STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1113

Southcross, LLC, a/k/a and d/b/a O'Connell Square,
Respondent,

vs.

Meridius Company, LLC, a/k/a and d/b/a Dunn Bros Coffee,
Defendant,

Paul Nesburg,
Appellant.

Filed March 17, 2014
Affirmed
Larkin, Judge

Carver County District Court
File No. 10-CV-12-660

George E. Warner, Jr., Warner Law, LLC, Minneapolis, Minnesota (for respondent)

Kay Nord Hunt, Barry A. O'Neil, Lommen, Abdo, Cole, King & Stageberg, P.A. Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant challenges the district court's determination that he is liable to respondent under a personal lease guaranty, arguing that when the tenant whose performance he originally guaranteed was released from the lease, his personal liability ended. Because the lease guaranty is ambiguous and the district court's factual determination that the parties did not intend to release appellant from his guaranty obligations is not clearly erroneous, we affirm.

FACTS

Respondent Southcross LLC owns a retail shopping center in Savage. In November 2001, Southcross entered into a "Lease Agreement" with Scott A. Winer to operate a coffee shop at the shopping center.

In late 2003 or early 2004, appellant Paul Nesburg's company, Auburn Quarters LLC, purchased the coffee shop from Winer. Southcross, Winer, and Auburn executed a "Second Amendment of Lease Agreement," which released Winer from the lease. The second amendment also stated that Auburn would be the "Tenant" under the lease and all future documents. Nesburg signed the second amendment on Auburn's behalf and executed a "Lease Guaranty," which guaranteed the obligations of the "Tenant" to Southcross, including "the full and prompt payment when due and the full, complete, and prompt performance of all rent, additional rent, and other conditions, covenants, stipulation and agreements" under the lease. In June 2007, Southcross and Auburn

executed a "Third Amendment of Lease Agreement," renewing the term of the lease for an additional five years.

In May 2008, Southcross learned that Auburn intended to sell the coffee shop to defendant Meridius Company LLC. Southcross notified Nesburg that it would not approve the transaction or consent to a lease transfer, and that Nesburg and Auburn would remain liable for the remainder of the lease term. The parties subsequently agreed to add Meridius as a co-tenant on the lease, with Meridius's owner, Chris Peterson, as an additional guarantor. In June, Southcross, Auburn, Nesburg, Meridius, and Peterson executed a "Fourth Amendment of Lease Agreement," which added Meridius to the lease as a co-tenant.

In May 2011, Southcross, Auburn, and Meridius executed a "Fifth Amendment of Lease Agreement." The fifth amendment granted Meridius three months of free rent in exchange for an extension of the lease through August 31, 2017. The fifth amendment also "fully released" Auburn from the lease "in its entirety," but it did not mention Nesburg's lease guaranty. Shortly thereafter, Meridius stopped paying rent, and Southcross evicted Meridius from the leased property.

Southcross sued Meridius and Nesburg for damages stemming from Meridius's default. Nesburg moved for summary judgment, and the district court denied the motion. The district court held a court trial and concluded that Nesburg is liable to Southcross under the lease guaranty. The district court entered judgment against Meridius and Nesburg, "jointly and severally, in the principal amount of $77,642.38, plus interest,

costs, and disbursements." Nesburg moved for amended findings, which the district court partially granted. Nesburg appeals.

D E C I S I O N

Nesburg challenges the district court's conclusion that he is liable for damages stemming from Meridius's default, arguing that, under the plain language of the lease guaranty, he had no obligation to Southcross after Southcross released Auburn from the lease. "In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). "However, we are not bound by and need not give deference to the district court's decision on a purely legal issue." *Id*. "When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id*. (quotation omitted).

"[A] lease is a form of a contract." *Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009). "When the language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). "Unambiguous contract language must be given its plain and ordinary meaning." *Noble*, 763 N.W.2d at 645. "But if the language is ambiguous, parol evidence may be considered to determine intent." *Dykes*, 781 N.W.2d at 582. "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Noble*, 763 N.W.2d at 645

(quotation omitted). "Whether a contract is ambiguous is a question of law that [appellate courts] review de novo." *Dykes*, 781 N.W.2d at 582. But the interpretation of an ambiguous contract is a question of fact. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). An appellate court will not set aside the district court's interpretation of an ambiguous contract unless it is clearly erroneous. *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn. 1990).

"Because a guaranty is [also] a contract, its terms must be understood in their plain and ordinary sense in light of the parties' intentions and the circumstances under which the guaranty was given." *Loving & Assocs., Inc. v. Carothers*, 619 N.W.2d 782, 786 (Minn. App. 2000), *review denied* (Minn. Feb. 13, 2001). Moreover, when construing a contract, "[s]eparate writings as part of the same transaction must be construed together." *Wm. Lindeke Land Co. v. Kalman*, 190 Minn. 601, 607, 252 N.W. 650, 652 (1934).

> Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other. So if two or more agreements are executed at different times as parts of the same transaction they will be taken and construed together.

Id., 252 N.W. at 653 (quotation omitted). We therefore construe the lease guaranty together with the original lease and all of the amendments.

