Affirmed and Opinion Filed June 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00001-CV

DOUGLAS STOUFFER, Appellant
V.
LEVINE AND FATHER OPERATING CORP., Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-00854-2018

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Partida-Kipness

Appellant Douglas Stouffer ("Stouffer") appeals the trial court's order granting summary judgment in favor of appellee Levine and Father Operating Corp. ("Levine") and implicitly denying Stouffer's motion for summary judgment. In a single issue, Stouffer argues the judgment should be reversed and judgment rendered that Levine take nothing on its claims against him. In a cross-issue, Levine seeks an award of appellate attorney's fees. We overrule Stouffer's sole issue, overrule Levine's cross-issue, and affirm the judgment.

BACKGROUND

Stouffer is the Managing Member of Recycle Asylum, LLC. In 2014, Levine entered into a three-year commercial lease with Recycle Asylum covering a 21,000 square foot property. Under the Lease, Levine was the landlord, Recycle Asylum was the tenant, and Stouffer signed as guarantor. The guaranty stated:

> By signing this lease, I personally guarantee the performance of all financial obligations of Douglas Stouffer under this lease.

Stouffer signed the lease on behalf of Tenant Recycle Asylum under the title of "Managing Member." He signed the guaranty as "Guarantor" under the title of "Owner."

The lease term began October 1, 2014. The lease required payment of a $3,500 security deposit and agreement to take the premises as-is. Recycle Asylum paid the security deposit and the first two monthly rent payments. Thereafter, Recycle Asylum made no more payments and vacated the premises.

Levine sued Recycle Asylum in 2015 for breach of contract. On February 17, 2017, the trial court in that lawsuit granted summary judgment in favor of Levine, awarding Levine $92,860 as the principal amount due under the lease, attorney's fees, interest, and court costs. On February 22, 2018, when Levine's attempts to collect that judgment failed, Levine filed the underlying suit against Stouffer for breach of contract under the guaranty. In its original petition, Levine stated that

Stouffer "personally guaranteed the performance of all financial obligations under the lease." Stouffer filed a general denial.

On June 6, 2018, Levine moved for summary judgment. In its motion, Levine argued that Stouffer, as managing member of Recycle Asylum, breached the Lease by refusing to pay rent after the second month of the contract and by deserting or vacating the property before expiration of the lease term. As it did in the original petition, Levine stated that Stouffer "personally guaranteed the performance of all financial obligations of the Lease." Levine sought actual damages of $92,860, attorney's fees, interest, and court costs.

Stouffer's response to the motion for summary judgment included a cross-motion in which he sought a take-nothing judgment against Levine. Stouffer argued that the guaranty clearly and unambiguously states that Stouffer was guaranteeing only his own personal obligations under the Lease, he had no personal obligations under the lease, and he specifically asked for the language of the guaranty to eliminate his personal liability for the rent payable by Recycle Asylum. According to Stouffer's unsworn declaration, the guaranty in the original draft of the lease stated: "By signing this lease, I personally guarantee the performance of all financial obligations of Recycle Asylum, LLC under this lease." Stouffer maintained that he did not want to personally guarantee the payment of rent under the lease, so he requested the language of the guaranty be changed to "By signing this lease, I personally guarantee the performance of all financial obligations of Douglas Stouffer

under this lease." Stouffer declared that he knew he had no financial obligations under the lease, he knew the revised guaranty would be meaningless, and he would not have signed the lease had he been compelled to guarantee Recycle Asylum's obligation to pay rent. Stouffer prayed that the court deny Levine's motion for summary judgment and grant Stouffer's cross-motion that Levine take nothing.

Levine's response to Stouffer's cross-motion included the affidavit of Saul F. Waranch, President and CEO of Levine's property management company. In his affidavit, Waranch stated that Stouffer was required to personally guarantee the financial obligations of the Lease because of Recycle Asylum's insufficient credit history. Levine's response also included what Levine contended was the original draft of the Lease that, contrary to Stouffer's declaration, included the same guaranty language as was signed by Stouffer.

The trial court granted Levine's motion for summary judgment and, on December 3, 2018, signed a Final Summary Judgment awarding Levine $92,860 as the amount due on the debt, interest, court costs, and $630.00 for attorney's fees. This appeal followed.

STANDARD OF REVIEW

The standards of review for a traditional summary judgment under rule 166a(c) are well known. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). The movant has the burden to demonstrate that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law.

Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009) (citing TEX. R. CIV. P. 166a(c), *Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003)). In reviewing a traditional summary judgment, we consider the evidence in the light most favorable to the nonmovant. *Fielding*, 289 S.W.3d at 848; *Pinkus v. Hartford Cas. Ins. Co.*, 487 S.W.3d 616, 622 (Tex. App.—Dallas 2015, pet. denied). We credit evidence favorable to the nonmovant if a reasonable fact-finder could, and we disregard evidence contrary to the nonmovant unless a reasonable fact-finder could not. *Fielding*, 289 S.W.3d at 848.

