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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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| INLAND WESTERN OSWEGO DOUGLAS, LLC,  | ) | Appeal from the Circuit Court of Kendall County. |
|  | ) |  |
| Plaintiff-Appellee,  | ) |  |
| v.   | ) |  |
|  | ) |  |
| RAND'S-TARA'S CARDS & GIFTS, INC.,<br>d/b/a HALLMARK, an Illinois Corporation,<br>DUANE HOADLEY and JANEEN<br>HOADLEY, | ) | No. 13-L-68                                      |
|  | ) |  |
| Defendants   | ) | Honorable  |
|  | ) | John F. McAdams,                                 |
| (Duane Hoadley and Janeen Hoadley,<br>Defendants-Appellants).  | ) | Bradley J. Waller,<br>Judges, Presiding.         |

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JUSTICE BURKE delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The guaranty at issue is broad enough to encompass material changes to the terms of the fifth amendment to the lease, without notice to defendants as guarantors, and thus, defendants' lack of reaffirmation of their guaranty to the new terms is not a defense to plaintiff's summary judgment motion; and, defendants failed to present admissible evidence to create a question of material fact that the tenant was a permitted transferee in order to extinguish their obligations under the guaranty; accordingly, we affirm the trial court's orders granting summary judgment in favor of plaintiff for breach of guaranty.

¶ 2 This appeal arises from a breach of guaranty action in which defendants, Duane and Janeen Hoadley (the Hoadleys), jointly and severally guaranteed the rent obligations of tenant/defendant, Rand's-Tara's Cards & Gifts, Inc. d/b/a Hallmark (Rand's), to landlord/plaintiff, Inland Western Oswego Douglas, LLC, under the terms of a lease agreement. The Hoadleys appeal the orders of the Circuit Court of Kendall County granting summary judgment to plaintiff to enforce the guaranty. The Hoadleys contend that summary judgment was improperly granted because: (1) material changes to the terms of the fifth amendment to the lease, without their reaffirmation of the guaranty, arguably raised a defense to the guaranty, and (2) when plaintiff accepted Rand's as a permitted transferee pursuant to an assignment and assumption of the lease in 2009, the Hoadleys were potentially discharged from the guaranty for payment. We affirm.

¶ 3

#### I. BACKGROUND

¶ 4 Plaintiff owns the shopping center known as Oswego Commons (the Center) located in Oswego, Illinois. The original lease that forms the basis of this action was executed on July 2, 2002, between the tenant, Hoadleys, Inc., Rand's predecessor in interest, and the landlord/owner of the Center, plaintiff's predecessor in interest. The owners of Hoadleys, Inc., Duane and Janeen, signed a guaranty of the lease, which unconditionally guaranteed the tenant's payment obligations.

¶ 5 The lease was scheduled to expire on February 28, 2010. On December 30, 2009, Rand's, the tenant which had assumed the lease from Hoadley's Inc., and plaintiff entered into a "Fifth Amendment to Lease Agreement," extending the lease term to February 28, 2015. Article 3 of the lease and paragraph 2 of the fifth amendment provided that Rand's, as tenant, was

obligated to pay its minimum annual rent in equal monthly installments on or before the first day of each calendar month.

¶ 6 Plaintiff alleged in its complaint that, since April 2013, Rand's had been in breach of its obligations under the lease for failure to pay the minimum rent and operating costs due and owing to plaintiff. In their answer to plaintiff's complaint, the Hoadleys neither admitted nor denied these allegations.

¶ 7 Plaintiff further alleged that the Hoadleys had refused to honor their obligations under the guaranty to pay Rand's default. In order to protect its interests, plaintiff filed suit on August 14, 2013. The complaint consists of three counts. Count I is a claim for breach of lease against Rand's. Counts II and III are claims for breach of guaranty against Duane and Janeen, respectively.

