[Cite as *Toledo v. Firstar Bank, N.A.*, 2004-Ohio-5238.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

The City of Toledo	Court of Appeals No. L-03-1167
Appellee	Trial Court No. CI-2001-2905
v.	
Firstar Bank, N.A., et al.	**DECISION AND JUDGMENT ENTRY**
Appellants	Decided: September 24, 2004

* * * * *

Barbara E. Herring, City of Toledo Law Director, Adam Loukx and Gary Taylor, for appellee.

Richard M. Kerger, Kimberly A. Donovan, and R. Joseph Parker, for Appellant.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee city of Toledo on the claims for breach of contract and promissory estoppel made by appellant Firstar Bank, N.A.

{¶ 2} In early 1997, a representative of the National Foundation for Retirement and Housing Preservation ("Foundation") appeared before the Toledo City Council and asked the city of Toledo ("city") to guarantee a portion of the debt on a loan the Foundation was seeking from Firstar Bank, N.A. ("Firstar") in order to build low-cost housing in Toledo. In April 1997, the city council passed an ordinance directing the city

administration to enter into such an agreement with the Foundation. In June 1997, the Foundation and the city entered into a "Funding Agreement" which required the city to provide an initial $230,000 as security to be paid Firstar against any first-year repayment deficiency. The Funding Agreement also provided that, if the Foundation defaulted on the Firstar loan, the mayor would ask city council to appropriate and authorize additional funding to replenish funds drawn down in the previous year, in an amount not to exceed $230,000 per year for a period of nine years. In July 1997, the city council passed an ordinance allocating $230,000 into a reserve fund for the benefit of the Foundation and Firstar, which had loaned the Foundation approximately $8.7 million. In 1998 and 1999, the Foundation defaulted on its obligations to Firstar and by July 1999, Firstar had drawn all of the $230,000 which the city had paid into the reserve. An ordinance was presented to city council in late 1999, requesting appropriation of an additional $159,530.80 for the reserve fund, but city council refused to act upon the proposed ordinance. Additional funds were never appropriated by city council and the Foundation abandoned the housing project in 1999. Since the reserve became depleted, Firstar has made repeated demands on the city and city council to appropriate and authorize payment of $230,000 per year for up to nine additional years.

{¶ 3} In May 2001, the city filed an action in the trial court seeking a declaration of its duties and obligations under the 1997 Funding Agreement. Thereafter, Firstar sought a declaration that the Funding Agreement obligated the city and the mayor to authorize funding of as much as $230,000 per year for a period of ten years. Firstar also stated claims for breach of contract and promissory estoppel against the city and the

mayor. Firstar and the city eventually filed motions for summary judgment, and on December 2, 2002, the trial court filed its decision granting, inter alia, summary judgment in favor of the city.

{¶ 4} Appellant raises the following assignments of error:

{¶ 5} "I. The trial court erred to the prejudice of appellant when it granted the City of Toledo summary judgment on appellant's claim for breach of contract.

{¶ 6} "II. The trial court erred to the prejudice of appellant when it granted the City of Toledo summary judgment on appellant's claim for promissory estoppel."

{¶ 7} Upon thorough review of the record, applicable law, appellant Firstar's arguments on appeal, and the decision of the trial court, we find that the trial court correctly considered the pertinent facts and issues in dispute, correctly applied the law to the facts, and rendered judgment accordingly. We therefore adopt the well-reasoned decision of the trial court as our own. (See *The City of Toledo v. Firstar Bank, N.A., et al*. (Dec. 2, 2002), Lucas C.P. No. CI2001-2905, attached hereto as Appendix A.)

{¶ 8} Appellant's assignments of error are therefore found not well-taken. On consideration whereof, this court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.
JUDGE

APPENDIX A

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

The City of Toledo,	*	
Plaintiff,	*	Case No. CI0200102905
vs.	*	OPINION AND JUDGMENT ENTRY
Firstar Bank, N.A., et al.,	*	Hon. Charles J. Doneghy
Defendants,	*	
and	*	
Firstar Bank, N.A.,	*	
Third Party Plaintiff,	*	
vs.	*	
Carleton S. Finkbeiner, etc.,	*	
Third Party Defendant.	*	

This case is before the Court upon the following motions: 1) the motion for summary judgment -- on the complaint, counter-claim, and third-party complaint -- filed by defendant Firstar Bank, N.A. ("Firstar") against the plaintiff, the City of Toledo ("the City"), and against the third-party defendant, the mayor of the City ("the mayor"); 2) the motion for partial summary judgment filed by the City and the mayor against Firstar on the complaint

and the counter-claim; 3) the motion for judgment on the pleadings filed by the City and the mayor as to Firstar's third-party complaint filed against the mayor; and 4) the Motion to Amend Complaint and Add a Party Defendant filed by the City. Upon review of the pleadings, evidence, memoranda of counsel, and applicable law, the Court finds that it should grant in part and deny in part Firstar's motion for summary judgment, grant in part and deny in part the City's and the mayor's motion partial summary judgment, deny the City's and the mayor's motion for judgment on the pleadings as that motion is moot, and grant the City's motion to amend the complaint.

I. FACTS

Construing the allegations in a light most favorable to nonmovants, and for the purpose of ruling on the instant motions only, the Court finds the following to be established facts.

