UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1333

(Summary Calendar)

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for PREMIER BANK, N.A.

Plaintiff-Appellee,

VERSUS

JAMES F. SMITH, ET AL.,

Defendants,

BARRY DONNELL,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CA 3 90 1772 T)

(December 14, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Barry Donnell appeals an order granting summary judgment to the Federal Deposit Insurance Corporation ("the FDIC"), in a suit brought by the FDIC to enforce a guaranty agreement. We affirm.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

William Decker executed a promissory note to Premier Bank, N.A. ("the Bank") for $185,000. As collateral for the loan, Decker pledged 800,000 shares of stock in Horizon Gas Systems, Inc. ("Horizon"). Decker also caused Horizon to execute a stock repurchase agreement ("the Repurchase Agreement"), whereby Horizon promised to purchase))for the sum of $185,000))the 800,000 shares Decker had pledged as collateral, if Decker defaulted on the note.

Decker executed a renewal of the note ("the first renewal note"), with a maturity date of December 20, 1987. To facilitate the execution of the first renewal note, Barry Donnell wrote a guaranty letter ("the Guaranty") to the Bank, whereby Donnell promised to "personally guarantee" Horizon's performance under the Repurchase Agreement.[1] The note was renewed several more times, the last of which provided for a maturity date of August 29, 1989 ("the last renewal note").

On March 31, 1989, the Bank was declared insolvent, and the FDIC was appointed receiver of the Bank ("FDIC-Receiver"). On August 29, 1989, Decker failed to pay the last renewal note. Thereafter, FDIC-Receiver made a written demand on Horizon to perform its obligation under the Repurchase Agreement. When Horizon failed to repurchase the stock, FDIC-Receiver brought an action against Donnell, as guarantor of the Repurchase Agreement.

[1] The parties concede that this letter constitutes a guaranty. *See* Brief for Donnell at 13; Brief for FDIC at 10. However, they differ as to the scope of the guaranty.

The district court granted FDIC-Receiver's motion for summary judgment, and denied Donnell's motion for summary judgment.

Donnell appeals, contending that the district court improperly granted summary judgment because: (a) the Guaranty related solely to the first renewal note, and did not constitute a continuing guaranty of the Repurchase Agreement; (b) FDIC-Receiver did not prove that it was the owner and holder of the note and the Guaranty; and (c) FDIC-Receiver failed to prove that it was ready and willing to perform its obligations under the Repurchase Agreement.

II

We review the district court's grant of a summary judgment motion de novo. *See Davis v. Illinois Central R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid*

v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57 (1986).

III

A

Donnell argues that the district court misconstrued the terms of the Guaranty. He specifically contends that the Guaranty: (1) was limited to the first renewal note;[2] and (2) did not constitute a continuing guaranty of the Repurchase Agreement.

The primary concern in construing guaranty contracts,[3] as with all contracts, is to ascertain the true intentions of the parties "by reference to the words used in the contract." *Preston Ridge Fin. Services Corp. v. Tyler,* 796 S.W.2d 772, 775 (Tex.

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[2] If the Guaranty was limited to the first renewal note, then Donnell argues that the subsequent renewals of the note extinguished his obligation under the Guaranty. *See United States v. Vahlco Corp.,* 800 F.2d 462, 465 (5th Cir. 1986) ("Under Texas law, the guarantor of a note is discharged from his obligation to answer for that debt if the creditor grants an extension of time for the payment of the note to the principal debtor."); *Holland v. First Nat'l Bank In Dallas,* 597 S.W.2d 406, 409 (Tex. Civ. App.))Dallas 1980) ("If [a renewal is] not included [in the guaranty], then the renewal discharge[s] the guarantor under well-settled rules.").

[3] Because this controversy concerns a note and guaranty executed by Texas parties in favor of a Texas bank, *see* Record on Appeal, vol. 1, at 2-4, we apply Texas contract law. *See Vahlco,* 800 F.2d at 465 n.7 (applying Texas contract law to a controversy involving a note and guaranty executed by Texas parties in favor of a Texas bank).

App.))Dallas 1990); *Southwest Sav. Ass'n v. Dunagan,* 392 S.W.2d 761, 767 (Tex. Civ. App.))Dallas 1965). "To determine the parties' actual intent, courts should examine and consider the *entire writing* . . . so that [no provision] will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Preston Ridge,* 796 S.W.2d at 775 (citation omitted).

Donnell's Guaranty, in letter form, provides:

> It is my understanding that you have loaned to Mr. William M. Decker the amount of $185,000 on a promissory note which matures December 20, 1987 [the first renewal note]. Mr. Decker has placed with Premier Bank, as collateral, 800,000 shares of Horizon Gas Systems, Incorporated. In order to help Mr. Decker facilitate this loan, Horizon Gas Systems, Incorporated issued a Repurchase Agreement covering said 800,000 shares for $185,000.
>
> This letter will serve as my official notice to Premier Bank that, in the event Horizon Gas Systems, Incorporated fails to honor its repurchase agreement, I will personally guarantee their performance up to a $50,000 maximum.

