

2014 IL App (1st) 133028-U

No. 1-13-3028

Filed December 19, 2014

FIFTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SULLIVAN & CROUTH HOLDINGS, LLC, a Limited Liability Company,)	Appeal from the
)	Circuit Court
)	of Cook County
Plaintiff-Appellant,)	
)	
v.)	
)	
PETER CEKO, an Individual,)	No. 2011 L 9701
)	
Defendant-Appellee)	
)	
(MGT LOTTERY MANAGEMENT, LLC, a Limited Liability Company, and MGT LOTTERY LLC, a Limited Liability Company, defendants).)	Honorable
)	Margaret Ann Brennan,
)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment of the trial court granting summary judgment to defendant is reversed. The guarantee provision in the agreement between the parties is ambiguous and, therefore, the rights of the parties under the

agreement cannot be determined on a motion for summary judgment. We also vacate the court's order denying plaintiff's motion for leave to amend its complaint. The circumstances underlying the court's determination that defendant would suffer prejudice from the amendment have changed. We remand for further proceedings.

¶ 2 Plaintiff Sullivan & Crouth Holdings, LLC, filed a breach of contract action against defendant Peter Ceko. Plaintiff sought damages for defendant's failure to honor a "Demand Promissory Note" containing a provision that defendant would "personally guarantee repayment" of a \$100,000 loan made by plaintiff to MGT Lottery, LLC. The trial court granted summary judgment to defendant and denied plaintiff's motion to amend its complaint. Plaintiff appeals, arguing that (1) unresolved questions of fact regarding whether defendant signed the note in his personal capacity foreclose entry of summary judgment and (2) leave to amend should have been allowed. We reverse and remand.

¶ 3 **BACKGROUND**

¶ 4 The agreement underlying this action is a one-half page "Demand Promissory Note" (the Note) dated June 15, 2010. The Note provides: "MGT Lottery LLC ('Borrower') promises to pay to the order of SC Holdings LLC ('Lender')" \$100,000 plus \$10,000 in interest in full no later than August 15, 2009. It also provides: "As security for its obligation to lend the principal amount to MGT Lottery LLC (MGT), Peter Ceko [defendant] will personally guarantee repayment of the loan." The Note states that it is a "demand note" that can be collected by the lender at any time after August 15, 2010. It further states MGT Lottery agreed that, upon default in making payment within 15 days of demand, it would pay reasonable attorney fees and costs of collection. The Note is signed as follows:

"MGT Lottery LLC

By: [Illegible Signature]

Ed Honour, One of its Managers

By: [Peter Ceko Signature]

Peter Ceko, One of its Managers"

It is undisputed that, upon receipt of the signed promissory note from Roy Weiss, the executive vice president of MGT Lottery Technologies, LLC on June 15, 2010, plaintiff sent \$100,000 to the bank account of MGT Lottery pursuant to Weiss's email instructions.

¶ 5 In September 2011, plaintiff filed a breach of contract action against MGT Lottery Management, LLC and defendant, individually. It claimed it had loaned MGT Lottery Management \$100,000 as shown by the Note and that MGT Lottery Management defaulted on the Note and refused plaintiff's demand for repayment. Plaintiff also claimed defendant had signed the Note in his individual capacity as a guarantor personally guaranteeing repayment of the loan and, after MGT Lottery Management's default, had refused to repay plaintiff as demanded.

¶ 6 The defendants moved to dismiss the complaint with prejudice, arguing that the complaint was defective on its face because (1) "Sullivan & Crouth Holdings, LLC" was not a party to the Note [the Note referenced "SC Holdings LLC"], (2) MGT Lottery Management was not a party to the Note [the Note referenced "MGT Lottery LLC"] and (3) defendant neither signed a personal guarantee at any time relevant to the Note and did not sign the Note in his individual capacity as guarantor. Noting that plaintiff did not object to the motion, the court granted the motion to dismiss without prejudice and

granted plaintiff leave to file an amended complaint to add MGT Lottery as a defendant.

¶ 7 Plaintiff then filed the "first amended" complaint at issue here, adding MGT Lottery as a defendant and changing its allegations to reflect that it made the \$100,000 loan to MGT Lottery "and/or" MGT Lottery Management. Plaintiff alleged that it was identified as "SC Holding LLC" in the Note and, at the time the Note "was made," it was unaware of the existence of MGT Lottery and believed it was entering into an agreement with MGT Lottery Management. Plaintiff asserted MGT Lottery Management was "an alter ego" of MGT Lottery. It alleged Honour signed the Note in his capacity as a manager of MGT Lottery but that defendant was not a manager of MGT Lottery. Plaintiff alleged that plaintiff had signed the Note in his individual capacity as a guarantor personally guaranteeing repayment of the loan and that he had defaulted on this obligation.

