Dissenting Opinion Filed August 27, 2012.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-11-00342-CV

MICHAEL FOSTER NEEL, M.D., LESLIE SKINNER WELBORNE, M.D., AND LIVE OAK OB/GYN, P.A., Appellants

V.

TENET HEALTHSYSTEM HOSPITALS DALLAS, INC., Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-01395-2008

DISSENTING OPINION

Before Justices Moseley, Lang-Miers, and Murphy
Dissenting Opinion By Justice Lang-Miers

On cross-motions for summary judgment, the trial court granted summary judgment in favor of appellee Tenet HealthSystem Hospitals Dallas, Inc. (Landlord) finding that appellants Michael Foster Neel, M.D. and Leslie Skinner Welborne, M.D. are jointly and severally indebted to appellee on a lease for office space. I would conclude that appellee did not show it was entitled to judgment as a matter of law and would reverse the summary judgment and remand for further proceedings. Because the majority does not, I respectfully dissent.

Landlord sued Live Oak OB/GYN, PA, Neel, and Welborne for past due rent alleging that Neel and Welborne were jointly and severally liable on the office lease between Landlord and Live Oak. Neel and Welborne moved for summary judgment arguing that they were not liable individually on the lease because they signed the lease in their representative capacities as officers of Live Oak. The trial court denied their motions. Landlord then moved for summary judgment claiming that Neel and Welborne were liable individually, and appellants filed cross-motions for summary judgment, again arguing, among other things, that Neel and Welborne are not liable individually because they signed the lease as officers of Live Oak. The trial court granted Landlord's motion and denied appellants' motions.

Landlord agrees that Live Oak was the tenant and that Neel and Welborne signed the lease on behalf of Live Oak. Landlord explained in its motion for summary judgment that it "joined Drs. Wellborne [sic] and Neel [as defendants] because [of] Article 14.12 of the Lease." Article 14.12 of the lease provides:

> Each and every person, firm, corporation, partnership and association comprising Tenant (other than an officer signing on behalf of any corporation) shall be jointly and severally liable hereunder for the full and faithful performance of all the conditions and covenants binding upon Tenant.

Landlord argued that Neel and Welborne were persons comprising Live Oak and were jointly and severally liable on the lease. Landlord argues on appeal that it proved "as a matter of law, that the doctors executed both in a representative and in an individual capacity." It argues that the language of article 14.12 is unambiguous and that, by signing the lease containing that language, Neel and Welborne agreed to be jointly and severally liable and, "as a matter of law, signed in their individual capacity."

Neel and Welborne argue that they are not liable individually because they signed the lease

only as representatives of the tenant, Live Oak. They also argued in opposition to Landlord's motion for summary judgment that even under Landlord's interpretation of article 14.12, they could not be held liable individually because they signed as officers on behalf of Live Oak, and article 14.12 excludes from liability "officer[s] signing on behalf of any corporation."

We construe the lease as a question of law without regard to the parties' subjective interpretations or whether they agree that the provision is unambiguous. *See Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983) (stating court may determine that contract is ambiguous even though parties contend contract is not ambiguous); *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 332 (Tex. App.—Dallas 2011, no pet.) (stating court of appeals may determine ambiguity as a matter of law for the first time on appeal). A contract is not ambiguous as a matter of law if the contract as written can be given a definite and certain legal meaning. *Coker*, 650 S.W.2d at 393; *Underwriters at Lloyd's v. Gilbert Tex. Constr., L.P.*, 245 S.W.3d 29, 34 (Tex. App.—Dallas 2007), *aff'd*, 327 S.W.3d 118 (Tex. 2010). A contract is ambiguous, however, if "its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning." *Coker*, 650 S.W.2d at 393; *accord Exxon Corp. v. W. Tex. Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993). If a contract is ambiguous, summary judgment is improper because the interpretation of the contract becomes a fact issue. *Coker*, 650 S.W.2d. at 394.

To succeed on summary judgment, Landlord had to satisfy its burden to establish that Neel and Welborne agreed to be liable individually under the lease as a matter of law. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985) (stating that moving party has burden to demonstrate no genuine issues of material fact exist and it is entitled to judgment as matter of law). The issue presented here is whether Landlord established that the lease is not ambiguous and imposes individual liability on Neel and Welborne as a matter of law. I would conclude that

Landlord did not satisfy its burden and that summary judgment for Landlord should have been denied for at least two reasons: the language Landlord relies on is ambiguous, and Landlord did not establish that Neel and Welborne personally obligated themselves to the terms of the lease as a matter of law.

The lease states that it is between Landlord "and the Tenant, ('Tenant') named on the execution page attached hereto . . . ." The execution page names Live Oak OB/GYN, PA as the Tenant. The lease, which appears to be a form contract, refers to "Tenant" throughout and does not refer to Live Oak OB/GYN, PA by name except on the execution page. The lease also states, "By their signature[s] . . . [Landlord] and Tenant covenant and agree as follows[.]" On the signature page, Neel and Skinner (now Welborne) signed on separate lines below the word "Tenant" without stating their official capacity in "Tenant." That is the only place where they signed the lease and nothing indicates they were also signing in their individual capacity. The parties agree that Neel and Welborne signed as representatives of Live Oak and that Live Oak is obligated under the Lease. Nevertheless, Landlord contends that these signatures not only bind Live Oak but also bind Neel and Welborne individually as a matter of law.

The lease is ambiguous

Landlord argues that article 14.12 is not ambiguous and is capable of only one interpretation. The majority agrees that the language is not ambiguous and states, "the only meaning article 14.12 can have is as expressed—each and every person comprising Live Oak is jointly and severally liable for performance of all conditions and covenants binding on Live Oak." *Neel v. Tenet HealthSystem Hosps. Dallas, Inc.*, No. 05-11-00342-CV, slip op. at 9 (Tex. App.—Dallas Aug. 27, 2012, no pet. h.).

Applying that interpretation literally means that article 14.12 binds personally and

individually all those persons and entities "comprising Tenant," even if those persons and entities did not sign the lease at all, did not sign the lease in an individual capacity, did not agree to be bound by the lease in their individual capacity, or did not even exist when the lease was signed.[1] That interpretation is contrary to established law that persons or entities that did not sign the lease cannot be held liable on the lease. *See Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701, 706 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("It goes without saying that a contract cannot bind a nonparty." (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

Landlord argues that it is not trying to bind any entity or person that might be included within the meaning of article 14.12 that did not also sign the lease. Consequently, Landlord asks us to construe article 14.12 against appellants as a matter of law, but not exactly as written. But by accepting Landlord's argument, we alter the meaning of article 14.12 from imposing individual liability on "[e]ach and every person . . . comprising Tenant" to imposing individual liability on "each and every person . . . comprising Tenant who signed the Lease." Because Landlord argues that the clause does not mean exactly what it says, I would conclude that it is ambiguous and that summary judgment should have been denied.

Landlord did not establish personal liability as a matter of law

[1] The majority also states that Welborne and Live Oak "admit 'it is clear what [Landlord] was intending to accomplish by including Article 14.12,' . . . [and that] Neel offers no alternative meaning for article 14.12[.]" *Neel*, No. 05-11-00342-CV, slip op. at 9. But Welborne and Live Oak's statement indicates that they believe it was Landlord's intent to hold Neel and Welborne individually liable, not that they concede that Landlord's interpretation of the language is correct as a matter of law. In fact, all of appellants' arguments below and to this Court were that Neel and Welborne are not liable individually because they signed the lease in a representative capacity. And whether *Landlord* intended to bind Neel and Welborne individually is not determinative of whether Neel and Welborne are actually liable in their individual capacities as a matter of law. *See Coker*, 650 S.W.2d at 393 (stating that primary concern of court in construing written contract is to ascertain true intentions of parties as expressed in instrument and, to do this, court "should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract . . . .").

Landlord also argues that this situation is like cases where the person signing on behalf of an entity also personally obligated himself. But in those cases the language in the documents stated that by signing the document in a representative capacity the person signing was also making himself individually liable. *See, e.g.*, *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 259 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (general manager agreed to personally guarantee liabilities of company); *Taylor-Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 488 (Tex. App.—San Antonio 2000, pet. denied) (en banc) (document stated above officer's name, "I, personally agree to pay all invoices and costs of collection . . . ."); *Austin Hardwoods, Inc. v. Vanden Berghe*, 917 S.W.2d 320, 322–23 (Tex. App.—El Paso 1996, writ denied) (document stated above signature "the undersigned personally guarantees the payment of this account in his individual capacity").

The language in this lease is different. It does not state that Neel and Welborne, by signing as representatives of Live Oak, were agreeing to be personally liable. It was Landlord's burden to establish that there is no other interpretation possible, as a matter of law. Here, it is equally reasonable that Neel and Welborne signed only as representatives of Live Oak because they signed under "Tenant," Landlord agrees that they signed as representatives of Live Oak, and there is no line for Neel and Welborne to sign the lease in their individual capacity.

And Landlord's interpretation is contrary to established law that a person does not become personally liable by signing an agreement in a representative capacity. *See Latch v. Gratty, Inc.*, 107 S.W.3d 543, 545–46 (Tex. 2003) ("The mere fact that [president of company] signed the agreement without indicating his agency is no evidence that he acted individually."); *Wright Grp. Architects–Planners, P.L.L.C. v. Pierce*, 343 S.W.3d 196, 201–02 (Tex. App.—Dallas 2011, no pet.) ("When it is apparent from the entire agreement that an officer of a corporation signed the contract on behalf of the corporation as an agent of the corporation, it is the corporation's contract."); *Robertson v. Bland*,

517 S.W.2d 676, 679 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ dism'd) ("One who contracts in a representative capacity is not individually liable where, from the manner in which the instrument is executed, or from the nature of the instrument, it appears that it is the obligation of the person or legal entity represented and that such person or legal entity is the contracting party . . . .").

When the meaning of language in a contract is uncertain or reasonably susceptible to more than one interpretation, it is ambiguous. *Exxon Corp.*, 868 S.W.2d at 302 (quoting *Coker*, 650 S.W.2d at 393–94). If the contract is ambiguous, the issue cannot be decided by summary judgment. *Coker*, 650 S.W.2d at 394. I would conclude that the language in article 14.12 is ambiguous and, combined with the question about whether Neel and Welborne signed the lease only in their representative capacities, precludes deciding these issues as a matter of law. Consequently, I would conclude that the trial court erred by granting summary judgment in favor of appellee. Because the majority concludes otherwise, I respectfully dissent.

ELIZABETH LANG-MIERS
JUSTICE

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