¶ 8 On September 11, 2013, the trial court entered a default judgment against Rand's. On October 10, 2013, Duane and Janeen filed a motion to dismiss. They did not deny that they executed the guaranty or that the guaranty was executed in conjunction with the lease agreement. Rather, Duane and Janeen argued that the fifth amendment to the lease modified material terms of the original lease by extending the term of the lease an additional five years and by increasing the rent payment. They alleged that each time there was an amendment to the lease when Hoadley's Inc. was the tenant, Duane and Janeen reaffirmed the guaranty. However, they argued that, when plaintiff entered into the fifth amendment to the lease, plaintiff did not obtain a consent and reaffirmation from the alleged guarantors, Duane and Janeen, and therefore they should be released from their obligations under the guaranty. The trial court denied the motion to dismiss, without prejudice, on January 10, 2014.

¶ 9 On February 7, 2014, the Hoadleys filed an answer and an affirmative defense to plaintiff's suit. In their answer, the Hoadleys admitted almost all of the allegations pertaining to the lease and to Rand's obligations under the lease. The Hoadleys' affirmative defense reasserted the argument from their motion to dismiss. They claimed that plaintiff should be estopped from asserting and enforcing the guaranty because the Hoadleys did not agree to the fifth amendment to the lease.

¶ 10 Plaintiff filed a motion for summary judgment on April 10, 2014. In their response to the summary judgment motion, the Hoadleys raised another affirmative defense for the first time. They argued that Rand's was a "Permitted Transferee" under section 15.1.1 of the lease pursuant to an assignment and assumption of the lease, which potentially discharged the Hoadleys from the guaranty for payment.

¶ 11 On July 11, 2014, the trial court entered summary judgment against the Hoadleys on the guaranty. The trial court allowed and considered the Hoadleys' argument regarding the "Permitted Transferee" and found that the Hoadleys presented no admissible evidence that Rand's was a permitted transferee under section 15.1.1 of the lease, even though the lease contemplated a permitted transferee. Following a hearing on damages, the court entered two separate final judgments, one against Duane in the amount of \$72,339.82, and one against Janeen for the same amount.

¶ 12 Although the judgments against the Hoadleys on counts II and III were final as to them, because the claim for attorney fees and costs in count I remained pending against Rand's and the orders against the Hoadleys did not contain Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language, we dismissed the original appeal for lack of jurisdiction. 2015 IL App (2d)

141019-U. Upon resolution of count I, the Hoadleys timely appeal the orders awarding plaintiff summary judgment.

¶ 13

## II. ANALYSIS

¶ 14 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clarke USA, Incorporated*, 224 Ill. 2d 274, 280 (2007). The mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment. *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (1995). We review a trial court's order granting summary judgment on a *de novo* basis. *National City Mortgage v. Hillside Lumber, Incorporated*, 2012 IL App (2d) 101292, ¶ 5.

¶ 15 The Hoadleys note that the fifth amendment to the lease between plaintiff and Rand's modified material terms by extending the tenancy for five years and increasing the rent. However, the Hoadleys assert that they did not agree to guarantee the extension of the assigned lease for the modified terms; they never signed another guarantee after the lease was materially modified. They argue that the guaranty they originally agreed to expired and therefore, they were no longer responsible for the tenant's rent. Plaintiff responds that, although they raised this argument in their motion to dismiss, the Hoadleys' completely abandoned it during the proceedings on the summary judgment motion and thus, forfeited the issue.

¶ 16 Either way, the trial court did address this issue when it ruled on the motion to dismiss and properly found that the lease did not require notice to the Hoadleys in the event of an amendment and that the guaranty was broad enough to encompass changes to the lease, without notice to the Hoadleys as guarantors. The guaranty provides, in relevant part:

“Duane Hoadley and Janeen L. Hoadley, jointly and severally (collectively, (Guarantor), \*\*\* does hereby on behalf of itself, its successors and assigns, unconditionally covenant and agree with Landlord, its successors and assigns, that if default shall at any time under the Lease be made by Tenant, its successors or assigns, in the payment of any monthly installment of rent, or additional rent, or in the performance of any of the terms, covenants and conditions of the Lease, and if the default shall not have been cured within the time specified in the Lease \*\*\*, Guarantor shall pay \*\*\* all rent then due and all damages incurred by Landlord as a result of or arising out of any such default by Tenant.

