) of Suretyship and Guaranty, Section 16, Continuing Guaranty. Generally, a continuing guaranty remains effective until the guarantor clearly communicates an intent to revoke and no longer be bound by the guaranty. *Huntington Natl. Bank of Columbus v. Symetics Group, Inc.* (Jan. 18, 1977), 10th Dist. No. 76AP-690.

{¶12} "Courts construe guaranty agreements in the same manner as they interpret contracts." *Stone v. Natl. City Bank* (1995), 106 Ohio App.3d 212, 217, citing *G.F. Business Equip., Inc. v. Liston* (1982), 7 Ohio App.3d 223, 224. The construction of a written contract is a matter of law for the court. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The purpose of contract construction is to effectuate the intent of the parties, which is presumed to reside in the language they chose to employ in the agreement. *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus; *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus (approving and following *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph one of the syllabus); *Resolution Trust Corp. v. GSW Assoc.* (Mar. 24, 1992), 10th Dist. No 91AP-1084. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander,* supra, paragraph two of the syllabus.

{¶13} Heitmeyer first argues that the continuing guaranty is not valid and enforceable against him with regard to HBI's outstanding obligations in 2007, because he believed his personal guaranty of payment for materials HBI purchased was not

continuous but related solely to HBI's initial purchase of materials from Jae Company in 1994.

{¶14} Courts will not, in effect, create a new contract by finding an intent not expressed in the clear language the parties employed. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 54-55; *Alexander,* supra, at 246; *G.F. Business Equip.,* supra. Where the language of a contract is clear and unambiguous, no issue of fact need be determined, and the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations. *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322; *Uebelacker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268, 271; *Maines Paper & Food Service, Inc. v. Eanes* (Sept. 28, 2000), 8th Dist. No. 77301.

{¶15} A plain, unambiguous contract does not become ambiguous simply because its operation may work a hardship upon one of the parties. *Aultman Hosp. Assn.,* supra, at 55; *Resolution Trust Corp.,* supra. The precise words of a contract bind a guarantor, like a surety, and other words cannot be added by construction or implication. *G.F. Business Equip.,* supra, at 224, citing *Morgan v. Boyer* (1883), 39 Ohio St. 324. The rule does not entitle the guarantor "to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed." Id. "It is not the responsibility or function of this court to rewrite the parties' contract to provide for such circumstances." *Aultman Hosp. Assn.,* supra.

{¶16} The continuing guaranty Heitmeyer executed is resolvable by its own terms, which are clear and precise. Heitmeyer's purported belief that he guaranteed payment

only of HBI's initial purchase of material in 1994 is in direct conflict with the unambiguous language of the continuing guaranty which assures his payment to Jae Company "for *all sales* heretofore and *hereafter made* by [Jae Company] to [HBI]." (Emphasis added.) No language in the guaranty limits its duration or its application to any specific purchases. Moreover, Heitmeyer presented no evidence that his subjective belief or intention was ever communicated to Jae Company. "The uncommunicated subjective intentions of one party have no significance in determining the meaning of disputed terms." *G.F. Business Equip.,* supra. Accordingly, by its express terms, Heitmeyer's guaranty is "continuing" in nature to "all sales" Jae Company made to HBI. See *Mercure* at ¶22.

{¶17} Heitmeyer next argues that genuine issues of material fact exist as to whether the continuing guaranty lapsed by virtue of the passage of time since it was executed in 1994. Heitmeyer urges this court to follow courts in other jurisdictions which concluded that a continuing guaranty, unlimited in duration, imposes liability upon a guarantor only for such period of time as is reasonable in light of all the circumstances of the particular case. See *Monroe Ready Mix Concrete, Inc. v. Westcor Dev. Corp.* (Conn.1981), 439 A.2d. 362; *Looney v. Belcher* (Va.1937), 192 S.E. 891; *Lehigh Coal & Iron Co. v. Scallen* (Minn.1895), 63 N.W. 245. Not only do those authorities not bind us, but they are inapplicable: unlike the continuing guaranty Heitmeyer executed, the language of the continuing guarantees in the noted cases did not give the guarantor the ability to terminate the guaranty.

{¶18} Well-settled Ohio law has established that a continuing guaranty "is not limited in time or to a particular transaction, or to specific transactions, but *is operative until revoked*." (Emphasis added.) *Merchants' Natl. Bank v. Cole* (1910), 83 Ohio St. 50,

syllabus; *Mercure* at ¶25; *Huntington Natl. Bank,* supra. The continuing guaranty Heitmeyer executed on June 23, 1994 plainly states it "shall continue" for all sales Jae Company made to HBI, and it further expressly provides the guaranty can be terminated by written notice to Jae Company. Because the continuing guaranty expressly provided Heitmeyer with the right to revoke the guaranty in writing, and he undisputedly failed to exercise that right, Heitmeyer's guaranty of payment for HBI's purchases of materials on credit from Jae Company continued to be valid and enforceable against him for HBI's outstanding debt to Jae Company. *Merchants' Natl. Bank; Mercure; Huntington Natl. Bank,* supra.

{¶19} Because no genuine issue of material fact exists, the trial court properly found as a matter of law that Heitmeyer's continuing guaranty remained valid and enforceable against him, thus making him personally liable for HBI's outstanding obligations to Jae Company in the amount of $49,891.50. Accordingly, we overrule Heitmeyer's single assignment of error and affirm the trial court's judgment against him.

Judgment affirmed.

McGRATH and TYACK, JJ., concur.

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