

FOR PUBLICATION

Appeal No. 02-004-GA

**IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**ISLAND LEISURE CORP.,
dba TINIAN HOTEL
Plaintiff-Appellee,**

v.

**OSCAR C. RASA and TINIAN CASINO
GAMING CONTROL COMMISSION,
Defendants,**

**TINIAN CASINO GAMING CONTROL COMMISSION,
Defendant-Appellant.**

OPINION

Cite as: *Island Leisure Corp. v. Rasa*, 2004 MP 4

Civil Action No. 99-0135-GA

Argued and submitted August 11, 2003

Decided April 20, 2004

Counsel for Appellant:
Elliot A. Sattler, Esq.
P.O. Box 143
Tinian, MP 96952

Counsel for Appellee:
No appearance

BEFORE: Miguel S. DEMAPAN, Chief Justice; Alexandro C. CASTRO and John A. MANGLONA, Associate Justices.

MANGLONA, Associate Justice:

¶1 Defendant-Appellant Tinian Casino Gaming Control Commission (“Tinian Gaming Commission” or “the Commission”) timely appeals a judgment entered by the trial court on March 5, 2002. We have jurisdiction pursuant to Article IV, Section 3 of the N.M.I. Constitution and 1 CMC § 3102(a). Because insufficient evidence exists to support the judgment, the judgment of the trial court is REVERSED.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The issue before us is whether the evidence in the record, pursuant to which the trial court ordered Tinian Gaming Commission to pay damages to Island Leisure Corp., dba Tinian Hotel (“Tinian Hotel”) in an action on a guaranty, supports the judgment entered by the trial court. “We review the application of contract law under the de novo standard, and any findings based on extrinsic evidence under the clear error standard.” *Camacho v. L & T Int’l Corp.*, 4 N.M.I. 323, 326 (1996).

FACTUAL AND PROCEDURAL BACKGROUND¹

¶3 Tinian Gaming Commission hired Defendant Oscar C. Rasa (“Rasa”) (not party to this appeal) pursuant to a Consulting Service Agreement (“Agreement”) to provide consulting services commencing October 1996 and ending October 2000. The Agreement included the following provision:

Consultant shall also be paid a housing allowance of TWO THOUSAND FOUR HUNDRED (\$2,400) DOLLARS for each three months of Consulting Services completed under the terms and conditions of the Agreement. Such allowance shall be payable in advance beginning with Consultant’s initial arrival on Tinian and upon completion of each three month period thereafter. Any lease, purchase

¹ The facts are taken from the Appellant’s Opening Brief.

or rental agreement entered into by Consultant for housing, furniture or utility services shall be the sole responsibility of Consultant.

¶4 Rasa attempted to register at the Tinian Hotel. The staff of the hotel would not allow him to register until they discerned that he was employed. Tinian Gaming Commission Commissioner Joaquin H. Borja accompanied Rasa to the hotel and stated that Rasa was employed by the Commission.

¶5 Rasa's hotel bills were not paid. The hotel sent invoices to Rasa and to Tinian Gaming Commission. The Commission sent a letter, dated June 10, 1998, stating that it "does not have an account with Island Leisure Corporation/Tinian Hotel, nor is anyone authorized to charge under TCGCC's name." Excerpts of Record ("E.R.") at 50.

¶6 On August 18, 1998, Rasa sent a letter to the Commission authorizing it to pay \$5,200 to Tinian Hotel. E.R. at 48. By a letter dated October 23, 1998, Rasa rescinded his assignment of his housing allowance and requested that payment be made to him, per the specific language of the contract. E.R. at 47.

¶7 A bench trial was held on January 25, 2001 on Tinian. Defendant Rasa did not answer the complaint, and default judgment was entered against him. Rasa did not appear at the trial.

¶8 Commissioner Borja was called as a hostile witness for Tinian Hotel. Commissioner Borja was the only witness called by Tinian Hotel. Commissioner Borja was cross-examined by Tinian Gaming Commission's counsel after he was examined by Tinian Hotel. E.R. at 2. Commissioner Borja testified that he did not guarantee payment of Rasa's bill, and made no other statement or representations whatsoever on behalf of Rasa or Tinian Gaming Commission other than confirming Rasa's employment with the Commission. *See* Supplemental Excerpts of Record (S.E.R.") at 16-17.

¶9 On March 5, 2001, the trial court entered its findings of fact and conclusions of law. These facts included:

On April 27, 1998, Defendant Rasa went to the Tinian Hotel and requested accommodation. Defendant Rasa was accompanied by Commissioner Joaquin H. Borja, a member of Defendant TCGCC, who assured the staff at the Tinian Hotel that Defendant Rasa was employed by Defendant TCGCC.

¶10 On March 5, 2001 the trial court entered final judgment against Rasa and Tinian Gaming Commission in the amount of \$5,200 (and costs), holding them jointly and severally liable to Tinian Hotel. The Commission timely appealed.²

ANALYSIS

¶11 A guaranty is a contract “collateral to the principal contract between the creditor and the principal debtor.” *Commonwealth v. Torres*, 3 CR 699, 707 (Trial Ct. 1989) (citing *Woods-Tucker Leasing Corp. v. Kellum*, 641 F.2d 210, 213 (5th Cir. 1981)). “Default on the primary contract by the debtor ripens an unconditional guaranty into an actionable liability of the guarantor separate and apart from that of the principal debtor.” *Torres*, 3 CR at 707-08.

¶12 Like any other contract, the formation of a guaranty “is governed by the principles of mutual assent, adequate consideration, definiteness, and a meeting of the minds.” *Haysville U.S.D. No. 261 v. GAF Corp.*, 666 P.2d 192, 201 (Kan. 1983); see also *Farmers’ Loan & Trust Co. v. Stuttgart & A.R.R. Co.*, 92 F. 246, 248 (C.C.E.D. Ark. 1899) (“A contract of guaranty is like every other contract in this: that there must be two or more parties to the contract, and to which the minds of the parties must assent.”).

² Tinian Gaming Commission cited *Management Investment Funding Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 19 F. Supp.2d 129 (S.D.N.Y. 1998). This case was vacated and remanded for rulings on other issues by the appellate court in *Compagnie Financiere de Cic et de L’Union Europeene v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F.3d 31 (2d Cir. 1999). Accordingly, the case has no value, persuasive or otherwise, and we will ignore it.

¶13 Since a guaranty requires a “meeting of the minds,” the guarantor “must know the terms of the obligation which is the subject of the guaranty.” *Williams Nationallease, Ltd. v. Motter*, 648 N.E.2d 614, 616 (Ill. App. Ct.1995). In other words, the terms of the guaranty must be definite, *id.* (“In most cases, the guaranty is by a separate written instrument *which sets forth the specific terms guaranteed.*” (emphasis added)), since “[g]uaranties are contracts to be interpreted in accordance with their clear and unambiguous meaning.” *Chrysler Credit Corp. v. Marino*, 63 F.3d 574, 577 (7th Cir. 1995) (citing *Bank of Benton v. LaBuwi*, 551 N.E.2d 749, 753-54 (Ill. App. Ct. 1990)).

¶14 The existence of a guaranty is a question of fact.

Whether or not statements constitute a personal guaranty is a question of fact. Exact words of guarantee are not essential, where the words and circumstances are sufficient to clearly infer a guarantee. . . . Courts generally attempt to determine whether the words used -- against the background of the circumstances which surrounded the use of those words -- would cause the creditor reasonably to believe that the promisor had agreed to answer for a principal obligation on the part of another person.

Moen v. Meidinger, 583 N.W.2d 634, 636 (N.D. 1998) (citations and quotations omitted).

“However, to charge one person with the debt of another, the undertaking *must be clear and explicit.*” *Id.* (emphasis added, quotations omitted) (quoting *N. Improvement Co. v. Pembina Broad. Co., Inc.*, 153 N.W.2d 97, 103 (N.D. 1967) (quoting 24 AM. JUR. *Guaranty* § 5)).

¶15 In the instant case, the trial court ostensibly determined that, based on the circumstances, the fact that Commissioner Borja traveled to Tinian Hotel with Rasa and stated that Rasa was, in fact, employed, was sufficient to amount to a guaranty that

Tinian Gaming Commission would pay Rasa's lodging bill should Rasa fail to pay it.³
This determination was erroneous.

¶16 Not every assurance is a guaranty. For example, a contract of guaranty should be distinguished from an expression of opinion such as that a third party is trustworthy or reliable. *Heathcote v. Curtis Pub. Co.*, 118 N.E. 909, 911 (Mass. 1918) (“The defendant assured the readers of its publication that its advertisements were honest and trustworthy. It did not guarantee the faithful performance of contracts made by its advertisers or agree to answer for their debt or default.”).

¶17 We begin by noting that, after the evidence was in, the trial court said, “[w]ell, you know Mr. Sattler, I think if this is not a government agency involved here, this will be just a case to be dismissed instantly.” S.E.R. at 36. This statement stems, we think, from the absence of any testimony from anyone associated with Tinian Hotel claiming that Commissioner Borja's statement was construed as a guaranty.⁴ While Tinian Hotel,

³ Commissioner Borja testified:

Q: Did the question come up at this hearing – at this meeting about – about the guarantee for the hotel bill from the Commission?

A: I will just go back to what I stated –

THE COURT: Yes or No.

A: No.

Q: Why did you even go there? What was...your purpose of being there if you weren't there to represent the Commission?

A: Like I said, Mr. Rasa was involve that he was in a variety of newspapers and media and he pleaded to the Chairman too that this is the – the things that's going through him when he came back without a housing by the Commissioner requiring him to come back, I mean by humane society you have to need – you have to have a place to stay. All he – all he wants is for someone to go there and just to say that yes, he's an employee of the Gaming Commission and that's it. And that's what I said and that's the one statement I'm telling you. Other than that, I didn't ah – I didn't guarantee anything.

Q: Did you discuss with Mr. Shin how payment was going to be made?

A: Your Honor, I only made one statement and that's it. I keep repeating myself.

Q: Well, so maybe I misunderstood you, you're saying you went there, you said Rasa was ah, employed by the Commission and that's it, no more – other words out of your mouth at that meeting?

A: No.

Supplemental Excerpts of Record at 16-17.

⁴ Although not discussed in the trial court or on appeal, for the purpose of clarification we note that the Commonwealth Statute of Frauds, 2 CMC §§ 4911, *et seq.*, requires that the contract of guaranty, “or some note or memorandum thereof, [be] in writing and subscribed by the party to be charged or by his agent.” 2 CMC 4914(b). The Commission did send a series of letters to Tinian Hotel. However, there exists no testimony from

through its attorney, alleged in the Complaint that Tinian Hotel was assured “by a higher ranking official of Defendant TCGCC in the person of Commissioner Joaquin H. Borja that Defendant TCGCC would pay all hotel bills to be incurred by Defendant Rasa,” Complaint in Civil Action No. 99-0135D ¶6 filed March 4, 1999, this allegation was specifically denied. *See* Answer in Civil Action No. 99-0135D ¶6 filed March 25, 1999.

¶18 The fact that Tinian Gaming Commission, the purported guarantor, is a government entity does nothing to change the proposition that Tinian Hotel, as the entity trying to recover on a guaranty theory, had the burden of proving the case. *See Marshall v. Ford Motor Co.*, 878 S.W.2d 629, 631 (Tex. App. 1994) (“To recover under the guaranty, Ford Motor Company must show proof of (1) the existence and ownership of the guaranty contract, (2) the terms of the underlying contract by the holder, (3) the occurrence of the conditions upon which liability is based, and (4) the failure or refusal to perform the promise by the guarantor”).

¶19 The unrefuted testimony of Commissioner Borja makes it clear that Commissioner Borja did nothing more than assure Tinian Hotel that Rasa was, in fact, employed. *See supra* n.3. Commissioner Borja’s assurance that Rasa was employed was simply that; it did not guarantee that Rasa’s bill would be paid.

CONCLUSION

anyone associated with Tinian Hotel claiming that the letters themselves were treated as a guarantee.

Tinian Hotel, through its attorney, did allege in the Complaint that Tinian Hotel allowed Rasa to collect his personal effects and belongings based on a letter from Tinian Gaming Commission. *See* Complaint in Civil Action No. 99-0135D ¶¶18-19 filed March 4, 1999. However, this allegation was denied, *see* Answer in Civil Action No. 99-0135D ¶¶18-19 filed March 25, 1999, leaving it up to Tinian Hotel to prove at trial, which, noted *supra*, it did not do.

Accordingly, we must conclude that the letters only memorialize the alleged oral guarantee of Commissioner Borja, and do not themselves, independently constitute a guaranty.

¶20

The judgment below is not supported by the evidence presented to the trial court. Accordingly, the judgment is Reversed and this matter is Remanded for further proceedings consistent with this Opinion.

SO ORDERED THIS 20TH DAY OF APRIL 2004

/s/
MIGUEL S. DEMAPAN, CHIEF JUSTICE

/s/
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/
JOHN A. MANGLONA, ASSOCIATE JUSTICE