\* \* \*

This Guaranty shall not be affected and the liability of the undersigned shall not be extinguished or diminished by \*\*\* (iv) any extensions, renewals, amendments, indulgences, modifications, transfers or assignments in whole or in part of the Lease by Landlord, whether or not notice thereof is given to Guarantor and whether or not Guarantor’s consent thereto is obtained.

\* \* \*

The provisions of the Lease may be altered, affected, modified, amended, or changed by agreement between Landlord and Tenant at any time, or by course of

conduct, without the consent of or without notice to Guarantor, including, without limitation, any extension of the Term pursuant to the Lease or otherwise.”

¶ 17 General rules of contract construction apply to guaranty contracts, and “[w]here the language of a contract is unequivocal, it must be carried out according to its language.” *McLean County Bank v. Brokaw*, 119 Ill. 2d 405, 412 (1988); see also *Cohen v. Continental Illinois National Bank & Trust Co. of Chicago*, 248 Ill. App. 3d 188, 192 (1993) (“The meaning of a guaranty agreement is a matter of law to be determined by the court.”).

¶ 18 As expressly set forth in the last paragraph of the guaranty executed by the Hoadleys, the provisions of the lease could be altered, modified, or amended by agreement between plaintiff and Rand’s at any time without the consent of or notice to the Hoadleys as guarantors, including any extension of the term pursuant to the lease. Thus, we agree with the trial court that the guaranty was broad enough to encompass material changes to the lease, without notice to the Hoadleys as guarantors.

¶ 19 The Hoadleys rely on *Claude Southern Corporation v. Henry’s Drive-In, Inc.*, 51 Ill. App. 2d 289, 301-02 (1964), for the proposition that a “guarantor is released from a guarantee of the original contract when the essentials of the contract have been changed and the performance required of the principal is materially different than first contemplated.” In that case, the guaranty at issue was ambiguous as to a price term. Thus, the First District Appellate Court interpreted the contract as a whole so as to make it effective and enforceable “where it [could] be done without violence to the intent of the parties.” *Claude Southern Corp.*, 51 Ill. App. 2d at 299-300.

¶ 20 In this case, the guaranty is not ambiguous and the Hoadleys have not raised any issue regarding ambiguity of the guaranty. Nor have the Hoadleys raised any argument that this

guaranty is void against public policy. The guaranty is not open to interpretation and must be enforced according to its plain meaning. See *Green v. Safeco Life Insurance Co.*, 312 Ill. App. 3d 577, 581 (2000) (parties are free to include any terms they choose, as long as they are not against public policy and do not contravene rules of law; such a contract is binding on both parties and it is court's duty to construe and enforce the contract as written).

¶ 21 The Hoadleys next contend that there is a factual dispute concerning whether Rand's was a permitted transferee under the lease, thereby extinguishing the Hoadleys' liabilities and obligations under the lease.

¶ 22 Section 15.1.1 of the lease provides:

“Notwithstanding the provisions of this Article 15, Landlord's prior consent shall not be required to an assignment of the Lease or a sublease of the Premises to Hallmark Cards, Incorporated, or a subsidiary thereof, or to a person or entity approved as a Hallmark licensee by Hallmark Cards, Incorporated, provided such person or entity has (i) a net worth equal to or greater than the net worth of Tenant as of the execution of this Lease or the proposed assignment or sublease, whichever is greater, (ii) experience in the operation of a so called 'Hallmark store,' (iii) a satisfactory business reputation and (iv) the financial ability to operate the business in the Premises in the same manner as previously conducted (the foregoing are hereby collectively referred to as 'Permitted Transferee'). Tenant shall be relieved of any further liability under this lease upon an assignment of this lease to a Permitted Transferee.”

¶ 23 The relevant portion of the guaranty states:

“An assignment of the Lease or a sublease of all or any portion of the Premises (whether or not in compliance with the Lease) shall not affect this Guaranty or



Guarantor's liability and obligations hereunder, except for an assignment or sublease to a "permitted Transferee" (as defined in the Lease) which will discharge this Guaranty."

¶ 24 Under paragraph 2(b) of the "Assignment and Assumption" between Hoadley's Inc. and Rand's, Rand's, as assignee, "expressly" agreed to: "amend the Lease or otherwise provide all documentation required by the Landlord under the Lease so that the provisions of Section 15.1.1 apply to [Rand's] and [Hoadley's Inc.] with evidence of the same within a reasonable amount of time after this Assignment."

¶ 25 The assignment and assumption of the lease to Rand's contains explicit terms that place the burden on Rand's to amend the lease or to otherwise provide documentation required to show that it was a permitted transferee under section 15.1.1 of the lease. The trial court found that the Hoadleys presented no evidence that such documentation was provided to plaintiff. Additionally, the Hoadleys failed to present evidence to the trial court that all four of the requirements of a permitted transferee under section 15.1.1 were satisfied.

¶ 26 Both Duane's and Janeen's affidavits state: (1) at the time of Hoadley's Inc. sale to Rand's, Rand's operated approximately 15 Hallmark stores, and (2) Rand's was "so much bigger than we were." This, arguably, may be evidence of Rand's experience regarding the operation of Hallmark stores, but the affidavits present no evidence or facts regarding Rand's net worth, business reputation, or financial ability to operate the business to satisfy the four required criteria of a permitted transferee as defined under the lease and that the required information and documentation was provided to plaintiff as landlord.

¶ 27 The Hoadleys argue that, since the lease does not provide for how a permitted transferee designation is made, the trial court improperly placed the burden on them. The Hoadleys contend that the obligation falls on plaintiff to demonstrate why the assignment was not to a

permitted transferee. We disagree.

¶ 28 Plaintiff did, in fact, sustain its initial burden in making its case for summary judgment. Plaintiff pled the existence of the guaranty and the elements of the breach of guaranty. See *Kopley Group V., L.P. v. Sheridan Edgewater Properties*, 376 Ill. App. 3d 1006, 1014 (2007) (to succeed on a claim for breach of contract, plaintiff must plead and prove existence of a contract, performance of its conditions by plaintiff, breach by defendant, and damages as a result of breach). The burden then shifted to the Hoadleys to present some factual basis that would arguably entitle them to a favorable judgment. “ ‘Only if [the movant] satisfies its initial burden of production does the burden shift to [the respondent] to present some factual basis that would arguably entitle [it] to a favorable judgment.’ ” *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933 (2001) (quoting *Rice v. AAA Aerostar Inc.*, 294 Ill. App. 3d 801, 805 (1998), rev’d on other grounds). As previously stated, the Hoadleys presented no evidence to show that Rand’s was a permitted transferee.

¶ 29 The Hoadleys argue that plaintiff’s actions in requiring that the assignment and assumption document be signed by Hoadley’s Inc. and Rand’s, by accepting Rand’s estoppel certificate, and by not involving the Hoadleys in the fifth amendment to the lease created a genuine issue of material fact concerning whether plaintiff accepted Rand’s as a permitted transferee. Nothing in plaintiff’s actions tended to show any decision on its behalf to release the Hoadleys from their obligations under the guarantee when the Hoadleys presented no evidence that Rand’s satisfied the requirements of a permitted transferee. Furthermore, the assignment agreement called for Rand’s to amend the lease or supply documentation required by plaintiff to satisfy the permitted transferee elements under section 15.1.1 of the lease. The Hoadleys presented no evidence that either of these was accomplished. The Hoadleys failed to present any

admissible evidence that Rand's was a permitted transferee under the lease which might extinguish the Hoadleys' obligations under their guaranty.

¶ 30

### III. CONCLUSION

¶ 31 Based on the preceding, we affirm the orders of the Circuit Court of Kendall County granting summary judgment against Duane Hoadley and Janeen Hoadley, individually, in favor of plaintiff.

¶ 32 Affirmed.