

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

UNION SAVINGS BANK,	:	APPEAL NO. C-081171
Plaintiff-Appellee,	:	TRIAL NO. A-0800418
vs.	:	<i>JUDGMENT ENTRY.</i>
CARL TUKE, JR.,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Carl Tuke, Jr., contests the entry of summary judgment for plaintiff-appellee Union Savings Bank on its claim for breach of a guaranty agreement. The trial court also denied Tuke’s motion for summary judgment.

Michael Macke, individually and as the sole member of Sugar Ridge, LLC, a real estate development in Lawrenceburg, Indiana, executed a promissory note in favor of Union Savings. Sugar Ridge and Macke agreed to pay Union Savings the lesser of \$475,500 or the total of all amounts advanced by the bank. As security for the note, Sugar Ridge granted Union Savings a mortgage on its lots, and Tuke executed a guaranty agreement with Union Savings.

The guaranty agreement provided that “in order to induce [Union Savings] \* \* \* to make a loan or loans in the aggregate principal amount of [\$472,500] to Sugar Ridge,”

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Tuke “hereby unconditionally and absolutely guarantees” the amounts due and to become due under the note. Union Savings ultimately disbursed \$472,500 to Sugar Ridge. But Sugar Ridge and Macke defaulted in 2007. The bank then filed this action for money damages, alleging that Tuke had breached the guaranty agreement.

Both parties moved for summary judgment, supported by affidavits from Tuke and from Union Savings officers. The trial court entered judgment for Union Savings in the amount of \$440,780.15 and awarded interest, costs, and attorney fees. This appeal followed.

In two interrelated assignments of error, Tuke contests the entry of summary judgment for Union Savings and the denial of his own motion for summary judgment. Tuke contends that factual inconsistencies between the terms of the note and the guaranty agreement precluded the entry of judgment for Union Savings. He highlights that the loan amounts specified in the note (\$475,500) and the guaranty agreement (\$472,500) were different, that the note and the guaranty agreement referred to different borrowers, and that the guaranty agreement was limited to loans disbursed for construction purposes because it was captioned “Continuing Guaranty Under Residential Construction Loan Disbursement Agreements.”

But the mere existence of factual disputes does not necessarily preclude summary judgment. Only disputes over genuine factual matters that affect the outcome of the suit will properly preclude summary judgment.<sup>2</sup> Summary judgment is appropriately granted when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most

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<sup>2</sup> See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505.

strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.<sup>3</sup> The parties' election to address the issues by cross-motions for summary judgment demonstrates that both sides believed that no genuine issues of material fact were in dispute and that the court was free to render a decision as a matter of law.<sup>4</sup> We review summary-judgment determinations de novo, without deference to the trial court's ruling.<sup>5</sup>

“Ultimately, a guarantor's liability \* \* \* is governed by the terms used in the contract. [A] guaranty agreement is interpreted as any other contract under Ohio law. If a guaranty's terms are clear and unambiguous, a court may not construe it to have another meaning.”<sup>6</sup> Courts presume that the intent of the parties to a contract resides in the language they have chosen to employ in the agreement.<sup>7</sup> The interpretation of clear, unambiguous contract terms is a question of law particularly appropriate for resolution by summary judgment.<sup>8</sup>

Here, the evidence of record, construed most strongly in Tuke's favor, demonstrated only that the guaranty agreement was clear and unambiguous. By its own terms, the agreement stated that it was intended to secure loans of up to \$472,500 from Union Savings to Sugar Ridge. Tuke agreed to “unconditionally and absolutely” guarantee the amounts due and to become due under the note. Union Savings had disbursed loan

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<sup>3</sup> See Civ.R. 56(C); see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

<sup>4</sup> See *Costanzo v. Nationwide Mut. Ins. Co.*, 161 Ohio App.3d 759, 2005-Ohio-3170, 832 N.E.2d 71, ¶10.

<sup>5</sup> See *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243; see, also, *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

<sup>6</sup> *O'Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App.3d 233, 2006-Ohio-5264, 862 N.E.2d 549, ¶23 (internal citations omitted); see, also, *Costanzo v. Nationwide Mut. Ins. Co.* at ¶19; *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

<sup>7</sup> See *Air Prods. & Chems., Inc. v. Indiana Ins. Co.* (Dec. 23, 1999), 1st Dist. Nos. C-980947 and C-990009, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146.

<sup>8</sup> See *Costanzo v. Nationwide Mut. Ins. Co.* at ¶19.

proceeds totaling \$472,500 to Sugar Ridge. And Sugar Ridge had defaulted on the note. Thus, Tuke's failure to make any payments to Union Savings breached the guaranty agreement.

Contrary to Tuke's argument, the amounts disbursed under the loan or guaranteed under the guaranty agreement did not differ in any material way. In the guaranty agreement, Tuke guaranteed amounts due to Union Savings "on a loan or loans in the aggregate principal amount of [\$472,500] to Sugar Ridge." The note provided for payments to Union Savings of "the lesser of" \$475,500 "or the amount of all advances" under the note. Since it was undisputed that the total amount advanced by Union Savings was \$472,500, the lesser of the two amounts and the total of all advances, the guaranty-agreement terms limiting Tuke's guarantee to \$472,500 were neither inconsistent nor exceeded.

Tuke also points out that while the guaranty agreement provided that it was being given to induce loans to Sugar Ridge, the note listed Sugar Ridge and Michael Macke, the sole member of Sugar Ridge, as the borrowers. Since the guaranty agreement was an agreement separate and distinct from the note, the guarantor was bound only by the precise words of his guaranty contract.<sup>9</sup> Tuke's intention, stated in his second affidavit, was to guarantee a loan to Sugar Ridge. Since his intention was reflected in the express terms of the guaranty agreement, Tuke's assertion that the note and the guaranty agreement referred to different borrowers also fails to raise a factual issue that would have precluded summary judgment.

Finally, Tuke's attempt to limit the guaranty agreement to construction costs is misplaced. First, the guaranty agreement contained no language that would have

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<sup>9</sup> See *O'Brien v. Ravenswood Apts., Ltd.* at ¶23; see, also, *Morgan v. Boyer* (1883), 39 Ohio St. 324, paragraph two of the syllabus; *Fifth Third Bank v. Jarrell*, 10th Dist. No. 04AP-358, 2005-Ohio-1260.

expressly limited it to a guarantee of payment under loans made for construction purposes only. The terms of the guaranty agreement expressly provided that the amounts loaned to Sugar Ridge were “evidenced by [its] promissory notes.” It also stated that Union Savings could have renewed, rearranged, or extended the note and loan agreements, and that it could have modified, waived, or supplemented the terms and conditions of the note and loan agreements without notice to Tuke and without his consent. Since Tuke waived any right to receive notice, his claimed defenses were waived by the terms of the guaranty agreement.<sup>10</sup>

The assignments of error are overruled. Therefore, the trial court’s entry of summary judgment for Union Savings is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 23, 2009  
per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>10</sup> See *O’Brien v. Ravenswood Apts., Ltd.*, at ¶29.