

Nos. A08-1252 and A08-1700

State of Minnesota
 In Court of Appeals

Premier Bank,

Appellant,

vs.

Becker Development, LLC, a Minnesota limited liability company,
 Boone Family Investments, LLC, a Minnesota limited liability company,
 Steven L. Boone, an adult resident of Minnesota, Annette C. Boone, an adult
 resident of Minnesota, Nancy C. Buehler, an adult resident of Minnesota,
 Robert G. Buehler, an adult resident of Minnesota, Michael S. Uzelac, an adult
 resident of Minnesota, Pamela J. Noll, an adult resident of Minnesota,
 Deanna M. Lasser, an adult resident of Minnesota, Ann-Marie Rasmus, an
 adult resident of Minnesota, Daniel P. Boone, an adult resident of Minnesota,
 Bauerly Brothers, Inc., a Minnesota corporation, Kuechle Underground, Inc.,
 a Minnesota corporation, John Oliver & Associates, Inc., a Minnesota
 corporation, and John Does 1 through 5,

Respondents,

Pamela J. Noll,

Respondent,

vs.

Gordon Jensen and Jensen Anderson Sondrall, P.A.,

Respondents.

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STATEMENT OF LEGAL ISSUES

1. Minnesota law provides for the reformation of a legal instrument where the parties had a valid agreement expressing their real intent; the written instrument fails to express that intent; and the failure was the result of mutual mistake. Here, contrary to the Loan Agreement that the Respondents signed, the guarantys securing the Loan erroneously list the “Debtor” as Boone Family Investments rather than Becker Development. Did the District Court err in failing to reform guarantys executed by Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler to correct a scrivener’s error and grant summary judgment in favor of Premier and against Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler for breach of guaranty?

Apposite Cases: *Magnuson v. Diekmann*, 689 N.W.2d 272, 274 (Minn.App.2004); *Hartigan v. Norwich Union Indem. Co.*, 188 Minn. 48, 246 N.W. 477 (Minn. 1933); *Berg v. Carlstrom*, 347 N.W.2d 809 (Minn. 1984); *Theisen’s Inc. v. Red Owl Stores, Inc.*, 243 N.W.2d 145 (Minn. 1976).

2. Alternatively, as written, the guarantys signed by Respondents guaranteed Boone Family Investments, LLC’s obligations under its guaranty of the Loan to Becker Development. Did the District Court err in failing to grant summary judgment in favor of Premier and against Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler for breach of their guarantys of Boone Family Investments’ obligations?

Apposite Cases: *Borg Warner Acceptance Corp. v. Shakopee Sports Center, Inc.*, 431 N.W.2d 539, 541 (Minn.1988); *see also Watkins Products, Inc. v. Butterfield*, 144 N.W.2d 56, 58 (Minn. 1966).

3. Alternatively, did the District Court err in dismissing Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler, *sua sponte*, based on the guarantys mistakenly identifying Defendant Boone Family Investments, LLC as the “Debtor” when a triable issue of material fact existed with regard to their intent to guarantee the Becker Development indebtedness?

Apposite Cases: *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986).

STATEMENT OF CASE

This appeal arises out of a mortgage foreclosure action that appellant Premier Bank ("Premier") commenced in Sherburne County District Court, District Court File No. 71-CV-07-1374. In that action, Premier sought to foreclose on a \$3.2 million mortgage that secured a loan it had provided to defendant Becker Development, LLC ("Becker Development"). Premier alleged that Becker Development had defaulted on the promissory note securing the loan and mortgage, and sought to recover the amounts due and owing under the promissory note. It also brought suit against Boone Family Investments, LLC, and members of the Boone family, individually, who were owners of Boone Family Investments and had executed guarantys as part of the loan transaction.

Premier brought a motion for summary judgment against Defendants Becker Development, LLC, Boone Family Investments, LLC, Steven L. Boone, Annette C. Boone, Nancy C. Buehler, Robert G. Buehler, Michale S. Uzelac, Pamela J. Noll, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone, Bauerly Brothers, Inc., Kuechle Underground, Inc., and John Oliver & Associates, Inc. seeking judgment for the balance owed on the note from the borrower and certain guarantors, jointly and severally; foreclosure of a mortgage securing the loan; and foreclosure of its security interest in other collateral pledged to secure the loans.

Judgment was entered on May 30, 2008 pursuant to the District Court's order of the same date (the "Order"). As to Count I (Breach of Note) and Count II (Breach of Guarantys), the Court granted Premier's motion for summary judgment against Becker Development, LLC and Boone Family Investments, LLC and entered judgment in the

amount of \$2,762,372.75. As to Counts III (Mortgage Foreclosure) and IV (Claim and Delivery), the Court granted Premier's motion for summary judgment against Becker Development, LLC and Boone Family Investments, LLC and granted judgment and a decree of foreclosure of the that certain Mortgage dated as of September 8, 2005 and recorded in the Office of the Sherburne County Recorder on September 9, 2005 as Document No. 598820; and decreeing that pursuant to the terms of the Mortgage, Appellant has a valid, properly perfected, first priority lien and security interest in and to certain fixtures and personal property legally described in the Mortgage ("Collateral").

On its own motion, *sua sponte*, the Court dismissed Premier's claims against Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone on the grounds that the guarantys they signed defined the "Debtor" as Boone Family Investments, not Becker Development, LLC, and thus, "[t]hese guarantees were executed as guarantees of the indebtedness of Boone Family Investments, LLC and not the indebtedness of Becker Development, LLC." Premier argued that the guarantys mistakenly defined Boone Family Investments, LLC to be the "Debtor" instead of Becker; and that this was a scrivener's error that should be reformed by the court under principles of mistake when read in conjunction with the Loan Agreement that the guarantors signed on the same date. Alternatively, Appellant argued that the guarantys guaranteed all of Boone Family Investments obligations to Appellant, including Boone Family Investments' guarantee of the Note. The Court rejected these arguments in its Order.

In its Order, the Court also granted the Motions to Dismiss and Strike of Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler, without prejudice, on the grounds that they were not served and did not submit themselves to the Court's jurisdiction by reason of an Answer filed on their behalf, but without their authorization. Following the hearing, and prior to the Order being issued, Premier properly served Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler.

With regard to Premier's claim for breach of guaranty against Boone Family Investments, LLC, the District Court found in its Statement of Undisputed Facts that Boone Family Investments, LLC signed the same guaranty as the individual guarantors. Premier moved for reconsideration of that issue because the Boone Family Investments, LLC guaranty in the record defined the debtor as Becker Development, LLC. On July 17, 2008, the District Court granted that motion and entered judgment against Boone Family Investments for breach of guaranty.

On July 23, 2008, Premier appealed the Order as it related to this case (71-CV-07-1374) on several grounds, including that the district court erred: in failing to grant Premier's summary judgment against Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone for breach of their Guarantys based upon principals of reformation to correct a scrivener's error, or alternatively, under the Guarantys as written; and, alternatively, in dismissing those defendants, *sua sponte*, based on the guarantys mistakenly identifying Defendant Boone Family Investments, LLC as the "Debtor" when a triable issue of material fact existed

with regard to their intent to guarantee the Becker Development indebtedness. That appeal was assigned Court of Appeal File No. A08-1252.

On August 1, 2008, the Court issued a Supplemental Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Judgment (the "Supplemental Order") dismissing the Buehlers and Ms. Noll on the same grounds as the Court dismissed Premier's claims against Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone - the guarantys they signed defined the "Debtor" as Boone Family Investments, not Becker Development, LLC. Premier now appeals that Supplemental Order.

By order dated October 7, 2008, appeal A08-1252 was consolidated with this appeal (A08-1700).

STATEMENT OF FACTS

This case arises out of the River Bend development project. The River Bend development is a residential housing development located on 40 acres in Becker, Minnesota.

On September 8, 2005, appellant Premier Bank loaned defendant Becker Development, LLC (Becker) \$3.2 million to develop the 40 acres on which the River Bend development is situated. (A-171-172, 179)¹ The loan documentation includes a Loan Agreement (A171-172, 179), Promissory Note (A-172, 213), Mortgage (A-174, 216), and Guarantys (175, 261-298). The authenticity of these documents was determined by the District Court. (A-10-14).

THE LOAN AGREEMENT

On September 8, 2005, Premier entered into a Loan Agreement with Becker Development pursuant to which Premier agreed to make a real estate development loan. (A171-172, 179-200). The original principal amount of the Loan Agreement is \$3,200,000.00. (*Id.*) *Each of the Individual Guarantors was a signatory to the Loan Agreement* which specifically states that Premier was loaning \$3.2 million to Becker Development and that the Loan was contingent upon each of the Individual Guarantors executing a Guaranty in favor of Premier to secure Becker's repayment of the Loan. (*Id.*) In their respective Answers, the Individual Guarantors admitted signing the Loan Agreement. (See, Answer of S. Boone, A. Boone and Becker Development ("Becker

¹ For ease of reference, and to avoid the filing of duplicate documents, Premier's citations refer to the Appendix filed in support of its appeal of the Order.

Answer”) at paragraph 2, admitting allegations of paragraph 17 of Complaint; Boone Family Investments, Uzelac, Lasser, Rasmus and D. Boone’s joinder in the Becker Answer; Answer, Counter-claim and Third Party Complaint of Pamela Noll (“Noll Answer”) at paragraph 2, admitting allegations of paragraph 17 of Complaint; and Joint Answer and Counter-claim of Robert and Nancy Buehler (“Buehler Answer”) at paragraph 8, admitting allegations of paragraph 17 of Complaint).

THE NOTE

To evidence Becker Development’s indebtedness to Premier under the Loan, on September 8, 2005, for value received, Becker Development executed and delivered to Premier a Promissory Note in the original principal amount of \$3,200,000.00 (“Note”), pursuant to which Becker Development promised to pay Premier consecutive monthly installments of all accrued interest commencing on October 8, 2005 and continuing on the same day of each month thereafter until September 8, 2006, at which time the remaining unpaid principal balance and all accrued and unpaid interest was to be due and payable in full. (A-172, 213-215).

THE MORTGAGE

To further secure the loan, Becker Development and Boone Family Investments executed a Mortgage in favor of Premier in the amount of \$3.2 million. Premier recorded the Mortgage with the Sherburne County Recorder on September 9, 2005. (A-174, 216-233).

THE GUARANTYS

To further secure repayment of the Note, and as an inducement to Premier's making of the loan to Becker Development, on or about September 8, 2005, Steven L. Boone, Annette C. Boone, Nancy C. Buehler, Robert G. Buehler, Michale S. Uzelac, Pamela J. Noll, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone (collectively the "Individual Guarantors")² each executed and delivered to Premier a Guaranty (collectively the "Guarantys") pursuant to which the Individual Guarantors absolutely and unconditionally guaranteed the full and prompt payment and performance of all of Becker Development's obligations under the Note, Mortgage, and related loan documents. (A-175, 261-298). In their respective Answers, the Individual Guarantors admitted signing the Guarantys. (See, Becker Answer at paragraph 2, admitting allegations of paragraph 25 of the Complaint; Boone Family Investments, Uzelac, Lasser, Rasmus and D. Boone's joinder in the Becker Answer; Noll Answer at paragraph 6, admitting allegations of paragraph 25 of the Complaint; and Buehler Answer at paragraph 16, admitting allegations of paragraph 25 of the Complaint).

Although the Guaranty signed by Boone Family Investments properly identifies the "Debtor" to be Becker Development (A-296 [Recital A]), the Guarantys executed by the Individual Guarantors mistakenly defined the "Debtor" as Boone Family Investments, LLC rather than Becker Development, LLC (See, Recital A of each Guaranty at A-261, 265, 269, 273, 277, 281, 285, 289, 293).

² Boone Family Investments was also required to give a Guaranty.

BECKER'S DEFAULTS

Between January and September 2007, Becker Development failed to make the monthly installments due under the Promissory Note it executed as part of the \$3.2 million development loan and failed to pay the real estate taxes and penalties due on the River Bend property for the first half of 2007. It also failed to pay the Promissory Note when it matured in September 2007. (A-20, 172). Under the Promissory Note, Mortgage and other loan documents, Becker Development's failure to make these required payments constituted conditions of default. (*Id.*) Despite Premier's demand to do so, Becker Development failed to cure these conditions of default. (*Id.*)

THE UNDERLYING LITIGATION

On July 25, 2007, Premier commenced an action against Becker Development in Sherburne County District Court to foreclose its \$3.2 million Mortgage, find Becker liable for the amounts due on the Note, and find the Individual Guarantors and Boone Family Investments, LLC liable on their Guarantys. This is district court file number: 71-CV-07-1374. (See, Summons and Complaint).

