20090214

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

First International Bank & Trust, Plaintiff/Appellant,	)	
vs.	)	**Supreme Ct. No.: 20090214**
D. Duane Peterson, MID AM Group, LLC, James R. Bullis, Kevin L. Christianson, Richard R. Jordahl, Douglas H. Peterson, Arlan H. Anderson, Greg Anderson, and Robert Green, Defendants/Appellees.	)	

Appeal from the Judgment, Dated May 18, 2009, Civil No. 09-07-C-04280
Cass County District Court, East Central Judicial District
The Honorable Frank L. Racek

REPLY BRIEF OF PLAINTIFF/APPELLANT

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I. SUMMARY

[1] This case remains purely a "documents and law" and contract interpretation case.

[2] The district court held that as a matter of law, because of the full credit bid that "… the underlying debt has been fully satisfied, and the guarantors have no liability to First International", App. P. 186, and recognized the expansive waivers. App. P. 183.

[3] There is no North Dakota case that holds that it is against the public policy of the state of North Dakota to contract to pay an unpaid loan balance existing after a full credit bid.

[4] The Appellees all signed express and unequivocal waivers of any defense based on payment by a full credit bid.

[5] They could not have done so more clearly by the terms of the guarantees and their own conduct.

[6] They agreed that the guarantees were absolute, unconditional and continuing guarantees of payment that would continue in full force and be binding "whether or not all Indebtedness is paid in full …". App. PP. 201 and 180, ¶2.

[7] They agreed that the guarantees would not be affected or impaired by "Any acceptance of collateral security" [or] "Any foreclosure or enforcement of collateral security". App. PP. 201 and 181.

[8] They agreed that they would not assert, plead or enforce any defense or waiver, and would remain liable "… whether or not the liability of borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision". App. PP. 201 and 181.

[9] They agreed that they would remain obligated to pay the indebtedness "… even though … otherwise discharged by law". App. PP. 201 and 181.

[10] They agreed that the guarantees were "… absolute, unconditional and continuing [guarantees] of payment of the Indebtedness and shall continue to be in force and be binding upon the undersigned, whether or not all Indebtedness is paid in full …". App. PP. 200 and 180.

[11] The conduct of all parties also shows that they understood the guarantees of payment to survive any foreclosure action.

[12] The affidavits of Jim Dunkel for FIB, show that FIB understood that the guarantees of payment would remain enforceable until FIB received an actual "green-dollar" payment of MID AM's indebtedness to FIB. App. PP. 173-174.

[13] The Appellees must have viewed the guarantees the same way, or at least one of their three attorneys would have responded to FIB's March 25, 2008, letter, App. PP. 250-252, where FIB stated that it would treat the guarantees of payment as enforceable despite a full credit bid by FIB, unless there were a "new money" bid, or a redemption. App. P. 251.

[14] The failure by even one of the attorneys to respond creates not just a waiver and estoppel argument, but more importantly, in a contract case like this, demonstrates that the Appellees agreed with FIB's interpretation of what no one has argued are, and no one has found, are unambiguous, contract terms and waivers.

[15] The Appellees and the district court rely exclusively on just one case, *First Federal Savings and Loan Association of Bismarck v. Scherle*, 356 N.W.2d 894 (N.D.

1984). Although this case does hold that a full credit bid can extinguish guarantee liability, the case says nothing about the actual terms of the guarantees.

[16] The guarantees in this case were drafted in response to *Scherle*, supra, and there is no subsequent case that would defeat that purpose.

II. NORTH DAKOTA CASES

[17] These North Dakota cases bear on the ultimate issue of whether, as a matter of the right to contract, parties can agree that guarantees of payment of mortgage indebtedness will survive a full credit bid.

[18] *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980), held that guarantors of mortgage indebtedness may be required to pay the mortgage indebtedness, not because of liability predicated on the notes or the mortgages, but because of the separate contract of guaranty. In *Mueller*, supra, the foreclosing mortgagor made a full credit bid. *Id.* at 642.