In 1997, defendant National Foundation for Retirement and Housing Preservation, Inc. ("the Foundation"), a Virginia non-profit corporation, sought to develop and rehabilitate two groups of existing properties in Toledo, Lucas County, Ohio, known as the Beacon Place Development and the Cub-Ship Properties (collectively referred to as "the Properties") to provide up to 300 low-income and moderate-income housing units ("the Project") for Toledo residents. (Complaint paras.3, 9.) Defendants Cavista Corporation, Inc., Vista Capital Group, Inc., and Cavalear Corporation, Inc. (referred to collectively as "the Cavista

defendants") and a non-party, Edwin Bergsmark, undertook agency roles for the Foundation in Toledo in relation to the Project. (See Complaint paras.5, 11-12.) In order to obtain financing for the purchase of the Properties, the Foundation learned that it would need a loan-debt-service guarantee from the City. (Complaint para.11.) In March 1997, the Foundation submitted a proposal and financing plan to the City. (Id.) To help the Foundation secure financing for the project, on or about April 1, 1997, the legislative body of the City ("the Council") passed Ordinance No. 194-97. (Complaint paras.11, 13.) In relevant part, Ordinance No. 194-97 reads as follows:

> "**ORD. 194-97 Authorizing and directing the Mayor to enter into an agreement with [the Foundation] for the purpose of providing a guarantee that the project debt will be serviced for a period not to exceed ten years; establishing a reserve to fund balance of Two Hundred Thirty Thousand and 00/100 Dollars ($230,000.00) from CDBG [Community Development Block Grant] fund for the purpose of establishing a loan guarantee for Beacon Place Development; and declaring an emergency.**
>
> "WHEREAS, [the Foundation] desires to purchase [the Properties]; and
>
> "WHEREAS, [the Foundation] will provide 201 home ownership opportunities by converting the Beacon Place complex in to condominiums and will improve 104 additional apartment units through the purchase and rehabilitation of the Cub-Ship properties; and
>
> "WHEREAS, [the Foundation] has submitted a proposal and financing plan that has identified a need to obtain loan debt service guarantees in order to secure the financing required to purchase and rehabilitate the properties; and
>
> "WHEREAS, said loan guarantees will be required for a period of ten years and the Department of Neighborhoods will request up to [$230,000.00] annually from future CDBG allocations and program income to complete [the

City's] Department of Neighborhoods commitment to guaranteeing the debt service for this project for the ten-year period; NOW, THEREFORE,

Be it ordained by the Council of the City of Toledo:

SECTION 1. That the Mayor is authorized and directed to enter in to an agreement with [the Foundation] that declares [the City's] intent to guarantee the debt service on a loan for the purchase and rehabilitation of [the Properties] in an amount not to exceed [$230,000.00] per year for a period of ten years as the first appropriation against the CDBG program in each year.

"SECTION 2. To establish a reserve to fund balance of [$230,000.00] to Account Code 15-0000-0832 from the unappropriated balance of the Block Grant Fund from Account Code 15-0000-0822 for [$230,000.00] for the purpose of guaranteeing the debt service on the subject loan.

"SECTION 3. That this Ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage. The reason for the emergency lies in the fact that funds are needed immediately to establish a loan guarantee.

"[Passed by the Council April 1, 1997; Approved by former mayor April 2, 1997.]" (Boldface sic; emphasis added.)

Subsequently, on June 17, 1997, the City's then-mayor entered into a Funding Agreement ("the Funding Agreement") with the Foundation. In relevant part, the Agreement reads as follows:

"FUNDING AGREEMENT

"This is a Funding Agreement * * * dated as of June 17, 1997 by and among [the Foundation] and [the City]. This Agreement is entered into pursuant to the provisions of Ordinance No. 194-97 passed by [the Council] on April 1, 1997.

"The Foundation is purchasing [the Properties], and the City has determined that the acquisition and rehabilitation of the Properties will preserve and improve residential opportunities for its citizens. The City further determined that the financing plan to purchase and rehabilitate the Properties required certain security to enable the Foundation to obtain financing for such purchase and rehabilitation. A Bank is providing

financing to the Foundation, which financing will require the City to provide at closing [$230,000.00], from Community Development Block Grant funds, as security to be paid against any first year repayment deficiency. The City upon an event of default shall on an annual basis request [the Council] to appropriate and authorize funding to replenish any amounts drawn down in the previous year, up to an amount not to exceed [$230,000.00], for a period of [9] years.

"NOW, THEREFORE, in consideration of the premises and in order to induce the Foundation to purchase and rehabilitate the Properties and to induce financing therefore, the parties hereby agree[] as follows:

"1. The City will appropriate and authorize in 1997, from [CDBG] funds for the City * * * the amount of [$230,000.00] as security to be paid against any first year repayment deficiency.

"2. The City shall on an annual basis for a period of [9] years, commencing upon an event of default, request [the Council] to appropriate and authorize funding to replenish any amounts drawn down in the prior year up to an amount not to exceed [$230,000.00].

"3. If at such time as the financing is paid in full, any City funds being held as security shall be released to the City.

"4. The Foundation and the City hereby acknowledge[] that in the event of default, all City amounts currently being held as security shall be paid over to the Foundation. It is further acknowledged that in the event of default, all City amounts as shall become due per this Agreement and as appropriated and authorized by [the Council], shall be paid over on an annual basis to the Foundation, up to an amount not to exceed the maximum amount described in the Agreement or the amount of actual loss if less.