The lease guaranty states, in relevant part:

> Paul Nesburg, Personal Guarantor ("Guarantor"), absolutely and unconditionally guarantees to [Southcross] the full and prompt payment when due and the full, complete, and prompt performance of all rent, additional rent, and other conditions . . . .

> Upon default of *Tenant* no act or thing need occur to establish the liability of Guarantor hereunder, and no act or thing, except full payment and discharge of all Obligations, shall in any way discharge Guarantor or modify, reduce, limit, or release the liability of Guarantor for all Obligations under the Lease. This Personal Guaranty ("Guaranty") shall continue to be in force and be binding upon Guarantor until all Obligations under the Lease are paid in full and all terms and conditions under the Lease have been fully and complete[ly] performed by *Tenant*.
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> . . . .
>
> This Guaranty . . . shall be binding upon Guarantor and his personal representatives, successors, and assigns, and shall inure to the benefit of [Southcross] . . . . This Guaranty may not be waived, modified, amended, terminated, released, or otherwise changed except by a writing executed by Guarantor and [Southcross].

(Emphasis added.)

When Nesburg signed the lease guaranty, Auburn was the tenant, whose performance he guaranteed. But the fourth amendment added Meridius as a tenant stating, "With the signing of this Amendment by all parties, Meridius Company, LLC and Auburn Quarters, LLC will be jointly known as 'Tenant' on the Lease and all future documents." Moreover, the fourth amendment extended Auburn's and Nesburg's obligations as follows:

> Existing Tenant agrees that this Amendment and assumption shall not release or discharge Existing Tenant and its guarantor, Paul Nesburg, from any liability or obligation of *the tenant under the Lease, whether past, present or future* (including liabilities and obligations arising or accruing during any renewal term of the Lease or with respect to any expansion space hereafter included in the Leased Premises), all of which liabilities and obligations the Existing Tenant, Co-Tenant, and their guarantors jointly guarantees to pay and perform promptly upon receipt of notice and demand from Lessor on account of the default on the part of Existing

> Tenant, Co-Tenant, and their guarantors, jointly or severally, under the Lease, together with payment of reasonable attorney's fees and expenses incurred by Lessor in the event suit be instituted pursuant to such notice and demand.

(Emphasis added.)

Although the fifth amendment released Auburn as a tenant stating, "Auburn will be fully released from the Lease in its entirety upon the full and final execution of this Amendment by all parties hereof," the amendment did not contain any language modifying Nesburg's obligations under the lease guaranty. Because Nesburg originally agreed to guarantee the "tenant's" performance, and because Meridius both became the tenant under the fourth amendment and remained the tenant after the fifth amendment, one reasonable interpretation of the lease guaranty is that Nesburg is liable for Meridius's default.

On the other hand, Nesburg argues that under the lease guaranty, he guaranteed only *Auburn's* performance. Nesburg agrees that the fourth amendment extended his obligations as guarantor to Meridius's performance, but only because Auburn and Meridius became jointly liable under the lease. Thus, Nesburg argues that, although he became liable for Meridius's performance, that liability stemmed solely from Auburn's joint liability with Meridius. Nesburg further argues that once Southcross released Auburn from the lease, Auburn was no longer jointly liable with Meridius and Nesburg was no longer liable for Meridius.

Nesburg's alternative interpretation of the lease guaranty is also reasonable. Because there are two reasonable interpretations of the lease guaranty, it is ambiguous

and parol evidence is properly considered to determine the parties' intent. *See Dykes*, 781 N.W.2d at 582; *Noble*, 763 N.W.2d at 645. Thus, assuming without deciding that the propriety of the denial of summary judgment is properly before this court on appeal,[1] the district court did not err by denying Nesburg's motion for summary judgment and holding a trial to determine the parties' intent and Nesburg's liability. *See Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004) ("Summary judgment is inappropriate where terms of a contract are at issue and those terms are ambiguous or uncertain.").

After considering the trial evidence, the district court made several findings regarding the parties' intent. The district court found that:

> 10. Sometime in May 2008, [Southcross] learned that Auburn Quarters intended to sell its Dunn Bros. Coffee business at O'Connell Square to Meridius. Upon learning of the potential sale, [Southcross] sent Nesburg a letter notifying him that it would not approve the transaction, would not consent to any transfer, and that Nesburg and Auburn Quarters would continue to remain liable for the remaining term of the lease and any exercised renewal periods.
>
> 11. The parties subsequently reached an agreement to add Meridius as a co-tenant to the lease, with Chris Peterson (Meridius's owner) as an additional guarantor. On or about June 13, 2008, [Southcross], Auburn Quarters, Nesburg, Meridius[,] and Chris Peterson entered into a "Fourth

[1] Compare *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918-19 (Minn. 2009) (ruling that, generally, a pretrial order denying summary judgment because of the existence of fact questions is moot once a jury reaches a verdict and that the denial of summary judgment cannot be reviewed on appeal from a final judgment) with *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 744 (Minn. App. 2010) (ruling that a pretrial order denying summary judgment based on a legal determination can be reviewed on appeal from the final judgment), *review denied* (Minn. Sept. 21, 2010).

