SO ORDERED.
SIGNED this 22nd day of July, 2021

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

K & L TRAILER SALES AND LEASING, INC.

Debtor

Case No. 3:20-bk-31619-SHB
Chapter 11

GREENEVILLE FEDERAL BANK, FSB

Plaintiff

v.

Adv. Proc. No. 3:21-ap-3013-SHB

KRIS FELLHOELTER;
FELLHOELTER ENTERPRISES, LLC;
LINDA FELLHOELTER;
MARVIN FELLHOELTER; and
GARY M. MURPHEY, TRUSTEE

Defendants

MEMORANDUM AND ORDER

Plaintiff filed the Complaint commencing this adversary proceeding on March 3, 2021 [Doc. 1], seeking a determination that claims filed by Defendants in Debtor's underlying

bankruptcy case were assigned to Plaintiff prepetition such that Plaintiff is entitled to receive any distributions from Debtor's bankruptcy estate for such claims or that Defendants' claims are subordinate to those of Plaintiff [*Id.* at p. 4]. Defendants Fellhoelter Enterprises, LLC; Linda Fellhoelter; and Marvin Fellhoelter[1] filed a Motion to Dismiss, or in the Alternative, for Summary Judgment ("Motion") with supporting documents on May 4, 2021 [Docs. 13, 14, 15], arguing that Defendants Marvin and Linda Fellhoelter were released from their personal guarantees of the Revolving Loan Agreement [Doc. 13 at ¶¶ 3-5].[2] Defendants filed with the Motion the following exhibits: (1) a Fourth Modified Promissory Note between Plaintiff and Debtor, signed by Debtor on August 15, 2019, with the related Revolving Loan Agreement dated October 1, 2010 [*id.* at pp. 4-30]; (2) a Consent to Release of Co-Guarantors executed on August 15, 2019, by officers of K&L Trailer Leasing, Inc.; officers of Fellhoelter Enterprises, LLC; and Kris and Amy Fellhoelter, in their individual capacities [*id.* at p. 31]; and (3) the Affidavit of Linda Fellhoelter [*id.* at pp. 33-34]. Plaintiff timely responded to the Motion. [Docs. 16, 17.] The Motion is now ripe for determination, with the record before the Court including all pleadings of record in this adversary proceeding and the attachments thereto and all documents and facts of record in the underlying bankruptcy case. *See* Fed. R. Evid. 201(a) (applicable in bankruptcy cases and adversary proceedings pursuant to Fed. R. Evid. 1101(a), (b) and Fed. R. Bankr. P. 9017). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (K), and (O).

[1] The Court will refer to these defendants collectively as "Moving Defendants" or individually by name. Additionally, Defendant Gary M. Murphey, Trustee, filed an Answer on March 11, 2021 [Doc. 12]. Defendant Kris Fellhoelter has not, as of the date of this Memorandum and Order, filed an answer, which was due on April 5, 2021. [*See* Doc. 11.]

[2] The Motion does not assert that any ground exists to dismiss Plaintiff's claim against Fellhoelter Enterprises, LLC. [*See* Doc. 13.] Thus, the Court treats the Motion as seeking partial dismissal or partial summary judgment. The Court cannot determine why Fellhoelter Enterprises, LLC, is a movant.

Concerning the Moving Defendants, Plaintiff asks the Court to enter a declaratory judgment that Claim Nos. 49, 51, 52, and 53 filed by Marvin and Linda Fellhoelter on September 29, 2020, and Claim No. 58 filed by Fellhoelter Enterprises, LLC, on September 30, 2020, were assigned by Moving Defendants to Plaintiff prepetition pursuant to a Revolving Credit Agreement dated October 1, 2010, between Plaintiff and Debtor, with Defendants providing personal guaranties to the agreement, which is now in default. Alternatively, if the Court determines that the claims were not assigned, Plaintiff seeks a declaratory judgment that Defendants' claims are subordinate to Plaintiff's claims and will not be paid until Plaintiff's claims have been paid in full.

I. UNDISPUTED FACTS OF RECORD

K&L Trailer Sales and Leasing, Inc., Debtor in the underlying Chapter 11 proceeding, executed a promissory note with Plaintiff in the original maximum principal amount of $2,500,000.00, the maturity date for which was extended several times, including by a Fourth Amended Promissory Note dated August 15, 2019, at which time the unpaid principal balance was $2,479,400.00. [Doc. 13 at pp. 4-7.] The Fourth Amended Promissory Note was executed by Defendant Kris Fellhoelter as Debtor's President and "[was] secured by, among other things, (I) a Security Agreement . . . of even date with the initial Promissory Note is hereby made, and (ii) any other collateral document now or in the future executed by [Debtor] securing the indebtedness owed to the Bank." [*Id.* at p. 5.] The underlying Revolving Loan Agreement dated October 1, 2010, was executed by (1) Kris Fellhoelter, as President of Debtor, the Borrower under the Revolving Loan Agreement, and (2) the following as "Guarantors": (a) Kris Fellhoelter, as President of K&L Trailer Leasing, Inc.; (b) Marvin Fellhoelter, as Chief Manager of Fellhoelter Enterprises, LLC; and (c) Marvin Fellhoelter, Linda Fellhoelter, Kris Fellhoelter,

