

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2357

Cir. Ct. No. 2014CV2395

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BANK MUTUAL,

PLAINTIFF-RESPONDENT,

V.

CAROL L. SHERMAN P/K/A CAROL L. FISCHER, P/K/A CAROL L. BOHRINGER, MATTHEWS LAW OFFICES, SC, DOBOBAI POLOUS & CO., INC., 5400 LOVER LANE, LLC, DISCOVER BANK, OLSON PLUMBING & HEATING, INC., WELLS FARGO BANK, DEPARTMENT OF WORKFORCE DEVELOPMENT AND WEST ALLIS CITY,

DEFENDANTS,

DANIEL BOHRINGER AND SAMMY'S TASTE OF CHICAGO, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Daniel Bohringer and Sammy’s Taste of Chicago, Inc. (hereafter Bohringer) appeal from a circuit court order denying a request to reopen proceedings relating to Bohringer’s liability to Bank Mutual pursuant to continuing guarantees of bank loans to Carol Sherman. Bohringer also appeals from an order denying reconsideration. We affirm.

¶2 We recite only the relevant facts. In December 2005, while Bohringer was married to Carol Bohringer, now known as Carol Sherman (Sherman), he and Sammy’s Taste of Chicago executed continuing guarantees of Bank Mutual’s extensions of credit to Sherman. The guarantees obligated the guarantor to make payments for financial “obligations” “arising out of credit previously granted, credit contemporaneously granted, and credit granted in the future by [Bank Mutual] to any Debtor.” Various promissory notes made by Sherman were subject to the continuing guarantees.

¶3 Bohringer and Sherman divorced in July 2010. The property division awarded Sherman the commercial building in which the Sammy’s Taste of Chicago business was located; the building secured a \$226,567 note and mortgage to Bank Mutual. Sherman was responsible for making the mortgage payment on the commercial property. The property division awarded Bohringer the Sammy’s Taste of Chicago business and a farm in Lancaster, Wisconsin.

¶4 After the divorce, Sherman entered into further notes with Bank Mutual about which Bohringer received no notice and to which he did not consent. Sherman defaulted on a 2012 note to Bank Mutual, and in 2014 the bank foreclosed upon and sold the commercial property securing the note. Thereafter,

the bank executed on Bohringer's farm to collect a \$52,947 deficiency for which Bohringer was liable pursuant to his guaranty.

¶5 Bohringer moved the circuit court to stay the execution of the bank's judgment upon his farm. The circuit court declined to stay the execution because the farm is not an exempt homestead. The court concluded that Bohringer was liable on his guaranty. The circuit court also denied Bohringer's motion for reconsideration.

¶6 Bohringer appeals.

Enforceability of the Guaranty

¶7 On appeal, Bohringer argues that his guaranty is not enforceable because Sherman became a "different legal entity" after she and Bohringer divorced and she remarried.¹ Bohringer argues that these circumstances worked a substantial change in the terms of Sherman's 2012 note which relieved him of his guaranty.

¶8 Bohringer cites no authority for the proposition that Sherman became a "different legal entity" upon divorce and remarriage such that he should be relieved of his guaranty. The guaranty is a contract between Bohringer and Bank Mutual, and Bohringer's liability to Bank Mutual is separate and distinct from Sherman's liability to Bank Mutual. ***Bank Mutual v. S.J. Boyer Constr.,***

¹ The guaranty's language is not ambiguous. Therefore, we do not devote any time to Bohringer's argument that a court should consider extrinsic evidence about his intent to guaranty debt incurred by Sherman only within the context of their marriage and not after their divorce. See ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476 (extrinsic evidence considered when ambiguity is present).

Inc., 2010 WI 74, ¶54, 326 Wis. 2d 521, 785 N.W.2d 462. The guarantor's liability is governed by the language in the guaranty, which we discuss below, *Crown Life Ins. Co. v. LaBonte*, 111 Wis. 2d 26, 32, 330 N.W.2d 201 (1983), and which we analyze de novo, *Heritage Mut. Ins. v. Truck Ins. Exch.*, 184 Wis. 2d 247, 252, 516 N.W.2d 8 (Ct. App. 1994) (construction of a contract presents a question of law).

¶9 There is nothing ambiguous about the guaranty's language. The guaranty states that it "shall continue in full force and effect notwithstanding any change in structure or status of Debtor, whether by merger, consolidation, reorganization or otherwise." The guaranty states, "You are being asked to guarantee the past, present and future obligations of Debtor [i.e., Sherman]. If Debtor does not pay, you will have to." That Sherman was Bohringer's wife at the time he signed the guaranty and that her status subsequently changed does not vitiate Bohringer's obligation under the guaranty. The guaranty states that it is "a complete and exclusive statement of its terms" and "intended [by the parties] as a final expression of this Guaranty." The guaranty's language does not relieve Bohringer of his liability under the circumstances of this case.

¶10 Without citing authority for the proposition, Bohringer argues that Bank Mutual waived its right to enforce the guaranty when it did not enforce the guaranty before he and Sherman divorced. This argument is at odds with the unambiguous language of the guaranty stating that Bank Mutual may, without notice to Bohringer, determine when it will "realize upon any of the Obligations or to proceed against any Debtor or any guarantor or surety," or "renew or extend the time of payment." Moreover, via his guaranty, Bohringer waived "all other legal and equitable surety defenses."

