STATE OF MINNESOTA
IN COURT OF APPEALS
A10-954

Nodland Construction Company, Inc.,
Respondent,

vs.

City of Avon, Minnesota,
Appellant,

Percheron Properties, LLC,
Defendant.

Filed January 4, 2011
Reversed
Minge, Judge

Stearns County District Court
File No. 73-CV-09-11329

John J. Steffenhagen, Hellmuth & Johnson, PLLC, Eden Prairie, Minnesota (for respondent)

Paul D. Reuvers, Jason J. Kuboushek, Iverson Reuvers, Bloomington, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the district court's denial of its motion for summary judgment and granting of summary judgment for respondent. Because the contract unambiguously supports appellant's position, appellant is entitled to summary judgment, and we reverse and order summary judgment for appellant.

FACTS

In early 2007, Percheron Properties, LLC (Percheron) received approval from the city of Avon for a new subdivision. As part of the development, the city was responsible for water, sanitary sewer, and storm sewer improvements, along with streets, sidewalks, and a park (public improvements). Percheron agreed to the city imposing special assessments to finance the public improvements, to pay those assessments, and to provide collateral to secure this obligation.

The city awarded Nodland Construction Company, Inc. (Nodland) the contract to build the public improvements for the Percheron development with a bid of just over $4.5 million. The contract between Nodland and the city (Nodland Agreement) is dated June 28, 2007. It contained a standard clause that the city would retain 5% of all progress payments to Nodland to insure the work was completed and the retainage would be paid to Nodland upon final acceptance of the work.

The city required that as a part of the subdivision approval Percheron had to provide collateral with a value equal to at least 50% of the costs of the improvements to be assessed by the city. This collateral arrangement is termed "assessment security."

Percheron, however, could only provide collateral for 30% of the costs. Without the required 50% security, the project would not have gone forward, and the city would have canceled Nodland's contract to construct the public improvements. To provide sufficient collateral, and apparently to avoid loss of construction work, Nodland signed a Memorandum of Understanding with the city, allowing the city to increase the retainage percentage in the Nodland Agreement from 5% to 10% and to "designate all such funds as Assessment Security."[1] Nodland and the city also signed Change Order No. 1 which incorporated the Memorandum of Understanding into the Nodland Agreement "[t]o be included as letter of credit for development."

Having arranged the required amount of security for the project, Percheron and the city formally entered into a Development Agreement on August 14, 2007. The Development Agreement recognized the increase in retainage percentage by Nodland and stated that the funds would be designated as the required assessment security. The Development Agreement further stated that "should [Nodland] challenge the City's right to use pledged funds as assessment security, this form of security shall no longer be approved and [Percheron] must immediately substitute other security . . . ." Although no document was signed by all three parties, the various documents cross-reference each other.

[1] The memorandum's full title is: "Memorandum of Understanding Between the City of Avon and Nodland Construction Co., Inc. Regarding Assignment of Retainage and Bond Proceeds to be Used as Assessment Security for the Avon Estates Development in Avon, Minnesota."

The construction of the public improvements proceeded smoothly. On January 26, 2009, Nodland notified the city that its work had been completed and requested final payment, including all retainage. In its notice, Nodland objected to and challenged further use by the city of any retainage as an assessment security. The city then sent a letter to Percheron requesting that it provide substitute security for the retainage requested by Nodland. Percheron failed to provide substitute security.

In the ensuing crash in the property market, Percheron failed to pay its special assessments and the city declared Percheron in default on its payment obligation in the Development Agreement. The city refused to pay Nodland the retainage, asserting that it was assessment security and could be applied against Percheron's obligation. Nodland filed suit on October 19, 2009. Both sides moved for summary judgment. The district court granted Nodland's motion, and denied the city's. This appeal followed.

D E C I S I O N

The issue on appeal is whether Nodland is entitled to payment of the retainage being held as assessment security. On appeal from summary judgment, we "review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "Where the critical evidence is documentary, there is no necessity for the reviewing court to defer to the [district] court's judgment of the meaning and credibility of the evidence." *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 901 (Minn. App. 1987) (citing *In Re Trust Known as Great Northern Iron Ore Prop.*, 308 Minn. 221, 225, 243 N.W.2d 302, 305 (1976)), *review denied* (Minn. Feb. 12, 1988). Evidence is viewed

in the light most favorable to the nonmoving party. *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 503 (Minn. 2006).

The task is to construe the four documents: the Nodland Agreement, the Development Agreement, the Memorandum of Understanding, and Change Order No. 1. When reviewing contract documents, writings related to the same transaction must be construed with reference to each other. *Am. Nat'l Bank of Minn. v. Hous. & Redevelopment Auth. for City of Brainerd*, 773 N.W.2d 333, 337 (Minn. App. 2009) (citing *Anderson v. Kammeier*, 262 N.W.2d 366, 370 n.2 (Minn. 1977)). When reading a contract, we give effect to all of the language in the instrument. *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). We acknowledge that no single document is signed by all three parties. However, because the documents relate to the same transaction and are tied together by cross-references, we construe them together.

A threshold question is whether the documents are ambiguous. "The parol evidence rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003) (quotation omitted). A contract is ambiguous if the language is reasonably susceptible to more than one interpretation, *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003), or if there is an irreconcilable conflict between terms, *Morris v. Weiss*, 414 N.W.2d 485, 487 (Minn. App. 1987) (interpreting an insurance

policy). Both sides argue that the language is unambiguous. This court agrees and will analyze the contract language without reference to parol evidence.[2]

From Nodland's perspective, paragraph 6.03 of the June 28, 2007 Nodland Agreement is the most important provision because it sets forth its right to payment of the retainage. That paragraph states: "Upon final completion and acceptance of the Work . . . [the city] shall pay the remainder of the Contract Price . . . ."

Nodland also points us to paragraph 10.A.c. of the Development Agreement between Percheron and the city. The Development Agreement is dated August 14, 2007—several weeks after the Nodland Agreement. The Development Agreement identifies the following as assessment security:

> Funds retained by the City under [the Nodland Agreement] which authorizes . . . the City to increase the percentage to be retained from payment requests from five percent (5%) to ten percent (10%) and which specifically designates all such funds as Assessment Security. . . . [S]hould [Nodland] challenge the City's right to use pledged funds as Assessment Security, this form of security shall no longer be approved and [Percheron] must immediately substitute other security in the amount of $458,777.00.

Nodland argues that this language in paragraph 10.A.c limited the pledge of the retainage as assessment security to the status of a conditional guaranty. Nodland reaches this conclusion by reasoning that the language of paragraph 10.A.c establishes a two-step process: first, Nodland can challenge the continued use of the retainage as an assessment

[2] Parol evidence, such as minutes to city council meetings and e-mails between the parties, was presented to the district court.

security; second, this challenge terminates the assessment security status of the retainage. Nodland asserts that at this point it is entitled to payment of the retainage.

The word "security" is defined as: "1. Collateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor." *Black's Law Dictionary* 1475-76 (9th ed. 2009). "A contract of guaranty, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor." *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 696 (Minn. App. 2009) (quotation omitted). A guaranty can be absolute or conditional. *Dahmes v. Indus. Credit Co.*, 261 Minn. 26, 33, 110 N.W.2d 484, 488-89 (1961).

We also observe that the Memorandum of Understanding is incorporated into the Nodland Agreement by Change Order No. 1, that both of them are signed by Nodland, and that both are subsequent to and modify that Agreement. The Memorandum states, in relevant part:

> 6. As provided for in the Development Agreement, the City requires Assessment Security to be provided by [Percheron] to secure special assessment payments for the improvements. The City has agreed to accept [Nodland]'s assignment of a portion of [Nodland]'s payment for construction as a form of acceptable Assessment Security.
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> 7. As such, as provided in Paragraph 10.A.c. of the Development Agreement, [Nodland] hereby agrees to, authorizes the City to, and directs the City to increase the percentage to be retained from [Nodland]'s payment requests (to be paid with bond proceeds) from five percent (5%) to ten

> percent (10%) and [Nodland] specifically agrees to designate all such funds as Assessment Security.
>
> . . . .
>
> 11. Once [Nodland]'s Assessment Security is eligible to be released pursuant to the Development Agreement, City agrees that [Nodland]'s Assessment Security will be released prior to the release of any other Assessment Security posted by any other party.

The Development Agreement that Nodland relies upon only obligates Percheron to replace the retainage provided by Nodland as assessment security if Nodland objects to its continued use as such. The Development Agreement says nothing about releasing Nodland from its commitment under the Memorandum of Understanding and does not obligate the city to pay Nodland its retainage before Percheron supplies adequate replacement collateral. The quoted provision of the Development Agreement just recognizes what the city has a right to demand of Percheron.

The interpretation urged by Nodland treats its construction contract (Nodland Agreement), which was the first signed document, as if none of the other documents modified Nodland's right to the retainage. Nodland uses this interpretation to characterize its obligation as a conditional guaranty. Such a limitation on the guaranty leads to an absurd result. The city would be relying on the retainage as assessment security but allowing Nodland to unilaterally withdraw the retained funds at any time after the construction is completed. Under such an interpretation, the so-called "assessment security" would be illusory; it would not provide any security if it could be unilaterally withdrawn.

The proper interpretation of the contract, giving effect to all of the language, is to view the assessment security as an absolute guaranty of Percheron's obligation to pay the assessments. "An absolute guaranty is a contract in which the guarantor promises that if the debtor does not perform the principal obligation, the guarantor will perform some act (such as the payment of money) to or for the creditor's benefit, the only condition being the principal's default." 38 Am. Jur. 2d *Guaranty* § 15 (2010). "In the absence of language clearly indicating that the guaranty is conditional, it is usually treated as absolute." *Charmoll Fashions, Inc. v. Otto*, 311 Minn. 213, 220, 248 N.W.2d 717, 720 (1976). When a guaranty is absolute, the guarantor "becomes liable merely upon the failure of performance by the debtor." *Id.* at 219, 248 N.W.2d at 720.

Other contract documents signed by Nodland confirm that the use of its retainage as assessment security was meant as an absolute guaranty. The previously quoted paragraphs in the Memorandum of Understanding state that the retainage was to be reclassified as assessment security to bolster the security Percheron was required to provide. The Memorandum also dictates that once the assessment security is eligible for release pursuant to the Development Agreement, Nodland's retainage will be released before collateral posted by others. Finally, Change Order No. 1 incorporates the Memorandum of Understanding into the Nodland Agreement "[t]o be included as letter of credit for development."

We recognize that if Nodland challenged the use of the retainage as assessment security *and if Percheron replaced that security*, the money could have been released to Nodland. The simple recognition of that eventuality does not make the guaranty

conditional. The guaranty arrangement between the parties does not provide for any contingency that must occur to trigger Nodland's liability. If Percheron failed to pay the assessments, the city had Nodland's retainage funds as assessment security. That fact does not change just because there is a clause by which the city could request that Percheron replace Nodland's security. Here, there is no indication that after Nodland demanded the retainage and challenged the arrangement, Percheron performed. Rather, Percheron defaulted. The city's application of the retainage to cover assessments leaves Nodland with a claim against Percheron, not the city.

In sum, we conclude that when properly read together, the contract documents are unambiguous, and that the district court erred in granting summary judgment for Nodland and denying summary judgment for the city. We reverse and order summary judgment for the city of Avon.

Reversed.

Dated: