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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1571**

AgStar Financial Services, FLCA,
Appellant,

vs.

HJR Farms, LLC, et al.,
Respondents,

Steven J. Bautch, et al.,
Respondents,

Todd E. Rodenwald,
Respondent,

Sarah Rodenwald,
Respondent.

**Filed June 11, 2012
Affirmed
Worke, Judge**

Stearns County District Court
File No. 73-CV-10-6192

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Todd E. Rodenwald, Buffalo, Minnesota (pro se respondent)

Sarah Rodenwald, Buffalo, Minnesota (pro se respondent)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's award of summary judgment to respondents, arguing that the district court erred in concluding that the guaranty agreements signed by respondents were unenforceable because they (1) did not represent a meeting of the minds and (2) were ambiguous. We affirm.

FACTS

In November 2006, Todd Rodenwald, Craig Sauer, Mark Talberg, Kurt Sauer, Steven Bautch, John Kurtz, and James Kurtz formed HJR Farms, LLC, for the purpose of purchasing real estate. They authorized HJR Farms "to obtain a loan of up to \$4,500,000" from appellant AgStar Financial Services, FLCA.

In January 2007, HJR Farms, by its chief manager, Todd Rodenwald, executed a promissory note to AgStar in the amount of \$3,257,000. As security for the promissory note, HJR Farms executed an open-ended mortgage encumbering real property in Stearns County. In addition, the members of HJR Farms and their wives signed guaranty agreements. The guaranty agreements provided:

Guarantor unconditionally and absolutely guarantees the due and punctual payment, performance and observance by Borrower of any and all of the Obligations, whether or not according to the present terms thereof, at any earlier or accelerated date or dates as provided therein, or pursuant to any extension or extensions of time or to any change or changes in the terms, covenants and conditions thereof, now

or at any time hereafter made or granted. The liability of Guarantor to Lender under this Agreement is unlimited in amount, unless one of the following boxes is checked:

- The liability of Guarantor is limited to not more than \$_____.
- The liability of Guarantor is limited to _____ % of all present and future obligations of Borrower to Lender.

The guaranty agreements further stated that the agreements were “a complete and exclusive statement of the Guaranty between the parties” and that “[n]o course of dealing, course of performance, trade usage, oral agreements or parol evidence shall be used to modify its terms.”

In November 2008, AgStar notified the guarantors that the loan was in delinquent status. A few months later, AgStar notified the guarantors that the loan was in default. Finally, in December 2009, AgStar sent each guarantor a letter stating that “[b]ecause of default in the payment of the above loan, the principal of the note is declared immediately due and payable in its entirety, together with all advancements and accrued interest.”

AgStar filed a complaint against HJR Farms and the guarantors, alleging breach of contract, among other things. Respondents Steven Bautch, Cynthia Bautch, John Kurtz, Linda Kurtz, James Kurtz, and Deborah Kurtz (the Bautch/Kurtz respondents) denied the allegations and asserted crossclaims against HJR Farms and the other guarantors. They claimed that they were unaware that the AgStar loan existed and that the land that was the subject of the litigation had been purchased. They further claimed that they were unaware that they were guarantors for the loan and had not received any communication from AgStar until they were informed the loan was in delinquent status.

AgStar moved for partial summary judgment against HJR Farms and the district court granted the motion, awarding judgment to AgStar in the amount of \$3,964,367.58. The district court reserved AgStar's right to pursue any claims in the matter against the individual guarantors.

AgStar and the Bautch/Kurtz respondents subsequently filed cross motions for summary judgment, both arguing that no material facts were in dispute and that the case could be disposed of summarily. After concluding that the guaranty agreements were unenforceable because they were ambiguous and there was no mutual assent between the parties, the district court granted the Bautch/Kurtz respondents' motion and entered judgment against AgStar. This appeal follows.

D E C I S I O N

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of fact exists if reasonable persons might draw different conclusions based on the evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments" and must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *Id.* at 71. This court reviews de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact when the evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson*,

L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002). This court will affirm summary judgment if it can be sustained on any ground. *See Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

AgStar argues that the district court erred in granting summary judgment to the Bautch/Kurtz respondents based on its conclusion that the guaranty agreements signed by the Bautch/Kurtz respondents were not valid contracts. A guaranty agreement is “a collateral contract to answer for the payment of a debt or the performance of a duty in case of the default of another who is primarily liable to pay or perform the same.” *Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 275, 64 N.W.2d 517, 522 (1954) (quotation omitted). “[A] guaranty is construed the same as any other contract, the intent of the parties being derived from the commonly accepted meaning of the words and clauses used, taken as a whole.” *Am. Tobacco Co. v. Chalfen*, 260 Minn. 79, 81, 108 N.W.2d 702, 704 (1961). A breach of contract claim consists of three elements: “(1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Oct. 21, 2008). The first element is the only one at issue in this case.

