Reverse and Remand in part; Affirmed in part and Opinion Filed March 20, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00196-CV

INTERSTATE 35/CHISAM ROAD, L.P. AND MALACHI DEVELOPMENT CORPORATION, Appellants
V.
MEHRDAD MOAYEDI, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-12666-A

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Stoddart
Opinion by Justice Francis

This is an appeal from a judgment on remand. Interstate 35/Chisam Road, L.P. and Malachi Development Corporation (I–35) bring two issues contending the trial court applied an incorrect interest rate to the judgment and erred in failing to award the full amount of attorney's fees proved up on remand. We conclude the trial court erred in its determination of the applicable interest rate and we reverse that portion of the judgment and remand for further proceedings. We affirm the trial court's award of attorney's fees.

In 2008, Mehrdad Moayedi signed a guaranty agreement in connection with a loan made by I–35 to Villages Sanger, Ltd. for the purchase of real property. Under the guaranty, Moayedi agreed to be liable for:

> ". . . any and all indebtedness or other liability, fixed or contingent, which [Villages] . . . may now or at any time hereafter owe [I–35], including without limitation the indebtedness (including all interest or other charges accruing thereon or incurred thereunder) evidenced by that certain Promissory Note (the "Note") dated of even date hereof, in the stated principal amount of SIX HUNDRED NINETY-SIX THOUSAND DOLLARS ($696,000.00), bearing interest and payable as therein provided . . . .

The guaranty further stated that

> . . . GUARANTOR'S LIABILITY HEREUNDER IS LIMITED TO ONE HUNDRED NINETY-SIX THOUSAND DOLLARS ($196,000.00) of principal together with accrued interest, and if applicable, collection costs including but not limited to attorney fees and costs of court.

The Villages defaulted on the Note and, after foreclosure and sale of the underlying property, a balance of $266,748.84 remained due. I–35 sued Moayedi under the guaranty agreement to recover $196,000 of the deficiency. In response, Moayedi asserted the affirmative defense of offset under section 51.003 of the Texas Property Code arguing the amount he owed was offset by the property's fair market value. *See* TEX. PROP. CODE ANN. § 51.003 (West 2014). Both sides moved for summary judgment, and the trial court granted judgment in favor of Moayedi under section 51.003.

On August 2, 2012, this Court reversed the trial court's summary judgment concluding that waiver language in the guaranty waived Moayedi's right to offset his liability under section 51.003. *See Interstate 35/Chisam Rd., L.P. v. Moayedi*, 377 S.W.3d 791, 801 (Tex. App.—Dallas, 2012), *aff'd* 438 S.W.3d 1, 8 (Tex. 2014). We rendered judgment in favor of I–35 for $196,000 and remanded the case to the trial court "for a determination of interest and costs as provided for in the guaranty agreement." *Id*. at 801–02. Our judgment was affirmed by the Texas Supreme Court. *See Moayedi*, 438 S.W.3d at 8.

On remand, I–35 filed a motion to assess costs and interest and for entry of judgment. In addition to judgment for the $196,000 principal amount, I–35 requested attorney's fees and costs of $40,574.03 incurred through the date of the original summary judgment, $13,587.56 incurred

prosecuting the appeal to this Court, $21,762.48 incurred defending the judgment from this Court in the Texas Supreme Court, and $2,100 for pursuing entry of judgment on remand for a total of $78,024.07. In support of its request for attorney's fees, I–35 submitted the affidavit of its attorney, Colin Durham, proving up the amounts incurred. I–35 also requested pre- and post-judgment interest at a rate of 18% per annum under the terms of the Note, which set the default interest rate at the "maximum nonusurious rate of interest per annum permitted [by law]."

Moayedi responded to I–35's motion arguing the remand was "not a remand for a new trial of any issue, but instead [was] solely a remand to determine what judgment should have been entered in favor of plaintiffs instead of Defendant." Moayedi contended I–35's recovery of attorney's fees should be limited to the amount it proved up as part of the original summary judgment proceedings, which was only $28, 533.75 for proceedings in the trial court and $10,000 for proceedings at the appellate level for a total of $38,533.75. Moayedi moved to strike Durham's affidavit in support of attorney's fees stating that no new evidence on attorney's fees could be considered.

Moayedi also contended that I–35's request for 18% pre- and post-judgment interest was erroneous because the remand limited the trial court to determining interest as provided in the guaranty and the guaranty did not specify an interest rate. Because an interest rate was not specified, Moayedi argued the statutory interest rates of 6% per annum for pre-judgment interest and 5% per annum for post-judgment should be applied. *See* TEX. FIN. CODE ANN.§§ 302.002 & 304.003(c) (West 2006) (interest rates to be applied when rate not specified in agreement). The final judgment signed by the trial court awarded I–35 $196,000 with pre-judgment interest at a rate of 6% per annum, post-judgment interest at a rate of 5%, and attorney's fees in the amount of $38,533.75 with post-judgment interest accruing on that amount at a rate of 5% per annum. I–

35 brought this appeal contending the trial court erred in applying the wrong interest rate and failing to award the full amount of attorney's fees it requested.

In its first issue, I–35 asserts the trial court erred in failing to award it interest at the maximum non-usurious rate permitted by law as provided in the Note. I–35 argues that, although the guaranty itself does not specify an interest rate, the guaranty incorporates the Note and the two must be read together. We agree.

When this court remands a case and limits subsequent proceedings to a particular issue, the trial court is restricted to a determination of that issue. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). In a subsequent appeal, instructions given to the trial court will be adhered to and enforced. *Id*. Our remand in this case stated the trial court was to determine the amount of interest owed by Moayedi under the terms of the guaranty. The issue before us on appeal, therefore, concerns the scope of the mandate and construction of the guaranty. Even when the remand is limited, the trial court is given a reasonable amount of discretion to comply with the mandate. *See Russell v. Russell*, 478 S.W.3d 36, 42 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The trial court has no discretion, however, in its construction of an unambiguous contract and we review its determinations on this issue de novo. *See Matheson Tri-Gas, Inc. v. Amtel Corp.*, 347 S.W.3d 339, 343 (Tex. App.—Dallas 2011, no pet.)

Moayedi contends that, because the mandate from this Court instructed the trial court to determine the interest and collection costs "as provided in the guaranty agreement," the court could not look outside the four corners of the guaranty to determine the applicable interest rate. Moayedi reads the mandate too narrowly. We remanded the case for a determination of interest "as provided in the guaranty agreement" because it is the guaranty that imposes liability on Moayedi to pay the interest due on the debt he guaranteed. The guaranty, however, also specifically references the Note as determining the amounts owed by the guarantor. Nothing in

the mandate prevents the trial court from looking to the Note, "as provided in the guaranty," to determine what amount is owed by Moayedi. To conclude otherwise would result in I–35 being unable to recover on remand the full amount it should have recovered in the original summary judgment proceeding.

A guaranty agreement creates a secondary obligation whereby the guarantor promises to answer for the debt of another and may be called upon to perform once the primary obligor fails to do so. *See Republic Nat'l Bank of Dallas v. Nw Nat'l Bank of Fort Worth*, 578 S.W.2d 109, 114 (Tex. 1978). A guaranty is ancillary to the underlying contract and any dispute as to the rights and obligations of the guarantor can only be resolved by a factual determination of the rights and obligations of the parties to the underlying contract. *See First Union Nat'l Bank v. Richmont Capital Partners I, L.P.*, 168 S.W.3d 917, 924 (Tex. App.—Dallas 2005, no pet.). The guaranty may also, however, include more extensive or more limited liability on the debt than the principal's liability. *See 84 Lumber Co., L.P. v. Powers*, 393 S.W.3d 299, 308 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). A guaranty agreement is construed strictly in favor of the guarantor and will not be extended, either by construction or implication, beyond the written terms of the agreement. *See Richmont*, 168 S.W.3d at 924. But this rule of strict construction applies only after the terms of the guaranty have been determined. *Id*. at 925.

The guaranty in this case states Moayedi agreed to be liable for the indebtedness evidenced by the Note and "all interest or other charges accruing thereon or incurred thereunder . . . *bearing interest and payable as therein provided*." Although the guaranty limits Moayedi's liability on the principal amount of the Note to $196,000, this limitation does not affect Moayedi's explicit agreement to be liable for interest as provided in the Note.

The Note states all past due principal and interest "will bear interest from the date due until paid at the . . . maximum nonusurious rate of interest per annum permitted [by law]."

Where a contract uses terms such as "maximum rate permitted by law," we do not apply the statutory rate for contracts that do not specify an interest rate because the rate the parties agreed to can be determined by reasonable calculations. *All Seasons Window and Door Mfg., Inc. v. Red Dot Corp.*, 181 S.W.3d 490, 497–98 (Tex. App.–Texarkana 2005, no pet.). The guaranty at issue incorporated the interest rate contained in the Note and the Note applied a rate that could be determined by reasonable calculations. Accordingly, the trial court erred in applying the statutory interest rates applicable to agreements in which the rate is not specified. *See id*.

Moayedi cites this Court's opinion in *Smith v. Rhodes*, No. 05-08-00856-CV, 2010 WL 2904626 (Tex. App.—Dallas July 27, 2010, no pet.) (mem. op.) to support his argument that the trial court could only look to the four corners of the guaranty to determine the interest rate. *Smith*, like this case, concerned a guaranty that did not specify a rate of interest but was made in conjunction with a promissory note that contained both a "contract rate" and a "default rate." *Id*. at *3. The trial court's final judgment against the guarantor did not specify a post-judgment interest rate. *Id*. at *1. The lender filed a motion for judgment nunc pro tunc contending it was a ministerial act to apply the interest rate found in the note. *Id* at *2. The guarantor responded that, because there was no interest rate specified in the guaranty, the determination of the proper interest rate to be applied was not clerical in nature and, therefore, the trial court's judgment was not final. *Id*. We agreed the judgment was not final because determination of the proper interest rate required deliberation, decision, or judgment, and we dismissed the appeal for want of jurisdiction. *Id*. at *3. We did not address in *Smith*, either directly or indirectly, the substantive issue of how to determine the interest rate to be applied to a guaranty that does not, on its own, specify a rate. *Id*. We merely decided that such a determination was not ministerial. *Id*. Accordingly, *Smith* does not support Moayedi's position.

Moayedi also suggests in his appellate brief that I–35 should not be able to recover any pre-judgment interest under the guaranty. He argues that because the Villages liability on the note was limited to $196,000 inclusive of interest, I–35 should not be able to recover a greater amount under the guaranty than it would have been able to recover against the borrower under the Note. It is undisputed, however, that unlike the Villages limited liability on the Note, Moayedi agreed in the guaranty to pay $196,000 plus accrued interest. A guarantor's liability on a debt may be more extensive than the principal's if such liability is expressly set out in the guaranty agreement. *See Simpson v. MBank Dallas N.A.*, 724 S.W.2d 102, 110 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

We conclude the trial court erred in failing to award interest under the terms outlined in the Note and incorporated into the guaranty. We resolve I–35's first issue in its favor.

In its second issue, I–35 contends the trial court erred in failing to award the full amount of attorney's fees requested because the proof of fees submitted on remand was not contradicted. Although Moayedi did not offer evidence to contradict I–35's proof of fees on remand, he took the position that no new evidence on fees could be adduced and I–35 was limited to the evidence provided in the initial summary judgment proceedings. Where the remand does not order a new trial or a redetermination of attorney's fees previously awarded, the general rule is that the trial court must rely on the evidence provided in the initial trial of the case to determine the amount of attorney's fees to award. *See Varner v. Cardenas*, 218 S.W.3d 68, 69–70 (Tex. 2007); *Tigert v. Tigert*, No. 05-12-01282-CV, 2014 WL 357411 at *4 (Tex. App.—Dallas March 18, 2014, pet. denied) (mem. op.). This limit on fee evidence applies to prohibit evidence on remand of "actual" appellate fees incurred as well as fees for work performed after the mandate issued. *See Tigert*, 2014 WL 357411 at *4; *Jacks v. G.A. Bobo*, No. 12-10-00163-CV, 2011 WL 2638751 at

*7 (Tex. App.—Tyler June 30, 2011, no pet.) (mem. op.).[1] I–35 provides no argument or authority to show why this general rule does not apply in this case. Furthermore, although I–35 characterizes the evidence on remand as being uncontradicted, its own evidence presented on summary judgment that the reasonable and necessary attorneys' fees for work performed at the trial and appellate levels totaled $38,533.75 contradicts the $78,024.07 sought on remand.

Our mandate instructed the trial court to determine "interest and costs as provided for in the guaranty agreement." It did not remand for a new trial or otherwise allow for a reopening of the evidence on attorney's fees. The trial court awarded I–35 the full amount of fees supported by the evidence originally submitted in the summary judgment proceedings by I–35. We conclude the trial court did not abuse its discretion in rendering judgment in this amount. *See Tigert*, 2014 WL 357411 at * 4. We resolve I–35's second issue against it.

Based on the foregoing, we reverse the trial court's judgment on the matter of pre- and post-judgment interest and remand the case for a determination of interest on the principal amount awarded consistent with this opinion. We affirm the judgment in all other respects.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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[1] We recognize that in *Tigert*, the trial court considered new evidence on remand of attorney's fees incurred for work performed after the mandate issued. *See Tigert*, 2014 WL 357411 at *2. Because neither side challenged the trial court's consideration of that evidence, however, *Tigert* cannot be read to opine on the propriety of the trial court's decision to reopen the evidence for that purpose.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

INTERSTATE 35/CHISAM ROAD, L.P. AND MALACHI DEVELOPMENT CORPORATION, Appellants

No. 05-16-00196-CV V.

MEHRDAD MOAYEDI, Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas
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Opinion delivered by Justice Francis.
Justices Fillmore and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding pre- and post-judgment interest. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for a determination of interest on the principal amount awarded consistent with this Court's opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment March 20, 2017.