[Cite as *WM Capital Partners, L.L.C. v. Beaver*, 2015-Ohio-2772.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

WM CAPITAL PARTNERS, LLC,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 14CA19
v.	:	
	:	DECISION AND
	:	JUDGMENT ENTRY
JEFFREY A. BEAVER, ET AL.,	:	
	:	
Defendants-Appellants.	:	Released: 07/01/2015

APPEARANCES:

Lori Pritchard Hardin, Circleville, Ohio, for Appellants.

John J. Rutter, Akron, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Defendants-Appellants, Jeffrey A. Beaver and Jeffrey L. Lanman, appeal a decision from the Pickaway County Court of Common Pleas which granted summary judgment in favor of plaintiff-appellee, WM Capital Partners, LLC. The dispute at issue originally involved two vehicle lease agreements between 1st Carrier Corp., a company in which Beaver and Lanman were officers, and Insurlease, LLC. Beaver and Lanman had also signed personal guaranties in their individual capacities in favor of Insurlease, LLC. Insurlease, LLC later assigned its rights in the leases to the Tennessee Commerce Bank ("TCB"). No separate assignments appear to exist of the personal guaranties from Insurlease, LLC to TCB.

{¶ 2} 1st Carrier Corp. filed a bankruptcy petition after the assignment of the leases to TCB. Beaver and Lanman, however, did not file a bankruptcy petition in their individual

capacities. In the bankruptcy proceedings, TCB and 1st Carrier Corp. entered into an adequate protection agreement with respect to the two leases. TCB and Beaver and Lanman made no specific provisions for the personal guaranties.

{¶ 3} At some point, the Tennessee Department of Financial Institutions closed TCB; and the Federal Deposit Insurance Corporation ("FDIC") was appointed as TCB's receiver. The FDIC then executed assignments of the leases to the appellee WM Capital Partners, LLC. The assignments from FDIC to WM Capital Partners, LLC included the collateral documents.

{¶ 4} Due to an alleged default of payments upon the leases, WM Capital Partners, LLC filed a complaint against Beaver and Lanman based upon the personal guaranties for the outstanding debt of approximately $120,731.29. During the proceedings, WM Capital Partners, LLC filed a motion for summary judgment. The trial court granted the motion in favor of WM Capital Partners, LLC.

{¶ 5} Here on appeal, we find that Beaver and Lanman have failed to raise a genuine issue of material fact. Therefore, appellants' sole assignment of error is overruled; and the judgment of the trial court is affirmed.

I. FACTS

{¶ 6} In November 2007, 1st Carrier Corp. entered into a "Fixed Term Motor Vehicle Lease" with Insurlease, LLC where Insurlease, LLC agreed to lease to 1st Carrier Corp. one 2007 Freightliner M2-112 Day Cab Tractor in return for monthly payments of $1,706.13 The contact listed on the rental agreement for 1st Carrier Corp. was "Jeffrey Lanman." In May 2008, the parties entered into a similar transaction for a different tractor. The forms used in this transaction were nearly identical to the ones used in 2007. Insurlease, LLC agreed to lease a 2009

Freightliner Cascadia Road Tractor to 1st Carrier Corp. in return for monthly payments of $2,267.16. The contact listed on this rental agreement for 1st Carrier Corp. was "Jeff Lanman."

{¶ 7} Both lease agreements state, in part:

> 15. Assignment or Sublease. ***Lessor may assign this lease and/or mortgage the vehicle, in whole or part, without notice to Lessee and its assignee or mortgagee may reassign this lease and/or such mortgage, without notice to Lessee. Each such assignee and/or mortgagee shall have all the rights but none of the obligations of Lessor under this lease.
>
> * * *
>
> 18. Default. Each of the following events will constitute an "*Event of Default*" hereunder: (a) Lessee's failure to pay when due any lease payment or other charges required herein to be paid; (b) Lessee's failure to observe or perform any other agreement required herein to be observed or performed by Lessee and Lessee's continued failure for ten days following written notice thereof by Lessor to Lessee; (c) the cessation of doing business as a going concern or assignment for the benefit of creditors by lessee or any guarantor of this lease or any partner in Lessee if Lessee is a partnership; (d) the bankruptcy or receivership of Lessee;***

{¶ 8} Beaver and Lanman ("appellants") also signed two documents entitled "Unconditional Guaranty (by Individual)." Each guaranty declared: "WHEREAS, the undersigned has requested Insurlease, LLC (LESSOR) to lease equipment to: 1st Carrier Corp (LESSEE) and the LESSOR has leased and/or may in the future lease equipment by reason of such request and in reliance upon this guaranty." The guarantees also state in part:

NOW, THEREFORE, in consideration of such lease of equipment and/or the lease in the future of equipment in its discretion by LESSOR to LESSEE (whether to the same, greater or lesser extent than the limit of this guaranty), the undersigned (who, if two or more in number, shall be jointly and severally bound) hereby unconditionally guarantees to LESSOR and its successors and assigns the punctual payment when due, with such sales or use taxes as may accrue thereon, of all rental payments, debts, and obligations (including legal fees and expenses) of the LESSEE, now existing or hereafter arising under, and the performance by the LESSEE of all the terms and conditions of, any Equipment, Vehicle or other Lease, whether heretofore or hereafter entered into between LESSOR and LESSEE.

***

This is a guaranty of payment and not of collection and also a guaranty of performance. The liability of the undersigned on this guaranty shall be absolute, continuing, direct and immediate and not conditional or contingent upon the pursuit of any remedies against LESSEE or any other person, nor against collateral, securities, or liens available to LESSOR, its successors or assigns.

* * *

If the LESSEE is a corporation, *this obligation covers all Leases, rental payments, debts and obligations to LESSOR, purporting to be incurred or undertaken in behalf of such corporation by any officer or agent or said corporation* without regard to the actual authority of such officer or agent. (Emphasis added.)

{¶ 9} On November 16, 2007, Steven Kochensparger ("Kochensparger"), a member of Insurlease, LLC, signed an "Assignment" in favor of TCB. Insurlease, LLC was referred to as the "Originator" in the "Assignment." The vice president signed the "Assignment" for TCB on November 19, 2007. The "Assignment" stated in part the following:

> Originator assigns to TCB all of Originator's right, title and interest in and to the following: (a) the Documents described below (the "Documents"); (b) all Payments payable under the Documents and any and all rights to late fees or other charges or monies due and to become due thereunder;
>
> * * *
>
> Originator assigns to TCB all proceeds of any of the foregoing and of any insurance maintained under the Documents, and any award or payment made to with respect to the Equipment or the Documents in any bankruptcy, reorganization or other court of administrative action, and all rights and remedies under the Documents, including the right to collect, lease, rental, principal and interest payments other payments due thereunder, to repossess the Equipment in the event of a default by the Obligor under the Documents, and to take legal proceedings or actions.

{¶ 10} Further, the "Description of Documents" in the assignment states:

> Description of Documents (Title and Date, Obligor Name): 20% TRAC Lease—11/13/2007- 1st Carrier Corp.

{¶ 11} On May 30, 2008, a second "Assignment" was executed by Kochensparger, as member of Insurlease, LLC, with nearly identical terms as the first "Assignment." A bank officer

with TCB signed the "Assignment" on June 3, 2008. The "Description of Documents" in the second "Assignment" states as follows:

> Description of Documents (Title and Date, Obligor Name): 20% TRAC Lease-05/30/2008- 1st Carrier Corp.

{¶ 12} In November 2009, 1st Carrier Corp. filed a Chapter 11 bankruptcy petition. A final decree in the bankruptcy proceedings was issued in December 2011. During the bankruptcy proceedings, TCB and 1st Carrier Corp. negotiated an adequate protection agreement with respect to the leased vehicles involved in the 2007 and 2008 transactions. The protection agreement provided for monthly payments commencing on September 1, 2010 of $1,401.63 for the 2007 Freightliner and $1,739.95 for the 2008 Freightliner. The corresponding personal guarantees were not mentioned in the protection agreement.