Mutual assent

For a valid contract to exist, “the parties must agree with reasonable certainty about the same thing and on the same terms.” *Peters v. Mutual Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988) (quotation omitted). A valid contract “requires a meeting of the minds concerning its essential elements.” *Minneapolis Cablesystems v.*

City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980). “[A] manifestation of mutual assent . . . may be inferred wholly or partly from words spoken or written or from the conduct of the parties or a combination thereof.” *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). But whether a contract was formed is determined based on an evaluation of the parties’ objective conduct, not their subjective intent. *Thomas B. Olson & Assocs., P.A.*, 756 N.W.2d at 918.

AgStar argues that the district court erred by concluding that there was a lack of mutual assent between AgStar and the Bautch/Kurtz respondents. The district court found that the parties attached a different meaning to the blank space in the following statement, which followed a box that was checked: “The liability of the Guarantor is limited to _____% of all present and future obligation of Borrower to Lender.” The statement preceding this sentence indicated that liability was unlimited unless a box was checked. Here, a box was checked, but no limitation on liability was included. The district court found that the percentage of liability was a material term, and the absence of a number in the space indicated a lack of mutual assent between the parties.

AgStar first contends that all of the Bautch/Kurtz respondents knowingly signed the guaranty agreements and that they understood, or should have understood, the agreements. AgStar argues that the Bautch/Kurtz respondents have not asserted that there was fraud, mistake, or unconscionable terms, and are therefore “bound by the clear terms of the Guarantees.” “In the absence of fraud, mistake, or unconscionable terms . . . a party to a contract on which others have relied cannot avoid the duties of the document

by showing he did not know its contents.” *Greer v. Kooiker*, 312 Minn. 499, 508, 253 N.W.2d 133, 140 (1977).

AgStar contends that *Greer* controls this matter. In *Greer*, the owner of a farm, who was also a licensed real estate agent, met with potential buyers of the farm, the plaintiffs, and, during the meeting, one of the plaintiffs prepared a memorandum for the sale of the farm. *Id.* at 501-02, 253 N.W.2d at 136-37. The plaintiffs and the owner of the farm signed the memorandum in the margin, and the owner took the memorandum into the house and told his wife to sign it, which she did. *Id.* at 502, 253 N.W.2d at 137. The plaintiffs gave the owner a \$5,000 check as down payment. *Id.* An attorney later prepared the contract for deed, but the owner of the farm refused to sign it and instead sold the farm to another party. *Id.* The plaintiffs sued the owner of the farm and his wife, requesting specific performance; the district court awarded damages to the plaintiffs. *Id.* at 503, 253 N.W.2d at 137. On appeal, the owner and his wife argued, among other things, that the contract for sale was void because the owner’s wife did not agree to the contract. *Id.*, 253 N.W.2d at 138. The Minnesota Supreme Court concluded that the owner’s wife was bound by the contract, despite the fact that she claimed she did not read the contract. *Id.* at 508, 253 N.W.2d at 140.

The district court distinguished the facts in *Greer* from the facts in this case, concluding that “[i]n *Greer*, the material terms of the contract were provided for in the four corners of the memorandum, and there was a meeting of the minds between the parties,” while “[i]n this case, the percentage of liability space is left blank, hence on its face it is unclear what the parties intended the agreement to represent.”

Here, each of the Bautch/Kurtz respondents acknowledged that their signatures are on the guaranty agreements, but they assert that they do not remember signing the agreements and that the terms of the agreements were never explained to them. None of them argue that there was fraud, mistake, or unconscionable terms. Thus, as AgStar contends, the Bautch/Kurtz respondents' argument that they did not understand the contents of the guaranty agreements is unsuccessful. But AgStar fails to acknowledge that the parties still must have a meeting of the minds regarding the essential terms of a contract in order for it to be valid. In this case, the percentage of each guarantor's liability was left blank in the guaranty agreement. We agree with the Bautch/Kurtz respondents that the percentage of liability was a material term to which each party has attached a different meaning. *See Smoliak v. Myhr*, 361 N.W.2d 153, 156 (Minn. App. 1985) (concluding that a contract could not be specifically enforced because each party attached a different meaning to the contract term "600 feet of shoreline property"). While AgStar argues that the fact that the space is blank means that the Bautch/Kurtz respondents are 100% liable, this is not supported by the record.¹ The checked box next to this language suggests that the parties assumed their liability would be limited to less than 100%. Further, as the district court concluded, the facts of this case are distinguishable from the facts in *Greer* because no material terms were missing from the document at issue in *Greer*.

¹ We also note that AgStar has since changed its practice and does not check any of the boxes if it intends for the guarantor to have 100% liability.

AgStar makes several additional arguments in support of its contention that there was mutual assent between the parties. AgStar argues that the parties' words and actions, including "their silence on the question of the existence" of the guaranties, indicated acceptance. "Conduct, as well as verbal expression, may at times constitute acceptance, and silence may be acceptance where there is a duty to deny." *Rosenberg v. Townsend, Rosenberg & Young*, 376 N.W.2d 434, 437 (Minn. App. 1985). But we see no evidence of conduct by the Bautch/Kurtz respondents that could be construed as acceptance. The record also supports the Bautch/Kurtz respondents' argument that they did not have contact with AgStar after they signed the agreements, including testimony from AgStar employees that they did not have any direct contact with the Bautch/Kurtz respondents. Although their signatures on the document indicate that they agreed to some percentage of liability, the lack of a specific term negates a finding of mutual assent.

AgStar further contends that the district court erred in granting summary judgment to the Bautch/Kurtz respondents because, at least, "the meaning of the liability provision" is a material issue of fact. We disagree. Here, there is no genuine issue of material fact because reasonable people could not reach different conclusions based on the evidence. The plain language of the guaranty agreements indicate that the parties intended to limit the Bautch/Kurtz respondents' liability, but the blank space in the agreement's language indicates that the parties did not agree to the amount of liability. In addition, the guaranty agreements do not permit consideration of "course of dealing, course of performance, trade usage, oral agreements or parol evidence." Finally, we note that both parties moved for summary judgment, agreeing that there were no material facts in dispute.

Accordingly, we conclude that the district court did not err in determining that the guaranty agreements were unenforceable due to a lack of mutual assent.

Ambiguity

AgStar next argues that the district court erred in concluding that the guaranty agreements were unenforceable because they were ambiguous. “[A]n alleged contract which is so vague, indefinite, and uncertain as to place the meaning and intent of the parties in the realm of speculation is void and unenforceable.” *King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 52 (1961). When “substantial and necessary terms are specifically left open for future negotiation, the purported contract is fatally defective.” *Id.* A contract’s language is ambiguous if it is “reasonably susceptible to more than one interpretation.” *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). A contract’s unambiguous language “must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.” *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 347 (Minn. 2003) (quotation omitted). A contract is construed against the drafter if its terms are ambiguous. *Empire State Bank v. Devereaux*, 402 N.W.2d 584, 587 (Minn. App. 1987). The issue of whether a contract is ambiguous is a question of law, which this court reviews de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

Because there are no Minnesota cases directly on point, AgStar relies on three cases from foreign jurisdictions that addressed a contract in which a term had been left blank. *See McCaleb v. Nat’l Bank of Commerce of Pine Bluff*, 752 S.W.2d 54 (Ark. Ct. App. 1988); *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978); *N. Carolina Nat’l*

Bank v. Corbett, 156 S.E.2d 835 (N.C. 1967). These cases are readily distinguishable from the facts before us. Here, a contract term, the percentage of liability, was left blank, but a box was checked, indicating that the parties intended the percentage of liability to be something less than 100%. Under these circumstances, the district court did not err by concluding that the percentage of the Bautch/Kurtz respondents' liability is a "substantial and necessary term[]," and that the fact that it was omitted renders the guaranty agreements vague and uncertain. See *Empire State Bank*, 402 N.W.2d at 587 (stating that an ambiguous contract is construed against its drafter).

In the alternative, AgStar argues that this court should conclude that even if the guaranty agreements are ambiguous, they are enforceable. AgStar contends that when a contract's "language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact unless such evidence is conclusive." *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966). But AgStar fails to recognize that both parties agreed that no material facts were in dispute when they filed cross motions for summary judgment and, thus, there are no facts for the fact-finder to determine. We conclude that the district court did not err when it determined that the guaranty agreements were ambiguous and unenforceable.

Accordingly, the district court did not err when it granted summary judgment to the Bautch/Kurtz respondents based on its determination that the guaranty agreements were unenforceable because they were ambiguous and lacked mutual assent.

Affirmed.