and Amy Fellhoelter in their individual capacities. [*Id.* at pp. 24-25.] Michael G. Burns, Senior Vice-President of Greeneville Federal Bank signed for the Bank. [*Id.* at p. 25.] The Revolving Loan Agreement provided that the "Guarantors expressly join herein for the purpose of acknowledging and consenting to the terms and provisions hereof . . . and do further, jointly and severally, absolutely and unconditionally guarantee the payment and performance of each and every obligation and undertaking of the Borrower hereunder." [*Id.* at p. 23 (¶ 7.15).]

Paragraph 4.8 of the Revolving Loan Agreement addresses the guarantors' subordination as follows:

> Each Guarantor hereby subordinates any sums now or hereafter due to any Guarantor from the Borrower ("Subordinated Indebtedness"), to the payment of any sums now or hereafter due to Bank from Borrower and agree that the Guarantors will not, without Bank's prior written consent, demand, takes steps for the collection of or assign, transfer or otherwise dispose of the Subordinated Indebtedness or any part thereof or realize upon or enforce any collateral securing the Subordinated Indebtedness, or any part thereof, so long as the Borrower shall be indebted to Bank, provided that so long as the Borrower is not in default under the obligations owed to the Bank the following types of payments in reasonable amounts may be paid by the Borrower without Bank's prior written consent: (a) regular wage and salary payments for services rendered by the individual Guarantors, (except as otherwise limited herein), (b) reimbursement of ordinary business expenses advanced on behalf of Borrower by the Guarantors, (c) payments for materials or property furnished by the Guarantors in the Ordinary Course of Business dealings between the Guarantors and the Borrower and (d) regularly scheduled payments of principal and interest on a promissory note owed by the Borrower to Marvin Fellhoelter in the original principal amount of $972,000 (the "Fellhoelter Note"). Each of the Guarantors hereby assigns and transfers to Bank all of their right, title and interest in and to the Subordinated Indebtedness and agrees to execute any additional assignments and instruments Bank my [sic] deem necessary or desirable to effectuate, complete, perfect or further confirm such assignment and transfer, and agrees to hold in trust for and promptly remit to Bank for application upon any indebtedness now or hereafter owing by the Borrower to Bank any amount received from the Borrower or any other Person on account of the Subordinated Indebtedness.

[*Id.* at pp. 16-17 (¶ 4.8).] The Revolving Loan Agreement also includes a paragraph entitled "Compromises, Releases, Etc.," which states:

> The Guarantors agree that the Bank is hereby authorized from time to time, without notice to anyone, to make any sales, pledges, surrenders, compromises, settlements, releases, indulgences, alternations, substitutions, exchanges, changes in, modifications, or other dispositions including, without limitation, cancellations, of all or any part of the Obligations, or of any contract or instrument evidencing any thereof, or of any security or collateral thereof, and/or to take any security for or other guaranties upon any of said Obligations. The liability of the Borrower and the Guarantors shall not be in any manner affected, diminished, or impaired thereby, or by any lack of diligence, failure, neglect, or omission on the part of Bank to make any demand or protest, or give any notice of dishonor or default, or to realize upon or protect any of said indebtedness or any collateral or security therefor. The Bank shall have the exclusive right to determine how, when, and what application of payments and credits, if any, shall be made on the Obligations and any Contracts purchased by it, or any party thereof, and shall be under no obligation, at any time, to first resort to, make demand on, file a claim against, or exhaust its remedies against the Borrower, or it Property or estate, or to resort to or exhaust its remedies against any Account Debtor, collateral, security, property, liens, or other rights whatsoever. The Bank may at any time make demand for payment on, or bring suit against, the Guarantors, jointly or severally, or any one or more of the guarantors, less than all, and may compound with any one or more of the guarantors for such sums or on such terms as it may see fit, without notice or consent, the same being hereby expressly waived, and release such of the guarantors from all further liability to the Bank hereunder, without thereby impairing the rights of the Bank in any respect to demand, sue for, and collect the balance of the indebtedness from any of the guarantors not so released. Any claims against the Borrower accruing to any of the Guarantors by reason of payments made to the Bank shall be subordinate to any indebtedness now or at any time hereafter owing by the Borrower to the Bank, each of the Guarantors hereby waiving all rights of subrogation against the Borrower until all indebtednesses, liabilities and obligations of the Borrower to the Bank shall have been fully and finally paid and satisfied.

[*Id.* at p. 23 (¶ 7.14).]

Additionally, the Revolving Loan Agreement expressly states that an "event of default" will exist "[i]n the event of the death or dissolution of any Guarantor or [if] any Guarantor shall notify the Bank that he no longer intends to be bound by the provisions of his Guaranty as to future loan advances and extensions of credit." [*Id.* at pp. 19-20 (§ 6; ¶ 6.8)]. Further, the Revolving Loan Agreement provided that any amendments or modifications to it, the underlying promissory note, or any other documents associated therewith would be effective "only by an instrument in writing signed by the parties hereto." [*Id.* at p. 21 (¶ 7.1).]

On the same day that the Fourth Modified Promissory Note was signed – August 15, 2019 – a document entitled "Consent to Release of Co-Guarantors" was executed by (1) Kris Fellhoelter, Marvin Fellhoelter, and Linda Fellhoelter, as Shareholders and Directors of K&L Trailer Leasing, Inc. and by Amy Fellhoelter, as Director of K&L Trailer Leasing, Inc.; (2) Marvin Fellhoelter, Linda Fellhoelter, Kris Fellhoelter, and Amy Fellhoelter, as Members of Fellhoelter Enterprises, LLC; and (3) Kris Fellhoelter and Amy Fellhoelter, individually. [*Id.* at pp. 31-32.] The Consent to Release of Co-Guarantors states in its entirety:

> K&L Trailer Leasing, Inc., a Tennessee corporation, and Fellhoelter Enterprises, LLC, a Tennessee limited liability company, and Kris Fellhoelter and Amy Fellhoelter, each of which are guarantors of the promissory note of K&L Trailer Sales and Leasing, Inc., to Greeneville Federal Bank, FSB, dated October 1, 2010, in the original principal sum of $2,500,000.00, do hereby consent to the release by the Greeneville Federal Bank, FSB, of two (2) of the co-guarantors of that promissory note, that being Marvin Fellhoelter and Linda Fellhoelter, and do acknowledge and agree that this will in no way affect their existing guaranties to Greenville Federal Bank, FSB, of the full unpaid balance of that promissory note.

[*Id.* at p. 31.] The loan documents are all governed by the laws of the State of Tennessee. [*Id.* at pp. 21 (¶ 7.6).]

II. APPLICABLE LAW

A. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "Only disputes over facts that might

affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

Moving Defendants bear the burden of proving, based on the record before the Court, that they are entitled to judgment as a matter of law because there is no genuine dispute concerning any material fact, such that the defenses alleged are factually unsupported. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If Moving Defendants meet that burden, Plaintiff then must prove that there are genuine disputes of material fact for trial; however, Plaintiff may not rely solely on allegations or denials contained in the pleadings because reliance on a "mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transp., Inc*., 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The facts and all resulting inferences are viewed in a light most favorable to Plaintiff as non-movant, with the Court to decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243. Nevertheless, when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

> When a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of the plaintiff's claim, as in the present case, Rule 56 requires the plaintiff to present evidence of evidentiary quality that demonstrates the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994). Examples of such evidence include admissible documents or attested testimony, such as that found in affidavits or depositions. *Winskunas*, 23 F.3d at 1267 (citations omitted). The proffered evidence need not be in admissible *form*, but its *content* must be admissible. *Celotex Corp*., 477 U.S. at 324; *Winskunas*, 23 F.3d at 1268. For instance, deposition testimony will assist a plaintiff in surviving a motion for summary judgment, even if the deposition itself

> is not admissible at trial, provided substituted oral testimony would be admissible and create a genuine issue of material fact.

Bailey v. Floyd Cty. Bd. of Educ., 106 F.3d 135, 145 (6th Cir. 1997).

B. Effectiveness of the Consent to Release of Co-Guarantors

Moving Defendants seek dismissal of this adversary proceeding or summary judgment based on the Consent to Release of Co-Guarantors, which they assert was intended to release Marvin and Linda Fellhoelter from their obligations as guarantors for Debtor's indebtedness to Plaintiff under the promissory notes and Revolving Credit Agreement. [Doc. 13 at p. 2; Doc. 15 at p. 2.] In support, they offer the Affidavit of Linda Fellhoelter, in which she states that she and Marvin Fellhoelter asked to be released from their personal guaranties during negotiation of the Fourth Modified Promissory Note in August 2019 "because [they] were no longer involved in the management of the business." [*Id.* at p. 33 (¶ 3).] She further asserts that it was her understanding that Plaintiff "released [her] and Marvin Fellhoelter from [their] personal guaranties when the Consent to Release of Co-Guarantors was executed" on the same day that the Fourth Modified Promissory Note was executed. [*Id.* at p. 34 (¶¶ 5-6).]