¶ 8 Defendant and MGT Lottery Management moved to dismiss under section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), asserting the amended complaint was defective as (1) defendant never executed and/or signed a personal guaranty, (2) plaintiff was not a party to the Note, (3) neither defendant nor MGT Lottery Management was a party to the Note and (4) plaintiff improperly was bringing "two claims in a single cause of action," namely a claim for breach of a personal guaranty against defendant and breach of the Note against MGT Lottery Management. The court denied the motion, finding that the defendants' first three assertions were affirmative defenses that did not provide a basis for dismissal under section 2-615. It also found that the defendants failed to show the complaint was legally insufficient, that plaintiff had stated a cause of action sufficient to withstand the motion

to dismiss and, as the claims against both of the defendants stemmed from the same Note, that the defendants had been informed of the nature of the claims and the complaint was properly pled.

¶ 9 Defendant and MGT Lottery Management made a third motion to dismiss. Citing section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)), they argued the Note was "an affirmative matter" establishing that (1) defendant never agreed to, signed or executed a personal guaranty and the guarantee provision was unenforceable under the State of Frauds, (2) plaintiff was not a party to the Note and thus had no standing to bring the action and (3) MGT Lottery Management was not a party to the Note. Two affidavits by defendant supported the motion. In the first affidavit, he averred that he signed the Note "in [his] capacity as a Manager of MGT Lottery," he did not sign the Note in his "individual capacity" and he "[had] never signed a personal guarantee relative to MGT Lottery LLC's obligations under the Note."

¶ 10 In the second affidavit, defendant averred that he had signed the Note in his capacity as a manager of MGT Lottery and, under the Note, MGT Lottery as the borrower agreed to pay SC Holdings as the lender \$100,000 plus interest. Defendant stated that he was a manager of MGT Lottery Management, MGT Lottery Management had no relation to or involvement or interest in MGT Lottery and MGT Lottery Management was not a party to the Note. He stated MGT Lottery Management was established for the single purpose of submitting a bid to privately manage the Illinois State Lottery, had never conducted any business at any time and had never entered into a contract or agreement with SC Holdings, plaintiff or any other individual or entity.

¶ 11 Plaintiff responded in part that the note was ambiguous and questions of fact

existed that could not be ruled on in a section 2-619 motion to dismiss. It asserted that it had supplied evidence of communications between the parties in negotiating the Note showing that defendant did intend to personally guarantee repayment of the Note as security for the loan and that defendant's guarantee was a material inducement for plaintiff to lend under the Note. It also pointed out that the parties had "a long history" of similar transactions and that both parties "knew and intended that 'SC Holdings LLC' be shorthand for 'Sullivan & Crouth Holdings, LLC [plaintiff]' " as they had in previous transactions.

¶ 12 In support of its response, plaintiff attached the affidavit of Patrick Sullivan. Sullivan averred that he was a manager of plaintiff and that plaintiff was a party to the Note. He stated that Weiss had approached plaintiff about entering into the Note and plaintiff has previously entered into similar transactions with "the parties to this suit." Sullivan stated that, in prior transactions, the parties had identified defendant as "SC Holdings LLC and that Weiss had identified plaintiff as such when the Note was entered into. Sullivan asserted that, on June 15, 2010, "for good and valuable consideration," plaintiff loaned "MGT Lottery LLC and/or MGT Lottery Management LLC" \$100,000. At the time the Note was made, Sullivan was unaware of the existence of MGT Lottery and believed that plaintiff was entering into an agreement with MGT Lottery Management "per previous transactions." He asserted that "MGT Lottery Management, LLC's involvement was a material condition to [plaintiff's] lending under the note." As the time the Note was made, Sullivan believed that defendant was personally guaranteeing the Note. Sullivan stated "Weiss, a manager and/or agent of the Defendants, stated that Peter Ceko would personally guarantee the Note." Sullivan believed defendant "signed

he Note as Guarantor in his individual capacity." He claimed that defendant's "personal guarantee was a material condition to [plaintiff] lending under the Note" and that the Note was drafted by one of the defendants or an agent.