[19] Nevertheless, this Court held that the mortgagee could still enforce the guarantees of payment, despite North Dakota's anti-deficiency statutes.

[20] *Mueller*, supra, quoted large portions of the guarantees of payment, particularly focusing on terms saying that the guarantees were "absolute and continuing, *Id.* at 644, and the fact that the guarantors waived all rights of subrogation. *Id.* at 645.

[21] These same terms are present in our case.

[22] In *Mueller*, supra, this Court held that the guarantors could not claim that the bank was estopped from enforcing the guarantees of payment because of the foreclosure action because of the specific waivers contained in the Mueller guarantees. Mueller held "… the guarantors by reason of explicit waivers and conduct, cannot claim

that the Bank has prejudiced their rights by acquiring the mortgaged property through the sheriff's sale has they had ample opportunity to protect their rights". *Id.* at 645.

[23] So too, the Appellees cannot claim that FIB has prejudiced their rights because of the explicit waivers in their guarantees and their conduct, by not responding to FIB's warning that FIB would treat the guarantees as enforceable "regardless of the bid by [FIB] or the outcome of the Sheriff's Sale on Foreclosure". App. P. 251.

[24] In *First Federal Savings and Loan Association of Bismarck v. Scherle*, 356, N.W.2d 894 (N.D. 1984), the foreclosing mortgagee made a full credit bid at a sheriff's sale after bringing an action on personal guarantees of payment. This Court held that by bidding the full amount of the foreclosure judgment, the debt the defendants had guaranteed had been satisfied. *Id.* at 896. But there was no discussion whatever about the exact terms of the guarantees of payment. One can assume the guarantees did not contain proper waivers, or other language, to make them survive a foreclosure action, a full credit bid, or any statutes or judicial decisions to the contrary, all terms of the guarantees of payment in our case.

[25] This Court distinguished *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980), by saying that Mueller only interpreted the anti-deficiency judgment statutes, and did not reach the issue presented in *Scherle*, supra.

[26] This Court warned that opinions should be read in the light of the facts of the case under discussion and that to keep opinions within reasonable bounds one should not interpret cases by "… writing into them … limitation[s] or variation[s] which might not be suggested by circumstances of cases not before the Court". *Id.* at 897.

[27] So too, *Scherle*, supra, should not be extended to cases like this, where there are specific terms and waivers in the guarantees of payment not cited nor addressed by *Scherle*, supra.

[28] *Scherle*, was also predicated on a finding that the foreclosing party had "… voluntarily converted the debt into property by taking the mortgaged property in satisfaction of the debt. *Id.* at 896.

[29] Here there was no such voluntary conversion. Instead, FIB's guarantees of payment were specifically drafted to allow them to be enforceable despite a full credit bid, and FIB clearly and unequivocally stated this intention by its March 25, 2008 letter, App. PP. 250-252, and the Appellees implicitly agreed that their guarantees of payment would remain enforceable after a full credit bid, by not responding to, let alone objecting to the letter.

[30] *First Bank of North Dakota (N.A.) Jamestown v. Scherbenske*, 375 N.W.2d 156 (N.D. 1985), unlike *Scherle*, supra, considered extensive terms of the guarantees of payment and upheld a waiver in the guarantees of payment making them enforceable despite an impairment of collateral. The case discussed whether there was good consideration for the guarantees, something not disputed here, since at least three of the Appellees were paid $50,000.00 each to provide their guarantees of payment, despite having no interest in MID AM. App. P. 239. More importantly, *Scherbenske*, supra, holds that rights can be waived by guarantors by unequivocal language in the guaranty agreement, *Id.* at 159, and thus the court could not "ignore the clear meaning of the words". *Id.* at 160.