"5. This Agreement shall bind the City, the Foundation and their respective successors and assigns and shall enure to the benefit of the Bank and its successors and assigns.

"[Signed by the former mayor; no signature by a representative of the Foundation.]" (Emphasis added.)

On July 3, 1997, a closing was held during which Firstar and the Foundation entered into a "Reimbursement Agreement." (Bailey

Affid. paras.7-8.) Pursuant to the Reimbursement Agreement, Firstar extended approximately $8.7 million in credit to the Foundation, and the Foundation assigned to Firstar all of the Foundation's rights under the Funding Agreement. (Id.) At the same time, the City allocated by check the amount of $230,000, which was authorized and provided for in Ordinance No. 194-97 and the Funding Agreement, into a reserve fund ("the reserve") for the benefit of the Foundation and Firstar. (Bailey Affid. para.9; Ordinance No. 194-97; Counterclaim and Third-Party Claim paras.6, 12; Firstar Motion Brief p.4.) On or about July 8, 1997, following the closing between the Foundation and Firstar, the City enacted Ordinance No. 447-97 which repealed and replaced Section 2. of Ordinance 194-97. The new Section 2 language reads in pertinent part as follows:

> "SECTION 2. That the Director of Finance be and is hereby authorized and directed to draw his warrant or warrants against Accounting Code 15-1620-5850-STD-REH-G23073 (Rehabilitation Loans) in an amount not to exceed [$230,000.00] in payment of obligations herein authorized upon presentation of the proper voucher or vouchers therefor, for the purpose of guaranteeing the debt service on the subject loan." (Emphasis added.)

The Foundation met its financial obligations under the Reimbursement Agreement and the Funding Agreement in 1997. (Bailey Affid. para.10.) In 1998 and again in 1999, the Foundation defaulted on its obligations. (Id.) By July 1999, because of the defaults, Firstar had drawn from the reserve all of the $230,000 which the City had paid into the reserve at the time of closing. (See id; Ordinance No. 194-97.) In the following years, the Foundation continued to be in default in the project and remains in

default. (Id.) On or about November 12, 1999, the City's Department of Neighborhoods submitted proposed Ordinance No. 900-99 to the Council for consideration. (Weber Affid. Exh.2.) In that proposed legislation, the City requested the Council to appropriate $159,530.80 to the reserve established for guaranteeing Firstar's financing of the Project and requested the Council to authorize the expenditure of that sum for payment to Firstar. (Id.) The Council did not pass the proposed legislation. (Weber Affid. para.4.) The Council has not made any other appropriation to the reserve and has not authorized any expenditure to Firstar or the reserve other than the $230,000 initially placed in the reserve and made available to the Foundation and to Firstar at the time of the July 1997 closing. (See Bailey Affid. paras.10-11.) Since the reserve became depleted, Firstar has made repeated demands on the City and the Council to appropriate and authorize payment of money to Firstar up to the total of $230,000 per year for up to nine more years. (See Complaint para.22.)

The City filed this action seeking, among other relief, a declaration that it owes no duty to Firstar to appropriate and authorize more funding beyond the $230,000 already authorized by Ordinance No. 194-97 in 1997. The City also brings fraud and quantum meruit claims against the Cavista defendants and the Foundation, and the City brings breach of contract claims against the Foundation. Firstar filed a counterclaim against the City and a third-party complaint against the former mayor in his official

capacity.[1] In that pleading, Firstar "seeks mandatory [injunctive] relief to compel the City and [the mayor] to meet their clear legal duty, manifested by [the Funding Agreement], to notify [the Council] of certain fiscal defaults and to require [the Council] to appropriate and authorize funding to cure those defaults, as required by [the Funding Agreement]"; Firstar also seeks recovery of damages from the City and the mayor under the theories of breach of contract and estoppel (Counterclaim and Third-Party Claim paras.1, 29, 33, 34-37.) The City and Firstar have moved for summary judgment on the issues outlined above. The City and the mayor have moved for judgment on the pleadings on the third-party claim brought by Firstar against the mayor. The City also seeks to file an amended pleading to join non-party Edwin Bergsmark.

II. SUMMARY JUDGMENT MOTIONS

A. SUMMARY JUDGMENT STANDARD

To succeed on a Civ.R. 56(C) motion for summary judgment, the movant must demonstrate:

> "(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 but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." Harless v. Willis Day Warehousing Co.

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[1] The Court has substituted the current mayor in this action. The Court will continue to refer to the third-party defendant current mayor and his predecessor together as "the mayor."

(1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

See, also, Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201. "The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." Id. at 370, citing Dresher v. Burt (1996), 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. Accord Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-430, 1997-Ohio-259, 674 N.E.2d 1164; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 114-115, 526 N.E.2d 798. In response, the nonmoving party may not rest on the allegations of her pleading, instead she must establish a genuine issue of material fact by affidavit or in some other manner provided in Civ.R. 56. State ex rel. Burnes v. Athens Cty. Clerk of Courts (1998), 83 Ohio St.3d 523, 524, 1998-Ohio-3, 700 N.E.2d 1260.