Record on Appeal, vol. 3, at 516.

Donnell cites the introductory language in the letter's first paragraph))"the amount of $185,000 on a promissory note which matures December 20, 1987"))to argue that the Guaranty was limited to Decker's performance under the first renewal note. We find this argument unconvincing. First, when placed in the context of the *entire writing,* it is clear that the first paragraph of the Guaranty merely sets out the facts underlying the Repurchase Agreement. Nowhere in the letter does Donnell state that he is

guaranteeing, or limiting his obligation to, Decker's performance under the first renewal note. Second, Donnell conveniently ignores the last paragraph of the letter, in which he expressly and unconditionally agreed to guarantee Horizon's performance under the Repurchase Agreement. Therefore, according to the plain language of the entire contract, we find that the Guaranty was not limited to Decker's performance under the first renewal note.

The district court concluded that because Donnell: (1) guaranteed Horizon's performance under the Repurchase Agreement; and (2) did not restrict his liability under the terms of the Repurchase Agreement,[4] his letter constituted a continuing guaranty of the Repurchase Agreement. *See* Record on Appeal, vol. 3, at 651. Citing *Government Personnel Mut. Life Ins. Co. v. Wear,* 247 S.W.2d 284 (Tex. Civ. App.))San Antonio), *aff'd in part, rev'd in part,* 151 Tex. 454, 251 S.W.2d 525 (Tex. 1952), Donnell contends that the district court impermissibly transplanted the renewal language of the Repurchase Agreement into the Guaranty. We disagree.

In *Wear,* the court stated that "[r]eading and construing contracts together does not justify bodily taking a paragraph from one contract and transplanting it in the other." *Wear,* 247 S.W.2d at 286. However, the instant case is distinguishable because the Guaranty expressly refers to the Repurchase Agreement.[5] In

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[4] The Repurchase Agreement expressly applies to "all renewals and extensions of the note." Record on Appeal, vol. 3, at 512.

[5] *See* Record on Appeal, vol. 3, at 516 ("[I]n the event Horizon . . . fails to honor its *repurchase agreement,* I will personally guarantee their performance . . . .") (emphasis added).

contrast, the two contracts at issue in *Wear* did not "expressly refer to each other or expressly make one a part of the other." *Id.* at 285. Thus, the district court did not imply terms from one contract to another.[6] Accordingly, we find that Donnell's letter constituted a continuing guaranty of Horizon's performance under the Repurchase Agreement.

Donnell also contends that the Repurchase Agreement and the Guaranty are inconsistent, and the Guaranty))being the later document))should prevail. *See Crown Western Investments, Inc. v. Mercantile Nat'l Bank,* 504 S.W.2d 785, 789 (Tex. Civ. App.))Tyler 1974) ("[When] a second contract deals with the same subject matter as did the first contract . . . [t]he two contracts must be interpreted together. In so far as they are inconsistent, the later one prevails . . . ." (quoting 6 Corbin on Contracts 198 (1962))). We disagree, because the Repurchase Agreement expressly applies to renewals of the note, and the Guaranty is silent on the subject of renewals. Again, a mere introductory reference to "a promissory note which matures December 20, 1987" does not equal a limitation on the extent of Donnell's obligation under the Guaranty for future renewals of the note. Therefore, the terms of

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[6] This conclusion is consistent with the rule of *strictissimi juris.* Under this rule, once the guaranty's precise terms are determined, the obligations of the guarantor must not be extended "by implication beyond the written terms of the agreement." *Preston Ridge,* 796 S.W.2d at 780. After a careful reading of the Guaranty, we conclude that Donnell expressly guaranteed Horizon's performance under the Repurchase Agreement, which in turn, expressly applies to all renewals of the note. Thus, we have not impliedly extended Donnell's obligations beyond the written terms of the Guaranty.

Repurchase Agreement and the terms of the Guaranty are not inconsistent.

In the alternative, Donnell claims that the terms of the Guaranty are ambiguous, and consequently, that summary judgment was improper. *See Coker v. Coker,* 650 S.W.2d 391, 394 (Tex. 1983) ("When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue."). "[I]f only one reasonable meaning clearly emerges [the contract] is not ambiguous." *Wynnewood State Bank v. Embrey,* 451 S.W.2d 930, 932 (Tex. Civ. App.))Dallas 1970) (quoting *Universal C.I.T. Credit Corp. v. Daniel,* 150 Tex. 513, 243 S.W.2d 154, 157 (1951)). After construing the plain language of Donnell's letter, only one reasonable meaning emerges))that it constituted a continuing guaranty of Horizon's performance under the Repurchase Agreement. Therefore, the terms of the Guaranty are unambiguous.[7]

B

Donnell also maintains that summary judgment was improper because FDIC-Receiver failed to prove it was the owner and holder of the note and the Guaranty. *See Resolution Trust Corp. v. Marshall,* 939 F.2d 274, 276 (5th Cir. 1991) (in a summary judgment action to recover on a promissory note and guaranty agreement,

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[7] Donnell attempts to introduce his own affidavit, and the affidavit of the former Bank president, to show his "true" intent upon writing the letter. However, where the terms of a contract are unambigous, "we may not look to extraneous evidence of intent." *FDIC v. Cardinal Oil Well Servicing Co., Inc.,* 837 F.2d 1369, 1371 (5th Cir. 1988) (applying Texas law). Thus, we may not consider these affidavits on appeal.

under Texas law the plaintiff has to establish that it is the present holder or owner of the note). In its motion for summary judgment, FDIC-Receiver submitted the affidavits of Bruce McLain, the former Bank president, and Kathy Yankovich, custodian of records for the FDIC. Donnell claims that these affidavits are insufficient summary judgment proof. We disagree.