¶ 13 Plaintiff also attached a copy of a June 7, 2010, email message from Weiss, identified as the executive vice president of MGT Lottery Technologies, to Jeff Crouth, an owner of plaintiff. In the email, Weiss thanked Crouth and Sullivan for "considering this" and told Crouth:

"I have attached a draft promissory note -- its [sic] basically the same format as the one you did back in January of 2009 but this time instead of putting up the gaming equipment as collateral -- Peter Ceko will personally guarantee the note. If you want we could also include the gaming equipment as collateral ... your call."

Plaintiff further attached a "demand promissory note" dated January 28, 2009, providing that borrower "Multiplayer Gaming Technologies LLC" promised to pay lender "SC Holdings LLC" \$50,000 plus interest and, "[a]s security for its obligation to lend the principal amount to Multiplayer Gaming Technologies LLC (MGT), MGT will pledge all of the inventory listed on [an addendum] as collateral." The remaining language in the note was almost identical to that in the Note at issue here. The 2009 note was executed as follows:

"Multiplayer Gaming Technologies LLC

By: MGT/TPN Management LLC, its manager

By: [illegible signature]

Ed Honour, one of its Managers

By: [illegible] Weiss

Roy Weiss, one of its Managers."

¶ 14 The court denied the motion to dismiss, finding that a question of fact existed precluding granting a section 2-619(a)(9) motion to dismiss.¹ Defendant filed a motion to reconsider the denial of the defendants' motion to dismiss. The court denied the motion.

¶ 15 Defendant answered the first amended complaint, admitting that he was the manager of Ceko Management LLC and that Ceko Management LLC and Honour were the managers of MGT Lottery LLC. He denied that "he personally guaranteed to repay the Note."

¶ 16 On May 9, 2013, the court set May 30, 2013, for the close of discovery and September 16, 2013, as the trial date. Defendant filed a motion for summary judgment asserting he was entitled to summary judgment as a matter of law. The record contains a copy of the motion but does not contain a copy of the "supporting memorandum at law with supporting exhibits" referenced in the motion. However, in defendant's reply in support of his motion, he stated his position was that two parties cannot bind a third party to a contract without that third party's written agreement or signature and here, where there was "no actual personal guaranty language" in the Note and no individual signature by defendant to a guarantee, there was no enforceable personal guaranty against defendant. Defendant asserted that plaintiff could not construe the Note as both a Note between plaintiff and MGT Lottery *and* as a personal guaranty between plaintiff and defendant. He argued plaintiff improperly would have the court look to extrinsic

¹ The court initially entered an order striking defendants' motion to dismiss for failure to comply with the court's briefing schedule but it subsequently vacated that order.

evidence beyond the four corners of the Note for evidence purporting to show a third party's belief that defendant had intended to personally guarantee the Note even though he "never signed the Note." Plaintiff's response to the motion for summary judgment shows defendant apparently also raised an argument under the Illinois Frauds Act (740 ILCS 80 (West 2012)) (statute of frauds), asserting that defendant's signature on the Note was insufficient to bind him to the guarantee.

¶ 17 In plaintiff's response, it argued that the Note was an "original promise" that did not fall within the statute of frauds and, even if the statute of frauds did apply, defendant's signature on the Note satisfied the statute of frauds. Plaintiff also argued that, regardless of the application of the statute of frauds, as the text of the Note conflicted with defendant's contention that he did not sign the Note in his personal capacity and plaintiff had produced substantial evidence to support the inference that defendant had intended to sign the Note in his personal capacity, an issue of fact existed regarding the capacity of the individual who signed the Note that could not be decided on a motion for summary judgment.

¶ 18 In addition to the email correspondence between Weiss and Crouth and Sullivan's affidavit that it had earlier produced, plaintiff also attached to its motion a May 30, 2013, affidavit by Weiss in which he stated that he was the executive vice president of MGT Lottery between 2009 and 2010 and defendant "was a member/manager of MGT Lottery." Weiss asserted that he drafted the Note, the Note was made in connection with a loan made by MGT Lottery by plaintiff, plaintiff was referred to as "SC Holdings LLC" in the Note and MGT Lottery was aware that the loan was being made by plaintiff. Weiss averred that he had several conversations with defendant regarding the

Note in June 2010 and thereafter in which defendant "acknowledged that he understood the Note contained a personal guarantee that made him personally obligated to pay on the Note if MGT Lottery LLC did not make payment on the Note as required by the Note's terms."

¶ 19 The court granted defendant's motion for summary judgment without comment and "dismissed with prejudice" plaintiff's cause of action against defendant. There is no copy of the report of proceedings in the record. On August 20, 21013, the court denied plaintiff's motions to reconsider, for clarification of judgment and for leave to file an amended complaint adding a fraud count against defendant. The report of proceedings reflects the court's statement that it was denying the motion for reconsideration for the same reason that it had granted the motion for summary judgment. The court explained "you [cannot] go ahead and force some other entity to be guaranteed for your debt without that person agreeing to it" and "there's no evidence here that Peter Ceko continued to agree to that without the guarantee being signed." The court made this latter determination despite the fact that the Weiss affidavit contained evidence showing the contrary.

¶ 20 The court stated it denied the motion to amend the complaint because the case had already been before the court on a motion to dismiss in 2012 and, at the time summary judgment was heard, a jury trial date had been set and discovery had been continued several times and ultimately closed. It explained:

"Trial dates had been moved. All sorts of things had gone on in this case. So to come in at that point in time to seek to add a fraud count when summary judgment is lost by the plaintiff, in essence there was prejudice, I

think extreme prejudice, towards the defendants at that point in time, and therefore my ruling stands."

¶ 21 On September 12, 2013, the court entered an agreed order pursuant to which the parties agreed that MGT Lottery was "the maker of the *** Note" and that it was in default under the Note. Plaintiff agreed to dismiss MGT Lottery Management without prejudice. The parties agreed that the order was a final judgment on the issues presented as to all parties and the court's order granting summary judgment to defendant became final and appealable. On September 20, 2013, plaintiff timely filed its notice of appeal.

¶ 22 ANALYSIS

¶ 23 On appeal, plaintiff makes two arguments: (1) the court erred in granting summary judgment to defendant as (a) questions of material fact exist regarding whether defendant personally guaranteed the Note and (b) the guarantee provision complied with the statute of frauds; and (2) the court erred in denying its motion for leave to amend its complaint.

¶ 24 1. Summary Judgment

¶ 25 a. Personal Guarantee

¶ 26 Plaintiff argues the court erred in granting summary judgment to defendant on the basis that there were no material questions of fact relevant to the question of whether defendant personally guaranteed the Note. Plaintiff asserts it presented substantial material evidence showing defendant did enter into a personal guarantee of the Note and was in breach of that guarantee. It also asserts that, based on the conflict between the language of the "personal" guarantee provision and defendant's purported

signing of the Note in his corporate capacity, an issue of material fact exists that prevents the court from entering summary judgment in defendant's favor. We agree that an issue of material fact exists regarding whether the parties intended that defendant be personally bound by the guarantee provision.

¶ 27 Summary judgment is a drastic means of disposing of litigation and should be granted only when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Axen v. Ockerlund Construction Co.*, 281 Ill. App. 3d 224, 229 (1996) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). The purpose of summary judgment is not to try a question of fact but to determine whether one exists or whether reasonable people could draw different inferences from the undisputed facts. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003); *Wood v. National Liability & Fire Insurance Co.*, 324 Ill. App. 3d 583, 585 (2001). We review the trial court's decision on a motion for summary judgment *de novo*, construing the pleadings, depositions, admissions and affidavits strictly against the moving party and liberally in favor of the respondent. *Golden Rule Insurance Co.*, 203 Ill. 2d at 462; *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (1994).

¶ 28 Contract construction and interpretation are appropriate matters for disposition by summary judgment. *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). However, when the language of a contract is ambiguous, its meaning must be ascertained through a consideration of extrinsic evidence and summary judgment is, therefore, inappropriate. *Id.* (citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992) ("In cases involving contracts, there is a

disputed fact precluding summary judgment when the material writing contains an ambiguity which requires admission of extrinsic evidence"). "A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair & Co., LLC*, 358 Ill. App. 3d at 334.

¶ 29 The contract at issue here is the Note underlying the loan from plaintiff to MGT Lottery. Defendant signed the Note and indicated under his signature his corporate affiliation as "one of its [MGT Lottery's] managers." "[A]n agent of a disclosed principal is not individually or personally bound by the terms of the contract which he executes on behalf of the principal, where the agency relationship is known to the other party at the time of the contracting, unless he agrees to be personally liable." *Yellow Book Sales & Distribution Co. v. Feldman*, 2012 IL App (1st) 120069, ¶ 38. "The intent to be personally bound may be express or may be inferred from all the facts." *Knightbridge Realty Partners, Ltd.-75 v. Pace*, 101 Ill. App. 3d 49, 53 (1981). "When an officer signs a document and indicates next to his signature his corporate affiliation, then absent evidence of contrary intent in the document, the officer is not personally bound." *Wottowa Insurance Agency, Inc., v. Bock*, 104 Ill. 2d 311, 315 (1984).