{¶ 13} Subsequent to the assignments from Insurlease, LLC to TCB, TCB was closed; and the FDIC was appointed as the receiver for TCB. In August 2012, FDIC, as receiver for TCB, executed an "Assignment and Assumption of Interests and Obligations" as the "Assignor." WM Capital Partners, LLC was designated as the "Assignee" with respect to this transaction. The assignment included the following:

> Assignor hereby transfers, grants, conveys and assigns to Assignee all of Assignor's right, title and interest in the Agreements to Pay, the Collateral Documents, the Real Estate Interests, and the Miscellaneous Agreements.

The assignment included the following information:

10423000598	12056	1st Carrier Corporation	$38,364.43	N	Released
10423001901	14085	1st Carrier Corporation	$82,433.00	N	Released

{¶ 14} After 1st Carrier Corp. failed to make the monthly payments, in January 2013 and April 2013, WM Capital Partners, LLC recovered and liquidated the subject vehicles of the 2007 and 2008 leases. WM Capital Partners, LLC applied the amount recovered from the vehicle sales to the amounts owed under the leases. In May 2013, WM Capital Partners, LLC sent a written demand to Beaver and Lanman to pay the remaining outstanding balance of $33,983.82 on the 2007 lease and $86,747.47 on the 2008 lease. Then, in June 2013, after failing to receive payments as requested, WM Capital Partners, LLC filed its complaint against Beaver and Lanman in the Pickaway County Court of Common Pleas, alleging damages of $33,983.82 for the remaining balance under the 2007 Lease and $86,747.47 for the remaining balance under 2008 lease.

{¶ 15} Shortly after filing its complaint, WM Capital Partners, LLC filed a motion for summary judgment. In support of its motion, WM Capital Partners, LLC provided the trial court with the deposition of Kochensparger and the affidavit of Roy L. Watters, Jr. ("Watters, Jr."). In response to a subpoena, Kochensparger produced copies of files maintained for the 2007 and 2008 transactions with 1st Carrier Corp. The papers included correspondence from Kochensparger to TCB indicating 1st Carrier Corp.'s desire to lease two vehicles from Insurlease, LLC and the willingness of Beaver and Lanman, owners of 90% of the company, to personally guarantee the financing. In Kochensparger's deposition, he testified that he personally closed the 2008 lease in Circleville, Ohio with Beaver and Lanman present. Kochensparger attested that he witnessed Beaver and Lanman sign both the 2008 lease and the 2008 guaranty. He also acknowledged that a lease was done in 2007, stating: "So I had a prior relationship. The first lease was done on 11-13-2007." Kochensparger acquired copies of Beaver and Lanman's driver's licenses as a requirement of the transaction.

{¶ 16} Watters, Jr. is the senior litigation/ bankruptcy coordinator employed by Portfolio Financial Servicing Company ("PFSC"). His affidavit states the following:

***

2. I have firsthand knowledge of the facts of this matter as set forth below and routinely manage and control the documents at issue in this case.

3. PFSC is the duly authorized servicing agent for Plaintiff WM Capital Partners, LLC ("WM Capital") pursuant to the Limited Power of Attorney executed on September 21, 2012, a true and accurate copy of which is attached hereto as Exhibit L-1.

4. On August 9, 2012, WM Capital took assignment of the 2007 Lease, the 2007 Guaranty, the 2008 Lease, and the 2008 Guaranty, as described in the Motion, from the Federal Deposit Insurance Corporation, as receiver for Tennessee Commerce Bank, pursuant to an Assignment and Assumption of Interests and Obligations that is dated August 9, 2012. A true and accurate copy of said Assignment and Assumption is attached hereto as Exhibit L-2.

5. The copies of the 2007 Lease, 2007 Guaranty, 2008 Lease and 2008 Guaranty that have been filed with the Motion are true and accurate copies of those documents as they exist in my file.

***

7. Lessee 1st Carrier Corp. ("1st Carrier") defaulted upon its payment obligations under the 2007 Lease and the 2008 Lease subsequent to WM Capital's taking assignment of said obligations.

