COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2316 **Cir. Ct. No. 2004CV728**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

BRIAN A. LUETZOW AND MARY C. LUETZOW,

PLAINTIFFS-APPELLANTS,

V.

BRIAN SCHUBRING,

DEFENDANT,

MICHELLE M. SCHUBRING,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. Brian A. and Mary C. Luetzow seek to hold Michelle M. Schubring liable for a $100,000 loan they claim they gave to her former husband Brian Schubring during the course of the Schubrings' marriage.

They cannot do so. The Luetzows loaned the money to Schubring Builders, a company that was co-owned by Michelle and Brian Schubring at the time, and not to Brian Schubring personally. Further, the after-the-fact guaranty contract signed by Brian Schubring is not supported by fresh consideration and therefore the Luetzows cannot enforce it against Michelle. The trial court properly granted summary judgment in favor of Michelle and dismissed her from the case.

¶2 In 2002, Brian Schubring worked as a general contractor for Schubring Builders, LLC. At the time, Brian Schubring and his then wife Michelle Schubring co-owned the company. The company maintained its own checking account and filed its own tax returns. In February 2003, Michelle and Brian Schubring entered into a postnuptial agreement whereby Brian Schubring received Michelle's fifty-percent share of Schubring Builders. Michelle later filed for divorce, which became final in March of 2004.

¶3 In May or June 2002, the Luetzows hired Schubring Builders to construct a steel building. The Luetzows advanced Schubring Builders roughly $100,000 as prepayment for work on the project. In October, Brian Schubring contacted Brian Luetzow and asked if Luetzow could front Schubring more money for Schubring's company. On October 28, the Luetzows issued a check to "Schubring Builders" in the amount of $100,000. At the Luetzows' request, Schubring Builders' office manager personally picked up the check at the Luetzow residence. She immediately deposited it into Schubring Builders' bank account. Schubring Builders used the money to pay its bills and not to help finance the Luetzow building project.

¶4 In late January or early February 2003, the Luetzows drafted a document entitled "Due on Demand Promissory Note." The document identified

Brian Schubring as the borrower and required Brian Schubring to repay the unpaid principal and accrued interest on the loan at the time the Luetzows demanded. The parties back dated the note to October 29, 2002.

¶5 On September 8, 2003, the Luetzows made a written demand upon Brian Schubring seeking payment on October 9 of all balances of principal and interest on the loan. Brian Schubring failed to make payment. In January 2004, the Luetzows filed suit against Brian Schubring seeking payment on the loan. In May 2004, the Luetzows amended their complaint, adding Michelle as a defendant.

¶6 The Luetzows filed a motion for summary judgment. The Luetzows maintained that Brian Schubring incurred the debt while married to Michelle and therefore, under Wisconsin's marital property law, she was jointly and severally liable for at least a portion of the debt. Michelle also filed a motion for summary judgment. Michelle argued that the Luetzows advanced the loan to Schubring Builders and not Brian Schubring; thus, the resulting obligations became the liability of the company and not the personal liability of either of the Schubrings. The Schubrings contended that the "promissory note" constituted a defective effort to force Brian Schubring to guarantee the debt of Schubring Builders without fresh consideration. The circuit court agreed with Michelle and granted summary judgment in her favor.

¶7 We review a decision on summary judgment using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. WIS. STAT.

§ 802.08(2) (2005-06).[1] The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Baxter***, 165 Wis. 2d at 312 (citation omitted).

¶8 The Luetzows contend that genuine issues of material fact exist with respect to whether the Luetzows issued the original loan to Brian Schubring personally or to Schubring Builders. While the dispute concerning whether Brian Schubring is responsible for the original debt is one of material fact, we conclude that a *genuine* issue of material fact does not exist. No reasonable jury could return a verdict holding Brian Schubring personally liable. *See* ***Baxter***, 165 Wis. 2d at 312. The Luetzows addressed the check to "Schubring Builders." Brian Schubring testified that, at the Luetzows' direction, Schubring Builders' office manager personally picked up the check at the Luetzow residence. A letter from the office manager to an attorney and Brian Schubring's testimony establish that the office manager immediately deposited the check into Schubring Builders' company bank account. Brian Schubring testified that Schubring Builders used the money to pay its bills and not to help finance the Luetzow building project. The Luetzows direct us to no contrary evidence that would suggest that they made the loan to Brian Schubring personally.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶9 Having established that no genuine issues exist concerning Schubring Builders' liability for the original October 2002 loan, we now turn to the question of whether Brian Schubring became liable for the debt when he signed the document guaranteeing the $100,000 debt plus interest. The guaranty states:

> For value received, the undersigned Brian Schubring (the "Borrower") … promises to pay to the order of Brian Alden Luetzow, (the "Lender") … the sum of $100,000 with interest from October 29, 2002, on the unpaid principal at the rate of 7.00% per annum.