Uncontroverted affidavits))based upon personal knowledge that a party is the holder or owner of a promissory note))are generally sufficient summary judgment evidence.[8] *See Resolution Trust Corp. v. Camp,* 965 F.2d 25, 29 (5th Cir. 1992) (affidavits to the effect that corporation took ownership and possession of assets of failed institutions, including note being sued upon, were adequate to support summary judgment). McLain's affidavit detailed the making of the Decker note, the Repurchase Agreement, and the Guaranty. *See* Record on Appeal, vol. 3, at 507-09. Based upon his personal knowledge, McLain averred that all of these documents were executed and delivered to the Bank. *See id.* at 508-09.

Yankovich averred that after the Bank was declared insolvent, the FDIC was appointed as the sole receiver of the Bank. *See id.* at 532-36. Based upon her personal knowledge, she stated that "FDIC-Receiver is the current owner and holder of the obligation

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[8] If Donnell had pointed to evidence in the record indicating a legitimate fear that FDIC-Receiver was not the owner and holder of the obligations under the Repurchase Agreement and that some other entity might later approach him demanding payment, then these affidavits would not have sufficed for summary judgment. *See Resolution Trust Corp. v. Camp,* 965 F.2d 25, 29 (5th Cir. 1992). However, Donnell did not point to such evidence in his motion for summary judgment. *See* Record on Appeal, vol. 2, 483-89.

that is the subject of this litigation." *Id.* at 533. Donnell did not contest this evidence, nor did he point to any evidence in the record indicating a legitimate fear that another party was the owner or holder of the note and the Guaranty. Therefore, these affidavits are sufficient summary judgment evidence that FDIC-Receiver was owner and holder of the note and the Guaranty.

C

Lastly, Donnell contends that summary judgment was improper because FDIC-Receiver failed to show that it was "ready, willing and able to tender performance of its obligations under the repurchase agreement." Brief for Donnell at 19. Specifically, Donnell argues that once Decker defaulted on the final renewal note, FDIC-Receiver did not show that it was ready and willing to tender the 800,000 shares of Horizon stock, in exchange for the $185,000 promised by Horizon. This argument is without merit.

The only elements which FDIC-Receiver needed to establish to secure summary judgment on the note and the Guaranty are: (1) that the note, Repurchase Agreement, and Guaranty exist, and are valid; (2) that FDIC-Receiver is the present holder and owner of the note and the Guaranty; (3) that the note and the Repurchase Agreement are in default; and (4) that Donnell is liable under the Guaranty. *See Marshall,* 939 F.2d at 276 (outlining necessary elements under Texas law to recover on summary judgment). Donnell attempts to add a further requirement))that FDIC-Receiver demonstrate its willingness to comply with the terms of the Repurchase Agreement))but offers no authority to support this argument.

Moreover, Donnell's contention is inconsistent with the terms of the Repurchase Agreement.[9] The Repurchase Agreement does not require that the Bank (after insolvency, FDIC-Receiver) "demonstrate its willingness" to deliver the stock certificates, as a prerequisite for Horizon to tender payment. Rather, the Repurchase Agreement only requires that the Bank give Horizon written notice of Decker's default, and deliver stock *contemporaneously* with receiving payment from Horizon. *See* Record on Appeal, vol. 3, at 512. FDIC-Receiver met this requirement by notifying Horizon in writing of Decker's default, and demanding that Horizon purchase the stock. *See* Record on Appeal, vol. 1, at 144-45. Because Horizon failed to repurchase the stock, FDIC-Receiver was not obligated to deliver the stock, or to demonstrate its willingness to do so.

IV

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[9] The Repurchase Agreement provides:

> 2. [Horizon] hereby warrants and represents to the Bank and Decker that it shall repurchase the stock for $185,000.00 in the event that Decker shall default in the payment of the note when due. The Bank shall exercise its repurchase right herein by giving to the Company written notice of Decker's default in paying the note and further specifying that the Company shall, within ten (10) days from receipt of such written notice, pay to the Bank $185,000.00 for the stock or the principal balance and accrued interest of the note due on such date of the written notice, whichever is less. The Bank agrees to deliver the stock certificates representing the stock and all assignments or endorsements relating thereto to the Company contemporaneously with the delivery by the Company of the funds as provided herein.

Record on Appeal, vol. 3, at 512.

For the foregoing reasons, we **AFFIRM.**