¶ 30 Standing alone, defendant's signature with its corporate affiliation shows defendant is arguably not personally bound to the Note. However, there is evidence of contrary intent in the following Note provision: "As security for its [plaintiff's] obligation to lend the principal amount to MGT Lottery LLC (MGT), Peter Ceko [defendant] will personally guarantee repayment of the loan." This provision in the document evinces an intent to make defendant personally liable for repayment of the loan and conflicts with

the intent expressed by defendant's signature and corporate affiliation that he would not be personally bound. "[W]here the language in the body of the document conflicts with the apparent representation by the officer's signature, an issue of fact as to the agent's intent arises, an issue for the jury to determine." *Id.* at 316 (citing *Knightridge Realty Partners, Ltd.-75*, 101 Ill. App. 3d at 53). Here the language of the guarantee provision in the Note conflicts with the apparent representation by defendant's "manager" signature. The Note is, therefore, reasonably susceptible to more than one meaning and, therefore, ambiguous.

¶ 31 There is further ambiguity in the guarantee provision given that it provides that defendant "*will* personally guarantee repayment of the loan" (emphasis added). Defendant argues that plaintiff is attempting to bind him to a personal guarantee that does not exist, to a personal guarantee for which there is no signature in a Note to which he is not a party. We find, however, that the language in the guarantee provision raises the question of whether the provision itself was intended to stand as defendant's agreement to be personally bound or whether the provision was intended to reflect that defendant agreed that he would be personally bound by some other means, *i.e.*, whether the provision itself is a guarantee or whether there was to be some other guarantee.² Again, this is a question of fact requiring examination of the extrinsic evidence.³ The Note is susceptible to more than one meaning and ambiguous on its

² A "guarantee" is "[t]he assurance that a contract or legal act will be duly carried out" and "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent." Black's Law Dictionary 711 (7th ed. 1999). A "guarantee clause" is "[a] provision in a contract *** by which one person promises to pay the obligation of another. *Id.*

³ For example, "parol evidence such as the parties' subsequent conduct and

face. Therefore, summary judgment is inappropriate as questions of fact regarding the meaning of the Note exist which must be ascertained through a consideration of extrinsic evidence and. *Loyola Academy*, 146 Ill. 2d at 272; *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d at 334.

¶ 32 Plaintiff asserts it presented substantial evidence showing defendant personally guaranteed the Note. Indeed, Weiss, the former executive vice president of MGT Lottery, averred in his affidavit that he had several conversations with defendant regarding the Note in June 2010 and thereafter in which defendant "acknowledged that he understood the Note contained a personal guarantee that made him personally obligated to pay on the Note if MGT Lottery LLC did not make payment on the Note as required by the Note's terms." However, in reviewing the trial court's grant of summary judgment to defendant, it is our role to determine whether any issues of material fact exist, not to try those issues. *Fatigato v. Village of Olympia Fields*, 281 Ill. App. 3d 347, 358 (1996). Defendant's right to judgment is not clear and free from doubt, and these contested questions of fact should go to the trier of fact. *Id.* It is for the trial court on remand to consider all the evidence to determine whether the parties intended that defendant be personally bound by the guarantee provision in the Note. Accordingly, we reverse the trial court's order granting summary judgment to defendant and remand for further proceedings.

¶ 33 b. Statute of Frauds

¶ 34 Plaintiff also argues that the guarantee provision falls outside the statute of

statements, and usage and custom 'may be decisive of the question whether a contract has been made even though a document was contemplated and has never been executed.' " *Knightsbridge Realty Partners, Ltd.*-75, 101 Ill. App. 3d at 53 (quoting Corbin, Contracts s 30, at 105, 109 (1963)).

frauds. Defendant had cited to the statute of frauds as a basis for relief in his motion for summary judgment. The court granted the motion for summary judgment but did not address whether the guarantee provision complied with the statute of frauds, presumably because it found that the provision did not bind defendant personally.

¶ 35 "In general, the statute of frauds provides that a promise to pay the debt of another, *i.e.*, a suretyship agreement, is unenforceable unless it is in writing."⁴ *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567-68 (2007). However, "when the 'main purpose' or 'leading object' of the promisor/surety is to subserve or advance its own pecuniary or business interests, the promise does not fall within the statute." *Id.* at 573. " 'The provisions of the statute apply to promises, the main purposes of which are to assume or guarantee the debt of another, and they do not apply to cases in which credit is extended to the promisor, or to cases in which the object or the promise is to promote some interest, purpose or advantage of the promisor.' " *Id.* at 574 (quoting *Schwartzberg v. Dresner*, 107 Ill. App. 3d 318, 324 (1982)).

¶ 36 "Whether the 'main purpose' or 'leading object' of the promisor is to promote a pecuniary or business advantage to it is generally a question for the trier of fact." *Rosewood Care Center, Inc.*, 226 Ill. 2d at 575 (citing 9 R. Lord, *Williston on Contracts* § 22:20, at 308 (4th ed.1999)). "The crux of this inquiry is the reason the promisor made

⁴ The statute of frauds provides, in relevant part:

"No action shall be brought * * * whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person * * * unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (West 2012).

the promise, *i.e.*, the impetus for the promise." *Rosewood Care Center, Inc.*, 226 Ill. 2d at 575. Here, this determination requires evidence from which one can ascertain whether the reason for defendant's promise to personally guarantee repayment of the loan was in fact or apparently desired by defendant mainly for his own advantage. *Id.* This determination is a question of fact to be made by the trial court on remand. However, before reaching this determination, the trial court must first have determined based on the evidence presented that there was a "promise" at all, *i.e.*, that defendant agreed to be personally bound by the guarantee provision. If the court finds that defendant did not agree to be personally bound, then there is no "promise" and a statute of frauds inquiry need not be made.⁵

¶ 37

2. Leave to Amend Complaint

¶ 38

Plaintiff argues the court erred in denying its motion to amend its complaint to add a fraud count against defendant. Plaintiff made the motion orally after the trial court granted summary judgment to defendant and renewed it in a written motion. The court denied the motion on the basis that "[t]rial dates had been moved," "[a]ll sorts of things had gone on in this case" and "to come in at that point in time to seek to add a fraud count when summary judgment is lost by the plaintiff, in essence there was prejudice, I think extreme prejudice, towards the defendants at that point in time, and therefore my

⁵ For purposes of remand, we note that plaintiff cites *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (2006), for the following proposition: "the statute of frauds is applicable, in matters of surety, only where the promise to pay the debt of another was made after the obligation of the principal debtor had been incurred." However, in *Rosewood Care Center, inc.*, 226 Ill. 2d at 572, our supreme court found "there is no preexisting-debt rule in Illinois" and that the appellate court erred in finding otherwise. The rule in Illinois is that a promise to pay the debt of another is not subject to the statute of frauds when "the object of the promise is to promote some interest, purpose or advantage of the promisor." *Schwartzberg*, 107 Ill. App. 3d at 324; *Rosewood Care Center, inc.*, 226 Ill. 2d at 574.

ruling stands."

¶ 39 The trial court may allow amendments to pleadings on just and reasonable terms at any time before final judgment. *Hayes Mechanical, Inc. v. First Industries, L.P.*, 351 Ill. App. 3d 1, 6 (2004); 735 ILCS 5/2-616(a) (West 2012). The decision to grant a motion to amend a complaint rests within the sound discretion of the trial court, and we will not reverse the court's decision absent an abuse of that discretion. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 74 (2010). The relevant factors to be considered in determining whether the trial court abused its discretion are: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 467 (2006) (quoting *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992))). A proposed amendment must meet all four Loyola Academy factors. *Sheffler*, 399 Ill. App. 3d at 74.

¶ 40 The circumstances under which the trial court denied leave to amend no longer exist. On appeal, we reverse the court's order granting summary judgment to defendant and remand for further proceedings. As a result, there is no longer a trial date set, the case has not been dismissed and the litigation will restart. There is, therefore, no longer prejudice to defendant for the reasons found by the trial court. Accordingly, we vacate the court's order denying plaintiff leave to file an amended complaint.

¶ 41 As plaintiff's loss on the summary judgment motion seemed to be the impetus for its requesting leave to amend its complaint, it may be that plaintiff will not renew the

motion for leave to amend given our decision reversing the grant of summary judgment to defendant. If plaintiff does again seek leave to amend, the trial court will decide the motion based on the *Loyola Academy* factors and the circumstances then existing.

¶ 42

CONCLUSION

¶ 43

For the reasons stated above, we reverse the trial court's grant of summary judgment to defendant, vacate the court's order denying plaintiff leave to amend its first amended complaint and remand for further proceedings.

¶ 44

Reversed in part, vacated in part and remanded.