When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641–42 (Tex. 2015) (citing *Comm'rs Court of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997)); *Holmes v. Graham Mortg. Corp.*, 449 S.W.3d 257, 261 (Tex. App.—Dallas 2014, pet. denied); *see also* TEX. R. APP. P. 43.3.

Within the framework of these standards, we review a grant of summary judgment de novo. *Trial v. Dragon*, 593 S.W.3d 313, 316–17 (Tex. 2019) (citing *Fielding*, 289 S.W.3d at 848). Here, the trial court granted the motion without identifying the basis of its ruling. Accordingly, we must affirm the order if any of the summary judgment grounds are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

APPLICABLE LAW

The construction of an unambiguous contract is a question of law, also reviewed de novo. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011). In construing a written contract, our primary objective is to ascertain the parties' true intentions as expressed in the language they chose. *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). We "construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served," and avoiding unreasonable constructions when possible and proper. *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). To that end, we consider the entire writing, harmonizing and giving effect to all the contract provisions so that none will be rendered meaningless. *Moayedi*, 438 S.W.3d at 7. No single provision taken alone is given controlling effect; rather, each must be considered in the context of the instrument as a whole. *Id.* We also give words their plain, common, or generally accepted meaning unless the contract shows that the parties used words in a technical or different sense. *Id.*

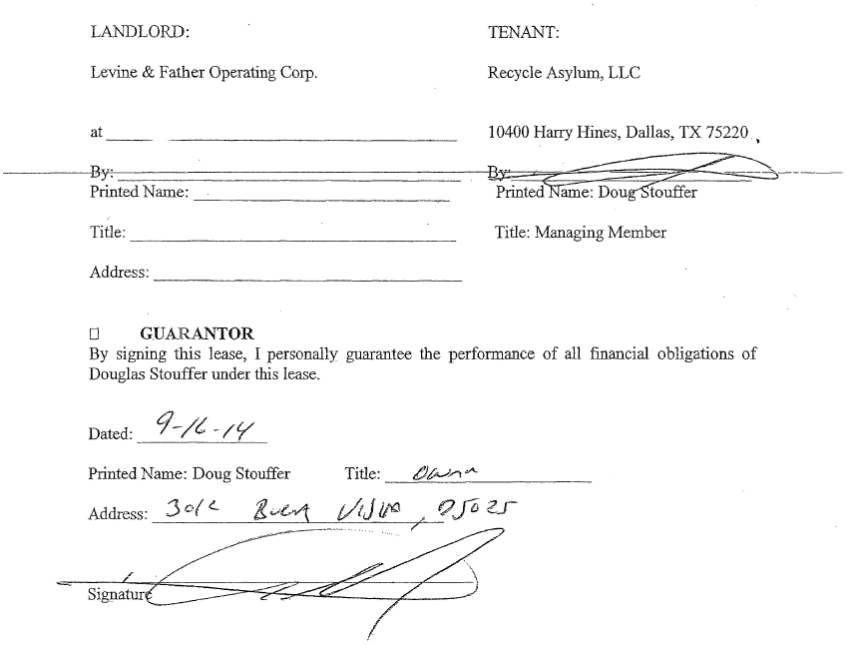
A contract is not ambiguous if the contract's language can be given a certain or definite meaning. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012). But if the contract is subject to two or more reasonable interpretations after applying the pertinent construction principles, the contract is ambiguous, creating a fact issue regarding the parties' intent. *Id.* Summary judgment is not the proper vehicle for resolving disputes about an ambiguous contract. *Bright*

Excavation, Inc. v. Pogue Constr. Co., LP, No. 05-18-00820-CV, 2020 WL 1921681, at *4 (Tex. App.—Dallas Apr. 21, 2020, no pet. h.) (mem. op.) (citing *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015)). Mere disagreement over the interpretation of an agreement does not necessarily render the contract ambiguous. *Plains Expl.*, 473 S.W.3d at 305.

ANALYSIS

Applying these rules of interpretation, we agree with Levine that the guaranty, when read in the context of the Lease as a whole, unambiguously obligates Stouffer to pay the rent owed by Recycle Asylum under the Lease upon default. "A guaranty agreement creates a secondary obligation whereby the guarantor promises to be responsible for the debt ***of another*** and may be called upon to perform if the primary obligor fails to perform." *Wasserberg v. Flooring Servs. of Tex., LLC*, 376 S.W.3d 202, 205 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (emphasis added); *Dann v. Team Bank*, 788 S.W.2d 182, 183 (Tex. App.—Dallas 1990, no writ) (same).

The Lease defines Recycle Asylum as Tenant. Stouffer, however, signed the Lease as Tenant using his title of Managing Member. He also signed the Lease as Guarantor using his personal address but also his title of Owner of Recycle Asylum. The relevant portion of the Lease is below:



LANDLORD: Levine & Father Operating Corp.

at _____

By: _____

Printed Name: _____

Title: _____

Address: _____

TENANT: Recycle Asylum, LLC

10400 Harry Hines, Dallas, TX 75220

By: _____

Printed Name: Doug Stouffer

Title: Managing Member

☐ **GUARANTOR**

By signing this lease, I personally guarantee the performance of all financial obligations of Douglas Stouffer under this lease.

Dated: 9-16-14

Printed Name: Doug Stouffer Title: Owner

Address: 3012 Bush Visio, 05025

Signature

Here, the parties agree the guaranty is unambiguous but disagree on the proper construction of the guaranty. Reading the guaranty in the context of the lease as a whole, however, the only reasonable interpretation is that Stouffer guaranteed Recycle Asylum's liability under the Lease. A guaranty is, by definition, a promise to answer for the debt *of another* not for one's own debt. Here, Stouffer is not an individual party to the Lease and admits that he had no financial obligations in his individual capacity under the Lease outside of the guaranty. Were we to adopt Stouffer's construction, i.e., that he executed the guaranty on his own behalf to guarantee financial obligations he did not owe individually to Levine, the guaranty would be rendered meaningless. *See O'Banion v. Inland W. Clear Lake Gulf Shores GP, LLC*, No. 01-15-00704-CV, 2017 WL 5494695, at *7 (Tex. App.—Houston [1st Dist.] Nov. 16, 2017, no pet.) (mem. op.) (guaranty would be rendered meaningless if the court accepted guarantor's construction, i.e., that he signed on behalf of

company and, as such, the company was guaranteeing its own performance and debt); *TWI XVIII, Inc. v. Carroll*, No. 02-12-00065-CV, 2013 WL 1457725, at *5 (Tex. App.—Fort Worth Apr. 11, 2013, pet. denied) (mem. op.) ("The appellants' construction, that Texas Wings was guarantying its own performance under a lease between itself and Carroll, is not a reasonable interpretation."); *see also Elsey/Honeycutt Ward Sur.-Ins. Agency, Inc. v. Nat'l Loan Inv'rs, L.P.*, No. 01-93-00060-CV, 1993 WL 322734, at *3 (Tex. App.—Houston [1st Dist.] Aug. 26, 1993, writ denied) ("Under normal circumstances, a written collateral undertaking given to secure a corporate debt will be rendered meaningless if the primary debtor is found to be the exclusive party liable under it."). Indeed, Stouffer's interpretation, by his own admission, renders the guaranty meaningless. His construction of the guaranty is unreasonable and contrary to well-settled Texas law that contract provisions should not be interpreted to be meaningless. *See Plains Expl.*, 473 S.W.3d at 305. As such, we overrule Stouffer's sole issue and affirm the trial court's final summary judgment.

APPELLATE ATTORNEY'S FEES

In a cross-issue, Levine requests that this Court award Levine its reasonable attorney's fees and costs incurred on appeal. Any "party who seeks to alter the trial court's judgment ... must file a notice of appeal." TEX. R. APP. P. 25.1(c). An appellate court may not grant a party who did not file a notice of appeal more favorable relief than the trial court did except for good cause. *Id.*; *Frontier Logistics,*

L.P. v. Nat'l Prop. Holdings, L.P., 417 S.W.3d 656, 666 (Tex. App.—Houston [14th Dist.] 2013, pets. denied) (subs. op.) (citing *Lubbock Cty., Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002)).

Here, the trial court did not include conditional appellate attorney's fees in the judgment, and Levine did not present evidence in the trial court of such fees. By seeking an award of appellate attorney's fees in this Court, Levine seeks a more favorable judgment than awarded below. Such a request to alter the trial court's judgment can only be considered when the party seeking the alteration has filed a notice of appeal or provides "just cause" for granting the party more favorable relief. *Reich & Binstock, LLP v. Scates*, 455 S.W.3d 178, 185 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 999 S.W.2d 887, 894 (Tex. App.—Waco 1999, pet. denied). Levine did not, however, file a notice of cross-appeal and has not given us reason to find "just cause." As such, Levine is not entitled to the relief requested in its cross-point. See TEX. R. APP. P. 25.1(c); *see also Scates*, 455 S.W.3d at 185 (rejecting appellee's cross-issue requesting remand for appellate attorney's fees where appellee did not file notice of appeal); *D.S.A.*, 999 S.W.2d at 894 (declining to award appellate attorney's fees where appellee did not file a notice of appeal and did not provide "just cause"). Accordingly, we deny Levine's request for an award of appellate attorney's fees.

CONCLUSION

We conclude the guaranty in the Lease unambiguously obligates Stouffer to pay the rent owed by Recycle Asylum under the Lease upon default. In addition, we reject Levine's request for an award of appellate attorney's fees. Accordingly, we affirm the trial court's final summary judgment.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DOUGLAS STOUFFER, Appellant	On Appeal from the 366th Judicial District Court, Collin County, Texas
No. 05-19-00001-CV V.	Trial Court Cause No. 366-00854-2018.
LEVINE AND FATHER OPERATING CORP., Appellee	Opinion delivered by Justice Partida-Kipness. Justices Bridges and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee LEVINE AND FATHER OPERATING CORP. recover its costs of this appeal from appellant DOUGLAS STOUFFER. *See* TEX. R. APP. P. 43.4.

Judgment entered this 22nd day of June, 2020.