B. DISCUSSION - SUMMARY JUDGMENT

In its motion for partial summary judgment, the City seeks a declaration that it owes no duty, pursuant to Ordinance No. 194-97, Ordinance No. 447-97, and the Funding Agreement, to pay money to Firstar beyond the $230,000 which was originally authorized through the ordinances and the Funding agreement. The City also seeks summary judgment on Firstar's counterclaim. The City contends that it breached no duty owed to Firstar. The City bases its arguments on three grounds: 1) Ordinance No. 194-97 is not a contract; 2) the Funding Agreement does not require further

payments to Firstar; and 3) Ohio statutory law and the City's charter and ordinances preclude further financial duties on the part of the City to Firstar.[2] In its motion, Firstar seeks a declaration that: 1) Ordinance No. 194-97 and the Funding Agreement are enforceable by Firstar and contain an obligation on the part of the City to guarantee up to $230,000 per year for ten years; 2) the mayor is required to notify the Council of the above described defaults by the Foundation; and 3) the Council is required to appropriate and to authorize funding to cure those continuing defaults. Firstar bases its arguments on two grounds: 1) Ordinance No. 194-97 and the Funding Agreement impose these requirements on the City (contractual grounds); and 2) the City made express representations to Firstar that it would provide a guarantee of $230,000 per year for ten years (estoppel grounds). The Court will address the parties arguments together.

1. Contractual Grounds

As a preliminary matter, the Court finds that Firstar has standing to seek to enforce contractual obligations arising under the Funding Agreement between the City and the Foundation; Firstar is a third-party beneficiary of the Funding Agreement. In Ohio, only a party to a contract or an intended third-party beneficiary

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[2] The City has asserted a challenge to the validity of the Funding Agreement based on a lack of signature by a representative of the Foundation. However, for the purpose of ruling on the instant motions, the Court will hold this argument in abeyance.

may bring an action on a contract. Grant Thornton v. Windsor House (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220.

> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> "(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> "(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> "(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." (Emphasis added.) Hill v. Sonitrol of Southwestern Ohio, Inc. (1988), 36 Ohio St.3d 36, 40, 521 N.E.2d 780, quoting Restatement of the Law 2d, Contracts (1981) 439-440, Section 302.[3]

In this case, several parts of the Funding Agreement indicate the City's and the Foundation's intention for the Funding Agreement to benefit Firstar. A portion of the second paragraph of the agreement reads as follows: "A Bank is providing financing to the Foundation, which financing will require the City to provide at closing [$230,000.00] * * *." (Emphasis added.) And, item No. 5 reads in relevant part as follows:

> "5. This Agreement shall bind the City, the Foundation and their respective successors and assigns and shall enure to the benefit of the Bank and its successors and assigns." (Emphasis added.)

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[3] Comment e to Section 302 states:

"Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created. * * *." See Hill v. Sonitrol of Southwestern Ohio, Inc., 36 Ohio St.3d at 40, 521 N.E.2d 780.

Thus, because the City and the Foundation clearly envisioned that Firstar would be protected by the provisions of the Funding Agreement, Firstar is a third-party intended beneficiary and may properly seek to enforce rights under the agreement.

The primary issue is whether Ordinance No. 194-97, Ordinance No. 447-97, and/or the Funding Agreement, together or independently, create a duty on the City to provide any further money (beyond the $230,000 already disbursed at the closing in July 1997) into the reserve for the benefit of Firstar as a result of the default of the Foundation on its financing agreement with Firstar. Firstar contends that Ordinance No. 194-97 and the Funding Agreement are the only relevant documents, because Ordinance No. 447-97 was enacted after closing and, thus, had no impact on the parties prior to the closing. The City contends that the Funding Agreement is the only binding document in this dispute and that Ordinance No. 194-97 is not a contract. The City contends that the Funding Agreement plainly provides for only a limited guarantee; thus, the City committed to provide the $230,000 at closing and committed only to request further disbursements from the Council in the event of further default and depletion of the reserve.

a. Which Documents, if Any, Constitute the Contract

An initial sub-issue is whether Ordinance No. 194-97 is an independent contract, a part of the Funding Agreement, or has no contractual weight at all. As a general rule, "city charters and

ordinances that confer benefits on individual citizens are not 'contracts' that the legislature cannot alter." Kohler v. Hirst (E.D.Va.1978), 460 F.Supp. 412, 416. Additionally,

> "[legislation] providing for the letting of contracts require some form of acceptance to the contract or action thereupon. The enactment of legislation directing to whom a contract should be awarded '* * * is not the making of a contract but is merely preliminary to the making of the written contract provided for by the [legislation], and such contract is the only one the [government] is by the [legislation] authorized to make.' * * *. Consequently, a city is not bound until a written contract is executed * * *." (Emphasis added.) Cleveland v. Highland Hills (June 24, 1993), Cuyahoga App. Nos. 64604, 64605, 1993 Ohio App. Lexis 3187, *13.

In this case, Section No. 1, in Ordinance 194-97, states in pertinent part as follows: "the Mayor is authorized and directed to enter in to an agreement with [the Foundation] that declares [the City's] intent to guarantee the debt service on a loan for the purchase and rehabilitation of [the Properties] * * *." (Emphasis added.) The ordinance plainly contemplates a subsequent contract to embody a guarantee. Thus, the Court finds that Ordinance No. 194-97 is legislation that is merely preliminary to the making of a contract. The Court also finds that the ordinance is not a contract in and of itself; the Funding Agreement was the only contract which the City and the mayor were authorized to make. See Cleveland v. Highland Hills, supra, 1993 Ohio App. Lexis 3187, *13.

b. Interpretation of the Contract

The interpretation of an ordinary written contract is a matter of law for the court. Latina v. Woodpath Dev. Co. (1991),

57 Ohio St.3d 212, 214, 567 N.E. 262. A court's primary focus is to give effect to the intentions of the parties as expressed in the plain language of the contract. Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St.3d 51, 53, 544 N.E. 920. There is a presumption that the intent of the parties is contained in the language of the contract. Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, 132, 509 N.E. 411. As a general rule, where contract language is clear and unambiguous, a court should not resort to rules of construction or look beyond the plain meaning of the contract's terms to determine the rights and obligations of the parties. Seringetti Constr. Co. v. Cincinnati (1988), 51 Ohio App.3d 1, 4, 553 N.E. 1371. When the contract language is clear, the court will employ the ordinary meaning of the words used in the contract. Alexander v. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241, 374 N.E. 146, paragraph two of the syllabus.

This general rule is modified slightly when construing guarantee agreements. In V.F., Inc. v. Hamilton (May 9, 1980), Lucas App. No. L-79-356, 1980 Ohio App. Lexis 9785, the court quotes a concise summary of the rules governing construction of guarantee agreements. In relevant part, the Hamilton court stated as follows:

> "* * * [T]he rule is well established in Ohio that in construing a guaranty, the language used is to be understood in its plain and ordinary sense, as read in the light of surrounding circumstances, the situation of the parties, and the object of the guaranty, and that construction given which most nearly conforms to the intention of the parties. Parol evidence is not admissible to enlarge or limit the terms of the instrument. But evidence of the surrounding circumstances is competent, in order to arrive at the intention of the

> parties, as declared by the words employed, which are to be construed in the light of such circumstances.
>
> "The chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first [i.e., restrictive or continuous]. Unless the language is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits, it should be confined to the immediate * * * a guaranty will not be construed as continuing unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt * * * if the language is equally capable of each construction, the one will be adopted which construes it to be limited, and not the one which construes it to be continuing." (Brackets sic; emphasis added.) Id. at *5-6.

Thus, in case of ambiguity or uncertainty, a guarantee contract is to be construed in favor of the guarantor. Norriss v. D.D. Fashions, Inc. (Apr.3, 1991), Summitt App. No. 14843, 1991 Ohio App. Lexis 1527, *4 (this is "the general rule in Ohio"), citing Morgan v. Boyer (1883), 39 Ohio St. 324; Liquidating Midland Bank v. Stecker (1930), 40 Ohio App. 510, 179 N.E. 504. See, also, 52 Ohio Jurisprudence 3d (1997) 290, Guaranty and Suretyship, Section 50.

The City argues that the plain language of the Funding Agreement required the City to place $230,000 into the reserve at the July 1997 closing for coverage of any initial default (Funding Agreement item No.1.),[4] and the language thereafter only requires the City to "request" the Council "to appropriate and authorize

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[4] Item No.1 reads in pertinent part as follows:

"1. The City will appropriate and authorize in 1997 * * * the amount of [$230,000.00] as security to be paid against any first year repayment deficiency * * *." (Emphasis added.)

funding to replenish any amounts drawn down in the prior year" from the reserve (Funding Agreement para.2 of introductory language, and item No.2).[5] The City also asserts that, while the Funding Agreement is a guarantee, the agreement is only a limited and restricted guarantee rather than an absolute one.

Firstar, on the other hand, focuses on item No.4 of the Funding Agreement.[6] Firstar contends that this "in the event of default" language requires the mayor to "request" and also unconditionally requires the Council to "[pay] over" those amounts "appropriated and authorized by [the Council]."

An unconditional (also known as an absolute) guarantee is

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[5] Paragraph 2 reads in relevant part as follows:

"The City upon an event of default shall on an annual basis request [the Council] to appropriate and authorize funding to replenish any amounts drawn down in the previous year, up to an amount not to exceed [$230,000.00], for a period of [9] years." (Emphasis added.)

Item No.2 reads as follows:

"2. The City shall on an annual basis for a period of [9] years, commencing upon an event of default, request [the Council] to appropriate and authorize funding to replenish any amounts drawn down in the prior year up to an amount not to exceed [$230,000.00]." (Emphasis added.)

[6] Item No.4 reads in pertinent part as follows:

"4. The Foundation and the City hereby acknowledge[] that in the event of default, all City amounts currently being held as security shall be paid over to the Foundation. It is further acknowledged that in the event of default, all City amounts as shall become due per this Agreement and as appropriated and authorized by [the Council], shall be paid over on an annual basis to the Foundation, up to an amount not to exceed the maximum amount described in the Agreement or the amount of actual loss if less." (Emphasis added.)

one that depends on no condition or contingency expressed in or implied from the agreement. 52 Ohio Jurisprudence 3d (1997) 268, Guaranty and Suretyship, Section 31. However, a guarantee need not be absolute; a guarantee may be limited as to the amount guaranteed and restricted as to the time or transactions covered. Id. 265, Section 29.

The Court finds that, in this case, the Funding Agreement was a limited guarantee. The only amount allocated toward the reserve by the Funding Agreement was the limited sum of $230,000 appropriated initially by Ordinance No. 194-97 and the Funding Agreement "to be paid against any first year repayment deficiancy." (Funding Agreement, item No.1; See Ordinance No. 194-97, item No.2; Counterclaim and Third-Party Claim paras.6, 12; Firstar Motion Brief p.4.) The Court also finds that the Funding Agreement is a restricted guarantee because it expressly contemplates that "the City" request the Council to "appropriate and authorize" any funding necessary to "replenish" the reserve for future defaults if the initial $230,000 had been drawn down. (Funding Agreement, para.2 of introductory language, and item No.2.) Rather than placing an unconditional duty on the City to guarantee, this plain and ordinary language clearly places only the following duties on the City: 1) to provide the initial sum of $230,000 for the reserve at closing; 2) to pay that $230,000 upon default; and 3) to "request" the Council to appropriate and authorize further amounts into the reserve after the depletion of the original $230,000. The Funding Agreement places a mandate on the City to "request," it

places no mandate on the Council to appropriate and authorize further sums. A standard definition of "request" is, "1a: to ask (as a person or an organization) to do something * * *." Webster's Third New Internatl. Dictionary (1993) 1929. This meaning is distinct and far different from that attributed to "require," which is defined as, "5. to impose a compulsion or command upon (as a person) to do something." Id.

The Court also finds that, even if Ordinance No.194-97 is read as part of the Funding Agreement, it does not make an unconditional guarantee of nine further appropriations of $230,000. Nowhere in that legislation are the words "absolute" or "unconditional" used in conjunction with "guarantee." The ordinance authorizes the mayor "to enter into an agreement with [the Foundation] that declares [the City's] intent to guarantee the debt service on a loan for the purchase and rehabilitation of [the Properties]." (Ordinance No. 194-97, section 1.) Firstar does not dispute that the ordinance also appropriates only $230,000 into the reserve. (Id., section 2; Firstar Motion Brief p.4.) Thus, construing the language of the Funding Agreement and Ordinance No. 194-97 in favor of the guarantor in this matter, the City, the Court finds that the City and the Council owe no duty to pay any further funds to Firstar. See Norriss v. D.D. Fashions, Inc., supra, 1991 Ohio App. Lexis 1527, *4; 52 Ohio Jurisprudence 3d (1997) 268, Guaranty and Suretyship, Section 31.

The Court notes that it may take into consideration the "surrounding circumstances" in this case to determine the intent

behind the guarantee. V.F., Inc. v. Hamilton, supra, 1980 Ohio App. Lexis 9785, *5. However, to do so would not change the result. Even if parole evidence were to be used,[7] Firstar has not presented any evidence indicating that the City had intended to undertake an unconditional guarantee of the debt service. On the other hand, the Court finds that the surrounding circumstances actually indicate that the City and the Foundation intended a limited guarantee. R.C. 705.18 authorizes municipal legislative authorities to make appropriations on an annual basis. That section reads as follows:

> "An annual appropriation ordinance shall be prepared by the legislative authority of a municipal corporation * * *. The annual appropriation ordinance shall * * * not exceed the total balances carried over from the previous year plus the estimated revenue of the current year. Supplemental appropriations shall not be made during the current year except from a contingent fund regularly set aside by the legislative authority in the annual appropriation ordinance or unless by an ordinance passed as an emergency measure." (Emphasis added.)

Thus, this statute contemplates that the Counsel, and not the mayor or the executive branch, make appropriations. In this case, Ordinance No. 194-97 commits the City to provide only $230,000, and that legislation directs "the City" to "request" that the Council appropriate further amounts. The Council neither "appropriated" nor "authorized" more than the initial $230,000 allocated into the

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[7] However, parole evidence is not to be used in this analysis. V.F., Inc. v. Hamilton, supra, 1980 Ohio App. Lexis 9785, *5.

reserve.[8]

As a supplementary argument, the City asserts that, even were Ordinance No. 194-97 and the Funding Agreement to place a further contractual duty on the City, that obligation would be unenforceable pursuant to Sections 226 and 229 of the Toledo Charter and R.C. 5705.41. Section 226 reads as follows:

> "No contract shall be executed or order involving the expenditure of money shall be made unless there is attached thereto a certificate of the Director of Finance that the amount required to meet the same has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of appropriate funds free from any previous incumbrance as prescribed by the Revised Code of Ohio; and all expenditures of money shall be subject to the provisions thereof." (Emphasis added.)

Section 229 reads as follows:

> "All contracts, agreements or other obligations entered into, and all ordinances, resolutions, and orders adopted, contrary to the provisions of the three preceding sections, shall be void, and no person shall have any claim or demand against the City thereunder, nor shall the Council, or any officer of the City, waive or qualify the limits fixed by any ordinance, resolution or order, complying with this or the three preceding sections, or fasten upon the City any liability whatever in excess of such limits, or release any party from an exact compliance with his or her contract under such ordinance, resolution or order." (Emphasis added.)

R.C. 5705.41 uses similar language to that employed in Sections 226 and 229. R.C. 5705.41 reads in pertinent part as follows:

> "No subdivision or taxing unit shall:
>
> "* * *

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[8] Because of the Court has found that the Funding Agreement does not place a duty on the Council to approve further appropriations, the Court need not determine whether Ordinance No. 447-97 has any impact on the matters now before the Court.