¶11 Bohringer argues that the transactions between Sherman and Bank Mutual implicate the bank’s duty of good faith and fair dealing toward him as guarantor. We fail to see how this argument helps Bohringer. Under the guaranty, Bohringer waived notice of future loans to Sherman, the bank could determine when it would realize on the obligations of either Sherman or Bohringer, and Bohringer guaranteed Sherman’s past, present, and future obligations to Bank Mutual. Bohringer does not establish that Bank Mutual acted other than in conformity with these provisions of the guaranty. “[W]here the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing.” *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521.

¶12 We conclude that Bohringer’s guaranty was enforceable.

Homestead Exemption

¶13 Bohringer argues that his farm is his homestead and is therefore exempt from execution. WIS. STAT. § 815.20(1) (2015-16).² He also argues that a jury should have determined the facts of his homestead claim.

¶14 In June 2015, Bohringer sought to stay Bank Mutual’s execution against his farm of its judgment on his guaranty. The parties filed affidavits and

² WISCONSIN STAT. § 815.20(1) (2015-16) provides in pertinent part: “An exempt homestead as defined in [WIS. STAT. §] 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment, and from liability for the debts of the owner to the amount of \$75,000.”

briefs, but the circuit court did not hold an evidentiary hearing on Bohringer's stay request.

¶15 The circuit court concluded that the facts relating to the stay request did not satisfy the legal standard for an exempt homestead. The court acknowledged Bohringer's great sentimental attachment to the farm. However, the court focused on the extent of Bohringer's intent to use the camping trailer on the farm as his dwelling and to occupy the trailer as his home. The court noted that while Bohringer informed the Department of Motor Vehicles and the local election board that he lives on the farm, he also informed the Internal Revenue Service and the Waukesha County circuit court in at least two separate cases that he resides in an apartment in Oconomowoc, where he hosts his children for placement periods, keeps his clothes and receives mail, including the tax bill for the farm. Bohringer does not receive any mail at the farm, and the farm trailer is not served by any utilities. The court deemed too remote and therefore not very relevant Bohringer's stated intention to retire to the farm at some undefined point in the future. In light of the foregoing undisputed facts, the court concluded that it was not Bohringer's "present intention to occupy the [farm] as his home." The court concluded that Bank Mutual met its burden to show that Bohringer's farm was not homestead property.

¶16 On reconsideration, Bohringer reiterated that the farm is his homestead. The circuit court restated its previous finding that Bohringer's Oconomowoc apartment is where he makes his home because he has equipped the apartment as his home, with all of the comforts and conveniences, and he treats the apartment like his home.

¶17 The parties argue over the procedure the circuit court used to decide the homestead issue. The record reveals that the circuit court essentially accepted all of the facts offered by Bohringer in support of his homestead claim and found that they were insufficient to satisfy the legal standard for a homestead: an intent to occupy the farm as a homestead. See *Moore v. Krueger*, 179 Wis. 2d 449, 455, 507 N.W.2d 155 (Ct. App. 1993) (discussing intent to occupy property as a homestead).

¶18 Whether facts fulfill a legal standard presents a question of law that we decide independently. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 88, 596 N.W.2d 417 (1999). Whether a party has satisfied its burden is also a question of law that we decide without giving deference to the circuit court's conclusion. *Spindler v. Spindler*, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996).

¶19 We conclude that the record supports the circuit court's conclusion that the farm was not Bohringer's homestead. WISCONSIN STAT. § 990.01(14) defines an exempt homestead as a "dwelling ... and so much of the land surrounding it as is reasonably necessary for its use as a home." The court noted Bohringer's inconsistent positions about whether he makes his home in his apartment or in the camping trailer on the farm. Relying on the undisputed facts before it, the court considered how Bohringer uses his apartment and his camping trailer and how that use elucidates his intent about where he makes his home.³ In reviewing the evidence, the court placed greater weight on the following facts about how Bohringer uses his apartment: the apartment is used for placement

³ Intent can be inferred from conduct. *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 569, 360 N.W.2d 65 (Ct. App. 1984) (intent can "be inferred from the acts and statements of the person, in view of the surrounding circumstances").

periods with his children, the apartment contains Bohringer's clothes, Bohringer declared to official government bodies that he resides in the apartment, and Bohringer cannot use the camper as a year-round primary residence. The court considered the trailer's undisputed lack of "home" attributes. As the court stated:

A person who intends to make a place his home, as opposed to a place in the woods he merely visits from time to time, equips the place like a home with the comforts and conveniences of home, with a kitchen and a toilet and reliable heat and electricity and a place for your clothes and a place to get your mail and a place to host your kids. [Bohringer] equipped his trailer with the comforts of camping, not the comforts of home; therefore, I conclude he does not occupy it as his home.

¶20 The undisputed facts show that Bohringer's apartment is his dwelling and constitutes his home. A person can only intend to have one home at a time. *Moore*, 179 Wis. 2d at 458. Having concluded on the undisputed facts that the apartment is Bohringer's dwelling or home, we necessarily conclude that the farm is not an exempt homestead.⁴

Conclusion

¶21 Bohringer's guaranty of Sherman's debt was enforceable by Bank Mutual against him and against his farm. The farm does not qualify for the homestead exemption from execution.

By the Court.—Orders affirmed.

⁴ Even if Bohringer used the farm as his homestead at any point, the fact that he makes his home in his Oconomowoc apartment constitutes abandonment of the farm as his homestead. *Plan Credit Corp. v. Swinging Singles, Inc.*, 54 Wis. 2d 146, 151-52, 194 N.W.2d 822 (1972).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