***

10. Despite due demand, 1st Carrier has failed to pay the amounts that are due and owing to WM Capital under the 2007 Lease and the 2008 Lease.

11. Despite due demand, Beaver and Lanman has failed to pay the amounts that are due and owing to WM Capital under the 2007 Guaranty and the 2008 Guaranty.

The date of the affidavit is March 25, 2014.

{¶ 17} In their motion contra to the motion for summary judgment, Beaver and Lanman argued that WM Capital Partner, LLC's evidence was insufficient and genuine issues of material fact existed to preclude summary judgment. Four exhibits were included in the motion contra: (1) 1st Carrier Corp.'s plan of reorganization under Chapter 11 bankruptcy, (2) the letter WM Capital Partners, LLC sent Beaver demanding payment under the 2007 and 2008 leases and guaranties, (3) an affidavit from Beaver, and (4) an affidavit from Lanman. The affidavits both stated the following:

1. I am a Defendant in this action. I was formerly an officer with 1st Carrier Corp.

2. I have no personal recollection of executing a personal unconditional guaranty for the lease of a 2007 Freightliner M2-112 Day Cab Tractor.

3. I have no personal recollection of executing a personal unconditional guaranty for the lease of a 2009 Freightliner Cascadia Road Tractor.

4. I did not have sufficient personal assets to guarantee any such leases in 2007 and 2008.

5. I was never asked to provide periodic personal financial statements to Insurlease or any other entity associated with the transactions at issue.

6. When the Lessee, 1st Carrier Corp, underwent a Chapter 11 bankruptcy reorganization, the use of a personal guaranty for the 2007 and 2008 leases was never addressed by the Lessor.

7. I recall dealing with Steven Kochensparger in my capacity as an officer of 1st Carrier Corp, however, I did not have dealings with him in my individual capacity.

8. I did not agree to be bound by the terms of a personal guaranty in 2007.

9. I did not agree to be bound by the terms of a personal guaranty in 2008.

{¶ 18} The trial court granted summary judgment in favor of WM Capital Partners, LLC. Specifically, the trial court found that Beaver and Lanman executed the 2007 guaranty and the 2008 guaranty. The trial court rejected Beaver and Lanman's claim that they did not intend to be individually bound by the terms of the guaranties. The trial court cited the language of the guaranty specifying that the guarantees were made to the lessor [Insurlease, LLC] *and its successors and assigns*. The trial court also concluded that the personal guaranties of the individual defendants were not liabilities or debts owned by 1st Carrier Corp., thereby excluding them from the company's bankruptcy proceedings. Therefore, the trial court found that there were no genuine issues of material fact that Beaver and Lanman executed the guaranties and granted WM Capital Partners, LLC's motion for summary judgment. Beaver and Lanman then filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Appellant's Sole Assignment of Error:

THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANTS BY GRANTING SUMMARY JUDGMENT IN APPELLEE'S FAVOR IN LIGHT

OF CONTRADICTORY EVIDENCE WHICH CREATES A GENUINE ISSUE OF MATERIAL FACT.

III. SUMMARY JUDGMENT STANDARD

{¶ 19} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 20} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996).

{¶ 21} To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate that

the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs,* 4th Dist. Pickaway No. 11 CA25, 2012–Ohio–3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher* at 293. However, once the initial burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Id.*; Civ.R. 56(E).

IV. LAW AND ANALYSIS

{¶ 22} Within their sole assignment of error, Beaver and Lanman raise several arguments in support of their position that the trial court erred in granting WM Capital Partners, LLC's motion for summary judgment. Beaver and Lanman contend that these arguments raise genuine issues of material fact. Beaver and Lanman's arguments include the following: 1) the facts of *Hoffman & Kuhn, Inc. v. Lynch*, 8th Dist. Cuyahoga No. 49581, 1985 WL 80941985 Ohio App. are analogous to the case at bar and that Beaver and Lanman should not be held liable in their personal capacities; 2) Beaver and Lanman deny knowledge of executing the 2007 and 2008 personal guaranties; 3) WM Capital Partners, LLC have failed to present sufficient proof that they performed under the terms of the contract at issue; 4) the affidavit presented by WM Capital Partners, LLC is insufficient to prove damages in a breach of contract claim; 5) an ambiguity exists in the unconditional guaranties because no evidence was submitted to prove that any financial statements were ever demanded or exchanged by the parties; and lastly 6) a question exists of whether or not the unconditional guaranties were absolute.

{¶ 23} "Under Ohio law, '[a] guaranty is a contract through which one party guarantees payment for debts incurred by another person or entity.' " *LB-RPR REO Holdings, L.L.C. v. Ranieri*, 10th Dist. Franklin No. 11AP-471, 2012 -Ohio- 2865, ¶ 23 quoting *Thayer v. Diver*, 6th Dist. Lucas No. L–07–1415, 2009–Ohio–2053, ¶ 77 citing *Nesco Sales & Rental v. Superior Elec. Co.*, 10th Dist. Franklin No. 06AP–435, 2007–Ohio–844, ¶ 10. "In general, Ohio courts construe guaranties, and releases thereof, 'in the same manner as they interpret other contracts." *Id.* (Internal and other quotations omitted.)

{¶ 24} Our analysis will involve contract interpretation. "In construing a written instrument, the primary and paramount objective is to ascertain the intent of the parties so as to give effect to that intent." *Shafer v. Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013-Ohio-885, ¶ 10 citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "Courts must give common words their ordinary meaning unless manifest absurdity would result or some other meaning is clearly evidenced from the face or overall contents of the written instrument." *Id*., citing *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 29. " 'If a contract is clear and unambiguous, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead, the court must give effect to the agreement's express terms.' " *Id*., quoting *Uebelacker v. Cincom Sys., Inc.*, 48 Ohio App.3d 268, 271, 549 N.E.2d 1210 (1st Dist.1988). Further, "[i]f a guaranty's terms are clear and unambiguous, a court may not construe it to have another meaning." *O'Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App.3d 233, 862 N.E.2d 549, 2006–Ohio–5264, ¶ 23 (1st Dist.).

{¶ 25} First, Beaver and Lanman submit that the facts of *Hoffman & Kuhn, Inc. v. Lynch*, 8th Dist. Cuyahoga No. 49581, 1985 WL 8094 are analogous to the case here. In *Hoffman*, the

Eighth District agreed with a lower court's decision that the purported guarantors executed guarantees as officers of a corporation, which later filed for bankruptcy. *Id.* at *3. The alleged guarantor inserted the following words in the guaranty document: we, the undersigned *AS OFFICERS AND AGENTS OF CLARK TECHNICAL CORPORATION [followed by his initials]*. *Id.* at *2. The alleged guarantor also signed his name at the bottom and added "Vice President of Clark Technical Corporation." *Id.* at *2.

{¶ 26} "The signature itself represents a clear indication that the signator is acting as an agent if: (1) the name of the principal is disclosed, (2) the signature is preceded by words of agency such as 'by' or 'per' or 'on behalf of', and (3) the signature is followed by the title which represents the capacity in which the signator is executing the document, e.g., 'Pres.' or 'V.P.' or 'Agent.' " *Baltes Commercial Realty v. Harrison*, 2nd Dist. Montgomery No. 23177, 2009-Ohio-5868, ¶ 56 quoting *George Ballas Leasing, Inc. v. State Sec. Serv., Inc.*, 6th Dist. Lucas No. L-91-069, 1991 WL 280135 (Dec. 31, 1991). (Other citations omitted).

{¶ 27} However, "When an officer of a company signs his or her name along with the name of her corporate title, 'the general rule of interpretation governing this kind of signature is that such words as 'president' are merely descriptive of the character or capacity of the person signing the document,' and the individual signing the guaranty cannot deny personal liability if the language of the guaranty is clear and unambiguous. *Baltes Commercial Realty v. Harrison*, 2nd Dist. Montgomery No. 23177, 2009-Ohio-5868, ¶ 55 quoting *Westgate Village Shopping Ctr. v. Parker*, 6th Dist. Lucas No. L-08-1017, 2008-Ohio-2571, at ¶ 8, quoting *S-S-C Co. v. Hobby Ctr.*, 6th Dist. Lucas No. L-92-049, 1992 WL 355205, (Dec. 4, 1992); *Wells Fargo Bank, N.A. v. WSW Franchising, Inc.*, 10th Dist. Franklin No. 09AP-26, 2009-Ohio-3845.

