COURT OF APPEALS
DECISION
DATED AND RELEASED

March 6, 1997

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-2808
95-3618

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

FIRST BANK (N.A.),

Plaintiff-Appellant,

v.

RUSSELL CLEARY, JOHN MOONEY, SABINA BOSSHARD, WILLIAM BOSSHARD, as the Personal Representatives of the Estate of JOHN BOSSHARD, ALEX SKOVER and JOSEPH WEBB,

Defendants-Respondents.

APPEALS from judgments of the circuit court for La Crosse County: ROBERT W. WING, Judge. *Reversed and causes remanded*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. First Bank (N.A.), appeals from summary judgments dismissing its complaint against Russell Cleary, John Mooney, Alex

Skover, Joseph Webb and the personal representatives of the Estate of John Bosshard (the respondents). We conclude that disputes of material fact remain unresolved, and therefore reverse and remand for further proceedings.

The respondents sought loans from First Bank to finance the purchase of a business, including a $3.6 million loan to buy real estate. At the time they applied, the respondents were undecided whether to operate as a partnership or a corporation. A letter stating First Bank's commitment to loan the money to either a corporation or partnership identified the following under the heading "collateral":

> First real estate mortgage on the real estate to be acquired by [the corporation] or the general partnership. The loan would require either an unlimited guarantee or joint and several liability, in the case of a partnership, from the following individuals: [the respondents].

The letter also stated that the loan commitment was conditional on "an agreement of the bank and borrower on documentation," and provided that "the commitment on the part of First Bank, N.A. is not transferable and is confidential between the bank, investors and guarantors of [the corporation] or the partnership."

The respondents accepted the commitment letter, and subsequently decided to proceed as a partnership known as JJAWC Partners. At the October 3, 1988 loan closing, First Bank asked the respondents to sign personal guarantees and each did so. Each respondent also signed the loan agreement which made the guarantees a condition precedent to the loan. Four and one-half years later each guarantor signed an agreement that reaffirmed the guarantees but without waiving "any defense which any of the Guarantors may assert against the Guarantee issued by them on October 3, 1988."

JJAWC ultimately defaulted on the loan with $2.7 million still owing. First Bank then commenced this lawsuit against the respondents on

their guarantees. For unexplained reasons, the bank did not sue JJAWC or the partners on the note resulting from the loan agreement itself.

On First Bank's summary judgment motion, the trial court concluded that the plain terms of the commitment letter did not require guarantees from the respondents if they received the loan as a partnership. Therefore, according to the court, First Bank failed to provide any consideration for the subsequent guarantees it obtained at closing because the loan was already promised without them. The court granted summary judgment to the respondents on that basis and dismissed the claim on the guarantee.

First Bank subsequently filed a motion for summary judgment on the note, and all of the respondents except the Bosshard estate moved to strike it on grounds that First Bank never stated a cause of action on the note. The trial court and First Bank learned at the hearing on the motion that the respondents, but not the estate, had commenced a separate action alleging several claims against First Bank arising out of the transaction. The court found that First Bank's complaint did not state a claim on the note and, after considering whether to allow First Bank to amend the complaint and add a claim on the note, concluded that it would not grant leave to amend. The court determined, as conceded by counsel for the four respondents, that First Bank could present its claims on the note by counterclaim in the respondents' newly filed action. The result was an order granting the motion to strike the summary judgment motion and a final judgment dismissing the complaint. The other action remains pending. First Bank has counterclaimed on the note in that action and filed a third-party complaint on the note against the estate.

Summary judgment is appropriate only if material facts are undisputed, only one reasonable inference is available from those facts, and that inference requires dismissal as a matter of law. ***Wagner v. Dissing***, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987). We independently decide this issue without deference to the trial court. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986).

There are two reasonable interpretations of the commitment letter clause on personal guarantees. The letter states that "the loan would require

either an unlimited guarantee or joint and several liability, in the case of a partnership," from the respondents. They reasonably interpret that language to require a personal guarantee only if the respondents formed a corporation. However, one could also reasonably interpret it to mean that First Bank reserved the right to choose between joint and several liability or an unlimited guarantee in the case of a partnership. Although the parties devote considerable effort in their briefs to the issue whether joint and several liability automatically attaches to the individual partners of a partnership, that is a question of law and does not assist in determining the intended meaning of the letter. Because that intent remains ambiguous, it must be resolved by resort to extrinsic evidence and subsequent determination by the fact-finder. *See* ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976).

If it is found that the commitment letter did not contemplate personal guarantees for the partners of JJAWC, a fact dispute then remains as to whether First Bank unilaterally imposed the guarantees at closing, or whether the respondents voluntarily agreed to amend the terms of the letter. First Bank introduced evidence that Bosshard, acting as attorney for the respondents, acknowledged and consented to the guarantees before closing. Respondents contested that interpretation of Bosshard's written statement, and presented disputed evidence that they signed guarantees under duress and threat of cancellation. These, too, are issues not capable of resolution on summary judgment.

First Bank also contends that the respondents have no defense because they agreed to unconditional liability at closing and waived any "circumstance whatsoever that might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor." We do not construe that provision as a waiver on the issues of duress or lack of consideration. *See* ***Midwest Corp. v. Global Cable, Inc.***, 688 F. Supp. 872, 875 (S.D.N.Y 1988) (unconditional waiver of defenses does not preclude lack of consideration defense).

First Bank has not waived its right to appeal. The Bosshard estate contends that First Bank cannot pursue this appeal against the estate because it filed a third-party complaint against the estate in the second action, rather than

pursuing efforts to amend the complaint in this action.[1] We disagree. The estate cites the proposition that when a party commences a second action in the trial court based upon the same cause of action, it waives its appeal rights. ***Richie v. Badger State Mut. Cas. Co.***, 22 Wis.2d 133, 137-38, 125 N.W.2d 381, 383 (1963). Here, as explained by the parties, First Bank's cause of action in the second action is different because it is based on the note and not on the guarantees.

Additionally, the estate cites the proposition that the right to appeal is waived by one who causes or induces the judgment to be entered. ***County of Racine v. Smith***, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984). Here, First Bank did not induce or cause the judgment dismissing its complaint. Although First Bank could have moved to amend its complaint, it reasonably chose not to after the trial court held that it could raise its alternative claims in the newly filed action. The trial court so held after counsel for the other four respondents confirmed the availability of that alternative, and counsel for the estate remained silent. While the estate is not bound by the representations of counsel for the other respondents, it is bound both by its failure to object to the trial court's ruling, and its failure to appeal, if aggrieved by it.

By the Court.—Judgments reversed and causes remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] At the time the trial court stated that it would not grant leave to amend the complaint to add a cause of action based on the note, there was no motion to amend before the court. Presumably the estate means First Bank should have filed a motion to amend to preserve the issue, and then appealed the denial of the motion.