> "(D)(1) * * * make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. * * *." (Emphasis added)

Generally, "the violation of these provisions render[s] the contract attempted to be entered into absolutely void and of no binding effect on the city". Hawley v. Toledo (1934), 47 Ohio App. 246, 247, 191 N.E. 827 ("City's contract for purchase of materials for bridge repair * * * in absence of certificate that money was in treasury applicable to such purpose, void, entitling taxpayer to have city's payment of money thereunder enjoined, though materials had been used for purposes intended," syllabus). See, also, Lathrop Co. v. Toledo (1966), 5 Ohio St.2d 165, 173, 214 N.E.2d 408 (It is well-established that, "the contractor must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril * * * ").

The Court finds that this back-up argument is without merit. It is true that a review of the Funding Agreement reveals that no certificate of the Director of Finance is attached as required by Section 226 and R.C. 5705.41(D)(1). However, Firstar

properly argues that the requirements of R.C. 5705.41 and Sections 226 and 229 are not applicable here. Firstar cites to R.C. 5705.42 which provides that when a municipality is entitled to a grant from the federal government, such as the Community Development Block Grants in this case, "the amount thereof is deemed appropriated for such purpose by the taxing authority of the subdivision as provided by law * * *." The Ohio Attorney General has opined that when such funds are indeed allocated, R.C. 5705.42 obviates the requirement of R.C. 5705.41(D) that the Director of Finance issue a certificate of the availability of the funds. 1991 Ohio Atty.Gen.Ops. No. 172; 1991 Ohio AG Lexis 31.[9]

It is important at this juncture to determine who must make the "request" that more money be placed into the reserve. The Court finds that the Funding Agreement, Ordinance No. 194-97, and surrounding circumstances indicate that the executive branch of the City must "request"; the Council is the body that may or may not "appropriate and authorize" further funding. Ordinance No. 194-97 indicates that, while "the Mayor" was authorized to enter into the Funding Agreement, "the Department of Neighborhoods" is the designated entity within the City to make any request. (Ordinance No. 194-97, Whereas Para.4.) In fact, the Department of

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[9] However, contrary to Firstar's contention, the Court finds that R.C. 5705.42 does not itself "appropriate and authorize" further expenditures into the reserve. That section only states that grants, such as CDBGs, are appropriated by the "taxing authority." The section does not obviate the need for the Council to make a further appropriation and authorization in order to place more monies into the reserve. See R.C. 705.18; Funding Agreement, item No.2.

Neighborhoods is the division of the City that did make such a request in November 1999. (See Proposed Ordinance No. 900-99.) Thus, the Court finds that, rather than the mayor, the Department of Neighborhoods is the City entity that properly must make any request from the Council.

Based on the foregoing, the Court finds that the City's motion for partial summary judgment on the breach of contract issue should be granted in part and denied in part, and Firstar's motion on this issue should be granted in part and denied in part. The City owes no contractual duty to Firstar to appropriate and authorize further money into the reserve, and, therefore, the City has caused no damage to Firstar by the Council's refusal.

2. Estoppel Grounds

In its motion, Firstar argues that "principals of estoppel" preclude the City from disaffirming explicit representations made about the guarantee. Firstar asserts that the City made representations in Ordinance No. 194-97 and in the Funding Agreement that must be enforced in favor of Firstar.

The four prima facie elements of estoppel are as follows:

> "(1) that the party knowingly made a false representation or concealment of a material fact (or at least took a position contrary to that now taken); (2) that the representation must be made in a misleading manner with the intention or expectation that another would rely on it to act; (3) that the plaintiff actually relied on the representation; and (4) that plaintiff relied to his detriment so much that unless the party is estopped from asserting the truth or a contrary position, plaintiff would suffer loss." (Emphasis added.) Wood v. Dorcas (1998), 126 Ohio App.3d 730, 735, 711 N.E.2d 291.

The plaintiff must establish each of these elements by clear and unequivocal evidence. Id. "Estoppel of the city may be predicated * * * upon the actions of some governing body or official who has authority to act * * * ." Welch v. Lima (1950), 89 Ohio App. 457, 468, 102 N.E. 888.

In this case, Firstar officers do not claim that the City made any representation to Firstar other than the representations contained in Ordinance No. 194-97 and in the Funding Agreement. (See Bailey Depo. pp.39-40; Cinquana Depo. pp.19-20, 28.) Based on the discussion in the previous section, in which the Court determined that these documents do not establish an unconditional guarantee (but, instead, they create a limited and restricted guarantee), the Court finds that reasonable minds could only conclude that the City made no material misrepresentation or concealment of material fact. There exists no clear and convincing evidence of any misrepresentation by the City to Firstar. Accordingly, the Court finds that the City's motion on this issue (see City Motion Brief pp.18-19) must be granted and Firstar's must be denied.

3. Conclusion - Summary Judgment

Based on the foregoing, the Court finds that the City is entitled to judgment as a matter of law on the breach of contract and estoppel claims asserted against it. Additionally, in the interest of judicial economy, the Court will grant summary judgment in favor of the mayor on these issues even though the mayor did not

clearly move for summary judgment on these bases.

> "While Civ.R. 56 does not ordinarily authorize courts to enter summary judgment in favor of a non-moving party, Marshall v. Aaron (1984), 15 Ohio St.3d 48, [472 N.E. 335,] syllabus, an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law. Houk v. Ross (1973), 34 Ohio St.2d 77, [296 N.E. 266,] paragraph one of the syllabus." State ex rel. Cuyahoga Cty. Hosp. v. Bur. of Workers' Comp. (1986), 27 Ohio St.3d 25, 28, 500 N.E. 1370.

In the proper situation, contract-based or declaratory judgment cases are types that are particularly well-suited for summary judgment in favor of a non-moving plaintiff. Stahl v. State Farm Mut. Auto. Ins. (1992), 82 Ohio App.3d 599, 602, fn. 1, 612 N.E. 1260. When evidence on all justiciable issues has been submitted to the court, the procedure of granting judgment to the nonmovant allows the court to make the same decision and to enter the same judgment that it would have made and entered had the nonmovant filed a motion for summary judgment. Id. Accordingly, the Court will grant summary judgment in favor of the mayor on Firstar's contract and estoppel claims.

The Court also finds that the City, the mayor, and Firstar are entitled to the following declaration and affirmative injunctive relief: 1) the Department of Neighborhoods has a duty to request and must request that the Council appropriate and authorize up to $230,000 from CDBG funds per year for the remaining nine years contemplated in the Funding Agreement; and 2) the

Council is not required to appropriate and authorize such sums.[10]

III. JUDGMENT ON THE PLEADINGS

In the motion for judgment on the pleadings, the City and the mayor seek judgment on the third-party claim asserted against the mayor in his official capacity. The Court notes that it has granted summary judgment in favor of the mayor on Firstar's breach of contract and estoppel claims and has granted only a portion of the declaratory and affirmative injunctive relief requested by Firstar against the City. The Court has declared that the Department of Neighborhoods has a duty to request and must request that the Council appropriate and authorize up to $230,000 from CDBG funds per year for the remaining nine years contemplated in the Funding Agreement. In so doing, the Court has determined that the mayor has no further duty under the Funding Agreement. Based on this determination, the Court will deny the instant motion for judgment on the pleadings as that motion is moot.

IV. MOTION FOR LEAVE TO AMEND COMPLAINT

In this motion, the City seeks to amend the complaint pursuant to Civ.R. 15(A) in order to add non-party Edwin Bergsmark

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[10] The Court notes that none of these parties has joined the resulting issue of whether the City (the Department of Neighborhoods) now is being asked to do a meaningless act (i.e., to "request"). The Court notes that, while unlikely, the Council might deem it advisable in the future to appropriate and authorize further money for the benefit of Firstar.

as a party defendant. The City argues that Mr. Bergsmark's presence is necessary for adequate relief because none of the Cavista defendants (against whom the City continues to assert fraud claims) are on-going business concerns. The City asserts that answers to interrogatories and requests for admissions indicate that these defendants are "unable to admit or deny [the] requests for admission because there is no agent, representative or employee" available to respond. (See Reply Brief Exh., pp.2-6.) Upon information and belief of the City, Mr. Bergsmark was a principal in these defendants. The City believes that Mr. Bergsmark was and is the alter-ego of the Cavista defendants, and the City seeks to pierce the corporate veil. See Belvedere Condominium Unit Owners' Assn. v. R.E. Roark (1993), 67 Ohio St.3d 274, 289, 1993-Ohio-119, 617 N.E.2d 1075 (addressing when corporate shareholders may be required to answer for the wrongs committed by the corporation).[11]

Civ.R. 15(A) reads in relevant part as follows:

> "Amendments. A party may amend his pleading once as a matter of course any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a

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[11] "[T]he corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." Id.

> party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. * * *"

In Hoover v. Sumlin (1984), 12 Ohio St.3d 1, 465 N.E. 377, the Supreme Court of Ohio addressed Civ.R. 15(A) amendments. The court held:

> "1. A motion for leave to amend a pleading made pursuant to Civ. R. 15(A) should be granted 'freely' when justice so requires.
>
> "2. The granting of a motion for leave to amend a pleading shall not be disturbed on appeal absent a showing of bad faith, undue delay or undue prejudice to the opposing party." Id. at paragraph one and two of the syllabus."

Firstar opposes the City's motion to amend contending that adding Mr. Bergsmark will delay the proceedings. The Court finds, however, that no delay will harm Firstar in this case because the Court has already addressed the merits of the claims Firstar is asserting in this case and the claims against it by the City. Accordingly, the Court finds that justice requires that the City's motion to amend be granted.

JUDGMENT ENTRY

It is ORDERED that the motion for summary judgment filed by defendant Firstar Bank ("Firstar") is granted in part and denied in part. It is ORDERED that the motion for summary judgment filed by plaintiff City of Toledo ("the City") is granted in part and denied in part. It is further ORDERED that the breach of contract

and estoppel claims asserted by Firstar against the City and the mayor of the City ("the mayor") are dismissed with prejudice. It is further ORDERED that Firstar, the City, and the mayor are entitled to the following declaration and affirmative injunctive relief: 1) the City's Department of Neighborhoods has a duty to request and must request that the Council appropriate and authorize up to $230,000 from CDBG funds per year for the remaining nine years contemplated in the Funding Agreement; and 2) the City's Council is not required to appropriate and authorize such sums. It is further ORDERED that the mayor's motion for judgment on the pleadings is denied as moot.

It is further ORDERED that the City's motion to amend complaint to add a party is granted.

December 2, 2002

Charles J. Doneghy, Judge

pc. Adam Loukx/Gary Taylor
Richard M. Kerger
R. Joseph Parker
Dana M. Farthing
Robert A. Winter
Janine Avila/Steven R. Smith

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