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News & Types: Commercial, Competition & Trade Update

Former NBA Star Has to Take His Game to Another Level – Appeals Court Refuses to Enforce NBA Star's Personal Guaranty

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Tim Grover is a celebrity athletic trainer whose clients have included Michael Jordan, Dwayne Wade, Scottie Pippen and other current and former NBA stars. One of his clients was Michael Finley, another NBA star who played with the Dallas Mavericks and San Antonio Spurs, winning an NBA championship with the Spurs in 2007.

In that same year, 2007, Mr. Grover, through his company, A.T.T.A.C.K. Properties, LLC (Attack Properties), obtained financing for $8.1 million from Old Second National Bank to purchase and develop a training facility in Chicago's North Lawndale neighborhood, described as the "Attack Training Facility." The loan was personally guaranteed by Mr. Grover and Mr. Finley, a Chicago native (although Mr. Finley's guaranty was limited to $2 million). The loan was also guaranteed by Mr. Grover's main operating company, A.T.T.A.C.K. Athletics, Inc. (Attack Athletics).

But the final loan went through some detours which proved to be fateful for the Bank and Mr. Finley. The Bank approved the loan on July 5, 2007. The loan closing date was scheduled for July 27, 2007. So the Bank sent Mr. Finley's attorneys a guaranty with the following language:

> "to induce [the Bank] at any time or from time to time to make loans or extend other accommodations to [Borrower] or to engage in other transactions with [Borrower], Finley guarantees to Lender the prompt and full payment and performance of the debt, liability, and obligation under [sic] incurred under that certain loan agreement between Old Second National Bank and Attack Properties, LLC dated July 27, 2007 all such debts, liabilities and obligations being hereinafter collectively referred to as the 'Indebtedness.'"

The guaranties of Mr. Grover and Attack Athletics had the following language:

> "[Grover / Attack Athletics] absolutely and unconditionally guarantee[ ] to Lender the prompt and full payment and performance of each and every debt, liability, and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender."

Because of environmental concerns, the loan did not close until August 24, 2007. Mr. Finley's guaranty was not revised to reflect the correct date.

Like many real estate development projects around this time, the project was unsuccessful, the borrower defaulted, and the Bank sought to collect from the guarantors, including Mr. Finley.

Time out, said Mr. Finley. Mr. Finley agreed to guarantee a loan that closed on July 27, 2007, but there was no such loan. So, argued Mr. Finley, the guaranty is worthless. The Bank argued this was a technical foul only, Mr. Finley should still be in the game.

The Bank lost the first round when the trial court dismissed the Bank's complaint on summary judgment. The Bank filed an amended complaint. The Bank took four shots at getting its claim past the trial court, alleging a) breach of guaranty, b) reformation of the guaranty, c) enforcement of the reformed guaranty, and d) fraudulent misrepresentation. All of its shots missed, as the trial court again dismissed the Bank's claim on summary judgment. So the Bank took the case to a higher level and appealed.

In the meantime, the Bank sold its interest in the project, the loan, and the guaranties to Ringgold Capital IV, LLC (Ringgold), which was substituted for the Bank as its assignee.

Ringgold argued that the trial court should have considered the entire agreement, and not just the four corners of the guaranty. Clearly and admittedly, there was no July 27, 2007 loan agreement, but references to the "loan documents" should encompass the loan that actually occurred on August 24, 2007. In addition, the guaranty itself contained an intrinsic ambiguity.

The appeals court discussed at length the principles behind interpreting a personal guaranty and the reasons behind those principles. The appeals court noted:

- A guaranty must be in writing and signed to be enforceable.
- A guarantor is "a favorite of the law and when construing his liability the court accords the guarantor the benefit of any doubts that may arise from the language of the contract."
- Guaranties are strictly construed in favor of the guarantor, especially when the guaranty agreement is prepared by the creditor.

After reading these points from the appeals court, most readers would place their bets on Mr. Finley to escape the guaranty.

Ringgold argued that the guaranty was ambiguous, because the integration clause in the guaranty incorporated the "related loan documentation" and, therefore, Mr. Finley was guaranteeing the actual loan, not the fictitious July 27, 2007 loan.

But, the court noted, just because parties disagree on a provision does not make it ambiguous. In this regard, the initial complaint filed by the Bank (before its assignment to Ringgold) came back to haunt Ringgold. In its initial complaint, the Bank said that Mr. Finley intended to guarantee obligations created under a July 27 loan agreement. The Bank quickly pivoted in its amended complaint, noting that Mr. Finley intended to guarantee

the loan facility regardless of when the loan was made. But the damage was done. The appeals court treated the statement in the initial complaint as a "judicial admission" as to the intent of the parties.

In any event, the appeals court decided that the guaranty was, in fact, unambiguous and only covered loans made on July 27, 2007, of which there were none.

The court compared Mr. Finley's guarantee, quoted above, with the guaranties of Mr. Grover and Attack Properties, also quoted above. Mr. Finley's guaranty was limited to the loan agreement dated July 27, 2007, clear and unambiguous in the court's opinion. In contrast, the guaranties of Mr. Grover and Attack Properties covered "each and every debt, liability, and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender." So the Bank knew how to draft a broad and inclusive guaranty – it just did not do so in the case of Mr. Finley's guaranty.

So the appeals court refused to enforce the guaranty as written and refused to reform the guaranty. In an interesting turnabout, the appeals court even said that it was actually protecting creditors, such as the Bank and Ringgold!

> "Lenders require certainty that written agreements will be honored and not easily avoided by consideration of extrinsic evidence. Were we to accept [Ringgold's] position, the certainty necessary for the transaction of commercial lending would be thrown into complete chaos and guarantors would be quick to claim the plain reading of their guaranty should be ignored and parol evidence allowed to absolve them of liability. . . . Absent ambiguity, a contrary finding in this case would not be well-received in the financial community."

Faced with this cataclysmic, end-of-the-world-as-we-know-it scenario, the appeals court apparently felt it had no choice except to find for Mr. Finley and decline to enforce or to revise his guaranty for the Bank's and Ringgold's own good.

Ringgold even went so far as to accuse Mr. Finley of fraud for failing to correct the guaranty he signed, knowing that the loan did not close on July 27, 2007. The appeals court swatted this argument away. Of course, the court expressed skepticism as to whether the Bank's reliance could be considered reasonable, given that the Bank knew the actual loan date as well as Mr. Finley. But, in addition, the Bank was relying on Mr. Finley's oral statements that he intended to guarantee the loan. But statements as to future intent fail to state a claim for fraud.

So Ringgold was again bounced out of court, failing on its claim under Mr. Finley's guarantee. The case is another example of post-recession cases that are continuing to flow through the courts. When things change so quickly, even minor points can have major implications. What probably seemed like a small typo at the time has prevented Ringgold from recovering a sizeable portion of its claim.

(*Ringgold Capital IV, LLC, as Assignee of Old Second National Bank, v. Finley*, 2013 Illinois Appellate (1st) 121702, June 19, 2013)