{¶ 28} The case sub judice is not analogous to facts in *Hoffman*. Beaver and Lanman signed the guaranties with their respective names printed underneath. There is no indication that Beaver and Lanman were intending to sign in their capacity as officers of 1st Carrier Corp. Furthermore, the title on both of the guaranties is "UNCONDITIONAL GUARANTY (By Individual)." Therefore, Beaver and Lanman's first argument that the facts here are similar to *Hoffman* and they did not intend to be personally bound when they signed the guarantees is not well taken.

{¶ 29} Next, Beaver and Lanman contend that WM Capital failed to present sufficient evidence to show the breach of a contract. In order to succeed on a breach of contract claim, the plaintiff must demonstrate that: (1) a contract existed; (2) the plaintiff fulfilled his obligations; (3) the defendant breached his obligations; and (4) damages resulted from this breach. *Chaney v. Ramsey*, 4th Dist. Pike No. 98CA614, 1999 WL 217656, *5 (Apr. 7, 1999), citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2nd Dist.1994).

{¶ 30} First Beaver and Lanman argue that WM Capital Partners, LLC failed to present sufficient evidence of the existence of a contract[1], specifically, whether or not they [appellants] executed unconditional personal guaranties. In their affidavits, both Beaver and Lanman expressly deny knowledge of executing the personal guaranties or that they agreed to be bound by a personal guaranty. The position of Beaver and Lanman is that even if the deposition testimony of

[1] With respect to whether or not a contract exists, Beaver and Lanman argued that the personal guaranties were not assigned in their motion contra to summary judgment but not here on appeal. Therefore, we decline to address the argument of whether or not the guaranties were assigned. App.R. 12; 16. See also *Bd. of Trustees Thorn Township v. Dillow*, 5th Dist. No. 2006-CA-7, 2006-Ohio-6888, at ¶ 37; *Fisk Alloy Wire, Inc. v. Hemsath*, 6th No. L-05-1097, 2005-Ohio-7007, at ¶ 72; *State v. Peoples*, 2nd Dist. No.2005CA20, 2006-Ohio-4162, at ¶ 24 (holding that the court may decline to address arguments not assigned as error pursuant to App.R. 12 and 16).

Kochensparger is found to be proof of the existence of the 2008 guaranty, WM Capital Partners,LLC failed to present similar evidence of the existence of the 2007 guaranty.

{¶ 31} Here the 2007 and 2008 guaranties are practically identical in form and wording. The guaranties provide that in consideration of the lease of equipment, the undersigned unconditionally guaranties to lessor, Insurlease, LLC the payments, debts, and obligations of the lessee, 1st Carrier Corp. Insurlease, LLC's sales manager, Kochensparger, testified in a deposition that Beaver and Lanman had entered into a lease in 2007. He also testified that he personally witnessed Beaver and Lanman sign the 2008 guaranty. Kochensparger made copies of Beaver and Lanman's Ohio driver's licenses and their signatures. The signatures on the 2007 and 2008 guaranties are similar with "Jeffrey A. Beaver" and "Jeffrey L. Lanman" printed underneath.

{¶ 32} WM Capital Partners, LLC argues that the affidavits of Beaver and Lanman are purely self-serving and are not supported by corroborating evidence. On the issue of affidavits without corroboration, this Court in *U.S. Nat'l. Bank Assn. v. Bobo*, 4th Dist. Athens No. 13CA45, 2014-Ohio-4975, ¶ 16 stated:

> "Mere speculation and unsupported conclusory assertions are not sufficient" to meet the nonmovant's reciprocal burden under Civ.R. 56(E) to withstand summary judgment. *Loveday v. Essential Heating Cooling & Refrigeration, Inc.*, 4th Dist. Gallia No. 08CA4, 2008–Ohio–4756, ¶ 9. A self-serving affidavit that is not corroborated by any evidence is insufficient to establish the existence of an issue of material fact. *Wells Fargo Bank v. Blough*, 4th Dist. Washington No. 08CA49, 2009–Ohio–3672, ¶ 18; *Deustche Bank Natl. Trust Co. v. Doucet*, 10th Dist. Franklin No. 07AP–453, 2008–Ohio–589, ¶ 13 ("We also find that Doucet's self-serving affidavit, which was not corroborated by any evidence, is insufficient to

> establish the existence of material issues of fact").“ ‘To conclude otherwise would enable the nonmoving party to avoid summary judgment in every case, crippling the use of Civ.R. 56 as a means to facilitate the early assessment of the merits of claims, pre-trial dismissal of meritless claims and defining and narrowing issues for trial.’ “ [Internal quotations omitted.] *Blough* at ¶ 18, quoting *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003–Ohio–7190, ¶ 36.

{¶ 33} Here, Beaver and Lanman's affidavits are without corroboration that they did not enter into the leases and personal guaranties at issue. We agree with WM Capital Partners, LLC that the affidavits do not raise a genuine issue of material fact. The record supports a conclusion that appellants in fact executed the personal guaranties in the process of entering the 2007 and 2008 leasing agreements.

{¶ 34} Beaver and Lanman next argue that WM Capital Partners, LLC failed to present sufficient proof that they [WM Capital Partners, LLC] performed under the contract. Here, Beaver and Lanman do not cite any evidence for this particular argument. Beaver and Lanman do not dispute the existence of the leases or that 1st Carrier Corp. obtained the benefit of the leased vehicles. The reorganization plan introduced in the motion contra to summary judgment specifically mentions the two vehicles involved in the leasing agreements. Beaver and Lanman provide nothing to have us conclude that Insurlease, LLC failed to perform its obligations under the lease agreements. Therefore, this argument fails to raise a genuine issue of material fact.

{¶ 35} Additionally, Beaver and Lanman contend that WM Capital did not establish either the third or fourth elements of a breach, default and damages. Beaver and Lanman argue that the statements in Roy Watters Jr.'s affidavit, "Despite due demand, Beaver and Lanman have each

failed to pay the amounts due and owing to WM Capital under the 2007 Guaranty and the 2008 Guaranty" was not enough to establish the default and damages elements of a breach. Beaver and Lanman cite to *Huntington National Bank v. Dale & Lisa's Expert Specialties Corp.*, Lucas C.P. No. CI 09-1907 (Apr. 23, 20010) in support of their argument that a conclusory affidavit submitted by plaintiff was not enough to establish default and damages. In *Huntington*, The Lucas County Court of Common Pleas ruled that the plaintiff's conclusory affidavit "*** as contrasted in Defendant's favor, does not *necessarily* show that the Corporation actually defaulted under the terms and conditions of the Promissory Note or the date of any such default."

{¶ 36} Civ. R. 56(A) clearly permits a movant to seek summary judgment with or without affidavits. The civil rules instruct only that affidavits "***be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ. R. 56(E). Roy Watters, Jr.'s affidavit states that he has first hand knowledge of these events as a Senior Litigation/Bankruptcy Coordinator, and he attests that 1st Carrier Corp. has failed to pay amounts due under the leases, as well as Beaver and Lanman's failure to pay under the personal guaranties.

{¶ 37} In addition, the record, supplied both by Beaver and Lanman and WM Capital Partners, LLC, establishes that 1st Carrier Corp. filed for bankruptcy on November 23, 2009. Under the 2007 and 2008 leases, the agreement states under the section titled "18. Default." that "(d) the bankruptcy or receivership of Lessee" will constitute an "*Event of Default*." Beaver and Lanman also admit in interrogatories that they have never made a payment under the guaranties.

{¶ 38} Watters, Jr.'s affidavit states the purported damages WM Capital Partners, LLC seeks in its judgment. Although the trial Court in *Huntington* found the plaintiff's submitted affidavit did not show default, Civ. R. 56(E) allows the moving party to rely on proper affidavits

in order to establish a claim for damages. *See e.g. Scioto Cty. Bd. of Commrs./Revolving Loan Fund Bd. v. McDermott Industries, L.L.C.*, 4th Dist. Scioto No. 12CA3504, 2014-Ohio-240, ¶ 23; *Lethrer v. McClure*, 5th Dist. Stark No. 2013CA00039, 2013-Ohio-4690, ¶¶ 15-16. Beaver and Lanman do not dispute the amount of damages[2] sought by WM Capital Partners, LLC, but instead direct this court's attention to their own affidavits. Having already determined that the affidavits of Beaver and Lanman do not raise a genuine issue of material fact and are deficient in proving they did not execute the guaranties, we cannot find merit in their argument regarding WM Capital Partners, LLC's claim of default and damages.

{¶ 39} Beaver and Lanman also cite paragraph 7 of the unconditional guaranties, stating: "so long as this guaranty is in effect, the undersigned shall provide LESSOR with continuing periodic financial statements at intervals of not less than every year…" and asserts that the intent of the provision is unclear and ambiguous. Beaver and Lanman argue that no evidence was submitted by WM Capital Partners, LLC to prove any financial statements were ever demanded or exchanged by the parties. Also Beaver and Lanman set forth that the continued ability to remain financially responsible was integral in the continuing obligation of unconditionally guaranteeing the lease. This speculative argument does not raise a genuine issue of material fact regarding the liability of appellants upon the guaranties.

{¶ 40} Finally, Beaver and Lanman argue that the question exists about whether or not the unconditional guaranties in this case were "absolute." However, paragraph five of the guaranties

[2] It appears that the assignment from FDIC as receiver for TCB to WM Capital Partners, LLC assigns the right to collect $38,364.43 and $82,433.00 for a total of $120,797.43 from Beaver and Lanman; however, since Beaver and Lanman do not specifically dispute the amount of damages on appeal, we also decline to address this issue. App.R. 12; 16. See also *Bd. of Trustees Thorn Township v. Dillow*, 5th Dist. No.2006-CA-7, 2006-Ohio-6888, at ¶ 37; *Fisk Alloy Wire, Inc. v. Hemsath*, 6th No. L-05-1097, 2005-Ohio-7007, at ¶ 72; *State v. Peoples*, 2nd Dist. No.2005CA20, 2006-Ohio-4162, at ¶ 24 (holding that the court may decline to address arguments not assigned as error pursuant to App.R. 12 and 16).

states: “The liability of the undersigned on this guaranty shall be *absolute*, continuing, direct and immediate and not conditional***.” (Emphasis supplied.) This argument is also without merit.

{¶ 41} Even construing the record and all inferences in the nonmoving parties’ favor, we find that the trial court properly granted WM Capital Partners, LLC’s motion for summary judgment. WM Capital Partners, LLC met its initial burden by providing evidence of the rights, assignments, and assumptions with respect to the 2007 lease, 2007 guaranty, 2008 lease and 2008 guaranty. It is clear that 1st Carrier Corp. defaulted on the leases, because 1st Carrier Corp. entered bankruptcy in violation of paragraph 18 section (d) of the 2007 and 2008 leases. The affidavit of Roy Watters, Jr. then set forth the amount of damages owed on the lease after the vehicles were liquidated. Beaver and Lanman failed to meet their reciprocal burden because their self-serving affidavits failed to raise a genuine issue of material fact regarding the execution of the 2007 and 2008 personal guaranties. Their arguments here on appeal also fail to raise any genuine issues of material fact in regards to their liability under the guaranties. Therefore, the trial court properly granted WM Capital Partners, LLC summary judgment against Beaver and Lanman as guarantors of the outstanding debts owed under the 2007 and 2008 lease agreements between WM Capital Partners, LLC's successor, Insurlease, LLC, and 1st Carrier Corp.

V. CONCLUSION

{¶ 42} For the foregoing reasons, appellants’ sole assignment of error is overruled; and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellants shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.