PREMIER'S MOTIONS FOR SUMMARY JUDGMENT

On March 27, 2008, Premier filed a motion for summary judgment based on the undisputed evidence that Becker Development had failed to make monthly payments due under the Promissory Note between January and September 2007, pay the Note in full when it matured in September 2007, and pay the real estate taxes on the River Bend property for 2007. (A-143-170). Premier therefore argued that Becker Development was in default under the Promissory Note, Mortgage, and other related loan documents. (*Id.*) It also

argued that defendants Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Nancy C. Buehler, Robert G. Buehler, Pamela J. Noll, Daniel P. Boone and Boone Family Investments, LLC, had breached their respective guarantys when they refused to satisfy Becker Development's payment obligations under the various loan and mortgage instruments. (*Id.*)

The District Court granted Premier a decree of foreclosure of its first mortgage, and found Becker Development liable to Premier for the amounts due and owing on the Note. (A-33-36). However, on its own motion, *sua sponte*, the District Court dismissed Premier's claims against Boone Family Investments and the Individual Guarantors on the grounds that the guarantys executed by these defendants incorrectly defined the "Debtor" as Boone Family Investments, LLC rather than Becker Development, LLC. (A-37). The District Court granted Defendants Nancy C. and Robert G. Buehler's and Pamela J. Noll's motion to dismiss and strike without prejudice for lack of service and finding that any answer filed did not subject them to the Court's jurisdiction. (A-40).

Premier argued that Boone Family Investments, LLC being defined as the "Debtor" was a scrivener's error and that the Guarantys should be reformed under the theory of mutual mistake because the intent of the parties was clear when the Guarantys were read in conjunction with the Loan Agreement that was executed by these same guarantors on the same day as the Guarantys. Premier further argued that the Guarantys guaranteed all of Defendant Boone Family Investments, LLC's obligations owed to Premier, including Defendant Boone Family Investments, LLC's guarantee of the Note.

The district court rejected these arguments. (See, Supplemental Appendix (“SA”), SA355-SA362).

PREMIER’S MOTION FOR RECONSIDERATION

The District Court found in its Statement of Undisputed Facts, that Defendant Boone Family Investments, LLC signed the same guaranty as the Individual Guarantors. (A-9). On June 30, 2008, Premier moved the District Court for reconsideration on this issue as the guaranty signed by Defendant Boone Family Investments, LLC listed the “Debtor” as Becker Development, LLC. (A-296). On July 17, 2008, the District Court granted Premier’s motion for reconsideration and entered judgment against Boone Family Investments under this Guaranty. (SA363-SA364).

THE COURT’S SUPPLEMENTAL ORDER

On August 1, 2008, the Court issued a Supplemental Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Judgment (the “Supplemental Order”) dismissing the Buehlers and Ms. Noll on the same grounds as the Court dismissed Appellant’s claims against Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Daniel P. Boone on the grounds - the guarantys they signed defined the “Debtor” as Boone Family Investments, not Becker Development, LLC. Premier now appeals that Supplemental Order. (SA365-SA368).

ARGUMENT

I. Standard of Review

Summary judgment shall be granted if there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P.

56.03. The purpose of Rule 56 of the Minnesota Rules of Civil Procedure is to secure the just, speedy, and inexpensive determination of an action "by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citation omitted).

On appeal from summary judgment, the reviewing courts ask two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal from summary judgment on undisputed facts, appellate review is limited to determining whether the district court erred in its application of the law." *Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 118 (Minn. App. 2001) (citation omitted).

II. Premier Is Entitled To Summary Judgment Against The Individual Guarantors.

A guaranty "is an independent contract between a guarantor and a creditor and is collateral to the contractual obligation between the creditor and a debtor." *Loving & Associates, Inc. v. Carothers*, 619 N.W.2d 782, 786 (Minn. Ct. App. 2000), *review denied*, (Minn. Feb. 13, 2001). A guaranty is "an undertaking or promise to pay on the part of one person that is collateral to a primary obligation and that binds the guarantor to performance in the case of the default of the one primarily bound." *Baker v. Citizens State Bank*, 349 N.W.2d 552, 557 (Minn. 1984).

To be enforceable, “[a] guaranty agreement, like any other contract, must be supported by a valid consideration.” *O’Neil v. Dux*, 101 N.W.2d 588, 594 (Minn. 1960). Unlike other types of contracts, however, in the case of a guaranty agreement, “there need be nothing moving from the promisee to the promisor.” *Id.* Rather, it has long been the law in Minnesota that where a creditor acts to its detriment by extending credit or altering the terms of existing credit in reliance on a guaranty, such detriment “is sufficient consideration to support” the guaranty. *Tri-County State Bank of Ortonville v. Golf Properties, Inc.*, 395 N.W.2d 409, 412 (Minn. Ct. App. 1986) (citing *Southdale Center, Inc. v. Lewis*, 110 N.W.2d 857, 862-63 (Minn. 1961)).