"To be enforceable, the modification of an existing contract requires mutuality of assent and meeting of the minds." *Buchholz v. Tenn. Farmers Life Reassurance Co*., 145 S.W.3d 80, 84 (Tenn. Ct. App. 2003); *see also Baptist Physician Hosp. Org., Inc. v. Humana Military Healthcare Servs., Inc*., 481 F.3d 337, 350 (6th Cir. 2007) ("In Tennessee, the parties to an existing contract can modify its terms at any time. However, an existing contract cannot be unilaterally modified. Rather, valid modification requires 'the same mutuality of assent and meeting of the minds as required to make a contract' in the first instance." (citations omitted)); *GEICO Marine Ins. Co. v. Monette*, 438 F. Supp. 3d 763, 768 (E.D. Ky. 2020) ("A modification of a contract requires the mutual assent of both, or all, parties to the contract. Hence, one party

to a contract may not unilaterally alter its terms without the assent of the other party." (quoting 17A Am. Jur. 2d *Contracts* § 496 (2019)).

> Modification of an existing contract cannot be accomplished by the unilateral action of one of the parties. There must be the same mutuality of assent and meeting of the minds as required to make a contract. New negotiations cannot affect a completed contract unless they result in a new agreement. And a modification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed.

Buchholz, 145 S.W.3d at 84 (quoting *Balderacchi v. Ruth*, 256 S.W.2d 390, 391 (Tenn. Ct. App. 1952) (citations omitted)).

Under applicable law and the face of the agreement between Plaintiff and Defendants, it matters not whether Moving Defendants *believed* that the Consent to Release of Co-Guarantors served to release Marvin and Linda Fellhoelter from their obligations as guarantors because the Revolving Loan Agreement by which Moving Defendants agreed to be bound expressly required any amendment or modification to be in writing and signed by the parties. [Doc. 13 at p. 21 (¶ 7.1).] The Consent to Release of Co-Guarantors was not signed by any representative of Plaintiff (the party sought to be bound by Moving Defendants), and Plaintiff, relying on the express terms of the Revolving Loan Agreement, does not agree that it authorized any such modification to the initial loan documents. [Doc. 17 at ¶¶ 1-3.] Any agreement between the guarantors as to responsibility for the underlying debt owed to Plaintiff by Debtor cannot be imposed on Plaintiff based on the record before the Court.

III. CONCLUSION

Because the record does not establish as a matter of law that Moving Defendants are entitled to enforce the Consent to Release of Co-Guarantors against Plaintiff, who was not a party to it, summary judgment is inappropriate, and the Motion must be denied.

IV. ORDER

Because there is a genuine dispute of material fact, and Moving Defendants have not shown that they are entitled to judgment as a matter of law or that dismissal of this adversary proceeding is appropriate, the Court directs the following:

1. The Motion to Dismiss, or in the Alternative, for Summary Judgment filed by Defendants Fellhoelter Enterprises, LLC; Linda Fellhoelter; and Marvin Fellhoelter on May 4, 2021 [Doc. 13], is DENIED.

2. Defendants Fellhoelter Enterprises, LLC; Linda Fellhoelter; and Marvin Fellhoelter shall answer the Complaint [Doc. 1] no later than August 4, 2021.

3. Pursuant to Federal Rule of Civil Procedure 16(b), incorporated into Federal Rule of Bankruptcy Procedure 7016, a scheduling conference will be held in this adversary proceeding on August 19, 2021, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, for the purpose of preparing a scheduling order. During the conference, the Court will schedule this adversary proceeding for trial and will set dates for completing discovery, filing dispositive motions, submitting a pretrial order, and filing pretrial briefs. The Court may schedule a final pretrial conference to be held shortly before the trial date.

4. In accordance with Federal Rule of Civil Procedure 26(f), incorporated into Federal Rule of Bankruptcy Procedure 7026, as soon as practicable and in any event at least seven days before the scheduling conference, the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Federal Rule of Civil Procedure 26(a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals

concerning the matters set forth in Rule 26(f)(3)(A)-(F). The parties shall file with the Court at least three days prior to the scheduling conference a written report outlining the plan that is required by Rule 26(f). Although the attorneys of record and all unrepresented parties that have appeared in the proceeding are jointly responsible for arranging and being present or represented at the Rule 26(f) meeting, for attempting in good faith to agree to the proposed discovery plan, and for submitting to the Court a written report outlining the plan, Plaintiff shall have the primary responsibility for initially contacting the other parties upon receipt of this order to schedule the meeting. By agreement, the parties may conduct the Rule 26(f) meeting by telephone.

5. Counsel for any party who resides outside the district may appear at the scheduling conference by telephone in accordance with the procedures outlined on the Court's website by filing written notice of the intention to so appear by 4:00 p.m. EST the day before the conference.

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