> Amendment of Lease Agreement," wherein Meridius was formally joined as a co-tenant to the Lease.

The district court further found that the fourth amendment stated that it did not release or discharge Nesburg from any liability or obligation of the tenant under the lease. And the district court expressly "found credible the testimony of Jeff Carriveau and [Southcross's] lease administrator, Elizabeth Hasledalen, that [Southcross] never intended to release Nesburg from his personal guaranty." We defer to this credibility determination. *See* Minn. R. Civ. P. 52.01. ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses."); *see also Denelsbeck*, 666 N.W.2d at 346 (stating that the interpretation of an ambiguous contract is a question of fact). Lastly, the district court explained that "the Court cannot find, based upon the evidence presented, that the parties ever intended that Mr. Nesburg be released from his guaranty obligations in connection with the Fifth Amendment to the lease."

Nesburg argues that it is unreasonable to conclude that he would have guaranteed Meridius's performance separately from Auburn's. But the district court's findings show why Nesburg would have done so. Auburn wanted to sell the business that it operated at the leased property to Meridius. Southcross would not agree to release Auburn and Nesburg from their obligations under the lease. Southcross eventually agreed to accept Meridius as a co-tenant with Auburn, but it did so based on the condition that Nesburg's obligations as guarantor would continue regardless of the change in tenant. In sum, the

record could be read to show that Southcross would not agree to accept Meridius as a tenant—a result that Nesburg desired—unless Nesburg agreed to continue his obligations under the lease guaranty, which would explain why Nesburg was willing to guarantee Meridius's performance.

For that reason, the district court did not clearly err by finding "based upon the preponderance of the credible and persuasive evidence, that Nesburg was not released from his personal guaranty and remains liable for the reasonable damages suffered by [Southcross] due to Meridius'[s] breach." In light of that finding, Nesburg's arguments for reversal are unavailing. The majority of Nesburg's arguments address whether Nesburg guaranteed Meridius's performance.[2] We reject those arguments for the reasons explained above. Nesburg also argues that the district court "failed to apply basic rules of contract construction" because it "failed to construe the documents before it against the drafter Southcross." *See Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002) ("[A]mbiguous contract terms must be construed against the drafter."). But Nesburg does not cite the record to support his assertion that Southcross drafted the lease, and the district court did not make findings regarding who drafted the lease. Thus, we are not persuaded that the district court erred by not construing the lease against Southcross.

Lastly, Nesburg argues that "the fifth amendment of the lease agreement is a new lease to which default by Meridius, Nesburg could not be held responsible." Nesburg

[2] Nesburg makes the following arguments in his brief: Nesburg guaranteed only Auburn's performance; the lease guaranty must be read as a whole, and because there was no default by Auburn, Nesburg's lease guaranty was never triggered; Nesburg's lease guaranty does not extend to Meridius's default; and the plain language of the fourth amendment refutes the conclusion that Nesburg guaranteed Meridius's performance.

contends that the fifth amendment "in fact was not an extension or a renewal of [the] earlier Lease Agreement. It was a new lease between Meridius and Southcross with new rental terms." Nesburg asserts that "as a matter of law, [he] is not the guarantor of that new Meridius/Southcross lease" and that he "has no liability on this substituted agreement." The only precedential authority that Nesburg cites as support is *Dewey v. Henry's Drive-Ins of Minn., Inc.*, which states that "a material alteration in the principal contract, made after execution of the guaranty contract and *without the consent of the guarantor*, discharges the guarantor if the alteration adversely affects the guarantor's interests." 301 Minn. 366, 370, 222 N.W.2d 553, 555 (1974) (emphasis added). Nesburg asserts "[t]hat is the situation here." For the reasons that follow, we disagree.

First, if the fifth amendment constituted a new lease between Southcross and Meridius, to which Auburn was not a party, we fail to discern why the fifth amendment expressly released Auburn from its obligations under the lease. Second, the critical material alternation in this case occurred under the fourth amendment, when Meridius was added as a tenant and Nesburg expressly agreed that his liability under the lease guaranty would continue despite the change in tenant. Third, Nesburg signed the fifth amendment on behalf of Auburn as its chief manager. Thus, Nesburg was aware that although the fifth amendment expressly released Auburn from the lease, it did not contain similar language ending his obligations under the lease guaranty, which states that "[t]his Guaranty may not be waived, modified, amended, terminated, released, or otherwise changed except by a writing executed by [Nesburg] and [Southcross]." In sum,

Nesburg's obligation as guarantor continued with his consent, and he is not entitled to relief under *Dewey*. *See id.*

In conclusion, we acknowledge that Nesburg articulates a reasonable interpretation of the lease guaranty. But there is more than one reasonable interpretation in this case. Thus, a determination regarding Nesburg's liability depends on the district court's findings regarding the parties' intent. And those findings, which are based on trial testimony and attendant credibility determinations, are not clearly erroneous. *See* Minn. R. Civ. P. 52.01. We therefore defer to the district court's determination that the parties did not intend to release Nesburg from the lease guaranty and affirm the judgment of the district court.

Affirmed.