Minnesota law favors and encourages the enforcement of personal guarantys given in connection with commercial transactions. As the Minnesota Supreme Court has held:

A personal guaranty is a significant business transaction. A person signing as guarantor is agreeing to pay, if need be, the debt of another, never an agreeable task for the person signing but a prudent business precaution for the financing party. In these circumstances the law requires guarantors to abide by what they have agreed to.

Borg Warner Acceptance Corp. v. Shakopee Sports Center, Inc., 431 N.W.2d 539, 541 (Minn.1988). According to the supreme court, when two competent parties who are able to read, write, and sign a guaranty, and a lender extends credit based on the guaranty, “there is nothing left for the Court to do but to find a judgment against such guarantors. . . . People who sign documents which are plainly written must expect to be held liable thereon. Otherwise written documents would be entirely worthless and chaos would prevail in our business relations.” *Watkins Products, Inc. v. Butterfield*, 274 Minn. 378, 144 N.W.2d 56, 58 (1966).

As is demonstrated below, the undisputed evidentiary record clearly establishes that the Individual Guarantors agreed to guarantee the loan that Premier made to Becker Development and that Premier acted to its detriment by extending that loan based upon those Guarantys. (A-261-298). The undisputed evidentiary record also clearly establishes that the Individual Guarantors breached their respective Guarantys because Becker failed to make installment payments due and owing under the parties' loan documents with respect to the Loan and, despite demand, the Individual Guarantor Defendants have failed to make such payment to Premier. (A-20, 177) The Individual Guarantors are trying to evade these obligations based on what is clearly a scrivener's error defining the Debtor as Boone Family Investments, the company through which the Individual Guarantors invested in the real River Bend project, instead of Becker Development, a company owned and operated by Boone Family Investments.

A. The District Court Erred When it Refused to Reform The Guarantys To Reflect The Intent Of The Parties.

A court may reform an instrument if all the following elements are proven: (1) the parties had a valid agreement expressing their real intentions; (2) the written instrument failed to express their intent; and (3) the failure was due to the parties' mutual mistake. *Johnson v. Giese*, 231 Minn. 258, 261, 42 N.W.2d 712, 715 (1950). Mutual mistake occurs when "both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement." *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn.1980). An agreement may be reformed when the parties made a mutual mistake, there was a unilateral mistake by one party

accompanied by fraud or inequitable conduct, or the parties failed to comply with a legal requirement for execution, such as including the proper grantor. *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn.1984). The evidence supporting reformation must be consistent, clear, and convincing. *Norwest Bank Minnesota, N.A. v. Ode*, 615 N.W.2d 91 (Minn. App. 2000).

In this case, the undisputed evidence clearly and convincingly demonstrates that the District Court should have reformed the Guarantys to reflect that Becker was the “Debtor”, not Boone Family Investments. The Loan Agreement signed by Premier and the Individual Guarantors on September 8, 2005 is a valid agreement that unequivocally expresses Premier’s and the Individual Guarantors’ intent that each Individual Guarantor would guarantee the Note to Becker Development.

The Loan Agreement sets forth the terms under which Premier is making the Loan and states that the Loan is being made to Becker Development and must be guaranteed by the Individual Guarantors. For example, the Loan Agreement expressly defines Becker Development as the “Borrower,” refers to the “Loan Note” in the original principal amount of \$3,200,000, and lists the Guarantys from the Individual Guarantors as required security and “Loan Documentation.” (A-179-180). At paragraph 4(i), the Loan Agreement further obligates the Individual Guarantors to:

Execute and deliver to Lender at any time or times such other further instruments as Lender may request and deem necessary and otherwise to do any and all things and acts whatsoever which Lender may request as reasonably required in order to perfect the assignment to Lender of security granted pursuant to this Loan Agreement.

(A-186).

Moreover, at paragraph 11, the Loan Agreement obligates the Individual Guarantors to:

. . . indemnify Lender [Premier] and save it harmless against all loss, liability, expense, or damages, including but not limited to attorneys fees, which may arise by reason of a breach by Borrower [Becker] or any Guarantor [this would include Boone Family Investments] of any warranties, representations or covenants contained in this Loan Agreement or the assertion of any lien against the Loan Property.”

(A-190).

In short, the Loan Agreement clearly sets forth the parties' intent that the Individual Guarantors agreed to guarantee Becker's indebtedness to Premier under the Loan Note in the original principal amount of \$3,200,000.00, which was executed on the same day. Thus, the undisputed facts clearly and convincingly establish the first element of reformation – the parties had a valid agreement expressing their real intentions.

Johnson v. Giese, 231 Minn. 258, 261, 42 N.W.2d 712, 715 (1950).

On September 8, 2005, the same day the Loan Agreement and Loan Note were signed, the Personal Guarantors each executed a “Guaranty.” In the “RECITALS” at paragraphs “B” and “C” each Guaranty states:

B. The Debtor and the Lender have agreed that the Lender will make an advance (“Loan”) to the Debtor in the principal amount of Three Million Two Hundred Thousand and 00/100 Dollars (\$3,200,000.00) which Loan is evidenced by a Loan Note of even date herewith from the Debtor to the Lender (hereinafter referred to as the “Note”) to be disbursed pursuant to the Loan Agreement of even date.

C. To secure payment of the Note, the Debtor has executed and delivered to the Lender a Mortgage and Assignment of Rents and Security

Agreement and Fixture Financing Statement of even date herewith (hereinafter referred to as the "Mortgage") covering the Premises.

(See, Recital B & C of each Guaranty at A-261, 265, 269, 273, 277, 281, 285, 289, 293). Paragraph 1 of each Guaranty provides that "*the Note, the Mortgage, and the Loan Agreement are hereby made a part of this Guaranty by reference thereto with the same force and effect as if fully set forth herein.*" (Emphasis added). (*Id.* at paragraph 1). The "unconditional and absolute" guaranty set forth in paragraph 3 of the Guaranty expressly refers to obligations set forth in the Note, Mortgage and Loan Agreement which were incorporated by reference. (See, A-262, 266, 270, 274, 278, 282, 286, 290, 294). Moreover, paragraph 8 of each Guaranty provides that "the Individual Guarantor agrees that this Guaranty is executed in order to induce the Lender to make and disburse the Loan. . ." (See, A-264, 268, 272, 276, 280, 284, 288, 292, 296). These documents make it clear that the parties understood that Premier was loaning \$3.2 million to Becker Development and that the Individual Guarantors were required to guarantee repayment of that debt. Thus, the undisputed facts clearly and convincingly establish the second element of reformation – the written Guarantys failed to express the parties' intent when they defined the Debtor to be Boone Family Investments rather than Becker Development. *Johnson v. Giese*, 231 Minn. 258, 261, 42 N.W.2d 712, 715 (1950).

This failure was due to the parties' mutual mistake and the Individual Guarantors' arguments to the contrary strain credulity. The Guarantys expressly incorporate the Loan Agreement by reference, which specifies that Becker Development is the Borrower. Similarly, the Note in the amount of \$3,200,000.00 is incorporated into the Guarantys by

reference and specifies Becker as the Borrower. Finally, the Guarantys expressly state that they are being given to induce Premier to make and disburse the Loan referred to in the Loan Agreement. All of the loan documents were signed on the same date. These documents make it obvious that the parties intended that the Individual Guarantors were guaranteeing the Note.

Conversely, there is no evidence that is inconsistent with Premier's arguments above. The record is devoid of any evidence that the parties ever contemplated the Individual Guarantors guaranteeing some other indebtedness. There is no evidence that Premier made, or even considered, a separate \$3,200,000.00 loan to Boone Family Investments that the Individual Guarantors were asked to guarantee. There is no evidence that the proceeds from the Loan were used for anything other than to develop the River Bend project consistent with the intent of the loan documentation. Thus, the undisputed facts clearly and convincingly establish the third and final element of reformation – the scrivener's error defining the debtor as Boone Family Investments was a mutual mistake. *Johnson v. Giese*, 231 Minn. 258, 261, 42 N.W.2d 712, 715 (1950).

Once the Guarantys are reformed as required by Minnesota law, it is undisputed that the Individual Guarantors are liable. The authenticity of the Note has been determined by the Court in its Order and is supported by the record. (A- 10, 26-27). Becker's breach of the Note and the amounts due and owing Premier has also been determined by the Court and is supported by the record. (A-26-27) The Individual Guarantors have absolutely no defense, all of which they waived in their respective Guarantys. (See paragraph 5 of each guaranty: A-262, 266, 270, 274, 278, 282, 286, 290,

294). This Court should not allow the Individual Guarantors to evade obligations they owe Premier that are expressly stated in a Loan Agreement that they admittedly signed by taking advantage of a scrivener's error.

Minnesota courts have routinely used reformation to fix scrivener's errors in legal documents where there has been a mutual mistake. For example, the Minnesota Court of Appeals has held "[a] deed creating by mistake a tenancy in common, where a joint tenancy was intended, will be reformed." *Magnuson v. Diekmann*, 689 N.W.2d 272, 274 (Minn.App.2004) (quoting *Papke v. Pearson*, 203 Minn. 130, 137, 280 N.W. 183, 186 (1938)). In *Hartigan v. Norwich Union Indem. Co.*, 188 Minn. 48, 246 N.W. 477 (Minn. 1933) the Court reformed an insurance policy to reflect proper name of the owner of the insured car based upon mutual mistake. In *Berg v. Carlstrom*, 347 N.W.2d 809 (Minn. 1984), the Court reformed a deed to include the proper parties' names in order to perfect the grant of an easement. In *Theisen's Inc. v. Red Owl Stores, Inc.*, 243 N.W.2d 145 (Minn. 1976), the Court reformed a lease to change the year the building was completed, which impacted the computation of the lessee's liability for tax increases, based upon the parties course of conduct and expert testimony.

The facts and documents in this case are much stronger than the evidence that was deemed sufficient to support reformation in each of the cases referred to above. Here, there is clear and convincing evidence of the parties' intent in a written document executed by the parties – the Loan Agreement. Moreover, the Loan Agreement is incorporated by reference in the Guarantys. When you combine these facts with the course of conduct of the parties in using the money loaned for purposes of developing the

River Bend project, and the fact that Boone Family Investments was the owner operator of Becker Development, there can only be one conclusion: identifying Boone Family Investments as the “Debtor” in the Guarantys was a scrivener’s error that should be reformed to reflect the parties’ intent that Becker Development was the “Debtor.”

B. The Guarantys Signed By The Individual Guarantors Guaranteed Boone Family Investments, LLC’s Obligations Under Its Guaranty Of Becker Development’s Obligations Under The Promissory Note.

Premier submits that Boone Investment’s guarantee of the obligations of Becker Development entitles it to summary judgment against the Individual Guarantors even if the Guarantys are not reformed. As written, the Guarantys guaranteed Boone Investment’s obligations as the “Debtor”. (A-261-298). Boone Family Investments breached its obligations under the Loan Agreement, Mortgage and its Guaranty. Thus, even if the Guarantys are read to guarantee the indebtedness of Boone Family Investments (as opposed to Becker) the Individual Guarantors are liable to Premier because Boone Investments has breached its obligations under the Mortgage, the Loan Agreement, and its Guaranty.

The Guarantys provide at paragraphs 2 and 3:

2. The Individual Guarantor hereby unconditionally and absolutely guarantees to Lender the due and prompt payment, and not just the collectibility, of the principal and interest and late charges and all other indebtedness, if any, on the Note, when due, whether at maturity, pursuant to mandatory or optional prepayments, by acceleration or otherwise, all at the times and places and at the rates described in and otherwise according to the tenor of the Note.

3. The Individual Guarantor further hereby unconditionally and absolutely guarantees to Lender the due and prompt performance by the Debtor of all duties, agreements and obligations of the Debtor contained in

the Mortgage and the Loan Agreement, respectively, and the due and prompt payment of all costs incurred, including reasonable attorneys' fees, in enforcing payment and performance of Debtor's obligations as provided in the Note, the Mortgage, the Loan Agreement and its obligations under this Guaranty (the payment and performance of the items set forth in paragraphs 2 and 3 of this Guaranty being hereinafter collectively referred to as the "Indebtedness Guaranteed.")

(*Id.*).

Thus, reading the Guarantys as written, each Individual Guarantor has guaranteed all obligations of Boone Investments under the loan documents. It is undisputed, and the District Court has found, that Boone Investments breached its obligations under the Loan Agreement and its Guaranty. Accordingly, Boone Family Investments is indebted to Premier and this is part of the indebtedness guaranteed by the Individual Guarantors in the Guarantys.