¶10 A guaranty is a contract and, like other contracts, is generally unenforceable unless supported by consideration. ***Amato v. Creative Confections Concepts, Inc.***, 97 F. Supp. 2d 949, 952 (E.D. Wis. 2000) (citing with approval ***Menzer v. Marathon County Bank***, 189 Wis. 340, 341, 207 N.W. 703 (1926)). New consideration is required for a guaranty of an existing indebtedness.[2] ***Menzer***, 189 Wis. at 341; ***Amato***, 97 F. Supp. 2d at 952. Where, as here, a guaranty includes a recitation of consideration such as "for value received" the recitation creates a rebuttable presumption that consideration had in fact been

[2] In footnote nine in their brief-in-chief, the Luetzows suggest that the "promissory note" is not technically a guaranty because Brian Schubring's obligation to pay was not conditioned on Schubring Builders' default on the original loan. *See* ***First Wis. Nat'l Bank of Milwaukee v. Oby***, 52 Wis. 2d 1, 11, 188 N.W.2d 454 (1971) (citing 38 AM. JUR. 2D § 3 *Guaranty* for the following principle of law, "[I]f the obligation sought to be enforced is a primary or unconditional promise so that the promisor is primarily liable regardless of the failure of some other party to perform his contractual duty, the conclusion is that the obligation is not a contract of guaranty."). Regardless of whether the document is a guaranty or is more in the character of a different category of contract that secures the debt of another such as a surety, which does not require the default of the principal debtor, the result is the same. *See* ***Associates Fin. Servs. Co. v. Eisenberg***, 51 Wis. 2d 85, 90, 186 N.W.2d 272 (1971) (holding that "a guarantor is secondarily liable on the obligation while a surety is primarily liable"); 38 AM. JUR. 2D § 12 *Guaranty* (1999). The contract between Brian Schubring and the Luetzows needed to be, but was not, supported by fresh consideration. *See, e.g.*, 74 AM. JUR. 2D § 13 *Suretyship* (2001).

given. *See* ***Wortley v. Kieffer***, 70 Wis. 2d 734, 739, 235 N.W.2d 296 (1975). The question thus becomes whether Michelle produced sufficient evidence to rebut the presumption. We conclude that she did.

¶11 Where contracts of guaranty are made simultaneously with the principal obligation, they are construed together and may be supported by the same consideration. ***Associates Fin. Servs. Co. v. Eisenberg***, 51 Wis. 2d 85, 89, 186 N.W.2d 272 (1971). However, Brian Schubring testified that while the guaranty was dated October 29, 2002, he did not actually sign it until early 2003 and there is no evidence that the Luetzows loaned Schubring Builders the money in reliance on the guaranty. Thus, the original indebtedness cannot supply consideration for the guaranty.

¶12 An extension of time of payment on the original indebtedness and a promise of forbearance from pressing a claim are adequate consideration for the promise of a guarantor. *See* ***Menzer***, 189 Wis. at 341; ***Amato***, 97 F. Supp. 2d at 952. However, neither the language of the guaranty nor the testimony in the record evidences a new exchange of promises regarding such an extension of time or forbearance. Brian Schubring testified that he just read through the document presented once and signed it. We are left with a mere naked promise to pay the existing debt of another and that is not sufficient. *See* 38 AM. JUR. 2D § 43 *Guaranty* (1999). *See also* ***Menzer***, 189 Wis. at 341; ***Amato***, 97 F. Supp. 2d at 952. The guaranty fails for lack of valid consideration.

¶13 The Luetzows contend that the promissory note was a negotiable instrument offered as security for an antecedent debt and, therefore, pursuant to WIS. STAT. § 403.303, the note was supported by consideration. The Luetzows, however, failed to present this theory in the trial court.

¶14 Generally, we do not consider legal issues that are raised for the first time on appeal. ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476. However, new arguments may be permitted on an issue that was properly raised in the trial court. ***Id.*** While the Luetzows urge us to apply this distinction here to allow them to present their argument based on WIS. STAT. § 403.303, we decline to do so. A fundamental appellate precept is that we "will not … blindside trial courts with reversals based on theories which did not originate in their forum." ***Schonscheck***, 261 Wis. 2d 769, ¶11 (citation omitted). Regardless of whether we designate the Luetzows' negotiable instrument contention as an argument, an issue or a theory, the Luetzows failed to give the trial court the opportunity to analyze the document as a negotiable instrument. The contention is waived.

¶15 In sum, the trial court properly granted summary judgment in favor of Michelle and dismissed her from the case. The Luetzows loaned the $100,000 to Schubring Builders and not Brian Schubring personally. The guaranty Brian Schubring signed is not supported by new consideration. We affirm the judgment.

By the Court.—Judgment affirmed.

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