UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10575

ROGER KROEKER and LOIS KROEKER,

Plaintiffs-Appellees,

versus

ROBERT E. SHATTUCK
and ABRAHAM MENIS, a/k/a RAMI MENIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1610-T)

(May 15, 1995)

Before LAY,[1], DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:[2]

Robert E. Shattuck and Abraham Menis appeal from the district court's grant of summary judgment in favor of Roger and Lois Kroeker. The court found that Shattuck and Menis breached their guaranty obligations with respect to two real estate lien notes

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

[2]Local Rule 47.5 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 Pursuant to that rule, the Court has determined that this opinion should not be published.

(the THI notes) executed by T.H.I., Inc. (THI) in partial payment for its 1988 purchase of a motel owned by the Kroekers. Shattuck and Menis are the principals of THI. They claim the court misconstrued their guaranty obligations. They also claim the court erred in imposing liability on them when the damages the Kroekers suffered were incurred long after the Kroekers had fully assigned their interest in the debt Shattuck and Menis had guaranteed. We affirm the judgment of the district court.

BACKGROUND

When the Kroekers purchased the Best Western Motel in Temple, Texas, they executed two real estate lien notes (the Kroeker notes) in favor of the Texas American Bank (the Bank) to finance the acquisition. On November 4, 1988, the Kroekers sold the motel to THI, which took title subject to the Bank's lien on the motel.

In partial payment, THI executed notes payable to the Kroekers (the THI notes), in the original principal balances of $1,113,878.64 and $92,138.66, the same as the balances then due on the Kroeker notes. Together, the two THI notes required THI to pay $13,075.00 per month to the Kroekers, an amount that would satisfy the Kroekers' obligation to the Bank under the Kroeker notes. The THI notes stated that

> Maker [THI] is taking title to the Mortgaged Premises [the motel] subject to but in no wise assuming the Prior Notes [the Kroeker notes]. Maker agrees to comply with the terms and provisions of the Prior Notes and the Deeds of Trust securing same . . . other than the obligation to make payments as the same shall become due pursuant to the Prior Notes, which Payee [the Kroekers] by acceptance of this Note agrees to make.

Shattuck and Menis also executed a guaranty agreement in favor of the Kroekers. The guaranty promised

> the prompt payment at maturity and at all times thereafter, of the Guaranteed Indebtedness . . . .
>
> 1. The term "Guaranteed Indebtedness," as used herein, includes:
>
> (a) Two (2) promissory notes [the THI notes] . . .
> (b) Interest on any of the indebtedness described in (a) preceding;
> (c) Any and all costs, attorney's fees, and expenses suffered by Creditor [the Kroekers] by reason of Borrower's [THI's] default in payment on any of the foregoing indebtedness; and
> (d) Any renewal or extension of the indebtedness, cost, or expenses described in (a) through (c) preceding, or any part thereof.

The guaranty also stated:

> 4. In the event of default by Borrower [THI] in payment of the Guaranteed Indebtedness, or any part thereof, when such indebtedness becomes due . . . Guarantor [Shattuck and Menis] shall, after ten (10) days' written notice from Creditor [the Kroekers] . . . pay the amount due thereon to Creditor . . . .

On that same day, the Kroekers and THI executed a collection agreement with the Bank wherein THI agreed to make its payments on its notes to the Bank instead of the Kroekers. The parties removed a provision from the collection agreement that, in the event THI defaulted on its payments, would have permitted the Kroekers to make payments to the Bank in THI's place and then pursue any remedies against THI available to the Bank as the holder of the THI notes. Also on that day, the Kroekers assigned the THI notes to the Bank with recourse.

On November 15, 1991, the Kroekers placed a $100,000.00 certificate of deposit (CD) with the Bank, agreeing that the CD was "to secure a promissory note or notes of even date herewith executed by Debtor [the Kroekers] and made payable to Bank and all other indebtedness and liabilities of all kinds of Debtor to Bank . . . whether now existing or hereafter arising . . . ." By the terms of the security agreement, the CD was thus clearly security for the Kroeker notes. The Kroekers aver the Bank required the CD as security for the sale of the motel to THI in the event THI defaulted on its notes and thereby cause the Kroekers to default on their notes. Shattuck and Menis admit they were aware of this requirement.

In 1991, the Bank failed and FAMCO Services, Inc. (FAMCO) acquired its security interests. About that time, THI ceased making payments on its notes to either the Bank or FAMCO. Shattuck and Menis made no payments under the guaranty to either the Kroekers, the Bank, or FAMCO. In December 1991, FAMCO seized Kroekers' $100,000 CD and offset it against the balance due under the Kroeker notes. In February 1992, FAMCO foreclosed on its security interests in the motel. In November 1992, Shattuck acquired the THI notes.

The Kroekers sued Shattuck and Menis to recover their deposit. The district court granted the Kroekers' motion for summary judgment, finding that Shattuck and Menis had breached the guaranty and damaged the Kroekers. The court awarded the Kroekers reimbursement on the CD, pre-judgment interest, and attorney's

fees.[3] The court denied the appellants' motion for a new trial.

We review a district court's grant of summary judgment de novo, applying the same standards as the lower court. Resolution Trust Corp. v. Marshall, 939 F.2d 274, 276 (5th Cir. 1991).

THE GUARANTY

Guaranty agreements are strictly construed. See Reece v. First State Bank of Denton, 566 S.W.2d 296, 297 (Tex. 1978).[4] The guaranty executed by Shattuck and Menis expressly provides that upon default prompt payment will be made of the "Guaranteed Indebtedness." Shattuck and Menis argue they only guaranteed the Kroekers for any losses and damages they might incur if THI defaulted on its notes. They observe that the "Guaranteed Indebtedness" as defined in the guaranty does not mention the Kroekers' CD. They insist they did not guarantee the Kroeker notes or the Kroekers' indebtedness to the Bank.