III. Even If Summary Judgment Was Not Mandated, The Court Erred When it Dismissed The Individual Guarantors.

Premier commenced this action in October 2007, seeking, *inter alia*, judgment for the balance owed on the loan from Becker and the Guarantors, jointly and severally; foreclosure of the mortgage; and foreclosure of Premier's security interest in other collateral pledged to secure the loans. On March 27, 2008, Premier moved for summary judgment against Becker and the Guarantors.³ (A-143). Premier did not take discovery prior to moving for summary judgment because the answers filed on behalf of the Defendants admitted the authenticity of the documents and the material facts supporting

³ Premier also moved for summary judgment on its claims of priority over the interests of Defendants Knife River Corporation-North Central, formerly known as Bauerly Brothers, Inc. ("Bauerly") and Kuechle Underground, Inc. ("Kuechle"), each of whom have filed mechanic's liens against the mortgaged property.

summary judgment. In addition, no scheduling order had been issued in this case and there would have been time to complete discovery if the summary judgment motion did not dispose of all issues. The hearing on the motion for summary judgment took place on April 25, 2008. (A-5).

In opposition to Premier's summary judgment motion, on or about April 23, 2008, two days before the hearing, three of the Individual Guarantors brought motions to dismiss for lack of service of process, claiming that Lawrence Marofsky, who had interposed an answer on their behalf, did not have authority to do so. When they filed their Opposition to Motion for Summary Judgment on April 21, 2008, four days before the hearing, the remaining Individual Guarantors argued, for the first time, that Premier was not entitled to summary judgment because the Guarantys they signed guaranteed the obligations of Boone Family Investments, not Becker Development. (A-318).

On May 30, 2008, the Court issued its Order for Judgment and Partial Summary Judgment (the "Order"). As part of that Order, the Court granted "the Motion to Dismiss of **DEFENDANTS STEVEN L. BOONE, ANNETTE C. BOONE, MICHAEL S. UZELAC, DEANNA M. LASSER, ANN-MARIE RASMUS AND DANIEL P. BOONE** requesting dismissal of the action of **PLAINTIFF PREMIER BANK** against said Defendants on their respective personal guarantees of obligations dated September 8, 2005." (A-37). Defendants had not noticed and filed a motion to dismiss on these grounds. This motion was considered *sua sponte* by the Court. The Court reasoned that "[t]hese guarantees were executed as guarantees of the indebtedness of Boone Family Investments, LLC and not the indebtedness of Becker Development, LLC." (*Id.*).

Premier submits that even if it were not entitled to summary judgment, this dismissal was improper because there was a triable issue of material fact regarding the intent of the Individual Guarantors to guarantee the Note. Should the Court of Appeals determine that Premier is not entitled to reformation of the Guarantys as a matter of law, at a minimum, the evidence in the record, detailed above to support Premier's claims of reformation, creates a triable issue of fact as to whether the Individual Guarantors guaranteed the indebtedness of Becker under the Loan Agreement and Note.

For example, as demonstrated above, the Guarantys expressly incorporate the Loan Agreement by reference, which specifies that Becker Development is the Borrower; the Note in the amount of \$3,200,000.00 is incorporated into the Guarantys by reference and specifies Becker as the Borrower; the Guarantys expressly state that they are being given to induce Premier to make and disburse the Loan referred to in the Loan Agreement; and all of the loan documents were signed on the same date. This evidence clearly demonstrates a triable issue of fact with regard to the Individual Guarantor's intent; especially, when the record is devoid of any evidence other than the Individual Guarantors' denials that they did not intend to guarantee the Loan to Becker. A party opposing summary judgment may not rely upon its pleadings or general statements of fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986). Rather, the non-movant must go beyond the pleadings and set forth specific facts which raise a genuine issue for trial. *Id.* at 322.

The Individual Guarantors failed to offer any evidence with regard to intent. Accordingly, the case should be remanded to the District Court for further discovery and trial on the issue of the intent of the parties, mutual mistake, and reformation.

CONCLUSION

The District Court erred when it refused to reform guarantys executed by Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler to correct a scrivener's error and grant summary judgment in favor of Premier and against Defendants Pamela J. Noll, Nancy C. Buehler, and Robert G. Buehler for breach of guaranty. Accordingly, Premier respectfully requests that this Court remand this matter to the District Court for further proceedings consistent with this Court's opinion.

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Dated: 10-30-2008

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 6,120 words. This brief was prepared using Microsoft Word 2002.

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