STATE OF MICHIGAN

COURT OF APPEALS

BANK ONE, N.A., Plaintiff-Appellee,	UNPUBLISHED November 16, 2006
v	No. 263919 Oakland Circuit Court
FARRELL MOORE, ANN MOORE and BRENTWOOD TAVERN, LLC, Defendants-Appellants.	LC No. 2003-053513-CK

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendants, Farrell Moore (Farrell), Ann Moore (Ann) and Brentwood Tavern, LLC (collectively defendants), appeal as of right a judgment for plaintiff, Bank One, N.A., in this action to enforce loan guarantees. We affirm.

Defendants first argue that the guarantees are unenforceable under the statute of frauds. We disagree.

Because this issue was not raised in, or decided by, the trial court, it is unpreserved. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Unpreserved issues are reviewed for plain error affecting substantial rights. *Veltman v Detroit Edison Co,* 261 Mich App 685, 690; 683 NW2d 707 (2004). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Michigan's statute of frauds, MCL 566.132, provides, in pertinent part:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged . . . :
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(b) A special promise to answer for the debt, default, or misdoings of another person.

"Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue." *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002) (citation omitted). This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning. *Willett v Charter Twp of Waterford*, 271 Mich App 38, 48; 718 NW2d 386 (2006) (citation omitted). Where the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 895 (2005). This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

To satisfy the statute of frauds, a writing need not contain all the terms of the agreement to be enforceable, and the writing may be considered with the admitted facts and extrinsic evidence showing the surrounding circumstances. *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc (On Remand),* 265 Mich App 105, 114; 693 NW2d 394 (2005).

> We should always be satisfied with some note or memorandum that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail. [*Id*. (internal quotation marks, brackets and citation omitted).]

Here, there are writings satisfying the statute of frauds. The guarantees are both in writing, and both are signed by the parties to be charged, i.e., defendants. There is no authority providing that the statute of frauds is unsatisfied where the written guarantee incorrectly states the primary obligor. Here, the guarantor is correctly identified in each of the guarantees. The obligee, plaintiff, is correctly stated. The incorrect identification of the primary obligor is of no consequence. Defendants cite no authority that the statute of frauds requires a guarantee to state the primary obligor at all. On the contrary, the statute expressly states that what is required is that the writing be signed by the party to be charged. MCL 566.132(1). Here, it is undisputed that the parties to be charged signed the guarantees.[1] Therefore, incorrectly identifying the primary obligor is irrelevant for statute of frauds purposes.[2]

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[1] Brentwood Tavern admitted that it signed its guaranty, and Ann and Farrell admitted that they too signed their guarantee.

[2] Defendants rely on *Moore v Capital Nat'l Bank of Lansing*, 274 Mich 56, 61; 264 NW2d 288 (1936). But *Moore* does not deal with the statute of frauds. Defendants also rely on *Goquiolay v Colin's Collection, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October

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Defendants argue that: (1) a contract of guaranty requires a principal, an obligee and a guarantor; (2) the guarantees in question, as drafted, "do not reflect a guarantor, obligee, and principal"; and (3) Brentwood Golf Club, LLC (BGC), was not an original party to the loan; "instead, the MFLP was the obligee . . . ."[3] This argument lacks merit. An obligee is "a person to whom another is obligated . . . ." *Random House Webster's College Dictionary* (1997), p 901. Plaintiff, as the lender, is the obligee under the guarantees because the borrower owes the repayment to plaintiff. The MFLP executed the term loan agreement on behalf of BGC. Since the MFLP is not owed any performance under the term loan agreement or the guarantees, the MFLP cannot be an obligee. In fact, since the MFLP executed the term loan agreement on behalf of BGC, the MFLP can be neither an obligor nor an obligee under the term loan agreement.

Defendants further argue that a personal guarantee for the debt of another can arise only where such an intent is clearly manifested, citing *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 505; 620 NW2d 531 (2001). "[T]he rights of sureties are always favored in the law, and persons standing in that relation in this class of obligations will not be held, unless an intention to bind themselves is clearly manifested." *Id*. at 513 (internal quotation marks and citation omitted).