[31] *General Electric Credit Corporation of Tennessee v. Larson*, 387 N.W.2d 734 (N.D. 1986) follows *Scherbenske*, by holding that waivers in guarantees of payment will be enforceable if they are clear and unequivocal. *Id.* at 736. As with *Scherbenske*, supra, this case also quoted and considered the exact language of the guarantees of payment, something not done in *Scherle*, supra.

[32] The holding was partly based on the wording of a bankruptcy court order determining that the underlying indebtedness would be fully satisfied by events specified in the order. *Id.* at 735.

[33] *Dakota Bank & Trust Co. Fargo v. Grinde*, 422 N.W.2d 813 (1988), considered specific terms of guarantees. Although the guarantees were found to be unenforceable, that was because of lack of notice and other compliance under the Uniform Commercial Code, something not present in our case. But the case affirms that under North Dakota Law, a guaranty of payment is a contract that is separate and distinct from the contract imposing obligations of the principal. *Id.* at 817.

[34] *Principal Residential Mortgage, Inc., v. Nash*, 2000 ND 21, 606 N.W.2d 120, holds that a credit bid is no different from any other type of bid against an argument made at oral argument that the mortgagee "could bid a million dollars at the sheriff's sale and there still would be no surplus". *Id.* at 126.

[35] For an unexplained reason, the mortgagee had bid about $6,000.00 more at the sheriff's sale than the amount due. The issue was whether the mortgagor was entitled to a surplus. But this has nothing to do with the issue in our case about whether parties can be paid to contract to remain liable after a full credit bid, where they are specifically warned that the mortgagee will make a full credit bid.

[36] The Appellee's whole case depends on *First Federal Savings and Loan Association of Bismarck v. Scherle*, 356, N.W.2d 894 (N.D. 1984), a case which did nothing to discuss specific language of the guarantee in issue, let alone its waivers, something deemed important by all subsequent decisions of this Court.

[37] The proper result comes from reviewing the specific language of FIB's guarantees, the specific waivers contained therein, coupled with the fact that there are no claims that the Appellees did not get good consideration for their guarantees, nor claims that the guarantees of payment, or the waivers are ambiguous. No legitimate claim can be made that FIB voluntarily waived its right to enforce the guarantees because of its full credit bid. It did not knowingly and voluntarily waive any rights because of its full credit bid, specifically reserved those rights, not just because of the waivers in the guarantees themselves, but because of its letters to the Appellees, App. PP. 251-252, and to which they failed to respond or object. App. PP. 238 and 188.

III. THE CONSTITUTIONAL RIGHT TO CONTRACT

[38] None of the Appellees' briefs address FIB's constitutional right to contract. All people have a constitutional right to contract for a lawful purpose. N.D.Const.Art.I § 18; U.S.Const.Art. I § 10, Cl. 1.

IV. THE CONTRACTS HAVE A LAWFUL PURPOSE

[39] The Appellees also fail to address whether FIB's contracts had a lawful purpose.

V. THE WARNING LETTER HAD TO BE SENT TO THE GUARANTORS' ATTORNEYS

[40] MID AM contends that the letter that FIB sent the Appellees as notice of the full credit bid was impermissible because the letter was sent to the guarantors'

attorneys, rather than to the guarantors individually. Rule 4.2 of the North Dakota Rules of Professional Conduct prohibit a lawyer from communicating with a person that is represented by an attorney.

VI. ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL CANNOT BE CONSIDERED

[41] The Bullis Defendants argue for the first time on appeal that FIB has been paid in full for reasons other than FIB's credit bid.

[42] This Court has consistently held that an issue which has not been raised or considered in the lower court cannot be raised for the first time on appeal. *In re Hirsch*, 2009 ND 135, ¶ 12, 770 N.W.2d 225 and *Chapman v. Chapman*, 2004 ND 22, ¶7, 673 N.W.2d 920.

VII. THE APPELLEES CANNOT ARGUE THAT THE FULL CREDIT BID EXEONERATES THEIR GUARANTEES OF PAYMENT

[43] A plaintiff alleging equitable estoppel is required to show the defendant engaged in:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are other than those which the defendant subsequently attempts to assert;
>
> (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the plaintiff; and
>
> (3) knowledge, actual or constructive, of the real facts.

[44] *Dalan v. Paracelsus Healthcare Corp. of North Dakota*, 2002 ND 46, ¶ 19, 640 N.W.2d 726. FIB relied on the Defendants' failure to respond to the letter of March 25, 2008, and as a result, made a full credit bid.

VIII. THE PERSONAL GUARANTEES SURVIVE DEFENSES OF A PRICIPAL DEBTOR

[45] Although liability undertaken by a guaranty may result in requiring the guarantor to pay the debt of another, that obligation is predicated upon the contract of guaranty separately from the obligation between the principal debtor and the one for whose benefit the guaranty was given. *Northern State Bank v. Bellamy*, 125 N.W. 888, 890 (N.D. 1910). Thus, a guarantor's obligation to pay is separate and distinct from the principal's obligation. See, e.g., *Bloom v. Bender*, 313 P.2d 568, 571 (Cal. 1958) ruling that the obligation of a guarantor is not barred merely because the statute of limitations had run against the obligation of the principal debtor; *Mercury Marine v. Monte's Enterprises, Inc.*, 892 P.2d 568, 571 (Mont. 1995) ("We agree with the California Supreme Court's conclusion that the obligation of a guarantor is not barred due to the running of the statute of limitations as to the obligation of the principal."); *Lee v. Lofton*, 737 P.2d 55, 59 (Kan. 1987) ("In Kansas the guarantors remain liable on the guaranty even though the principal debtor could have defeated an action brought against him by interposing the statute of limitations as a defense."); and *American Trading Co. v. Fish*, 396 N.Y.S.2d 617, 619-20 (N.Y. 1977) ("There is a very basic reason why the guarantor should not be discharged merely because the Statute of Limitations could have been raised in an action against the principal.")

[46] Absolute and unconditional guarantees of payment are also enforceable even though the principal obligor might have defenses of fraudulent inducement, *Great Falls Bank v. Pardo*, 622 A.2d 1353 (N.J. 1993), there are other affirmative defenses, *Ursa Minor Limited v. AON Financial Products Inc.*, 2000 W.L. 1010278 (S.D.N.Y.) or

any other circumstances which might otherwise constitute a defense. *CitiBank, N.A. v. Plapinger*, 485 N.E.2d 974 (N.Y. 1985).

Dated this 12th day of October 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff/Appellant, in this matter, and as the author of the above Reply Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that this Reply Brief was prepared with proportional typeface and the total number of words in the above Reply Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 2,498.

Dated this 12th day of October 2009.

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AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

First International Bank
v.
D. Duane Peterson, MID AM Group, LLC, et al.
District Court File No.: 09-07-C-04280
Supreme Court File No.: 20090214

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Sarah D. Klava, being duly sworn, deposes and says that she is a resident of the City of Mapleton, State of North Dakota, is of legal age; and that she served the within:

REPLY BRIEF OF PLAINTIFF/APPELLANT

on October 12, 2009, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

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To the best of affiant's knowledge, the e-mail addresses above given are the actual addresses of the parties intended to be so served as published in the North Dakota Supreme Court's online directory.

And on October 12, 2009, by placing a true and correct copy in envelopes addressed as follows, to-wit:

Mr. Douglas H. Peterson
c/o Sportland, Inc.
106 5th Street South
Moorhead, MN 56560

and depositing the same with prepaid postage in the United States mail at Fargo, North Dakota.

To the best of affiant's knowledge, the given address is the actual post office address of the party intended to be so served. The above documents are mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Sarah D. Klava
Sarah D. Klava

Subscribed and sworn to before me this 12th day of October 2009.

/s/ Karen Davis
(SEAL) Notary Public