In addition, Shattuck and Menis argue that the amendment to the collection agreement is highly significant. They claim the parties agreed to delete the "wrap-around" provision and thereby limited the guarantors' liability. With a wrap-around provision, the Kroekers would have been able to make payments and then charge

[3]The district court reduced the attorney hours from 155 claimed to 50 because the court found only 50 hours were necessary to achieve the result reached. The court also set specific attorneys' fees to be paid on appellate review. The parties do not contest this part of the judgment.

[4]The guaranty agreement states that it "shall be construed according to the laws of the State of Texas."

the payments against the THI notes. Without such a provision, the Kroekers could not place charges against the notes.

The guaranty promised to pay the THI notes. The THI notes stated that "Maker [THI] is taking title to the Mortgaged Premises subject to but in no wise assuming the Prior Notes." Shattuck and Menis believe this language should be construed as similar language was construed in Lyons v. Montgomery, 701 S.W.2d 641, 643 (Tex. 1985). In Lyons, the court held the seller responsible for payment of the prior indebtedness where the contract stated "Buyer shall perform and observe all of the obligations, covenants, conditions and stipulations of the part of the Borrower to be performed in the said Deed of Trust, excepting the covenant for the payment of the note secured thereby." Id. (emphasis added in the opinion).

The court found Shattuck and Menis liable under clause (c) of the definition of Guaranteed Indebtedness -- "[a]ny and all costs, attorney's fees, and expenses suffered by Creditor [the Kroekers] by reason of Borrower's [THI] default in payment of any of the foregoing indebtedness [the THI notes and interest on them]." The appellants contend this was error. According to appellants, when read together the THI notes, guaranty, and collection agreement indicate the parties clearly intended to limit the liability of the guarantors to the THI notes and any expense associated with collecting those notes. The Kroekers lost their CD because they did not pay their indebtedness to the Bank, not because THI defaulted on its payments.

The Kroekers claim the THI notes were wrap-around junior

purchase-money liens subordinate to the Kroeker notes and we agree. We reject appellants' argument to the contrary because the THI notes state that they are "All-Inclusive Wraparound real estate lien note[s]," and because the collection agreement also described the notes as "wrap-around."

The district court found the plain meaning of the language in clause (c) of the guaranty, "any and all costs, attorney's fees, and expenses," entitles the Kroekers to recover for any expense they suffered in consequence of THI's default on its notes.[5] We agree with the court that FAMCO's seizure of the CD was an expense the Kroekers suffered as a result of THI's default. Neither the modification of the collection agreement nor the language in the THI notes limits the guarantors' obligations under their guaranty when these documents are understood in light of the entire transaction, which included not only the agreements between guarantors and the Kroekers, but also the security agreement between the Kroekers and the Bank which was an integral part of the conveyance of the motel.

OWNERSHIP OF THE THI NOTES

The basis of the appellants' second argument is that the Kroekers did not assign the guaranty to the Bank, only the THI notes. Although the Kroekers assigned the THI notes with full

[5]We find Lyons inapposite because it involved a contract for purchase and sale, not an absolute guarantee. In Lyons, the seller did not disclose to the buyer facts essential to an accurate understanding of the obligations the buyer was assuming under the contract.

recourse, neither the Bank nor FAMCO has sought recourse against them. The Kroekers did not assign the guaranty, but the guaranty does not become relevant until recourse is sought against the Kroekers. The guaranty defines the "Creditor" as the owner of the THI notes. Because the Kroekers are not the owners of the THI notes, the appellants argue that the Kroekers are not the "Creditor" and cannot bring an action on the guaranty. See Resolution Trust Corp. v. Marshall, 939 F.2d 274, 276 (5th Cir. 1991).

This argument fails because it confuses THI's obligations under the THI notes with Shattuck's and Menis's obligations under the guaranty. This argument would have the guaranty become worthless in the Kroekers' hands on the very day it was written because the Kroekers assigned the THI notes on that day. The sixth paragraph of the guaranty states that the rights and benefits under it may be transferred with a transfer of the guaranteed indebtedness, but not that those rights and benefits must be transferred at such a time. Clearly then, the guaranty contemplated that the Kroekers would remain the "Creditor" under the guaranty until such time as they transferred the guaranty to another. We conclude that once THI defaulted on its payments on the THI notes, Shattuck and Menis became liable to the Kroekers for "any and all costs, attorney's fees, and expenses" they incurred as a result.

FORESEEABLE DAMAGES

Shattuck and Menis contend the damages the Kroekers suffered from the loss of the CD were "too remote, uncertain, conjectural, speculative or contingent" to constitute compensable damages under Texas common law. Meyers v. Moody, 693 F.2d 1196, 1214 (5th Cir. 1982), cert. denied, 464 U.S. 920 (1983). They claim they had no way of anticipating the Kroekers would pledge the CD. The Kroekers did not make the pledge until November 15, 1988, eleven days after the agreements between Shattuck, Menis, and the Kroekers were executed.

We find the seizure of the CD was a direct, foreseeable consequence of the breach of the guaranty. The record indicates Shattuck and Menis knew of the connection between the sale of the motel and the deposit. Even if Shattuck and Menis did not know the specific way in which THI's default would damage the Kroekers, they knew very well of the risk that their own default would cause the Kroekers to default under the Kroeker notes.

We conclude the district court did not err in granting the summary judgment.

JUDGMENT AFFIRMED.