Here, the guarantees clearly manifest the intent that defendants should answer for the primary obligor. The guarantees state that the guarantor "absolutely and unconditionally guaranties to the Bank, as primary obligor and not merely as surety, the full and prompt payment of the Liabilities when due . . . ." Moreover, other loan documents clearly manifest an intent that defendants personally guarantee the BGC debt. A credit approval summary listed Farrell, Ann and Brentwood Tavern as guarantors and clearly states, under "risk rating rationale," that the loan's risk rating is based in part on "strength of guarantor." The term loan agreement clearly lists BGC as the borrower. The term loan agreement lists, among the conditions precedent, the delivery of loan documents, including "guaranties." Finally, defendants admitted below in a motion for stay that BGC was the primary obligor. The loan documents, taken together, clearly manifest an intent that defendants personally guarantee plaintiff's loan to BGC.

Defendants next argue that the trial court erred by finding that the designation of defendants as both "borrower" and "guarantor" in the personal guarantees was a result of mutual mistake, and by finding that the plaintiff proved, by clear and convincing evidence, that defendants intended to personally guarantee the loan. This Court reviews a trial court's findings of fact in a bench trial for clear error and reviews de novo its conclusions of law. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n,* 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when, although there is evidence to support the finding, we are left with a definite and firm conviction that a mistake has been made. *Id*. Whether contract language is ambiguous is a question of law reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The proper interpretation of a

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28, 2003 (Docket No. 240884), but unpublished decisions are not binding on this Court. MCR 7.215(C)(1).

[3] The MFLP is the Moore Family Limited Partnership.

contract is a question of law reviewed de novo. *Id*. The question of whether a statute of frauds bars enforcement of a contract is a question of law reviewed de novo. *Kelly-Stehney & Assoc, Inc, supra,* p 110.

The rules of construction for contracts in general also govern guarantees. *In re Landwehr's Estate*, 286 Mich 698, 702; 282 NW2d 873 (1938). "Where the language of the writing is not ambiguous the construction is a question of law for the court, on consideration of the entire agreement." *Id*. (internal block quote, quotation marks and citation omitted). When the document is uncertain and ambiguous, "evidence is competent to show the relations of the parties and attending circumstances as an aid in interpreting" the guarantee. *Id*. at 703 (internal quotation marks and citation omitted).

"When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). "If two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous." *Klapp, supra*, p 480. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997) (internal quotes and citation omitted). The court must determine the intent of the parties "by reference to the contract language alone," and may not look to extrinsic evidence to assess intent. *Hubbel, Roth & Clark, Inc, supra* at 291. But in "construing any contract, whether one of indemnification or otherwise, the court will ascertain the intent of the parties both from the language used and from the surrounding circumstances." *Zurich Ins Co, supra* at 607. A contract is read as a whole, with meaning given to all terms, and technical, constrained constructions are avoided. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). "When the parties' intent in a . . . contract cannot be ascertained from the evidence submitted, any ambiguities should be construed against the drafter." *Farmers Ins Exch v Kurzmann,* 257 Mich App 412, 417-418, 668 NW2d 199 (2003) (citations and internal quotation marks omitted). "Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language. *Id*. at 418.

Reformation is an equitable remedy available for contracts where the writing "fails to express the intentions of the parties . . . as the result of accident, inadvertence, mistake, fraud, or inequitable conduct . . . ." *Najor v Wayne Int'l Life Ins Co*, 23 Mich App 260, 272; 178 NW2d 504 (1970). "Mutual mistake is not the exclusive ground for granting reformation." *Id*. Error or inadvertence (accident) can also support a need for reformation. *Id*. at 272-273. But where the basis for a proposed reformation is mistake, the mistake must be mutual. *Retan v Clark*, 220 Mich 493, 496; 559 NW2d 397 (1922). In addition, the "proof to warrant reformation must be clear and convincing." *Id*. at 494.

Here, the trial court found that the parties intended the guarantees to make defendants personally liable for the loan to BGC. The trial court found that "Zazula testified unequivocally that she had told Farrell Moore that the loan transaction would require a personal guaranty from

Farrell Moore, Ann Moore and Tavern." This conclusion is well supported. Kimberly M. Zazula, plaintiff's former[4] loan officer, testified that she told Farrell that plaintiff would require guarantees as a condition of making the loan to BGC. Zazula told Farrell that "the loan to the golf course would require the guarantee of Mr. and Mrs. Moore and of Farrell Moore as well as Brentwood Tavern . . . ." Zazula testified that she explained to Farrell and Barrie Moore, a son of Ann and Farrell, the reasons why plaintiff needed the guarantees. Zazula also testified:

> *Q*. And . . . what did Farrell say when you said you have to guarantee?
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> *A*. Farrell fully accepted the full guarantee of this credit facility.
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> *Q*. What did he say?
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> *A*. Okay, yes.

Thus, there was clear and convincing testimony from Zazula that she told defendants about the need for them to guarantee the loan to BGC. Further, Ann testified at trial that when she signed the guarantee she knew that BGC was receiving a loan from plaintiff.

The trial court also concluded that documentary evidence indicates that Ann and Farrell "understood and agreed to personal guaranties of the BGC loan." This conclusion is well supported. The credit approval summary lists Farrell, Ann and Brentwood Tavern as guarantors, lists BGC as the obligor, and clearly states, under "risk rating rationale," that the loan's risk rating is based in part on "strength of guarantor." Thus, the credit approval summary clearly reflects that a condition of the loan to BGC was that defendants personally guarantee the loan.

The guarantees themselves support this conclusion. The guarantees are each entitled "Continuing Guaranty," and they repeatedly use the words "guaranty" and "guarantor." The signatures of Ann and Farrell appear immediately below the word "guarantor," and the signature of Farrell on behalf of Brentwood Tavern also appears immediately below the word "guarantor." The guarantees state: "the Guarantor absolutely and unconditionally guarantees to the Bank, as primary obligor and not merely as surety, the full and prompt payment of the Liabilities when due, whether at stated maturity, by acceleration or otherwise."

The term loan agreement clearly identifies BGC as the borrower,[5] and lists, among the conditions precedent, the delivery of loan documents, including "guaranties." The term loan agreement also states: "*Payment of the Loans and all other Liabilities shall be guaranteed by Farrell Moore, Ann Moore and Brentwood Tavern, LLC* . . . ." (Emphasis added.) Thus, the trial court correctly held that the loan documents support the notion that the parties intended for defendants to personally guarantee the loan to BGC.[6] Given all of the foregoing, it must be held

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[4] At the time of trial, Zazula was no longer employed by plaintiff.

[5] In a motion below, defendants admitted BGC to be "the primary obligor" on the loan.

[6] The trial court also found defendants' testimony not credible. This conclusion is not clearly erroneous. Defendants had a strong financial incentive to contradict plaintiff's position.

that plaintiff demonstrated by clear and convincing evidence that the parties intended that defendants would personally guarantee the debt of BGC.

Because the parties clearly intended that defendants would personally guarantee the debt of BGC, the failure to identify BGC in the guarantees as the principal obligor was an error by both sides. Given the clearly and convincingly evidenced intent of the parties, the trial court did not err in concluding that the failure to identify BGC as the obligor in the guarantees was a mutual mistake, remediable by reformation.

Defendants finally argue that the trial court abused its discretion in ordering plaintiff to amend its complaint to add a count for reformation of the guarantees. Defendants contend that the trial court was acting as an advocate. This issue is not properly preserved for appellate review since it was not raised in and decided by the trial court. *Brown, supra*, p 599. Unpreserved issues are reviewed for plain error affecting substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or with the written consent of the adverse party." Leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2). Here, the trial court was not acting as an advocate, but was merely ordering what was necessary "when justice so requires." MCR 2.118(A)(2). A proper adjudication of the case appeared to require a determination of whether equity would countenance a reformation of the guarantees. Therefore, the trial court ordered plaintiff to include a request for reformation in its pleading. In any event, an amendment was not strictly required since reformation is a remedy. See *Holda v Glick*, 312 Mich 394, 404; 20 NW2d 248 (1945) ("remedy of reformation," not a cause of action). We find that no error affecting defendants' substantial rights occurred as a result of the trial court's ruling.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot