IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT
August 25, 2009
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

BRIEF OF PLAINTIFF/APPELLANT

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I. JURISDICTIONAL STATEMENT

[1] The district court had jurisdiction under N.D. Const. Art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal is timely under N.D.R.App.P. 4(a). This court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, and N.D.C.C. § 28-27-01.

II. STATEMENT OF THE ISSUES

[2] First International Bank & Trust, the Plaintiff/Appellant ("FIB") presents this issue: (1) Must courts enforce a contract where parties have been paid to guarantee payment of mortgage indebtedness remaining after a foreclosure sale, as the guaranty states, and where they were warned that they would remain liable after a purchase at the Sheriff's Sale on Foreclosure by the mortgage?

III. STATEMENT OF THE CASE

A. Nature of the Case.

[3] FIB seeks to enforce personal guarantees of payment given by each of the individual Defendants, App. PP. 110, 112, 140, 142, 144, 146 and 148.

B. Course of Proceedings.

[4] The Complaint, App. P. 4, sought to collect three commercial loans, one to Defendant D. Duane Peterson, App. P. 27, and two to MID AM Group, LLC ("MID AM"), App. PP. 83 and 125. FIB was able to foreclose the real estate mortgages and realize other collateral despite the answers. App. PP. 151, 162 and 170.

[5] Defendants Arlan H. Anderson, Greg Anderson and Robert Green ("Zimmerman Defendants") made a motion for summary judgment.

[6] On December 18, 2008, the court entered its memorandum and order granting summary judgment for the Zimmerman Defendants only. App. PP. 182-186.

The court made no determination that there is no just reason for delay under Rule 54(b) N.D.R.Civ.P., and thus the court's memorandum and order granting summary judgment against the Zimmerman Defendants was subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Rule 54(b) N.D.R.Civ.P.

[7] After FIB then made its own motion for summary judgment against all Defendants, on May 7, 2009, the court issued its memorandum and final order granting summary judgment dismissing FIB's claims against all of the Defendants. App. PP. 254-257. The court noted the interlocutory nature of its December 18, 2008 ruling, App. P. 54, and indicated that the May 7, 2009 order would be the final judgment of the court. App. P. 257.

[8] Judgment was entered on May 18, 2009, App. P. 258, notice of entry of judgment was served on May 19, 2009, App. P. 259, and on July 16, 2009, FIB filed its notice of appeal.

C. The Disposition Below.

[9] The court's rulings are confined to a legal ruling on the enforceability of the individual guarantees of payment given by the individual Defendants after a full credit bid at the foreclosure sale, and did not address the particular amounts that would have been due under each of the guarantees. The court held that the guarantees were no longer enforceable as a matter of law because of FIB's full credit bid at the Sheriff's Sale on Foreclosure, despite the clear language of the guarantees, the fact that the individual Defendants were paid for the guarantees and specifically warned that FIB would enforce them even with a full credit bid.

D. What Went Wrong and What FIB Wants.

[10] FIB believes that the specific language of the guarantees, the intentions of the parties, the consideration paid to the guarantors, the waivers contained in the guarantees and the warnings given to the guarantors compels a ruling that the guarantees of payment remain enforceable, despite a full credit bid, and FIB requests that the matter be remanded to the district court for a determination of the exact amounts due FIB on each of the guarantees of payment.

IV. APPLICABLE STANDARDS OF REVIEW

[11] This is purely a "documents and law" and contract interpretation case, with no disputed facts or claims of abuse of discretion.

[12] Questions of law are subject to de novo review. *Fish v. Doctor*, 2003 ND 185, ¶7, 671 N.W.2d 819. The interpretation of a statute is fully reviewable on appeal. *VND, LLC v. Leevers Foods, Inc.*, 2003 ND 198, ¶9, 672 N.W.2d 445. The interpretation of a contract is a question of law, and thus fully reviewable on appeal. *Fortis Benefits Insurance Company v. Hauer*, 2001 ND 186, ¶11, 636 N.W.2d 200. A guarantee of payment is a contract. *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640, 643 (N.D. 1980). The construction of a written contract to determine its legal affect is a question of law for the court to decide and on appeal this Court must independently examine and construe the contract to determine if the court erred in its interpretation. *Ag Acceptance Corp. v. Glinz*, 2004 ND 154, ¶12, 684 N.W.2d 632.

V. STATEMENT OF FACTS

[13] The individual Defendants gave guarantees of payment of the two real estate loans FIB made to MID AM, so MID AM could get the loans.

[14] The first was a $5,000,000.00 construction loan made under the terms of a January 27, 2006 loan agreement, App. PP. 65-82. The loan agreement required MID AM to provide personal guarantees of payment from D. Duane Peterson, James R. Bullis, Kevin L. Christianson and Richard R. Jordahl ("Bullis Defendants"). App. PP. 66, 67 and 70. They gave their guarantees of payment on January 27, 2006. App. PP. 110-113, as better defined by the Limited Guaranty Agreement and Amendment to Guaranty Agreement. App. PP. 114-123.

[15] FIB made a second loan to MID AM of $1,500,000.00 on December 3, 2006, App. P. 125, this time receiving guarantees of payment from D. Duane Peterson, Douglas H. Peterson, and the Zimmerman Defendants. App. PP. 140-149.

[16] Both loans were secured by real estate mortgages, on MID AM's property, App. PP. 86-96 and 127-137, upon which it built a forty unit condominium building.

[17] According to the uncontradicted affidavit testimony of FIB, none of the Zimmerman guarantees of payment had been revoked. App. P. 173. Mr. Dunkel's affidavit attaches copies of the Zimmerman guarantees of payment. App. PP. 176-181. Mr. Dunkel's first affidavit swears that he believed and understood that the guarantees of payment would remain enforceable until FIB's real estate loan to MID AM was paid in full, meaning that FIB would have received an actual "green dollar" payment of MID AM's indebtedness to FIB in full. App. PP. 173-174. He also swears that he believes that the guarantees of payment were absolute and unconditional guarantees of payment that would remain in full force, according to their terms, until FIB had received the "green dollar" payment of the real estate indebtedness. App. P. 174.

[18] Mr. Dunkel also acknowledged that he was aware before FIB made the full credit bid that the guarantors might argue that by making a full credit bid, the guarantees of payment might be rendered unenforceable. App. P. 174. However, Mr. Dunkel believed that at the time of the Sheriff's Sale on Foreclosure, there would be other parties at the Sheriff's Sale on Foreclosure whose bid would likely exceed a full credit bid of FIB. App. P. 174.

[19] FIB's strategy then, was to make a full credit bid, to avoid leaving the guarantors unnecessarily exposed because of something less than a full credit bid, and thus FIB made a full credit bid. App. P. 174.

[20] Mr. Dunkel concluded in his first Affidavit that FIB's clear intention when it took the guarantees of payment was that they would remain enforceable, according to their terms, notwithstanding foreclosure of other interests or mortgages, unless and until all indebtedness due from MID AM to FIB was paid in full by actual green-dollar payments, not by operation of law, not by extinguishments based on a full credit bid, notions of converting indebtedness into property, or other such circumstances. App. PP. 174-175.

[21] When FIB made its own motion for summary judgment, it submitted two additional affidavits, another from Jim Dunkel, and one from counsel for FIB, Roger J. Minch.

[22] Mr. Dunkel's supplemental affidavit reaffirmed all of the allegations made in his first affidavit. App. P. 237.

[23] In addition, the supplemental affidavit shows that on March 25, 2008, counsel for FIB sent a letter to the attorneys for all of the individual Defendants

informing them that FIB would be making a full credit bid at the Sheriff's Sale on Foreclosure scheduled to occur almost one month later, and despite a full credit bid, would hold each of the individual Defendants liable on their guarantees of payment. The letter warns "We want to be clear about this so that you could take this into account when considering how to approach the Sheriff's Sale on Foreclosure". App. P. 251.

[24] Mr. Dunkel's supplemental affidavit swears that he received a copy of the March 25, 2008, letter, still had a copy in his records, and was aware of the March 25, 2008, letter before the Sheriff's Sale on Foreclosure on April 23, 2008. App. P. 237.

[25] The affidavit shows that Mr. Dunkel heard nothing from any of the addressees shown on the March 25, 2008 letter. App. P. 238.

[26] Mr. Dunkel swears that if he had learned that if any of the Defendants would have taken the position that a full credit bid would terminate their guarantees of payment, "FIB would have reviewed other bidding strategy's and would have made a bid substantially less than a full credit bid at the Sheriff's Sale on Foreclosure conducted on April 23, 2008". App. P. 238.

[27] Mr. Dunkel swears that in order for FIB to make its loans to MID AM, MID AM was required to produce personal guarantees of payment from creditworthy individuals to be chosen by MID AM, but subject to approval by FIB. App. PP. 238-239.

[28] It was MID AM that proposed guarantees of payment from the individual Defendants. App. P. 239.

[29] Mr. Dunkel swears that he knows of his personal knowledge that MID AM paid the three Bullis Defendants $50,000.00 each for their guarantees of payment so

that MID AM would be able to obtain the mortgage loans it sought from FIB. App. P. 239.

[30] Mr. Dunkel also swears that he had learned from Defendant Doug Peterson that the most expensive cost of money was the funds MID AM paid for the guarantees of payment provided by the three Zimmerman Defendants. App. P. 239.

[31] Finally, Mr. Dunkel swears that to the best of his knowledge, information and belief, neither the Bullis Defendants nor the Zimmerman Defendants ever had any ownership interest in MID AM, and that each of the Defendants are knowledgeable business people and that those paid for their guarantees of payment had to know what they were doing. App. P. 239.

[32] The affidavit of Roger J. Minch was designed to support a waiver and estoppel argument. App. P. 188. That affidavit swears that Minch had prepared the March 25, 2008 letter, App. P. 227-229, and saw to it that a copy of the letter was sent to counsel for each of the Defendants. App. P. 188. The affidavit swears that there were no written nor oral responses to the letter before the Sheriff's Sale on Foreclosure of April 23, 2008. App. P. 188.

[33] The affidavit swears that if any of the addressees on the March 25, 2008 letter, or any of the Defendants had contacted Minch to indicate that if FIB made a full credit bid at Sheriff's Sale on Foreclosure, a Defendant would take the position that a full credit bid would have made a guarantee unenforceable, Minch would have so advised FIB and recommended that FIB consider a different bidding strategy and bid something substantially less at the Sheriff's Sale on Foreclosure, rather than the full amount of the

indebtedness, to preserve substantial liability on the guarantees of payment. App. PP. 188-189.

[34] The only timely affidavits were filed by FIB.

[35] FIB argued that the language of the guarantees of payment specifically provides that they would remain enforceable despite any foreclosure action, any full credit bid, or any other circumstances, and FIB provided highlighted copies of the relevant portions of the guarantees to the court. App. PP. 200-201.

VI. THE RULINGS OF THE DISTRICT COURT

[36] In its first ruling the district court ruled that with FIB's purchase because of its full credit bid at the Sheriff's Sale on Foreclosure, the underlying indebtedness had been paid, and thus notwithstanding any other circumstances, including the specific language of the guarantees of payment, the payments for the guarantees and the warnings, there was no longer any indebtedness, and thus no remaining liability on the guarantees of payment.

[37] In its second ruling the court, although noting the interlocutory basis of its first order, App. P. 254, affirmed that order and incorporated the reasoning from the prior ruling, App. P. 255, but also dismissed FIB's waiver and estoppel arguments. App. PP. 255-256.

[38] The answers do not specifically raise the anti-deficiency judgment statutes as a defense, and this issue was not addressed by the court. However, some of the cases discussed below do discuss the anti-deficiency judgment statute, and we offer some discussion of the anti-deficiency judgment statutes so that this Court will see that they do

not apply, so the Court is assured that a reversal and remand would not be a futile exercise because of the anti-deficiency judgment statutes.

VII. LAW AND ARGUMENT

A. Contract Rights are Protected by Federal and State Constitutions.

[39] "All individuals . . . have certain inalienable rights." N.D. Const. Art. I § 1. Among these is the freedom to contract for a lawful purpose. N.D. Const. Art. I § 18; U.S. Const. Art. I § 10, Cl. 1; *see also* 16A C.J.S. Constitutional Law § 720 ("Liberty to contract for a lawful purpose is a basic, fundamental, and highly important right."). It is a right protected by the North Dakota Constitution. N.D. Const. Art. I § 18. It is a right protected by the United States Constitution. U.S. Const. Art. I § 10, Cl. 1. It is a right that exists to ensure that "[n]o … law impairing the obligations of contracts" will ever be passed, by any state. N.D. Const. Art. I. § 18; U.S. Const. Art. I § 10, Cl. 1.

[40] In *McKibben v. Grigg*, 1998 ND App 5, ¶ 11, 582 N.W.2d 669, the court discussed the constitutional guarantee that contracting parties have. The *McKibben* court indicated that remedies between contracting parties are constitutionally protected and cannot be taken away by the courts. *Id.* But the court also indicated that, should a court take away a particular remedy under a contract, that remedy must be replaced with an equal remedy to the one taken away. *Id.* The court stated as follows:

> As for a subsequent change of the law, a contracting party is protected, generally speaking, by the constitutional guaranty that no state shall pass any law impairing the obligation of contracts. By reason of this constitutional inhibition, a state legislature may not withdraw all remedies and thus in effect destroy the contract; but modes of procedure in the courts of the state are so far within the legislative control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract

> if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away.

Id.

[41] In this case, the remedies under the contracts have been taken away by the district court's decisions, and they have not been replaced with equal remedies. FIB has only received partial payment of MID AM's debt, as a result of the sheriff's foreclosure sale. The district court's decision allowed the individual Defendants to avoid paying their guarantees of payment. FIB has not been made whole by this result. The parties did not bargain for this result. By not receiving payment under the guarantees of payment, FIB has been stripped of its remedies under the contracts, which is the exact result the *McKibben* court warned against. This is the result that our state constitution and federal constitution prohibits.

[42] As will be explained in more detail below, the express language of the personal guarantees provides that FIB would be able to enforce them even after a full credit bid at the Sheriff's sale on Foreclosure.

B. Courts Enforce Contracts According to Their Terms as Long as They Have a Lawful Purpose.

[43] "All persons are free to make whatever contracts they please as long as the contracts are legal in all respects and not contrary to public policy." 16A C.J.S. Constitutional Law § 720. Additionally, courts are to enforce contracts, "unless it clearly appears they contravene public policy or express law." *Continental Casualty Co. v. Kinsey*, 499 N.W.2d 574, 580 (N.D. 1993). Therefore, contracts are interpreted to give effect to the mutual intention of the parties as it existed at the time the parties entered into

the contract, at least to the extent that the mutual intention is ascertainable and lawful. N.D.C.C. § 9-07-03.

[44] In this case, the parties all had a lawful intention when they entered into the contracts. The purpose of the contracts was to guaranty that FIB would receive payment of its loans to MID AM. Banks need assurance of payment when they make a loan, and it is common practice for individuals to personally guaranty payment of loans with a bank to assure payment of the loan. FIB lawfully accepted the promises of the individual Defendants that FIB would be paid in full for its loans to MID AM. Because the parties in this case, and the guarantees had a lawful purpose for which the Zimmerman and Bullis Defendants were handsomely paid, this Court should enforce the contracts.

C. The Personal Guarantees are Separate Contracts that Survive Independently of the Mortgage Foreclosure Sale.

[45] The general rule is that guarantees of payment are enforceable without regard to the anti-deficiency judgment statutes as long as a true guaranty exists.

[46] A guaranty is the promise to answer to the debt, default or miscarriage of another person. N.D.C.C. § 22-01-01(2). Personal guaranties of payment of mortgage debt are enforceable where the mortgagor is a corporation and the persons giving the guaranties of payment are the owners of the corporation or others who have received consideration.

[47] Guaranties of payment have been part of North Dakota's law since 1877, N.D.C.C. Ch. 22-01, and are treated as contracts. In *Northern State Bank v. Bellamy*, 125 N.W. 888 (N.D. 1910) this Court ruled that the contract of a guarantor is his own separate contract and warranty by him that the thing guarantied to be done by the principal shall be done and is not merely an engagement jointly with the principal to do the thing. *Id*. at 890.

[48] All other North Dakota cases that have decided the issue have ruled that guaranties of payment or collection are contracts. A few such cases are *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980); *Wallwork Lease and Rental Co., Inc. v. Decker*, 336 N.W.2d 356 (N.D. 1983); *First Fed. S & L v. Compass Investments*, 342 N.W.2d 214 (N.D. 1983); *General Elec. Credit Corp. of Tenn. v. Larson*, 387 N.W.2d 734 (N.D. 1986); and *Dakota Bank & Trust Co., Fargo v. Grinde*, 422 N.W.2d 813 (N.D. 1988). Research has disclosed no cases to the contrary.

[49] In *Bellamy*, supra, this Court also ruled that since a guarantor is not a joint contractor with the principal, the guarantor is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. *Id*. at 890. The Court concluded that although the 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. *Id*. at 890. A case that shows how separate and distinct a guarantor's obligation to pay is from the principal's obligation to pay is *Bloom v. Bender*, 313 P.2d 568 (Cal. 1957), which ruled that even if a statute of limitations has made the principal's obligation unenforceable, the guarantors still must pay the principal's obligation. *Id*. at 571.

[50] *Dakota Bank & Trust Co., Fargo v. Grinde*, 422 N.W.2d 813, 817 (N.D. 1988) states:

> Under North Dakota law, a guaranty is "a promise to answer for the debt, default or miscarriage of another person." § 22-01-01(1), N.D.C.C. It is a contract which, although separate and distinct from the contract imposing obligations on the principal, nevertheless imposes an obligation on the

> guarantor if the principal defaults in performance or payment. (Emphasis supplied).

[51] In *General Elec. Credit Corp. of Tenn. v. Larson*, 387 N.W.2d 734 (N.D. 1986) this Court used the usual rules of contract construction to interpret a guaranty.

[52] *First Nat. Bank & Trust Co. of Bismarck v. Hart*, 267 N.W.2d 561 (N.D. 1978) enforced a guaranty despite the "novel argument" that the guarantor had not read the guaranty and was not given a copy of it. *Id*. at 563. Similar rulings appear in *Pioneer Credit Co. v. Medalen*, 326 N.W.2d 717 (N.D. 1982) and *Wallwork Lease and Rental Co., Inc. v. Decker*, 336 N.W.2d 356 (N.D. 1983). In *Hart* this Court ruled that although the guaranty in question was broad, it was still enforceable. *Id*. at 564. The Court ruled:

> We conclude that the breadth of a contract alone does not invalidate it. Unless the great breadth also contributes to a finding of unenforceability due to unconscionability § 41-02-19(2-302), N.D.C.C., unlawful restraint of business § 9-08-06, N.D.C.C., fraud or other disqualification, the courts of North Dakota will enforce a broad contract. *Id*. at 564.

[53] *Hart* also enforced a guaranty of payment that covered promissory notes arising in the future. *Id*. at 565.

[54] In *International Harvestor Credit Corp. v. Leaders*, 818 F.2d 655 (8th Cir. 1987) the Eighth Circuit Court of Appeals, applying Iowa law, ruled that a personal guaranty of payment, although a contract of adhesion, was not unconscionable and was enforceable. The court noted that although there was a disparity of bargaining power between the parties, there was no unfair surprise or substantive unfairness involved. The court pointed out that the guarantors had an opportunity to read the contract and to consult with an attorney before signing it.

[55] This Court enforces expansive guaranties of payment whether or not those giving the guaranties have read the guaranties. *First Nat. Bank &Trust Co. of Bismarck v. Hart*, 267 N.W.2d 561 (N.D. 1978). The Court enforces waivers in guaranties of payment. In *First Bank of North Dakota, (N.A.) v. Scherbenske*, 375 N.W.2d 156 (N.D. 1985) the Court enforced a guaranty authorizing the creditor to exchange or surrender collateral without affecting the absolute liability of the guarantor. Id. at 159.

[56] In *General Elec. Credit Corp. of Tenn. v. Larson*, 387 N.W.2d 734 (N.D. 1986), this Court stated the general rule that full satisfaction of the principal debtor's debt normally operates to exonerate those guarantying payment of that debt. *Id*. at 735. But the court also stated:

> It is a well established rule of law, however, that the discharge of the principal debtor through release or settlement does not relieve the guarantor of liability where the right of recourse against the guarantor is expressly reserved in the guaranty agreement.

Id. at 735. In *Larson* the guaranty was enforceable because the guaranty agreement contained a waiver of the defense of discharge by satisfaction of the principal debtor's obligation.

[57] This Court has shown a consistent willingness to enforce waivers contained in guaranties of payment. For example, in *First Bank of N.D.(N.A.) v. Scherbenske*, 375 N.W.2d 156 (N.D. 1985), the Court enforced a guaranty authorizing the creditor to surrender collateral without affecting obligations of the guarantors.

[58] In general, debtors are responsible for paying the debts they incur. Any limitations are found in common law, statutes or case law but not in the anti-deficiency judgment statutes. Those statutes never reduce the debt of a principal debtor. If mortgaged

property has a value less than the debt of the principal debtor, that debt, whatever its nature and amount, absent application of other law, is fully collectible. Although the anti-deficiency judgment statutes may make collection difficult under specific factual circumstances, they never reduce the debt of a principal debtor. The court is simply allowed to limit collectibility under the equitable circumstances of the case. Since the anti-deficiency judgment statutes do nothing to reduce debt but only affect its collectibility, the debt is never different from the obligation of those who may have guarantied payment of the debt.

[59] The interesting history behind North Dakota's anti-deficiency judgment statutes, N.D.C.C. §§ 32-19-06 and 32-19-07, is contained in *First State Bank of Cooperstown v. Ihringer*, 217 N.W.2d 857 (N.D. 1974), where two husbands had signed a mortgage note and a mortgage but their wives had signed only the mortgage note. The Court ruled that the mortgagee had to comply with the anti-deficiency judgment statutes if it sought to recover the mortgage debt from the wives, the non-mortgagor debtors. Justice Vogel focused on language repeatedly contained in the anti-deficiency judgment statutes stating that they apply to deficiency judgments "against the party or parties personally liable for that part of the debt and costs of the action remaining unsatisfied." Since the two wives had signed the mortgage note they were personally liable for the mortgage debt although they had not signed the mortgages. Justice Vogel's focus on the nature of the liability has defined the anti-deficiency judgment statutes ever since.

[60] This Court later ruled that contracts of guaranty are separate and distinct from obligations imposed by notes or the mortgages given to secure the notes. *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640, 643 (N.D. 1980). Therefore a mortgagee

can collect corporate mortgage debt from those who have guarantied payment of the corporation's mortgage debt even if those persons are stockholders of the corporation, *Mueller*, supra.

[61] N.D.C.C. § 22-01-01(2) defines guaranty:

> A "guaranty" means a promise to answer for the debt, default, or miscarriage of another person.

[62] This Court has long held that the obligation of a guarantor is separate from obligations predicated on the terms of the underlying instrument.

> Authorities all agree that a contract of guaranty is entirely separate from that contained in the negotiable instrument to which it is appended, and that the remedy of the holder of the note against a guarantor must be pursued as a distinct cause of action.

Northern State Bank v. Bellamy, 125 N.W. 888, 890 (N.D. 1910).

[63] In *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980) this Court ruled:

> Thus, although the guarantors may be required to pay the notes in the instant case, the liability is not predicated on the notes or the mortgages, as in Ihringer, but on the separate contract of guaranty.

Id. at 643. In *Mueller*, the Court held that guarantors were not included in the anti-deficiency statutes and that the liability of the guarantors "derives wholly from the guaranty agreement". *Id.* at 643-644. The Court distinguished between "guarantees of payment" and "guarantees of collection." *Id.* at 644.

> The fundamental distinction between a guaranty of payment and one of collection is that, in the first case, the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor without taking any step to collect of the principal debtor, . . . while, in the second case, the undertaking is that, if the demand cannot be collected by

> legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor, ..." *State Bank of Burleigh County v. Porter*, 167 N.W.2d 527, 532, 533 (N.D. 1969).

[64] In *Mueller*, the original promissory notes were for the face amount of $125,000.00 plus interest, secured by mortgages. The loan was from the Bank of Kirkwood ("Bank") to Develco, Inc. ("Develco"). Three individuals guaranteed the payment of any obligation between the Bank and Develco in the maximum amount of $125,000.00 plus interest. The loan was not paid, the bank brought foreclosure actions on the mortgages, and the bank purchased the real estate at the sheriff's sale for $147,842.25, the amount of the judgment including interest and costs. The Court held that the bank could proceed directly against the guarantors for a money judgment, and that it was not estopped by the foreclosure action, citing the language of the guaranty, "I waive all rights of subrogation to any securities and remedies of the Bank until the entire indebtedness of the Debtor shall have been fully discharged." *Id.* at 644.

[65] The guarantees in question in the instant action contain similar waiver provisions. Paragraph 1 states that "No act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder." (Emphasis added), App. P. 176. Paragraph 2 states that "This is an absolute, unconditional and continuing guaranty 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, until this guaranty is revoked by written notice….". App. P. 176. In paragraph 10 the guarantors waive "any right of subrogation." App. P. 177.

[66] The Defendants' reliance on *First Federal Sav. and Loan Ass'n v. Scherle*, 356 N.W.2d 894 (N.D. 1984) is misplaced. The opinion that did not include any statement or analysis of the terms of the guaranty at issue, yet the Court in essence held that if a creditor makes a full credit bid at a sheriff's sale on foreclosure, the mortgage is satisfied and the debt is discharged, extinguishing the guaranty. The Court held that *Mueller* was not precedent to the contrary because *Mueller* only decided whether the guarantees of payment could be enforceable in the face of the anti-deficiency judgment statues, and did not address the issue of enforceability when there had been a full credit bid at a sheriff's sale on foreclosure, despite the fact that in *Mueller*, the bank was the purchaser at the sheriff's sale on foreclosure for the amount of the foreclosure judgment, with interest and costs. *Id.* at 897.

[67] Most importantly, the Court in *Scherle* said:

> Our opinions should be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by circumstances of cases not before the Court.

Id. Therefore, in the present case, the Court must look to the language of the guaranty to determine the questions of law presented to the court.

[68] In *General Elec. Credit Corp. of Tenn. v. Larson*, 387 N.W.2d 734 (N.D. 1986), decided after *Scherle*, the Court did indeed look at the issue of the enforceability of guarantees of payment by looking to the terms of the guaranty agreement. However, in *Larson*, the guarantees were unclear and did not contain clear and unequivocal waivers to the defense of discharge by satisfaction of the principal's obligation. The *Larson* court

was clear that a properly drawn clear and unequivocal waiver of the defense of discharge by satisfaction of the principal obligations could be effective. *Id.* at 736.

[69] In the instant action there are clear and unequivocal waivers by the guarantors, specifically designed to address the exact situation presently at issue – the argument that the guarantees would be rendered unenforceable because of a foreclosure sale if FIB made a full credit bid at the Sheriff's Sale on Foreclosure.

D. The Plain and Unambiguous Language of the Guarantees of Payment Makes Them Enforceable Notwithstanding a Full Credit Bid at a Sheriff's Sale on Foreclosure.

[70] The Defendant's guarantees contain the following specific, clear and unequivocal waivers in the paragraphs indicated shown by the highlighting, App. PP. 201-202, but App. PP. 180-181 for a clean copy:

> 1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all Indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.
>
> 2. This is an absolute, unconditional and continuing guaranty 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, until this guaranty is revoked …
>
> * * *
>
> 4. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder.
>
> * * *
>
> 6. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time …(i) any acceptance

of collateral security … [and] (vii) any foreclosure or enforcement of any collateral security).

7. Undersigned waives any all defenses, claims and discharges of Borrower, or any other obligor, pertaining to the Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense or waiver … [and] shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. (Emphasis added).

8. The Undersigned further agrees that the Undersigned shall be and remain obligated to pay Indebtedness even though … otherwise discharged by law. (Emphasis added).

* * *

10. Until the obligations of the Borrower to Lender have been paid in full, the Undersigned waives … any right of subrogation.

* * *

12. The liability of the Undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the Undersigned to Lender as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

* * *

[71] The clear and unambiguous language and the waivers makes it certain that the individual Defendants' guarantees of payment will specifically survive foreclosure actions, no matter FIB's bidding strategy and the individual Defendants specifically waived the right of any defenses based on "claims and discharges of the borrower," and they specifically promised that the guarantees of payment would remain enforceable even if "otherwise discharged by law."

[72] Clearly, the guarantees of payment in the present case could only be extinguished by payment in full, meaning a green dollar payment, not a purchase of the foreclosed property at a sheriff's sale. This is not an unconscionable result given the payments the individual Defendants got from MID AM to provide the guarantees. App. P. 239. There is no restraint of business and no fraud.

[73] The 8th Circuit considered the same issue in the context of a bankruptcy case in *Henning v. Main Street Bank*, 538 F.3d 975 (8th Cir. 2008). In *Henning*, the Eighth Circuit Court of Appeals affirmed the grant of summary judgment to the bank, finding no ambiguity in its agreement for release of collateral securing a guaranty. The debtor was the shareholder-guarantor of corporate debt. The credit agreement provided that when the bank had been "paid" $200,000.00 against the loan, the mortgage on the guarantor's home would be released. Prior to default, the loan was paid down $124,000.00; after default, the bank received another $196,000.00 as proceeds from the sale of equipment against which it levied. The bankruptcy court granted summary judgment to the bank and the district court affirmed. On appeal, the 8th Circuit affirmed. The debtor argued that "paid" meant that the mortgage must be released if the bank received $200,000.00 toward the debt from any source. The Court disagreed, saying that a "payment" must be made voluntarily in connection with the receipt of a benefit to the source of that benefit, and found that the purchasers who paid $140,000.00 for equipment at the lien foreclosure sale were not obligors on the promissory note and such purchase couldn't not be considered a payment made on the obligor's behalf. *Id.* at 978. The Court also declined to "equitably excuse" the debtor from his obligation as guarantor. *Id.* at 979.

E. The Individual Defendants have Waived Their Right to Argue that the Full Credit Bid Exonerates Their Guarantees of Payment.

[74] Counsel for all of the Defendants were sent a letter by FIB specifically advising them that FIB would make a full credit bid at the Sheriff's Sale on Foreclosure, and would continue to pursue all of its remedies under the guarantees of payment. App. PP. 188 and 227-229.

[75] As stated in the letter "We want to be clear about this so that you could take this into account when considering how to approach the Sheriff's Sale on Foreclosure." App. P. 228.

[76] As shown by the affidavits, the Defendants made no response to the letter before FIB made its full credit bid at the April 23, 2008, Sheriff's Sale on Foreclosure. App. PP. 237-238 and 188.

[77] By the March 25, 2008, letter, FIB clearly and unequivocally explained and cautioned each of the Defendants that it had commenced suit against each of the Defendants on their guarantees of payment, citing some of the language in the guarantees, and warning that FIB would treat the guarantees of payment fully enforceable "… whether or not First International Bank bids in the full amount of its indebtedness". App. P. 228.

[78] The letter indicated that FIB hoped "… that there will be a third party 'new-money' bid at the sale, which will allow all of the indebtedness due from MID AM to FIB to be paid in full, thus discharging all liability on all guarantees of payment." App. P. 228.

[79] The letter specifically warned the Defendants that FIB "… will be bidding in the entire principal and interest due on both mortgages, all advances made by prior

Court order, or future Court order, and all sums deemed necessary by FIB to have all indebtedness paid in full so there will be no remaining indebtedness to be covered by the guarantees of payment if there is a third party bid or redemption." App. P. 228.

[80] FIB warned that "If for any reason, there is not a third party "new-money" bid, or a redemption, FIB reserves all rights against all those giving guarantees of payment, regardless of the bid by First International Bank & Trust or the outcome of the Sheriff's Sale on Foreclosure." App. P. 228.

[81] The Defendants were specifically asked to take this into account when considering how they might approach the Sheriff's Sale on Foreclosure. App. P. 228.

[82] None of the Defendants made any written or unwritten response to FIB's March 25, 2008, letter. A third party did make a bid at the Sheriff's Sale on Foreclosure, App. P. 183, but that bid was bested by the full credit bid of FIB about which it specifically warned the Defendants in the March 25, 2008, letter.

[83] On February 11, 2009, FIB notified the Defendants by letter that FIB would be making its own Motion for Summary Judgment, a copy of which is attached to the Minch Affidavit as Exhibit E, App. PP. 230-231, but again, there has been no written or oral response from any of the Defendants.

[84] By allowing FIB to make the full credit bid, the Defendants have waived all rights to argue that their guarantees of payment have been exonerated as a result, should be estopped from raising the argument now, and they are guilty of latches.

[85] FIB changed its position because it did not hear from any of the Defendants before finalizing its bidding strategy for the sale. Had any of the Defendants contacted FIB before the sale indicating that a Defendant would treat a full credit bid as

terminating a guaranty of payment, FIB would have changed its bidding strategy. Thus, FIB detrimentally relied on the fact that no Defendant objected to FIB's March 25, 2008, letter, and it will be unfair for the Defendants to "lay and wait" until after FIB made the full credit bid, only to later argue that the guaranty liabilities are gone.

[86] A waiver requires:

1) a voluntary and intentional;
2) relinquishment or abandonment;
3) of a known, existing right, privilege, claim, or benefit; and
4) that the party could have enjoyed, but for the waiver.

[87] Once a right is waived, the right or privilege is gone forever and cannot be recalled.

[88] A waiver can be made expressly or inferred by conduct or inaction evidencing an intention to waive, such as silence after notification. Those acts or that conduct may involve neglect or failure to act, when affirmative action is required, that leads the other party reasonably to believe that it was the party's intention so to waive. *Shoberg v. State Auto. Ins. Ass'n.*, 48 N.W.2d 452 (N.D. 1951); *Tormaschy v. Tormaschy*, 1997 ND 2, ¶ 19, 559 N.W.2d 813; and *Anderson v. American Standard Ins. Co.*, 293 N.W.2d 878, 883 (N.D. 1980).

[89] By not responding to the March 25, 2008, letter, the Defendants' inaction abandoned their right to claim that their guarantees of payment did not survive the full credit bid, and they cannot now make that claim, and they should be estopped from doing so.

[90] Estoppel is a defense that relates to preservation by law of the rights and privileges of a party where it would be unfair to allow the party to assert those rights and privileges. Estoppel requires that there has been some act or conduct or lack thereof on

the part of one party, here the Defendants, upon which another party, here FIB, acted to its disadvantage in reliance, in good faith, upon the conduct or lack thereof of the Defendants. *Conklin v. North American Life & Casualty Company*, 88 N.W.2d 825, 830 (N.D. 1958); *Blocker Drilling Canada Ltd. v. Conrad*, 354 N.W.2d 912, 920 (N.D. 1984).

[91] In other words, it is unfair for one party, here the Defendants, to, through their lack of conduct or inaction to, allow the other party, here FIB, to act in reliance, in good faith, and to its disadvantage, by making the full credit bid.

[92] No doubt the Defendants were happy, after having pocketed what they were paid for their guarantees of payment, with the prospect that FIB would make a full credit bid, perhaps thinking to themselves, under the circumstances at the time, that there would be a third party "new-money" full bid or redemption, and their problems would rightfully be at an end. They might have also wrongfully thought that if there were no "new-money" full bid or redemption, even so, if FIB did, as it announced it would, make a full credit bid, still their guaranty liability would be at an end. Under these circumstances, the Defendants simply had no reason to respond to the March 25, 2008, letter. They had to know that if they did, FIB would readjust its bidding strategy, to assure at least some substantial leftover indebtedness to support the guarantees of payment.

[93] Of course, if that had occurred, then the Defendants would be arguing now that FIB in bad faith "rigged" the bidding process to deliberately leave them exposed on the guarantees of payment, knowing full well that FIB would eventually be paid in full from the sale of the condominium units.

[94] The district court's ruling on waiver and estoppel, App. P. 255-256, is too restrictive. The ruling is based on the fact that the individual Defendants did not respond to the March 25, 2008 letter, App. PP. 227-229, specifically warning the individual Defendants that FIB would be making a full credit bid and would continue to enforce the guarantees of payment.

[95] By not responding to the letter, FIB forwent other bidding strategies and made a full credit bid.

[96] Because the individual Defendants ignored the letter, FIB could reasonably conclude that the individual Defendants too intended that the guarantees of payment would survive a full credit bid.

[97] True, although the individual Defendants had no duty to respond to the letter, by failing to do so, they have waived their rights to argue that a full credit bid relieves them of liability, and should be estopped from raising that argument now.

VIII. CONCLUSION AND PRECISE RELIEF SOUGHT

[98] We submit that the best solution to all of this is to simply hold that the guarantees remain fully enforceable despite FIB's full credit bid, either because of the express language of the guarantees themselves; *Henning v. Mainstreet Bank*, 538 Fed.3d 975 (8th Circuit 2008), holding that lien foreclosure sale proceeds do not constitute payment under a loan agreement; or because of notions of waiver and estoppel.

[99] The specific language must be protected and enforced as a matter of due process. There is no unconsciousability, no restraint to business and no fraud. There is no clear public policy reason why parties cannot be paid to guaranty debt remaining after disposition of real property obtained because of a full credit bid at a Sheriff's Sale on

Foreclosure. The district court is fully capable of addressing the particulars determining the remaining unpaid indebtedness.

[100] The Court should reverse the final judgment of the district court holding that the guarantees of payment of each of the individual Defendants remain enforceable, according to their terms, and directing the district court to determine each of the Defendant's liabilities under their guarantees of payment.

Dated this 25th day of August 2009.

/s/ Roger J. Minch
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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 Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that this Brief was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,726.

Dated this 25th day of August 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:

BRIEF OF PLAINTIFF/APPELLANT AND
APPENDIX OF PLAINTIFF/APPELLANT

on August 25, 2009, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

supclerkofcourt@ndcourts.gov	Clerk of the Supreme Court North Dakota Supreme Court 600 E Boulevard Ave. Dept. 180 Bismarck, ND 58505-0040
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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 August 25, 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 25th day of August 2009.

/s/ Karen Davis
(SEAL) Notary Public