

STATE OF MICHIGAN
COURT OF APPEALS

CHARTER ONE BANK, N.A.,

Plaintiff-Appellant,

v

EDWIN L. OSBOURN and JAMES E.
OSBOURN,

Defendants-Appellees.

UNPUBLISHED

August 10, 2006

No. 260497

Macomb Circuit Court

LC No. 2003-004950-CK

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants under MCR 2.116(I)(2). We reverse and remand.

Defendants owned two businesses, ELO, L.L.C. (ELO) and OSB, Inc. (OSB). ELO and OSB collectively executed promissory notes in favor of plaintiff, and defendants executed personal guarantees for repayment of those promissory notes. ELO and OSB eventually defaulted on the notes. An assignment for the benefit of creditors, pursuant to MCL 600.5201 *et seq.*, was later filed on behalf of ELO and OSB, which began Case No. 03-003796-CZ. Plaintiff was one of those creditors. Plaintiff joined a stipulation that, among other things, agreed to a waiver of claims in exchange for the remaining assets of ELO and OSB. Plaintiff later commenced this suit against defendants in their personal capacities for the remaining outstanding debt. Therefore, the issue here is whether the waiver was of plaintiff's claims against the business entities only, or whether the waiver extended to any claims under the personal guaranties to hold defendants liable, individually, for the remaining amount of debt against the principal obligors, ELO and OSB. The trial court relied on an affidavit of the assignors' (ELO and OSB) attorney from Case No. 03-003796-CZ purporting to clarify what he understood plaintiff to have actually waived. On that basis, the trial court concluded that the waiver extended to the individual defendants.

We review de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). Interpretation of a contract is a question of law that is reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Whether extrinsic evidence should be used to interpret a contract is a question of law that is also reviewed de novo. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005). Generally, the purpose of contract interpretation is to enforce the parties'

intent, and if a policy's language is unambiguous, interpretation is limited to the actual words used. *Burkhardt, supra* at 656. Accordingly, a clear contract must be enforced according to its terms. *Id.*

Parol evidence is inadmissible to vary a clear and unambiguous contract, but may be admissible to prove that an ambiguity exists and to clarify the meaning of an ambiguous contract. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). For example, ““where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract.”” *In re Kramek Estate, supra*, 268 Mich App 574, quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). Because extrinsic evidence is required to determine whether a latent ambiguity exists outside the instrument itself, extrinsic evidence is admissible to prove the existence of the ambiguity and to resolve any ambiguity shown to exist. *McCarty, supra* at 575.

Plaintiff argues that the trial court erred because defendants, individually, were not parties to the stipulation and were therefore not subject to its terms. We agree. The affiant never stated that plaintiff waived any claims against defendants, individually. Rather, he merely averred that he represented the interests of defendants' businesses, ELO and OSB, in Case No. 03-003796-CZ and that plaintiff only intended to waive any future claim against those businesses. Plaintiff was a creditor-party in that case because of its rights under the three promissory notes executed by ELO and OSB. Plaintiff was not pursuing its rights against defendants individually pursuant to the personal guaranties.

In the stipulation itself, paragraph 11¹ provides that the creditors in Case No. 03-003796-CZ agreed to waive “any further claim they may have against the estate” in exchange for the corporate assets. “The estate” must refer to the businesses' collective estates, because the stipulation was entered into in accordance with proceedings commenced under MCL 600.5201 *et seq.*, and the case involved liquidation of the businesses' assets to satisfy creditor debts represented in those proceedings. Defendants were not individually listed in the captions of the stipulation or in the order approving of the stipulation. Moreover, there is nothing in the stipulation or subsequent order approving the stipulation to suggest that defendants, individually, were parties to those proceedings. Therefore, we conclude that plaintiff did not waive its right to sue defendants individually as guarantors of the loans. Defendants' liability as guarantors was expressly reserved in paragraph 5 of the personal guaranty, regardless of whether plaintiff released the principal obligors, so defendants remain liable for the outstanding notes.

Plaintiff is entitled to summary disposition pursuant to MCR 2.116(C)(10). However, the exact amount of damages is unknown at this time because interest has apparently continued to accrue on the debt. Remand is necessary for further proceedings relating to damages.

¹ “Based on the appraisals received by the Assignee and the amounts of secured indebtedness owed to both GE Capital and the Bank, the parties to this Stipulation believe that it would be in the best interest of the estate to immediate [sic] turn over all of the remaining assets to the secured parties in exchange for a waiver of any further claim they may have against the estate.”

Reversed and remanded for entry of an order granting summary disposition to plaintiff and for calculation of damages owed to plaintiff. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello