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	: SUPERIOR COURT OF NEW JERSEY
SAMUEL BARRESI	: APPELLATE DIVISION
	: DOCKET NO. A-002159-22
Plaintiff	:
	: ON APPEAL FROM:
	:
vs.	: SUPERIOR COURT OF NEW JERSEY
	: BURLINGTON COUNTY
FZG ENTERPRISES, LLC,	: LAW DIVISION
d/b/a BIG LEAGUE DREAMS,	:
a/k/a FGZ ENTERPRISES,	: DOCKET No. BUR-L-001201-20
LLC and FXG ENTERPRISES,	:
LLC, GARY LIGUORI,	: Sat Below:
ZANE KROMISH, AND	: Honorable Eric G. Fikry, J.S.C.
FRED VINSON	: Honorable Sander Friedman, J.S.C.
	:
Defendants	: Civil Action

BRIEF ON BEHALF OF APPELLANT, SAMUEL BARRESI

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PRELIMINARY STATEMENT

This is a case about a typical commercial landlord/tenant matter where on February 20, 2015, Plaintiff, Barresi, leased a $2 million dollar sports facility to Defendant, FZG Enterprises, LLC, d/b/a Big League Dreams. Barresi required the individual guarantees of Defendants, Liguori, Kromish and Vinson, the three members of the LLC, as to all obligations of the tenant as the LLC had no assets.

After a little over a year in business, on April 11, 2016, FZG sent Barresi a notice of termination as the business was not doing well. Barresi and FZG met on May 5, 2016 and worked out an arrangement under which FZG agreed to stay. FZG agreed to withdraw its notice of termination and Barresi agreed to give FZG a $3,000.00 discount from its monthly rent of $9,250.00, for the months of May, June, July and August. Later, at FZG's request, Barresi added another $3,000.00 discount for the month of September 2016. Thereafter, on October 1, 2016 the rent returned to $9,250.00.

FZG remained as a tenant and remained in business for the next three and one-half years finally succumbing to the poor business climate brought on by the pandemic in April of 2020,and sent a notice terminating the February 20, 2015 Lease.

During the course of the Lease, FZG had fallen behind in its rental payments in 2019 and in April of 2019 Barresi and FZG entered into a Consent Order setting

forth the amount of the arrears, and a schedule to pay back those arrearages. The 2019 Consent Order also acknowledged that the February 2015 Lease remained in place.

In June of 2020 Barresi filed this action to recover unpaid arrearages under the February 2015 Lease. The suit named FZG the tenant, and Liguori, Kromish and Vinson, the guarantors.

On August 1, 2022 the Trial Court entered partial summary judgment against FZG for amounts owing under the Lease through April of 2020. The Court also found Liguori, Kromish and Vinson liable on the guarantees, but also ruled that the Lease and guarantees were terminated as of May 11, 2016 and, therefore, only enforced the guarantees through May 11, 2016, prior to the time any substantial rents were due.

It is Barresi's position that the Trial Court erred when it found a termination of the Lease and a termination of the guarantees in 2016 when it is clear from the facts and the actions of the parties that the 2016 termination of the Lease was rescinded, and the Lease continued in place until April of 2020. He asks this Court to correct this error and reverse that portion of the Trial Court ruling that found that the Lease and guarantees were terminated in 2016, award judgment in favor of Barresi and against the guarantors, Liguori, Kromish and Vinson, for $100,965.77 through April of 2020, $37,649.00 in attorney's fees, and remand for trial as to

Barresi's remaining damages incurred after April of 2020.

FACTS AND PROCEDURAL HISTORY[1]

This is a matter that involves a dispute between landlord, Samuel Barresi ("Barresi"), tenant, FZG Enterprises, LLC ("FZG"), and guarantors, Gary Liguori ("Liguori"), Zane Kromish ("Kromish"), and Fred Vinson ("Vinson"), all members of FZG at the time the Lease and guarantees were executed on February 20, 2015. The premises is a former hockey rink/sports complex containing 38,400 square feet with a value of about two million dollars ($2,000,000.00) at the time of the Lease. Pa53.

Barresi and FZG entered into the Lease dated February 20, 2015, ("Lease") which was guaranteed by Liguori, Kromish and Vinson, a copy of which is attached as Pa60. The rent set forth in the lease was $5,250.00 per month from March 1, 2015 through May 1, 2015, $7,250.00 per month from June 1, 2015 through November 1, 2015, and $9,250.00 per month for December 1, 2015 through February 1, 2016, net net net (Lease ¶2(a), 7) Pa60, Pa62-63. In addition to rent, FZG was responsible for repair and maintenance of the building, (Lease ¶6)Pa62, water and sewer permits, municipal improvement assessments, and any other charges made by any public authority (Lease ¶7)Pa62. FZG was responsible for charges and rents for water, gas,

[1] Facts and Procedural History are combined because they are inter-related and for ease of reading.

telephone, heat and electricity, and such other services used or consumed in or servicing the premises (Lease ¶8). FZG was responsible to keep and maintain building and fire insurance, general liability and an umbrella liability policy as well as public liability, property damage, employer liability, and workers compensation insurance, and an umbrella business insurance policy (Lease ¶9)Pa63. Pursuant to Lease ¶5, Pa62, FZG is responsible for all of landlord's attorney's fees and costs enforcing the Lease.

At the end of the term, FZG was required to surrender the premises (Lease ¶3) Pa61, and pursuant to the Lease ¶12(b), Pa65, FZG was required to "peaceably deliver up and surrender possession of the premises to the landlord" and "deliver to landlord at its offices, all keys to the building."

The Lease provided at page 11, Pa70, immediately above the signatures of Liguori, Vinson and Kromish as follows: "… the undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant herein." Barresi relied on the personal guarantees of Liguori, Kromish and Vinson, as FZG had no assets. He relied on Liguori, Kromish, and Vinson as local businessmen who would have the personal assets to satisfy any default on the Lease.

The Lease was monthly as Barresi was trying to sell the property. Pa60.

On February 10, 2016 Barresi and FZG agreed to continue with the existing Lease. It was agreed that rent would remain at $9,250.00 per month. Pa72.

Two months later on April 11, 2016, FZG sent a letter to Barresi notifying him that the Lease would be terminated within 30 days, as of May 11, 2016.[2] Pa126.

Barresi and FZG had further discussions on May 5, 2016, and on May 6, 2016, Barresi wrote to FZG confirming their agreement that FZG would continue with the existing Lease, that FZG rescinded the notice to terminate dated April 11, 2016, and that Barresi would grant a courtesy discount of $3,000.00 per month from the existing rent of $9,250.00 per month for the months of May, June, July, and August of 2016. It was agreed rent would return to $9,250.00 for the month of September 2016. Thereafter, FZG and Barresi continued their relationship under the Lease, with Barresi granting a courtesy discount of $3,000.00 per month through September of 2016[3], and with rents returning to $9,250.00 thereafter.

In November and December of 2016 Liguori bought out Kromish and Vinson and agreed to indemnify them for any liabilities of FZG. Pa112-113, Pa115-116. Kromish and Vinson did not request or obtain a release from Barresi with respect to their personal guarantees of the obligations of FZG. Kromish and Vinson were active participants in the business, not just passive investors, up until their departure in November and December of 2016. Barresi was never told that Kromish and

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[2] Arguably the lease termination date would have been May 31, 2016, as the lease ran from the first of the month to the 31st of the month. The next term, 30 days after the termination notice, began on June 1, 2016. Harry's Village, Inc. vs. Egg Harbor Twp., 89 N.J. 576, 587 (1982).

[3] Barresi later on September 8, 2016 granted an additional courtesy discount of $3,000.00 for September of 2016.

Vinson left the business until 2019. Pa54, Pa90-91. Barresi testified in depositions that if Liguori, Kromish and Vinson had asked him to release them from their guarantees, he would have requested substitute collateral such as a bank letter of credit or an escrow. Pa91.

On January 12, 2019 Barresi sent FZG and the three guarantors notice of defaults and arrearages. The letter sought to resolve the arrearages. The schedule attached to the letter shows total arrearages in rents of $66,110.00 as well as total default on repairs and maintenance of $27,808.00. Total arrearages and default was $100,723.00. Pa76-77.

In response to the letter of January 12, 2019, there were various emails back and forth between Barresi and Vinson where Vinson argued the Lease had been terminated and therefore there was no liability on the guarantee. Barresi pointed out in his responses that the Lease was not terminated and that Vinson and Kromish were liable on their guarantees. Vinson also disclosed to Barresi for the first time that he and Kromish were no longer members of FZG. Pa79-88.

In his deposition, Barresi stated that he would not have released the guarantors unless FZG provided an irrevocable letter of credit or escrow. Deposition of Samuel Barresi, September 9, 2021 at p. 178, l. 11-14, Pa91. In fact, Barresi testified he believed the reason he was not told that Vinson and Kromish left the business is

because they knew Barresi would have wanted some substitute equity for a release. Deposition of Samuel Barresi, p. 177, l. 18 to 24. Pa90.

On March 7, 2019, Barresi filed a complaint against FZG for eviction. The eviction complaint set forth arrearages as of March 5, 2018 of $108,973.00. Pa95-97. A schedule of the arrearages and defaults on repairs and maintenance is attached to the eviction complaint. Pa98.

A trial date for the eviction was set for April 18, 2019. Prior to the date of trial, Barresi met with Liguori on behalf of FZG and entered into a Consent to Enter Judgment (Tenant to Stay in Premises) ("Consent Order") which allowed FZG to stay in the premises. The Consent Order signed by Barresi and FZG set forth the amount owed as of April 17, 2019 as $112,729.00. The parties agreed that $5,300.00 would be paid immediately with $24,000.00 to be paid at $2,000.00 per month for one year beginning May 1, 2019.

On May 1, 2020 the balance of $83,429.00 would be due in a lump sum unless otherwise agreed. It was also agreed that the subtenant would make payments directly to Barresi of $4,000.00 per month which would be credited $2,000.00 to arrears and $2,000.00 to the current rent. The Consent Order also provided that FZG agreed to pay $9,250.00 per month "as required by the rental agreement as well as all other payments required by the rental agreement". Finally, the Consent Order provided that the Lease of February 20, 2015 "remained in effect". Pa22.

Thereafter from May 1, 2019 through April 19, 2020 FZG made payments according to the Consent Order, but not always in the full amount as agreed.

On or about March 19, 2020, FZG terminated the Lease effective April 19, 2020[4]. Pa102. The amount due and owing at that time was $13,536.77. Pa24.

Thereafter, on April 29, 2020 counsel for Barresi issued a letter to FZG and the guarantors demanding payment of the rent due through April 19, 2020 of $13,536.77. Pa104. In addition, the letter indicates FZG would owe Mr. Barresi $83,429.00 pursuant to the Consent as of May 1, 2020. In addition, the subtenant failed to make its $4,000.00 monthly payments directly to the landlord for the month of April 2020 and therefore the tenant owed that amount as well. The undisputed amount owed as of April 19, 2020 was $100,965.77. FZG does not dispute this amount. See Deposition of Gary Liguori, September 8, 2021, p. 48, l. 20 through p. 51, l.19. Pa107-110. In addition, Barresi was entitled to attorney's fees under ¶5 of the Lease.

On June 18, 2020, Barresi filed suit against FZG and guarantors, Liguori, Kromish and Vinson. Pa16.

The parties engaged in early mediation, unsuccessfully, paper discovery, and depositions of the principals.

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[4] Arguably the termination was not effective until April 30, 2020. See fn2.

On December 15, 2022, Barresi moved for partial summary judgment against all defendants as to the amount owed through May 1, 2020. Pa51.[5] Defendants, Kromish and Vinson, filed a cross-motion for summary judgment for a determination that the individual guarantors, Liguori, Kromish, and Vinson, were not liable on the personal guarantees. Pa117.

The Court heard oral argument on July 29, 2022, and on August 1, 2022 entered an Order for Partial Summary Judgment finding that FZG was liable to Barresi in the amount of $100,965.77, and that Liguori, Kromish and Vinson were liable on the guarantee but that the guarantee was terminated on May 11, 2016. Pa8.[6] The Court also awarded attorney's fees, subject to submission of a Certification of counsel. Pa8.[7]

The Court found that the language on Page 11 of the Lease was clear and unequivocal and established a guarantee agreement between Liguori, Kromish, and Vinson, and the landlord, Barresi. 1T63-10 to 1T64-11.[8]

The Court distinguished the case of City of Millville vs. Rock, 683 F. Supp.

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[5] Barresi did not move for summary judgment of additional damages of $166,176.47, consisting of actual expenses incurred after May 1, 2020, for damages to leasehold and $138,872.00 in estimated costs incurred after May 1, 2020, due to tenant failure to maintain premises and remove alterations installed by tenant.

[6] An insubstantial amount of money was owed under the Lease of May 11, 2016.

[7] The Court later awarded attorney's fees of $37,649.00 by Order dated October 21, 2022. The award of attorney's fees is not subject to the appeal or cross-appeal.

[8] 1T is Transcript of Motion for Partial Summary Judgment and Cross Motion for Summary Judgment dated July 29, 2022; 2T is Transcript of Motion for Reconsideration dated September 23, 2022.

2d, 319 (2010) cited by Defendants, because in that case there were cross-outs of the word "personally" and replacement with the word "trust" in the guarantee language. Also in that case the personal home address as well as position with the company did not appear below the signature lines. 1T64-12 to 1T65-1.

However, the Court found that the Defendants terminated the Lease when they sent notice on April 11, 2016. 1T65-2 to 7. The Court found that the May 6, 2016 letter drafted by Barresi stating that Defendants rescinded their notice to terminate did not reinstate the 2015 Lease or the guarantee agreement of Liguori, Vinson, and Kromish, citing the Statute of Frauds, N.J.S.A. 25:1-15. 1T65-8 to 20.

The Court went on to find the May 6, 2016 letter did not reinstate the terms of the Lease and guarantee, as it was not signed by any of the other individual Defendants. 1T65-21 to 24. The Court went on to state the April 11, 2016 letter to Barresi terminated the Lease and severed Liguori, Vinson, and Kromish, from being personally liable for the obligations of FZG. 1T65-24 to 1T66-2. The Court further stated that since FZG continued to occupy the premises, FZG became a holdover tenant at that time. 1T66-2 to 5. The Court found that the individual tenant guarantors were only liable on the guarantee for amounts due up to May 11, 2016. 1T66-10 to 12; Pa8, Pa9.

The Court went on to award partial summary judgment in favor of Barresi and against FZG in the amount of $100,965.77. 1T66-13 to 15. The Court also awarded

attorney's fees subject to submission of counsel's Certification of Services. 1T66-25 to 1T67-5; Pa8.[9] On Defendants, Liguori, Kromish and Vinson's Cross Motion, the Court found personal liability against Liguori, Kromish and Vinson, for amounts due prior to May 11, 2016, but not liable for amounts due after May 11, 2016. 1T68-23 to 1T69-1; Pa9.

On August 24, 2022, Barresi moved for reconsideration and Defendants cross moved to amend the Judgment of August 1, 2022. Oral argument was held on September 23, 2022.

On the Motion for Reconsideration, Barresi argued that the Court erred when it held that the Lease and guarantee were terminated on May 11, 2016, based on the facts and the law. In particular, Barresi argued that the Court misapplied the Statute of Frauds, N.J.S.A. 25:1-15, to find that the Lease and guarantee were terminated. The Court had ruled that the letter of May 5, 2016 was ineffective to "reinstate" the Lease and guarantee that was terminated by the April 11, 2016 letter because the letter of May 5, 2016 was not a writing signed by the guarantors, citing N.J.S.A. 25:1-15. Barresi argued on reconsideration that N.J.S.A. 25:1-15 did not apply because N.J.S.A. 25:1-15 applies to guarantees and not leases. The statute that applies to leases is N.J.S.A. 25:1-12 and would not be applicable here because the

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9 See fn7.

lease was for less than three years. 1T5-1 to 17. Moreover, no party argued N.J.S.A. 25:1-15 applied to this situation. 2T10-24 to 2T11-11.

Barresi argued that the May 5, 2016 agreement did not change the guarantee language; the May 5, 2016 agreement rescinded the notice of lease termination and in return modified the lease rental terms by reducing the rent by $3,000.00 for the months of May, June, July, and August of 2016, a $12,000.00 concession given to and accepted by the tenant, FZG. 2T8-2 to 2T8-22; 2T9-1 to 2T16-10; 2T20-18 to 2T36-18; 2T39-21 to 2T40-20. FZG never vacated the premises; FZG occupied the premises continuously from February 20, 2015 until April 19, 2020. 2T40-6 to 10. As such, Barresi argued that the Court expressed its decision that the guarantee was terminated on May 11, 2016, based upon a palpably incorrect or irrational basis, and based on unlitigated or unargued matters.[10] As such, reconsideration was appropriate and the Court should have corrected its decision.

On the Motion for Reconsideration, the Court ruled that Barresi had not raised any new information. 2T42-20 to 21. The Court ruled that the termination letter terminated the Lease and any discussions thereafter to resurrect anything was as a holdover tenant on different terms, not covered by the guarantors. 2T43-3 to 9. The Court found that Barresi did not meet the reconsideration standard and denied the Motion. 2T43-10 to 2T44-1.

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[10] No one had argued N.J.S.A. 25:1-15 applied to the facts of the case.

On the Cross Motion to amend the Order of August 1, 2022 as to the amount of damage on May 11, 2016, the Court found that Barresi's claims are limited to possible liability for damage to property to be determined at trial. 2T66-2 to 2T67-17; Pa10.

On October 21, 2022, the Court entered an Order awarding Barresi attorney's fees against FZG in the amount of $37,649.31.

On November 29, 2022, the Court issued its written Order denying the Motion for reconsideration and granted the Cross Motion to amend as described above. Pa10.

On February 7, 2023, the parties entered into a Final Judgment by Consent. Pa12-15 Under the Final Judgment by Consent, judgment was entered in favor of Barresi and against FZG on his remaining claims for $166,176.47, and all claims against Liguori, Kromish and Vinson were dismissed with prejudice. However, all parties reserved their rights on appeal such that should the Appellate Court rule that Defendants guaranteed the obligations of FZG after May 11, 2016, then Judgment will be entered against Kromish, Vinson and Liguori for $100,965.77 and $37,649.31 attorney's fees, and judgment for indemnity shall be entered for Kromish and Vinson against Liguori in the amount of $100,965.77 and $37,649.31 attorney's fees, and the judgment for $166,176.47 against FZG and the dismissal of all claims

against Liguori, Kromish and Vinson will be vacated, and those matters will be remanded to the Trial Court for trial.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Appellate courts review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk vs. Berthe, 251 N.J. 73 (2022); Stewart vs. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch vs. Cream-O-Land Dairy, 244 N.J. 567, 582(2021).

II. SUMMARY JUDGMENT STANDARD.

R. 4:46-2(c) compels summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment … as a matter of law." After reviewing the evidence presented "in the light most favorable to the non-moving party," Brill vs. Guardian Life Ins. Co. of Am., 142 N.J. 540, 523 (1995), courts must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted

by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "[F]acts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious," do not raise a genuine issue of material fact. Brill, 142 N.J. at 529 (quoting Judson vs. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)) (internal quotation marks omitted). Barresi, not Kromish and Vinson, was entitled to a grant of partial summary judgment because he established the amount due through April 19, 2020 of $100,965.77. Moreover, he established that Liguori, Kromish and Vinson are liable under their guarantees for the obligation of the Tenant, jointly and severally. Liguori, Kromish and Vinson failed to establish that their personal guarantees were invalid or were terminated.

III. STANDARD FOR PARTIAL SUMMARY JUDGMENT.

In this case, Plaintiff was entitled to partial summary judgment. R. 4:46-1 provides that a party seeking affirmative relief may move for a summary judgment or order on all or any part thereof or as to any defense.

R.4:46-2 provides that "A summary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as the amount of damages). Subject to the provisions of R.4:42-2 (judgment upon

multiple claims) a summary judgment final in character may be rendered in respect of any portion of the damages claimed."

Plaintiff moved for damages through and including April 19, 2020 in the amount of $100,965.77, an amount not disputed by the Tenant, FZG. Moreover, Plaintiff sought judgment against Liguori, Kromish and Vinson on their guarantees for the amount owed by FZG, $100,965.77. In addition, Plaintiff is entitled to judgment against FZG, Liguori, Kromish and Vinson, for attorney's fees pursuant to Paragraph 6 of the Lease, and the Final Judgment by Consent, if the Court rules that Defendants guaranteed the obligations of FZG after May 11, 2016. Pa14.

This will leave for remand to trial damages as to actual expenses incurred following Tenant departure for Tenant damages to leasehold of $27,304.47, and estimated costs due to Tenant failure to maintain premises and remove alterations installed by Tenant in the amount of $138,872.00. Pa14.

IV. THE COURT ERRED WHEN IT RULED THE GUARANTEES WERE TERMINATED ON MAY 11, 2016.ALL OF THE UNDISPUTED FACTS INDICATE THAT THERE WAS A MODFICIATION OF THE LEASE, NOT A TERMINATION.

(Pa8, Pa9, 1T64-12 to 1T66-2)

A. Factually there was no termination of the Lease or guarantees.(1T65-2 to 7).

Based on the facts set forth above, it is undisputed that FZG occupied the premises continuously and without interruption from February 20, 2015 to April 19, 2020 and operated its business out of the premises from February 20, 2015 to April

19, 2020, under the Lease of February 20, 2015. There was a modification of the Lease between the time of notice of termination, April 11, 2016, and the time the termination would have taken place under the terms of the Lease, May 11, 2016 (or May 31, 2016, See fn2) but there was no termination of the lease. The parties agreed on May 5, 2016, that FZG would rescind its termination notice, and Barresi agreed to give a $12,000.00 discount. The parties performed accordingly, whereby FZG did not vacate the premises (as would be required by ¶3 and ¶12(b)) Pa61; Pa65,and Barresi reduced his rental invoices for May, June, July and August (and September, see fn3) by $3,000.00, and FZG paid those invoices for May, June, July and August (and September)at the discounted rate. Moreover, the Consent Order of April 17, 2019 specifically admits that the Lease of February 20, 2015, "remained in effect", meaning it had been in effect since February 20, 2015 and continued to be in effect. Finally, in the termination notice of March 19, 2020, FZG acknowledges the February 20, 2015 Lease was in effect when FZG gave notice it was terminating same. Pa102.

The cardinal rule for the construction of a written lease is to ascertain and to give effect to the mutual intention of the parties. 22 N.J. Prac., Landlord and Tenant Law § 10.1 (5th ed.) citing Onderdonk vs. Presbyterian Homes of N.J., 85 N.J. 171, (1981); Marini vs. Ireland, 56 N.J. 130 (1970); Fargo Realty, Inc. vs. Harris, 173 N.J. Super. 262 (App. Div. 1980); Levin vs. Frishman, 73 N.J. Super. 324 (App. Div.

1962); Schultz vs. Kneidl, 56 N.J. Super. 575 (Law Div. 1959), aff'd 59 N.J. Super. 382 (App. Div. 1960).

Under New Jersey law, even in the absence of any ambiguities in the terms of a contract, the court may consider extrinsic evidence to assist in gleaning the intent of the parties and the import of the contract and its provision. In re Nickels Midway Pier, L.L.C., 2010 WL 3881376 (D.N.J. 2010). The extrinsic evidence may "include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct. (emphasis added). NTH250E, L.L.C. vs. Global Toys Acquisition LLC, 2011 WL 722026 (N.J. Super. Ct. App. Div. 2011) (unpublished) citing Kearny PBA Local No. 21 vs. Town of Kearny, 81 N.J. 208, 221.

The parties to a written lease are bound by its terms and the construction which they, by their conduct, have placed upon such terms. Ganary vs. Linker Realty Corp., 131 N.J.L. 317 (E. & A. 1944). Questions of law on appeal may be decided by the Appellate Court based on the controlling principles and without deferring to the trial judge's analysis. Manalapan Realty, L.P. vs. Township Committee of Tp. of Manalapan, 140 N.J. 366, 378 (1995).

The practical construction placed upon the lease as shown by the conduct of the parties and their acts done under it in partial performance, is a clue to the intention of the parties. Michael vs. Brookchester, Inc., 26 N.J. 379 (1958). If the conduct of the parties, subsequent to a manifestation of intention, indicates that all parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation. Balsham vs. Koffler, 8 N.J. Super. 48 (App. Div. 1950). In Conway vs. 287 Corporate Associates, 187 N.J. 259 (2006), the New Jersey Supreme Court held that extrinsic evidence of the contracting parties' intent is properly considered even "when the written terms of the agreement appear to be clear." The Court instructed that "we permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties". Id. 187 N.J. at 269-70.

When a lease may bear two constructions, one of which makes it legal and the other makes it illegal, courts prefer the construction which renders the lease legal and hence enforceable. Such construction of a lease is favored as will give it force and validity, rather than a construction which makes it meaningless and inoperative. A lease should be so construed as to avoid an absurd or illogical result. Associated Realties Corp. vs. Million Dollar Pier, etc., Co., 6 N.J. Super 369 (App. Div. 1950); Christian Feigenspan vs. Popowska, 75 N.J.Eq. 342 (Ch. 1909); Hoffman vs. Seidman, 101 N.J.L. 106 (E. & A. 1925).

Applying these principles, it is clear that based on the undisputed facts and the actions of the parties, the lease was in effect from February 20, 2015 to April 19, 2020, and was modified for the months of May, June, July, August and September such that the rental was reduced by $3,000.00 for those months. All other terms remained the same.

In its decision, the Trial Court focused on the letter of April 11, 2016, Pa127, but failed to appreciate the Barresi letter of May 6, 2016 memorializing discussions of May 5, 2016 in which FZG agreed to rescind the termination notice and Barresi agreed to a $3,000.00 per month rent reduction for the months of May through August (later extended to September). The Court failed to address the subsequent conduct of the parties consistent with the modification of the Lease. In particular, the Court failed to address the rental discounts; the continuous occupation of the property; payments from May 2016 to April 2020; the Consent Order of April 17, 2019, in which FZG confirmed the Lease agreement of February 20, 2015 remained in effect; and the March 19, 2020 FZG letter that acknowledged and gave notice of termination of the Lease.

Based on the foregoing, this Court should reverse the Trial Court's determination that the Lease and guarantee were terminated on May 11, 2016.

B. The Statute of Frauds, N.J.S.A. 25:1-15, does not apply.
(1T65-8 to 20)

N.J.S.A. 25:1-12 applies to leases. That statute does not apply to leases less than three (3) years. Therefore, in this case the Statute of Frauds does not apply to the limited modification of the lease that occurred on May 5, 2016, memorialized in the letter of May 6, 2016.

N.J.S.A. 25:1-15 applies to guarantees. However, neither the termination notice of April 11, 2016, or the letter of May 6, 2016, refers to the guarantee. Neither the termination notice of April 11, 2016, or the letter of May 6, 2016 are signed by the guarantors. The language of the guarantee remains unchanged, that Liguori, Vinson, and Kromish "personally guarantee the obligations of the tenant herein". As set forth above, the only modification in the May 5, 2016, agreement was the amount of rent of the Lease agreement, for 4 months and the rescision of the termination notice. There simply was no discussion or modification or change of any other terms, including the guarantee language.

The Court used language that the Lease was "terminated" and the May 5, 2016 agreement was an attempt to "reinstate" the Lease. However, the Lease termination was not effective until May 11, 2016 (arguably not until May 31, 2016) See fn2. On May 5, 2016 Barresi and FZG agreed that the termination notice was rescinded and the existing Lease rental terms would be modified. This modification went into effect immediately such that the summer months of May, June, July and August were

immediately discounted by $3,000.00. So the Trial Court erred. It was not a termination and attempt at reinstatement, it was a notice of termination and before the termination could take effect, the termination was rescinded and the rental terms of the Lease were modified.

The bottom line is that the Statute of Frauds is not applicable because it was not the guarantee that was being modified, it was the Lease terms involving the rent that was modified. The guarantee language remained the same. Thus, N.J.S.A. 25:1-15 was simply not applicable.

Even if the Statute of Frauds applied to the lease modification through some mental gymnastics, which it does not, part performance takes the modification out of the Statute of Frauds. Deutsch vs. Budget Rent-A-Car, 213 N.J. Super. 385 (App. Div. 1986). In this case clearly there was part performance. The parties agreed that in lieu of terminating the Lease, the landlord would agree to a $3,000.00 discount for the months of May, June, July, and August. Barresi thereafter invoiced FZG for $9,250.00 with a discount of $3,000.00 and a net rent due of $6,250.00 for the months of May, June, July, August, (and September, see fn3), FZG paid the amount of $6,250.00 for the months of May, June, July, and August and September. As indicated in Pa77, no rental defaults occurred until October of 2016. Thus, the modification was made on May 5, 2016 and both parties performed their respective obligations under that modification for the months of May, June, July, and August

(and September) of 2016. Therefore, there can be no question, through part performance on the part of FZG (and full performance by Plaintiff) that the parties had agreed to the modification. As set forth above, the part performance would take it out of the Statute of Frauds, if the Statute of Frauds applied.[11]

C. The requirement that any modifications must be in writing was waived. (Not raised below)

Defendants may raise Paragraph 17 of the Lease, which provides "this Lease contains the entire agreement between the parties hereto and may not be modified or terminated except by agreement in writing signed by both of the parties hereto."

However, it has long been the law of the State of New Jersey that provisions requiring any changes to be made in writing can be waived.

> Disputes between contractors and owners as to extra work and changes on building or working contracts are as old as the practice of contracting for such work and are a fertile cause of litigation. Headley vs. Cavileer, 82 N.J.L. 635, 637 (E&A 1912).
>
> The "fundamental difficulty" encountered in this field in litigation is that "there is no statute requiring such contracts.... to be in writing [.]" Id. at 637-638. No matter how "solemn in form" the original agreement, parties are free to renounce or modify it in any way they see fit. Id. at 638 (quoting Cooper vs. Hawley, 60 N.J.L., 560, 563

[11] Moreover, there is an exception to the Statute of Frauds for oral guarantees where the oral guarantee is to benefit the guarantor. This is known as the "leading object" exception. See Walder, Sondak, Berkeley Brogan vs. Lipari, 300 N.J. Super 67, 68 (App. Div. 1997), citing Schoor Associates vs. Holmdel Heights Construction Co., 68 N.J. 95, 101-02 (1975). Here, there can be no dispute that Liguori, Kromish and Vinson were all members of FZG and the "leading object" of the guarantee was to benefit the success of the business in which all three guarantors were actively engaged.

> (E&A 1897). Therefore, a "writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives". Homeowners Construction Company vs. Glen Rock, 34 N.J. 305, 316 (1961). See also Salvatore vs. Trace, 109 N.J. Super. 83, 103 (App. Div. 1969) affirm. 55 N.J. 362 (1970) (observing that contracting parties can waive a writing requirement through their conduct).

These aged pronouncements reflect little has changed over time.... Michael A. Walter Builders, Inc. vs. Bednar, 2011 WL 4407462, at *5. (App. Div. 2011). See also Goldstein vs. Barclay Amusement Corporation, 123 N.J.L. 166 (1939) at 169 (it is always within the province of the contracting parties to waive a provision .... and to modify a written contract by parole, unless the agreement is of a character required to be in writing by a peremptory rule of law.)

See also Stark vs. National Research & Design Corp., 33 N.J. Super. 315, 322 (1950) where the Court found that the landlord's oral consent to and approval of an assignment of a lease constituted a waiver of the covenant against assignment without written consent. Citing Dries vs. Trenton Oil Co. Inc., 17 N.J. Super. 591 (App. Div. 1952) and Van Dusen Aircraft Supplies, Inc. vs. Terminal Const. Corp., 3 N.J. 321, (1949).

Therefore, based on the foregoing authority, there is no requirement of a writing and where it is clear the parties made the modification, the Court will find a waiver of the writing requirement.

Here, it is clear from the surrounding facts that the parties orally modified the Lease, and in so doing waived the writing requirement contained in Paragraph 17 of the Lease.

D. Offer and Acceptance, Partial Performance, and Practical Construction. (1T64-12 to 1T66-2)

Here, it is clear from the surrounding facts that the Lease commenced on February 20, 2015, was slightly orally modified on May 5, 2016, to allow $12,000.00 in discounts (later increased to $15,000.00) and terminated on April 19, 2020.

Moreover, the oral modification was placed in writing by Mr. Barresi. Although FZG did not agree to the oral modification in writing, FZG performed according to the modification, by accepting a $3,000.00 discount for the months of May, June, July, and August (and later September, see fn3). By partially performing under the modification, FZG has manifested its consent to the modification, both the reduction in rent, and the recission of the termination notice. Deutsch, supra; See also Weichert Co. Realtors vs. Ryan, 128 N.J. 427, 436 (where an offeree accepts the offeror's services without expressing any objection to the offer's essential terms, the offeree has manifested assent to those terms); Association Group Life, Inc. vs. Catholic War Veterans, 120 N.J. Super. 85, 95 (App. Div. 1971) (an offer which invites acceptance by performance rather than by a promissory acceptance will give rise to a binding contract where the offeree begins the invited performance or tenders

part of it). Moreover, Plaintiff fully performed the modification by accepting five (5) months of reduced rents.

Even without implying consent to the modification, the Court can simply accept FZG's statement in the Consent Order of April 17, 2019 where FZG stipulates the Lease of 2015 "remains in effect". By stipulating that the Lease "remains in effect", FZG is acknowledging that the Lease of February 20, 2015 has been in effect since February 20, 2015 and continued to be in effect on April 17, 2019 and thereafter until terminated in April of 2020.

Similarly, it is undisputed that FZG occupied the premises and ran its business out of the premises continuously and uninterrupted and without interference from February 20, 2015 to April 19, 2020. Those facts have already been set forth above. Practical construction of the contract by the parties is given controlling weight in determining a contract's interpretation. Barila vs. Bd of Education, 241 N.J. 595, 616 (2020); Serico vs. Rothberg, 234 N.J. 168, 178 (2018). Here there is no question based on the parties' own actions, that there was an agreement to rescind the termination and modify the rental amounts in FZG's favor. On May 11, 2016, (or May 31, 2016, fn2) FZG did not vacate the premises as required by Paragraphs 3 and 12(b) of the Lease. Immediately after the May 5, 2016 oral agreement, Plaintiff issued the May 2016 letter memorializing the agreement. Plaintiff invoiced and FZG paid rent of $9,250.00 less a $3,000.00 discount per month for a total of $6,250.00

for the months of May, June, July, and August (and September). Thereafter Plaintiff invoiced FZG $9,250.00 monthly, and FZG paid rent monthly (though not in the agreed amount). On April 17, 2019 the parties came to an agreement that provided a payment plan for all of the arrearages that had built up. The parties specifically stipulated and agreed in the Consent Order of April 17, 2019 that the February 20, 2015 Lease "remained in effect". Thereafter, the Plaintiff continued to invoice FZG every month and FZG paid every month according to the Consent Order (but not always in the full amount). On March 19, 2020 FZG sent its termination letter effective April 19, 2020 (arguably April 30, 2020, see fn2) and thereafter physically vacated the premises. It is undisputed that FZG occupied the premises continuously and without interruption from February 20, 2015 through April 19, 2020. The parties' own actions are given controlling weight, Barila, supra, Serico, supra, and their actions demonstrate that the Lease was continuously in effect from February 20, 2015 to April 19, 2020.

E. Modification of the lease does not terminate the liability of the guarantors. (Not raised below)

Undoubtedly Defendants will argue that a modification of their obligations under the Lease terminates the guarantee. However, as Defendants well know the case law provides that the modification would have to materially increase their undertaking to allow termination. New Jersey's rule governing modification of obligations between the principal obligor and the obligee reflects the Restatement

Rule that a secondary obligor is not discharged from the original obligations undertaken unless "the modification creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the transaction prior to modification. Center 48 Ltd. Partnership vs. May Dept. Stores Co., 355 N.J. Super. 390, 410 (quoting Restatement (Third) of Suretyship and Guarantees §41b)(i) (1996). See also Aldrich Nine Associates vs. Foot Locker Specialty Inc., 2005 WL 3005715 (App. Div. 2005) (unpublished) at *3. A material alteration has been defined as "one which alters the legal identity of the principal's contract, substantially increases the loss to the guarantor, or places the guarantor in a different position. Center 48 Ltd. Partnership, at 408-409 (citing S-Mart, Inc. vs. Sweetwater Coffee Co., 744 N.E., 2d. 580, 586 (Ind. Ct. App.), transfer denied, 761 N.E., 2d. 416 (Ind. 2001); Aldrich Nine Associates, Id. Here the undertaking of the guarantors was not increased, but actually decreased by $12,000.00 (later increased to $15,000.00, see fn3). As such, Defendants cannot argue that the modification of the Lease terminated their obligations under the guarantee.

The terms of the guarantee are open ended and cover all obligations of the tenant. Not only does this include the rent, it includes Tenant's obligation to surrender the premises at the end of the term (Paragraph 3) to maintain, repair the premises and building and keep same in good repair and condition (Paragraph 6), payment of water and sewer rents, municipal improvement assessments, and any

other charges made by any public authority (Paragraph 7). Such a wide ranging guarantee was necessary because the landlord was giving possession of a $2 million dollar building to a LLC with no assets, and his only security for the tenant meeting the obligations of the Lease and returning the property to the landlord was the personal guarantees of Liguori, Kromish and Vinson. Deposition of Barresi. Pa90-91.

F. FZG was not a holdover tenant. (1T66-2 to 5)

A tenancy from month to month is a tenancy which continues indefinitely from one month to another until terminated by a proper notice to quit, or other appropriate action. It is a particular type of periodical tenancy, and similar to a tenancy from year to year in many respects. The chief difference consists of the notice required to terminate it. It is a continuing tenancy and not a new relationship each month. 22 N.J. Prac., Landlord and Tenant Law § 8.51 (5th ed.), citing Harry's Village, Inc. vs. Egg Harbor Township, 89 N.J. 576 (1982).

The Trial Court turns the concept of a holdover tenant on its head. A holdover tenant is a tenant that remains after the landlord has terminated its Lease. A holdover tenant remains in possession until such time as the landlord can, through legal process, remove him. The purpose of the Holdover Statute, N.J.S.A. 2A:42-5, is to encourage the tenant to move from the premises on the specified date or as close to that date as possible. Lorril Co. vs. La Corte, 352 N.J. Super. 433 (App. Div. 2002).

The legislation requires a holdover tenant to pay double rent pursuant to the Holdover Statute, not only to encourage the tenant to move as quickly as possible after the specified "move out" date passes, but also to award the landlord rental income for the period of the tenant after the tenant finally vacates the premises. Id. Here, there can be no question that Barresi did not consider or treat FZG as a holdover tenant in May of 2016. Barresi did not seek to evict FZG at that time, or charge double rent, nor did Barresi issue a notice to quit or notice of termination. The purported "termination" of the Lease was on the tenant's part and not on the landlord's part. If the tenant truly "terminated" the Lease on April 11, 2016, it would have vacated the premises as required by Paragraph 3 of the Lease, "End of Term", Pa61, and peaceably deliver up and surrender possession of the premises to the landlord and deliver to landlord at its office all keys to the building, as required by Paragraph 12(b). Pa65. No such vacation or surrender of the premises occurred. These provisions of the Lease belie the Trial Court's conclusion that the tenant had "terminated" the Lease. A surrender puts an end to the lease, and also works a termination of the tenancy. 23A N.J. Prac. Landlord and Tenant Law § 39.6(5th ed.) citing Dector vs. Phelps, 136 N.J.L. 53 (Sup. Ct. 1947); Sypherd vs. Myers, 80 N.J.L. 321, 324 (E. & A. 1910); Fleming vs. Matter Construction Co., 11 N.J. Misc. 129, 132 (Cir. Ct. 1933).

A surrender of the lease terminates the liability of the lessee's guarantor of the rent. Id. citing Liskovsky vs. Blau, 114 N.J.L. 324 (E. & A. 1935). Delivery of possession of the demised premises by the lessee to the lessor and the acceptance thereof by the lessor, are essential to the creation of a surrender by act and operation of law. 23A N.J. Prac., Landlord and Tenant Law §39.21 (5th ed.) citing May vs. Van Benschoten, 13 N.J. Misc. 268 (Sup. Ct. 1935); Donan Development Co. vs. Donan Hardware, 34 N.J. Super. 293 (App. Div. 1955).

Here, there was clearly no surrender of the premises and, therefore, the tenant's obligations were not terminated. The Court's finding that the Lease was "terminated" and FZG became a "holdover tenant" is a fiction created by the Trial Court, but does not comport to the facts of the case, or the law.

Therefore, the Trial Court's finding of a "holdover tenancy" is simply error.

Moreover, Defendants are estopped to improperly use the Holdover Statute as a "sword" when the statute was clearly enacted for the benefit of the landlord. The Defendants would have the Court rule that the tenant can simply send a "termination" notice without surrendering the premises, and thereby cut off the liability of its guarantors without vacating the premises and returning possession to the landlord.

In the alternative, even if this Court should find that the tenant was a holdover, the guarantee still applies.

First of all, the guarantee guaranteed "all obligations of the tenant herein". In a holdover situation, the tenant is bound by the terms of the prior lease. Newark Park Plaza Associates Ltd. vs. City of Newark, 227 N.J. Super. 496 (Law Div. 1987) citing Haymen vs. Bishop, 15 N.J. Super. 266, 269 (App. Div. 1951). It follows then that even if FZG was a holdover tenant, (which is disputed) all of its obligations as a holdover tenant were defined by the February 20, 2015 Lease, and all obligations "of the tenant herein" were guaranteed by Liguori, Kromish, and Vinson.

Again, alternatively, if the Court finds FZG was a holdover tenant, As Liguori, Kromish and Vinson have guaranteed all obligations of the tenant under the February 20, 2015 Lease, they guaranteed the tenant's obligation to surrender the premises. If the Trial Court is going to engage in the fiction that the Lease was terminated, it is undisputed that the premises were not surrendered and, therefore, all obligations under the Lease continued. See law re: surrender above. All of the damages resulted from the failure to surrender the premises, including the rental and other obligations for which FZG was found liable.

Therefore, in the alternative, even if the tenant was a holdover, (which is vigorously disputed) the obligations guaranteed continued until the tenant surrendered the premises in 2020.

V. THE COURT ERRED WHERE IT BASED ITS DECISION ON A STATUTE OF FRAUDS THAT WAS NOT APPLICABLE, WAS NOT RAISED OR SUGGESTED BY EITHER PARTY, AND ERRED WHEN IT FAILED TO CORRECT ITS MISTAKE ON THE MOTION FOR RECONSIDERATION.
(2T42-20 to 21; 2T43-3 to 2T-44-1)

A. Motion for Reconsideration.

The Standard for Review for a Motion for Reconsideration is as follows:

A motion for reconsideration seeking to alter or amend a judgment or order:

> shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.
> R.4:49-2.

Reconsideration is appropriate where "either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious the Court either did not consider, or failed to appreciate the significance of probative, competent evidence …" Cummings vs. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria vs. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Motion should be denied where the Court's decision was not palpably incorrect or irrational. Flecker vs. Statue Cruises, LLC 444 N.J. Super. 31, 36, 40, 44 (Law Div. 2013).

B. A Motion for Reconsideration is Particularly Useful Where an Opinion or Order Deals With Unlitigated or Unargued Matters.

In this matter, the Court decided the issue of whether the 2015 Lease was terminated on May 11, 2016 based on the Statute of Frauds, N.J.S.A. 25:1-15, which is applicable to guarantees. No party argued that N.J.S.A. 25:1-15 applied to the rescission of the termination notice on May 5, 2016, memorialized in the letter of May 6, 2016. Pa74.

The Court, on its own, suggested that N.J.S.A. 25:1-15 was applicable for the first time at oral argument on July 29, 2022. 1T65-8 to 20. The Court did not cite to either counsel's Briefs or arguments and gave counsel no advance notice that it would be deciding the issue based on that statute. Therefore, it was appropriate for Plaintiff to file a Motion for Reconsideration addressed to that issue.[12] R. 4:49-2 is particularly useful where an opinion or order deals with unlitigated or unargued matters. Pressler and Verniero, current N.J. Court Rules, comment R. 4.49-2 [2] citing Calcaterra vs. Calcaterra 206 N.J. Super. 398, 403-404 (App. Div. 1986).

As the Court raised the issue for the first time in its decision, it was only appropriate to allow counsel to address the application of N.J.S.A. 25:1-15.

[12] The Trial Court also raised for the first time in its opinion that FZG was a "holdover" tenant. No party had briefed this issue.

Not only was it appropriate for Plaintiff to address N.J.S.A. 25:1-15 but it was also appropriate for Plaintiff to argue part performance, practical construction, and the lease requirement that any modifications must be in writing was waived, as all those arguments flowed from the application of N.J.S.A. 25:1-15.

Plaintiff will not repeat those arguments here. They are made above. See Pb23-27.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court reverse so much of the Trial Court's Order of August 1, 2022, that finds the guarantees were terminated on May 11, 2016, and enter judgment in favor of Barresi and against Liguori, Kromish, and Vinson, jointly, severally, or in the alternative, for $100,965.77 through April 20, 2020, and for $37,649.31 in attorney's fees, and remand the matter to the Trial Court to determine any amounts due on Barresi's remaining claims. Pa12-15.

LAW OFFICE OF McINERNEY AND SCHMIDT, L.L.C.
Attorneys for Appellant

BY: _____
SANDFORD F. SCHMIDT

Dated: July 25, 2023

SAMUEL BARRESI, PLAINTIFF/APPELLANT VS. FZG ENTERPRISES, LLC d/b/a BIG LEAGUE DREAMS a/k/a FGZ ENTERPRISES, LLC, GARY LIGUORI, ZANE KROMISH, AND FRED VINSON, DEFENDANTS/RESPONDENTS/ CROSS APPELLANTS	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002159-22 On Appeal From: SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION DOCKET NO. BUR-L-1201-20 SAT BELOW: Honorable Eric G. Fikry, J.S.C. Honorable Sander Friedman, J.S.C. CIVIL ACTION

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS ZANE KROMISH AND FRED VINSON

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PRELIMINARY STATEMENT

This is a landlord tenant action in which Plaintiff, Samuel Barresi ("Plaintiff"), the owner of a commercial property located at 15 Fostertown Road, Medford, New Jersey (the "Leased Premises") seeks to recover over three hundred thousand dollars based upon alleged breaches of a month to month lease for the Leased Premises dated February 20, 2015 (the "Lease"). The sole tenant named in the Lease is Defendant FZG Enterprises, LLC, a New Jersey limited liability company ("FZG"). It is undisputed that pursuant to the terms of the Lease, both Plaintiff, as landlord and FZG, as tenant, had the right to terminate the Lease at any time upon giving thirty (30) days advance written notice to the other party. It is further undisputed that on April 11, 2016 FZG issued a valid notice of termination of the Lease to Plaintiff with an effective lease termination date of May 11, 2016.

Plaintiff seeks to recover its alleged damages not only from FZG, but also against Defendants Zane Kromish, Fred Vison and Gary Liguori who are present and prior members of FZG. This claim is made even though none of the members of FZG signed the Lease other than in their capacities as members of the LLC and even though all damages sought by Plaintiff accrued after May 11, 2016, the termination date of the Lease.

This office represents Defendants Kromish and Vinson. In 2016 Mr. Kromish and Mr. Vinson sold 100% of their interests in FZG to Gary Liguori, the remaining member of FZG. It is undisputed that Mr. Kromish and Mr. Vinson had nothing to do with FZG or the Leased Premises after the effective date of the sale of their interests to Mr. Liquori. It is also undisputed that neither Mr. Vinson nor Mr. Kromish had any written or verbal communication with Plaintiff during the period February 20, 2015 (the date the lease was signed) and January 12, 2019 when Plaintiff issued correspondence to Mr. Vinson, Mr. Kromish and Mr. Liguori, claiming for the first time that they were all personally liable for the obligations of FZG regarding its occupancy of the Leased Premises.

In response to cross motions for summary judgment the Trial Court made the following rulings that are the subject of the cross-appeals in this matter:

1. Based solely upon language tucked away in the "WITNESS WHEREOF paragraph of the Lease, the Court found that Defendants Kromish, Vinson, and Liquori did personally guarantee the obligations of FZG under the Lease.

2. The guaranty obligations of Defendants Kromish, Vinson, and Liquori terminated as of May 11, 2016, the effective date of the termination of the Lease as found by the Court.

In their cross-appeal, Defendants Kromish and Vinson request that this Court reverse ruling number 1 above because the Trial Court did not recognize the ambiguity in the language of the Lease as to guarantees, did not apply the strict rule of construction applicable to guarantees, did not properly give weight to the fact that there was no separate signature line by which Kromish, Vinson and Liquori signed in their individual capacities and did not give any weight to the lease used by Plaintiff for the Leased Premises with the immediately prior tenant, which included a separate page for the individual personal guarantees and required the individuals to sign twice, once as a member of the LLC tenant and once on the separate guaranty page in their individual capacities.

If this Court reverses the Trial Court's ruling number 1, it need not undertake a review of the second ruling noted above. If this Court does reach the second issue the Court should affirm the Trial Court's ruling on the second point since the Trial Court properly ruled that that the Lease was terminated as May 11, 2016 and that any personal guaranty terminated as of the Lease termination date. The Trial Court properly based this ruling on the undisputed fact that at no time did any of the individual members of the tenant LLC sign any writing or provide any verbal communication that reaffirmed that any personal guarantees that might have been given survived the lease termination.

PROCEDURAL HISTORY

Plaintiff filed its complaint in this matter on June 18, 2020 (Pa160 and an amended complaint on July 7, 2020. Pa25.) Count One of the amended complaint states a claim for unpaid rent against Defendant FZG Enterprises, LLC ("FZG") under a month to month lease between Plaintiff and FZG dated February 20, 2015 (the "Lease"). Count Two of the amended complaint states a claim against Defendants Kromish, Vinson and Liquori in their individual capacities based upon the assertion that these Defendants personally guaranteed the obligations of FZG under the Lease.

Defendants Kromish and Vinson filed their Answer and Affirmative Defenses to the Amended Complaint on November 19, 2020. Pa30. In this pleading these defendants deny any liability for the obligations of FZG under the lease and seek a dismissal of Count Two of the Amended Complaint. On November 19, 2020 Defendants FZG and Liquori filed their Answer and Affirmative Defenses. Pa38. In this pleading these defendants deny any liability for any amounts due the Plaintiff.

On January 15, 2021 Defendants Kromish and Vinson filed a cross claim for indemnity against Defendants FZG and Liquori. Pa45. Defendants FZG and Liquori filed an answer to this cross claim on January 29, 2021. Pa49.

The parties exchanged written discovery and the depositions of all parties were taken on September 8, 2021 and September 9, 2021. During the discovery period, counsel for Defendants Kromish and Vinson repeatedly requested the production of the lease used by Plaintiff for the Leased Premises for the tenant that immediately proceeded the tenancy of FZG. The requested lease, which contains guaranty provisions that were drastically different than those found in the FZG Lease, was not produced until March 1, 2022, during the pendency of the cross motions for summary judgment. DKVa 001.

On December 15, 2021 Plaintiff filed a motion for partial summary judgment seeking to obtain a judgment for part of its alleged damages as against all Defendants including the individual defendants on the personal guaranty claim. Pa51. On January 11, 2022 Defendants Kromish and Vinson filed opposition to Plaintiff's motion and filed a cross motion that sought a dismissal of all claims against Defendants Kromish and Vinson. Pa117. In this submission Defendants Kromish and Vinson argued: (a) the language in the Lease was not sufficient to create a personal guaranty of the obligations of FZG under the Lease; (b) even if a personal guaranty was created the personal guaranty was

terminated upon the termination of the Lease effective May 11, 2016 and (c) even if a personal guaranty was created and was not terminated with the termination of the Lease, the personal guaranty was revoked prior to the accrual of amounts currently due under the Lease. Also, on January 11, 2022, Defendants FZG and Liquori filed opposition to Plaintiff's motion for partial summary judgment, arguing that Plaintiff was not entitled to the requested relief.

On March 2, 2022, counsel for Defendants Kromish and Vinson issued correspondence to the Court requesting permission to submit to the Court (as part of the cross motions for summary judgment) the lease entered into between Plaintiff and the immediately prior tenant at the Leased Premises. DKVa 001.

The Court heard oral argument on the cross motions on July 29, 2022. T1. On August 1, 2022 the Court issued two orders providing its rulings on the cross-motions for summary judgment. Pa 8, Pa9. The Court ruled that the language of the Lease was sufficient to create a personal guaranty of the lease obligations of FZG by Defendants Kromish Vinson and Liquori but that the personal guaranty obligations of the individual Defendants terminated as of May 11, 2016, the effective date of the termination of the Lease. The Court did not reach the guaranty revocation argument raised by Defendants Kromish and Vinson. T1.

On August 24, 2022 Plaintiff filed a motion for reconsideration of the Court's August 1, 2022 orders. Pa254. On August 30, 2022 Defendants Kromish and Vinson filed opposition to the motion for reconsideration and a cross motion to amend judgment to clarify what amounts might be found due against Defendants Kromish and Vinson under the Court's orders. Pa 259. On September 1, 2022 Plaintiff submitted a reply to the foregoing submission. The Court heard oral argument on these cross motions on September 23, 2002. T2. By order dated November 29, 2022 the Court denied the motion for reconsideration and granted the motion to amend the judgment. Pa10. The Court entered Final Judgment by Consent on February 7, 2023, preserving the parties right to appeal certain issues as set for the Final Judgement. Pa 12.

Plaintiff filed its Notice of Appeal to this Court on March 23, 2023 and an Amended Notice of Appeal on March 27, 2023. Defendants Kromish and Vinson filed a Cross Notice of Appeal on April 5, 2023. Defendants FZG and Liquori filed a Cross Notice of Appeal on April 6, 2023.

FACTS

On February 20, 2015, Plaintiff Samuel Barresi ("Plaintiff") as Landlord and Defendant FZG Enterprises, LLC d/b/a Big League Dreams ('FZG") as Tenant entered into a month to month lease for commercial property located at 15 Fostertown Road, Medford, New Jersey ("the Lease"). Pa59. At the time

the Lease was executed FZG had three members: Gary Liguori ("Liguori"), Zane Kromish ("Kromish") and Fred Vinson ("Vinson"). The Lease was signed by Liquori, Kromish and Vinson but all in their capacity as members of FZG. See signature lines at page 11 of the Lease. Pa70. Critically for purposes of the cross appeal, none of the members of FZG signed the lease in their individual capacities as there was only one signature line for each (which was the signature line for members of FZG).

Paragraph 9 of the Lease has the heading "Insurance and Guarantees" but the section includes no language at all regarding guarantees. Pa 63-64. The only language in the entire lease that mentions a personal guaranty is tucked away in the "IN WHITNESS WHEREOF" paragraph. The entire paragraph provides as follows:

"IN WHITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written. Additionally, the undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant herein."

Pa70. This language does not appear in any of the numbered paragraphs of the Lease where substantive terms are put forward. Moreover, no separate guaranty agreement or even separate guaranty page is attached to the Lease.

The confusing and "buried' guaranty language in the Lease is in sharp contrast to the clear and unequivocal language that Plaintiff used to state a

personal guaranty in the lease Plaintiff used for the immediately preceding tenant for the Leased Premises (the "Prior Lease"). DKV001. The Prior Lease includes a separate page announcing in Block Caps: "INDIVIDUAL PERSONAL GUARANTEES". The separate page then includes the following language as a separate paragraph and not buried in a "WHITNESS WREREOF" clause:

"The undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant hereunder, including but not limited to the Tenant's obligations for rent and additional rent."

DKV001. The Prior Lease than goes on to include a separate set of signature lines to evidence the agreement by the signatories to be personally liable for the obligations under the lease. Id. Notably, in the Prior Lease the members of the tenant LLC **signed in two places**, once to evidence the LLC's agreement as tenant to be bound by the lease and a second time on the personal guaranty page to evidence agreement to be personally liable for the obligations of the LLC tenant under the lease. The contrast of the two leases, which are virtually identical in form except for the guaranty language, clearly demonstrates that Plaintiff knew how to draft a clear personal guaranty provision if Plaintiff wanted to but that Plaintiff simply choose not to do so for the Lease in the case at bar.

It is undisputed that the Lease in the case at bar was prepared by counsel for the Plaintiff and not by any of the Defendants. Deposition of Plaintiff 10:8-18. Pa130. Plaintiff also admits that the lease that was executed was the only draft of the Lease provided to the members of FZG and that there are no writings (including e-mails and texts) between the Plaintiff and any of the members of FZG regarding the terms of the Lease or the requirement of a personal guaranty that were exchanged prior to the execution of the Lease. Pa130-31. At their depositions Mr. Kromish and Mr. Vinson both testified that they did not believe their execution of the Lease created any personal guaranty on their part that guaranteed the obligations of FZG under the Lease and that Plaintiff never told them that a personal guaranty was required under the lease. Deposition of Kromish 10:16-21, (Pa 132), 13:25-14:13 (Pa 133-34); Deposition of Vinson 21:5-11 (Pa135).

On April 11, 2016, Liguori, on behalf of FZG issued correspondence to Plaintiff that FZG was terminating the lease of 15 Fostertown Road, Medford, New Jersey, effective 30 days from the date of Plaintiffs receipt of the notice. Pa126. Plaintiff maintains that the lease termination was rescinded by FZG in a conversation that took place between Plaintiff and Liquori on May 5, 2016. Liquori denies that he verbally rescinded the termination of the Lease. Pa138. Plaintiff further asserts that the rescission was confirmed in a letter dated May

6, 2016 that was addressed to FZG c/o of Liquori. Pa74. The May 6, 2016 letter was never co-signed by any of the members of FZG nor is there any other writing that confirms the rescission of the notice of termination. Paragraph 17 of the Lease specifically provides that "no terms may be modified except by agreement in writing signed by both parties."

In 2016 both Kromish and Vinson sold all interests they held in FZG to Liquori by way of Bill of Sale and Assignment and Assumption Agreements that have an effective date of August 31, 2016. Pa112-13; Pa115-16. At his deposition Liquori testified that Plaintiff had notice of the sale of the Kromish and Vinson interests to Liquori at or about the time of these transactions. Pa136.

Between the execution of the Lease on February 20, 2015 and January 12, 2019 Plaintiff had no verbal or written communication with either Kromish or Vinson at all. During this period all communications regarding the rental of the property were between Plaintiff and Liguori. Pa 131. For example, all monthly invoices of amount due were issued exclusively to FZG c/o Liquori. Pa131. On January 12, 2019, Plaintiff issued correspondence for the first time ever to Kromish and Vinson claiming for the first time ever that Kromish and Vinson (and Liguori) were personally liable for monies owed by FZG. Pa76. Vinson promptly responded to the January 12, 2019 correspondence in a series of e-mails between he and Plaintiff during the period January 18, 2019 and January

25, 2019.Pa79-88. In these e-mails Vinson asserts that he and Kromish have no personal liability for the debts of FZG.

On March 27, 2019, counsel for Mr. Kromish and Mr. Vinson issued correspondence to Plaintiff that discussed the prior termination of the lease and included the following unequivocal statement:

> "It is my understanding that you have previously been advised that Mr. Kromish and Mr. Vinson no longer have any interest in FZG or in the leased premises. This is additional notice of such facts. Further this is notice that Mr. Kromish and Mr. Vinson have previously revoked (by reason of the lease termination described above) and hereby revoke again any personal guarantees that they have issued in the past that pertain to any lease obligations owed by FZG for the leased premises. Accordingly, if you decide to continue to lease the leased premises to FZG in the future and do not exercise your right to terminate the lease you shall do so without the benefit of any personal guarantees by either Mr. Kromish or Mr. Vinson."

Pa127.

On or about March 7, 2019 Plaintiff filed a Landlord Tenant Complaint seeking the eviction of FZG from the Fostertown Road property. Pa93-98. Notably, the only defendant named in the complaint is FZG. Neither Kromish nor Vinson are named as defendants in the complaint. On or about April 17, 2019 Plaintiff and FZG executed a Consent to Enter Judgment which provides for the payment of certain amounts in order for FZG to remain in the premises. Pa 22. Again, notably this Consent to Enter Judgment was not signed by either Kromish nor Vinson.

LEGAL ARGUMENT

A. Summary Judgment Standard

Rule 4:46-2(c) compels summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment ... as a matter of law." After reviewing the evidence presented "in the light most favorable to the non-moving party," Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 540, 523 (1995), courts must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "[F]acts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious," do not raise a genuine issue of material fact. Brill, 142 N.J. at 529 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)) (internal quotation marks omitted). Kromish and Vinson are

entitled to a grant of summary judgment because all of their defenses are established as a matter of law and don't depend on any disputed facts.

B. Guaranties Are to Be Strictly Construed Against the Party Seeking Enforcement and Against the Party Who Drafted the Guaranty

Under clearly established New Jersey Law, guaranty agreements are strictly construed against the party "at whose insistence such language was included" and are to be "interpreted most strongly against the party" who inserted the terms of guaranty. Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002). "It has long been settled law that a [guarantee] is chargeable only according to the strict terms of its undertaking and its obligations cannot and should not be extended either by implication or by construction beyond the confines of its contract." Peoples Nat'l Bank v. Fowler, 73 N.J. 88, 101 (1977) (quoting Monmouth Lumber Co. v. Indemnity Ins. Co. of N. Am., 21 N.J. 439, 452 (1956)). Although a guarantor's obligation cannot extend beyond the strict terms of his or her promise, "the terms of a guarantee agreement must be read in light of commercial reality and in accordance with the reasonable expectations" of the parties involved. Ctr. 48 Ltd. P'ship, 355 N.J. Super. at 405-06. Cf. Nat'l Westminster Bank N.J. v. Lomker, 277 N.J. Super. 491 (App. Div. 1994) (language contained within the contract is strictly construed against the entity that insists on the disputed language).

A second applicable rule of construction is that "[A]mbiguous terms are generally construed against the drafter of the contract." Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008). Here it is undisputed that the Lease Agreement was drafted by the attorney for Plaintiff and that no proposed revisions to the Agreement were ever submitted by any of the Defendants.

Both of the foregoing rules weight heavily in favor of the position of Defendant Kromish and Defendant Vinson that they owe nothing to Plaintiff and support a ruling by the Court that (a) these individuals never personally guaranteed the obligations of FZG Enterprises, LLC under the month to month lease dated February 20, 2015; (b) to the extent a personal guaranty was given it was terminated with termination of the month to month lease in 2016 and (c) to the extent a personal guaranty was given and was not terminated with termination of the lease in 2016, the termination of the lease was revoked on three separate occasions, all before Plaintiff entered into a consent judgment with FZG.

C. Defendants Zane Kromish and Fred Vinson Did Not Personally Guarantee the Obligations of FZG Enterprises, LLC Under the February 20, 2015 Lease

Defendants Zane Kromish and Fred Vinson are not listed as Tenants under the Lease, as the only tenant under the lease is FZG Enterprises, LLC. Thus,

neither Mr. Vinson nor Mr. Kromish have any personal liability for any obligations of FZG under the lease unless they are found to have personally guaranteed the obligations of FZG. Plaintiff's assertion that they have made such a guaranty hangs on a single sentence in the February 20, 2015 Lease which appears on the last page of the lease and tucked in a WITNESS WHEREOF clause and reads in full as follows: "Additionally, the undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant herein." Notably, there is no separate guaranty agreement or even a separate page or paragraph of the lease that further speaks to the alleged personal guaranty. Moreover, the position that the above language constitutes an enforceable personal guaranty is directly contrary to other parts of the Lease. Thus, paragraph 9 of the Lease has the heading "Insurance and Guarantees" but the section includes no language at all regarding guarantees. Perhaps most importantly, the sole lease signature line for Zane Kromish reads "*Zane Kromish-FXG Enterprises, LLC*" and the sole lease signature line for Fred Vinson reads *Fred Vinson-FXG Enterprises, LLC*." Pa 70. These signature lines clearly indicate that Mr. Kromish and Mr. Vinson are signing the lease on behalf of the entity only and are not signing as guarantors in their individual capacity. The important component missing is a signature line for either Mr. Kromish or Mr. Vinson that expressly indicates that they are agreeing to guaranty the

obligations under the lease in their individual capacity. Under New Jersey law the absence of such a signature line for either of these individuals is fatal to Plaintiff's claim of personal guaranty.

An important case that was discussed at length in the oral argument on the cross motions for summary judgment is City of Millville v. Rock, 683 F. Supp. 2d. 319 (D.N.J. 2010). In this action individuals who signed two promissory notes that evidenced two loans made to a corporation sought summary judgment determining that they had no personal liability under the notes. The first note (in the amount of $311,430.00) included the following language: "*The borrower shall personally guarantee the repayment of all funds borrowed.*" Id. at 323 (emphasis added). This note was signed by Defendants Nave and Rock with official titles (Chairman & CEO and Vice Chairman and General Counsel) immediately following their name. Id. The second note (in the amount of $700,000.00) included the following language: "*The undersigned trusts hereby guarantee the repayment of this loan made to the aforesaid corporation.*" Id. The second note was signed the same way as the first except the individuals signed the Note a second time evidencing the guarantee of the loan by their respective trusts. Id.

The Court granted summary for both Nave and Rock finding that neither was personally liable under either note. In reaching this conclusion the Court focused on two considerations which they indicated were relevant under New Jersey law: (1) whether the individual sought to be held personally liable signed the document a second time in their individual capacity and (2) whether there was evidence that the individuals sought to be found personally liable intended to be personally liable. 683 F. Supp. 2nd at 327-28. For both notes the Court determined that neither of the above considerations were satisfied as necessary to impose personal liability Id. [1]

There are at least two un-published New Jersey Appellate Division cases that are fully consistent with the ruling in City of Millville and in which personal liability was denied as a matter of law under very similar facts as the case at bar. Herz v. 141 Bloomfield Ave. Corp., No. A-2954-13T2, 2015 WL 2465027, at *2 (N.J. Super. Ct. App. Div. June 1, 2015) (Pa 145) also involved an alleged personal guaranty of a commercial lease. The lease included the following language: "In the event of a default on the within Lease, John P. MacEvoy will

[1] In its review of New Jersey law the Court cited the unpublished case of Buyers Warranty v. Roblyn Dev. Corp., 2006 WL 2190742 (N.J. App. Div. 2006) (Appellate Division ruled that personal liability did not attach to a builder who signed a contract without indicating his professional capacity because the builder only signed the contract once) (Pa 162).

be personally liable for all obligations, rents (past and future) and damages [etc.], due in connection with said Lease." Id. at *1 (emphasis added).

Mr. MacEvoy's signature appears once on the lease, on the following line:

_____

141 BLOOMFIELD AVENUE CORPORATION, Tenant
By John P. MacEvoy, President

The Trial Court granted Mr. MacEvoy summary judgment, finding no personal liability under the lease. This was affirmed by the Appellate Division without difficulty on appeal:

"Appellants argue that the omission of a separate signature line binding MacEvoy personally was a clerical error and does not invalidate the personal guarantee. We disagree. Given the strict construction of guarantee agreements, and the longstanding principle that corporations are distinct entities from their officers, MacEvoy cannot be held personally liable for 141 Bloomfield's alleged breach of the lease. As there was no separate signature indicating that MacEvoy was undertaking a personal guarantee, we cannot conclude that there was an agreement between the parties that he was signing the lease in his individual capacity. As the motion judge noted, appellants cannot rely on a clerical error as a basis "to make someone liable for something that they never signed on the line for."

Id. at *2.

A second Appellate Division case on point is Lawyers Guild Realty, Inc. v. ICSD, L.L.C., No. A-4908-07T2, 2009 WL 3429755, at *4-6 (N.J. Super. Ct. App. Div. Oct. 6, 2009) (Pa150). This case involved a dispute over whether Mauro and Sinha, two principals of a LLC subtenant of office space, were

personally liable for the obligations of the LLC under the sublease. A rider to the sublease contained the following language: "The undersigned individuals personally guarantee the performance of the obligations of the Sub-Tenant in favor of the Tenant unconditionally and fully." The signature line of the Sub-Tenant under the sublease, as described by the Court was as follows: "The names Alfred Mauro and Binod Sinha are handwritten twice under the typed name, "COURTHOUSE MEDICAL GROUP, L.L.C." Each is written once in cursive form and once in printed form. Underneath those signatures appears the word "GUARANTORS:". No signatures are written beneath that word and there are no separate guarantees appended to the sublease as are appended to [the prime lease]". Id. at *4.

The Trial Court granted summary judgment for Mauro and dismissed all claims against him. This holding was affirmed on appeal:

> "The final argument of Lawyers Guild with respect to this issue, that Mauro's signature on the sublease constituted his guarantee, is, in our judgment, easily disposed of. We have previously set forth the manner in which Mauro signed the sublease, both in terms of the physical placement of his name on the document and its appearance. Our examination of this document convinces us that Mauro signed this sublease solely on behalf of Courthouse, and not in any individual capacity. The signatures of Mauro and Sinha are contained entirely within the space between the typed headings Courthouse Medical Group, L.L.C. and Guarantors. No signatures appear beneath the word "Guarantors:". The conclusion is inescapable that Mauro did not sign the sublease individually but only on behalf of Courthouse."

Id. at *6.

The Trial Court ruling that found personal liability in the case at bar was entered in error for several reasons. First, the Court disregarded the holding in the City of Millville case based on the observation that one of the notes in the case (the second note) had eliminated the personal liability language in favor of language that trusts guaranteed the loan to the corporation. This position ignores the fact that the first note in the case contains personal liability language that is very similar to the Lease in the case at bar and is directly comparable with the Lease in this case. Second, the Trial Court failed to acknowledge the two guiding principles espoused by the Court in the City of Millville case as important in determining personal liability and failed to apply the factors to the case at bar. Third, the Trial Court erred in its ruling because the Court was not supplied with any case law by Plaintiff whatsoever that found personal liability in a situation where there was not a separate signature line on which the alleged guarantor signed in their individual capacity.[2] Fourth, the Trial Court erred in finding an enforceable personal guaranty because it failed to give any consideration to the terms of the Prior Lease which highlight how muddled the Lease is regarding guarantees compared with a properly drafted agreement. Finally, the Court erred

[2] The guaranty cases cited by Plaintiff in their summary judgment briefing do not support the Trial Court's ruling. Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002), Mount Holly State Bank v. Mount Holly Washington Hotel, Inc., 220 N.J. Super. 506 (App. Div. 1987) and Housatonic Bank & Trust Co. v. Fleming, 234 N.J. Super. 79 (App. Div. 1989) all involve separate guaranty documents that were signed by the individual parties. The last case, HLP Associates, L.P v. Carpet City, Inc., 2015 WL 1181271 (App. Div. 2015) included an extensive personal guaranty provision in the lease, although the Court's opinion does not indicate the form of signature line.

on this point because it did not apply the rules of strict construction as outlined in point B above.

Pursuant to the City of Millville case and the similar unpublished cases cited above, personal liability should only be found if the individual sought to be charged with personal liability signs the document on a signature line that clearly indicates the person is signing in their individual capacity and if there is evidence that the signor intended to be personally bound. Here there is no separate signature line and there is absolutely no evidence that any of the individual defendants intended to be personally bound. Accordingly, the finding of the Trial Court that there is personal liability must be reversed.

D. The Trial Court Correctly Ruled that Even if Zane Kromish and Fred Vinson Did Personally Guarantee the Obligations of FZG Enterprises, LLC Under the February 20, 2015 Lease, Any Such Guaranty Terminated On May 11, 2016 the Effective Date of the Termination of the February 20, 2015 Lease

As noted in the Preliminary Statement, if the Court reverses the Trial Court on the above point and finds that the Lease did not create any personal guaranty, then the Court need not determine whether any personal guarantees were terminated as of May 11, 2016 as ruled by the Trial Court. However, if this Court does reach such issue, it should affirm the Trial Court on this point.

Under the single sentence in the Lease that is relied upon to create the guaranty, the guaranty is limited to "the obligations of the Tenant **herein**."

(emphasis added). It is clear that "herein" in the foregoing sentence means the month to month lease dated February 20, 2015. Thus once the obligations under the February 20, 2015 Lease were terminated so too were all guaranty obligations under the Lease (if any). See, Peoples Nat'l Bank v. Fowler, 73 N.J. 88, 101 (1977) (guarantor's obligations cannot and should not be extended either by implication or by construction beyond the confines of its contract (quoting Monmouth Lumber Co. v. Indemnity Ins. Co. of N. Am., 21 N.J. 439, 452 (1956); see also Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 409 (App. Div. 2002) (termination of lease pursuant to a lease right would have relieved tenant of its obligation to pay rent under the lease and would have likewise discharged any obligation of guarantor).

As admitted by Plaintiff, on April 11, 2016 FZG Enterprises, LLC sent a letter to Plaintiff notifying him that FZG was terminating its lease effective on the date that is 30 days after Plaintiffs receipt of the notice. Importantly, Plaintiff does not dispute that FZG had the right to terminate the lease by this notice. Instead Plaintiff claims FZG rescinded its notice of termination pursuant to a verbal conversation with Gary Liquori which is said to be confirmed by a letter issued by Plaintiff to FZG dated May 6, 2016.

There are two problems with Plaintiff's position. First, Mr. Liquori disputes that he ever verbally agreed to rescind the notice of termination.

Second, the "confirming" letter sent by Plaintiff was not countersigned by Mr. Liquori or any other member of FZG. In fact, Plaintiff can produce no writing signed by any member of FZG that rescinds the notice of termination. As Plaintiff admits in his moving brief, "paragraph 17 of the Lease specifically provides that "no terms may be modified except by agreement in writing signed by both parties. Since there is no binding agreement to rescind the notice of termination signed by both parties, there has been no effective rescission, and thus the termination of the lease stands and with that the obligations of the guarantors are released.[3]

In its Appeal Brief Plaintiff, argues that the Court's ruling that any personal guarantees were terminated as to May 11, 2016 was made in error because the Court applied the statue of frauds that governs guaranty agreements (N.J.S.A. 25:1-15) rather than properly applying the statute of frauds that relates to leases (N.J.S.A. 25:1-12). This argument fails for two separate reasons. First, the Court applied the correct statute of frauds. Second even if the Court failed to apply the correct statute of frauds the Court clarified in its ruling on Plaintiff's

[3] Even if the verbal conversation with Gary Liguori was an effective rescission of the termination notice as to FZG, such a rescission would not reinstate any personal guaranty by Mr. Kromish or Mr. Vinson as a rescission of the termination of the lease would constitute a material enlargement to the obligations of Mr. Kromish and Mr. Vinson without their consent which has the effect of terminating any further obligation under the original guaranty. See Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 394 (App. Div. 2002) (guarantor is discharged if there is an alteration or modification of the underlying lease that injures the guarantor or increases its risk or liability under the guaranty). A change from no personal guaranty to a full personal guaranty is clearly a material enlargement of the Guarantor's obligations.

motion for reconsideration that its decision that any personal guarantees were terminated on May 11, 2016 did not turn on a statue of frauds analysis but rather on the point that once the lease was terminated there was no evidence at all that the individuals sought to be charged agreed to reinstate any personal guarantees that were created under the Lease.

As to the argument that the Court misapplied the statue of frauds Plaintiff's argument fails to properly separate two different issues that were presented to the Court on summary judgment: (1) liability of the Tenant LLC for rent and other charges incurred after the lease termination and (2) the liability of the individual guarantors for obligations of the Tenant LLC after the lease termination. The issue of whether the Tenant LLC could be bound by a verbal amendment of the lease is a type (1) issue and the lease statute of frauds (N.J.S.A. 25:1-12) might have had some relevancy had that issue been litigated in the case. The contested issue at summary judgment and the ruling sought to be reversed on appeal is a type (2) issue– liability of the individual guarantors post lease termination. As to this issue the guaranty statute of frauds is directly on point and was correctly applied by the Court to bar the claim.

Perhaps recognizing that its guaranty claim has a statute of frauds problem, Plaintiff next argues that the doctrine of "part performance" overcomes this defense. There are two problems with this argument. First there is no

authority provided that the doctrine applies beyond the statute of frauds provision for leases. The only case cited, Deutsch v. Budget Rent-A-Car, 213 N.J. Super 385 (App. Div. 1986) is a lease case and describes the doctrine as applying to "real estate" cases under the statute of frauds. Second, even if the doctrine potentially applies to the guaranty statute of frauds, there is absolutely no evidence in the case that any of the guarantors part performed under the guarantees. Thus no guarantor has paid any personal funds for the Tenant LLC's obligations, ever. Indeed, it is undisputed that after the signing of the lease in 2015, there was no verbal or written contact between Plaintiff and either Mr. Vinson or Mr. Kromish until Plaintiff made a claim under the guaranty by letter dated January 12, 2019. As noted above, upon receipt of Plaintiff's January 12, 2019 correspondence, Kromish/Vinson immediately disputed the claim by a series of e-mails and never wavered from this position.

Plaintiff is also wrong in asserting that the Court's ruling that any personal guarantees terminated on May 11, 2016 turned on the Court's statute of frauds analysis. The Court clarified this point in its ruling on the motion for reconsideration:

The Court: "…. you're arguing against the termination and I'm saying if I find that the guarantee was terminated with that letter, then let's take statute of frauds out of it….So. … if …. I found the lease was terminated. Take statute of frauds out of it. I don't think we even need to address it." T2, p12-13.

Instead, the Court found termination because there was not sufficient evidence to find a reinstatement of any guaranty:

> "But I am going to have to hold something up a little firmer as it relates to this guarantee. Because … when you have personal guarantees out there and they … have an ability to get out of it on ….. a 30 day notice and they provide that notice …. through the Tenant, I…. think that self-serving by the tenant to say okay, I'm going to stay, doesn't bring back the guarantees at …guarantors at that point in time." T2, page 33.

The above analysis correctly applies the rules of strict construction as to personal guarantees and should be sustained by this Court in its ruling on appeal.

The balance of Plaintiff's arguments for overturning the Court's ruling on this point also have no merit and can be easily dismissed by this Court. The first argument is that the "practical construction" of the lease establishes that Plaintiff and the LLC tenant intended to rescind the notice of lease termination. The cited cases present the idea that when the wording of a contract is ambiguous the Court can look at the conduct of the parties to assist with interpreting the intent of the parties. The practical construction argument is a rule of interpretation for ambiguous signed contracts. As the Trial Court pointed out in its ruling, the May 6, 2016 letter issued by Plaintiff was never countersigned by either the Tenant LLC or any of the individual guarantors. Nor is there any other signed writing that can be interpreted due to conduct. Likewise, if conduct of the parties is to be considered, the conduct that would be relevant to the liability of the guarantors (the only issue contested in the appeal) would be the conduct of

the individual guarantors. As noted above, none of the guarantors ever took any action that affirmed their personal liability for the obligations of the Tenant LLC.

The next argument presented in Plaintiffs appeal brief is that the requirement in the month to month lease that any modifications to the lease must be in writing was waived. This argument fails because there is nothing in the record that indicates that the conduct of the guarantors constituted a waiver of their right to require a signed writing if their obligations under the guarantor were to be modified or amended. A reinstatement of their personal liability for the Tenant LLC obligations under the lease after termination of such obligations would certainly be a major expansion of guaranty obligations for which the guarantors could rightfully expect a new writing signed by them to confirm such reinstatement.

E. Even if Zane Kromish and Fred Vinson Did Personally Guarantee the Obligations of FZG Enterprises, LLC Under the February 20, 2015 Lease, And Even if Such Guaranty Was Not Terminated With the Termination of the Lease in 2016, Such Guaranty Was Revoked Before Plaintiff and FZG Enterprises, LLC Entered into A Consent Judgment For Payment of Amounts Due.[4]

Under New Jersey law a continuing guaranty is one that is not limited to a particular transaction but which is intended to cover future transactions. Swift

[4] This argument was briefed in the cross motions for summary judgement but was not addressed by the Trial Court in its summary judgment rulings. If necessary, the argument should be addressed by this Court.

& Co. v. Smigel, 115 N.J. Super. 391, 394 (App. Div. 1971) (citing, Fidelity Union Trust Co. v. Galm, 109 N.J.L. 111, 116, 160 A. 645 (E. & A.1932). A continuing guaranty is at its inception an offer from the guarantor and is accepted by the creditor each time the latter does a specified act (E.g., extending credit to the debtor). Id. To the extent the February 20, 2015 lease created a personal guaranty (which it did not) such guaranty is a continuing guaranty since each month the lease was not terminated by Plaintiff, Plaintiff provided an additional month of possession to FZG. Typically, a conditional guaranty reserves in the guarantor the power to revoke it unilaterally prior to action by way of acceptance by the creditor. Swift & Co. 115 N.J. Super at 394.

In this case Zane Kromish and Fred Vinson have revoked any continuing guaranty that was created on at least three occasions. First, the guaranty was revoked in 2016 when Plaintiff became aware that Zane Kromish and Fred Vinson had sold all of their interest in FZG and retained absolutely no interest in the entity.[5] Second, in an exchange of e-mail correspondence between Plaintiff and Fred Vinson that took place in January, 2019 Mr. Vinson clearly stated to Plaintiff that he and Mr. Kromish had sold all of their interests in FZG

[5] Plaintiff cites the case of Mount Holly State Bank v. Mount Holly Washington Hotel, Inc., 220 N.J. Super. 506 (App. Div. 1987) for the idea that knowledge that a guarantor has sold its interest in an entity does not automatically equate to a revocation. The case is distinguishable from the case at bar because in Mount Holly the guarantor retained a financial interest in the corporate debtor after the sale of its interest (as a creditor of the corporate debtor) and therefor benefited from the continued advancement of funds by the Bank. Here Mr. Kromish and Mr. Vinson retained absolutely no interest in FZG and received no benefit from the continuation of the month to month lease by Plaintiff.

"several years ago" and that they had no further responsibility under any lease guaranty (if there ever was such a guaranty). Pa79-88. Third, in case there remained any doubt about revocation, on March 27, 2019 counsel for Mr. Kromish and Mr. Vinson issued correspondence to Plaintiff that discussed the prior termination of the lease and included the following unequivocal statement:

> "It is my understanding that you have previously been advised that Mr. Kromish and Mr. Vinson no longer have any interest in FZG or in the leased premises. This is additional notice of such facts. Further this is notice that Mr. Kromish and Mr. Vinson have previously revoked (by reason of the lease termination described above) and hereby revoke again any personal guarantees that they have issued in the past that pertain to any lease obligations owed by FZG for the leased premises. Accordingly, if you decide to continue to lease the leased premises to FZG in the future and do not exercise your right to terminate the lease you shall do so without the benefit of any personal guarantees by either Mr. Kromish or Mr. Vinson."

Since Plaintiff's rent damages are based entirely on the April 17, 2019 Consent to Enter Judgment,[6] Mr. Vinson and Mr. Kromish are not responsible for any such amounts due since the revocation took place before the entry of the Consent Judgment.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Trial Court's ruling that the execution of the Lease by Defendants Kromish, Vinson and Liquori created personal liability by them for the obligations of FZG under

[6] Plaintiff's Appeal Brief fails to give any reason why Mr. Vinson and Mr. Kromish would be bound by the April 17, 2019 Consent to Enter Judgment. Mr. Vinson and Mr. Kromish were not named as defendants in the underlying landlord tenant matter, and did not sign the Consent Judgment.

the Lease. In the alternative the Court should affirm the Trial Court's ruling that any personal guaranties terminated as of May 11, 2016 or were revoked prior to the accrual of the obligation sought to be enforced.

BROWN & CONNERY, LLP
Attorneys for defendants Zane Kromish and Fred Vinson
/s/ Mark P. Asselta
By: Mark P. Asselta

Dated: October 11, 2023

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October 11, 2023

File No. 5774

Via E-Courts and Regular Mail
Joseph H. Orlando, Clerk
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RE: Samuel Barresi v. FZG Enterprises, d/b/a Big League Dreams, et al
Appellate Division Docket No. A-002159-22 TEAM 02

Dear Mr. Orlando:

Joseph J. Bennie, Esq., attorney for Respondent/Cross Appellant Gary Liguori, joins in on the brief on behalf of Defendants/Respondents/Cross Appellants Zane Kromish and Fred Vinson filed by Mark P. Asselta, Esq. on October 11, 2023. Thank you.

Respectfully submitted,
BENNIE & BENNIE, P.C.

Joseph J. Bennie
Joseph J. Bennie, Esq.

JJB/ab

cc. Sandford F. Schmidt, Esq. (via E-Courts and email)
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	: SUPERIOR COURT OF NEW JERSEY
SAMUEL BARRESI	: APPELLATE DIVISION
	: DOCKET NO. A-002159-22
Plaintiff	:
	: ON APPEAL FROM:
	:
vs.	: SUPERIOR COURT OF NEW JERSEY
	: BURLINGTON COUNTY
FZG ENTERPRISES, LLC,	: LAW DIVISION
d/b/a BIG LEAGUE DREAMS,	:
a/k/a FGZ ENTERPRISES,	: DOCKET No. BUR-L-001201-20
LLC and FXG ENTERPRISES,	:
LLC, GARY LIGUORI,	: Sat Below:
ZANE KROMISH, AND	: Honorable Eric G. Fikry, J.S.C.
FRED VINSON	: Honorable Sander Friedman, J.S.C.
	:
Defendants	: Civil Action

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF/APPELLANT, SAMUEL BARRESI'S APPEAL AND CROSS-RESPONDENTS' BRIEF ON DEFENDANT/RESPONDENTS' CROSS-APPEAL

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PRELIMINARY STATEMENT

In his opening Brief, Barresi asserted that the Trial Court correctly found that the Lease guarantees by Liguori, Kromish and Vinson, were enforceable, but that the Court had erred when it ruled that the Lease and guarantees were terminated as of May 11, 2016.

In Barresi's Reply Brief, he responds to Defendants' opposition. In response to Defendants' argument that Defendants did not sign any rescission of the notice of termination, Barresi points out that the Statute of Frauds does not apply, and if it did, the conduct of the parties subsequent to the notice of termination demonstrates it was rescinded. In particular, the May 5, 2016 meeting between Barresi and Liguori, the May 6, 2016 letter confirming the agreement to rescind in exchange for rental concessions, the subsequent rental concessions given by Barresi and accepted by FZG, while Liguori, Kromish and Vinson were all members in May, June, July, August, and September of 2016, the continuous occupation of the premises from May 2016 to April of 2020 by FZG, the continued rental payments under the Lease from 2016 to 2020, the acknowledgment of the Lease in the April 2019 Consent Order between Barresi and FZG, and the acknowledgment of the existing Lease in the termination notice in 2020.

In response to Defendants' argument that the Court did not rely on the Statute of Frauds, but rather relied on the fact that there was no evidence that Defendants

agreed to reinstate any personal obligations, Barresi points out that there was no termination of the Lease or guarantees for all of the reasons set forth above, and the guarantees contained no provision which allowed them to be unilaterally terminated nor was there any evidence that Defendants sought to terminate the guarantees.

In response to Defendants' argument that the recission of the Lease termination notice would materially enlarge the obligations of the guarantors, the opposite is true; the recission of the notice of lease termination reduced the obligations of the tenant and the guarantors by $15,000.00 over 5 months.

In response to Defendants' argument that "practical construction" only applies to a signed contract, Barresi replies that the Lease was signed and the modification was placed in writing and confirmed and ratified by the parties' conduct.

In response to Defendants' argument that actions did not amount to a waiver of Paragraph 17 of the Lease, Barresi replies that acceptance of the terms of the modification by their actions constituted a waiver of Paragraph 17 of the Lease.

As to the Cross-Appeal, the Court correctly found that the guarantees were clear and unequivocal and found Defendants, Liguori, Kromish, and Vinson liable. Contrary to Defendants' arguments, there is no established New Jersey case law that requires 2 signature lines to bind an individual in his corporate capacity as well as his personal capacity.

Guarantees are to be strictly construed and in light of commercial reality and in accordance with the reasonable expectations of the parties involved. Here there is no question Barresi required the personal guarantees as the tenant LLC had no assets. Barresi testified he would not entrust his $2 million dollar sports facility to an LLC with no assets; further Barresi testified he would not release the individuals from their guarantee obligations without replacement collateral such as a letter of credit or escrow. Finally, Barresi responds that the guarantees were not revoked at any time. The guarantees do not contain any provisions that would allow them to be unilaterally terminated.

Based on the foregoing, the fact that Kromish and Vinson left FZG in November and December of 2016, and the fact that their attorney attempted to revoke the guarantees in 2019, were ineffective to terminate the Lease guarantees. Kromish and Vinson have a right of recourse. They entered into agreements with Liguori when they left FZG. Under these agreements, Liguori is responsible to hold harmless Kromish and Vinson for any losses of FZG for which they are found responsible. Much like any "business divorce", the parties leaving the business remain liable on the business obligations for which they signed. Their recourse is against their partner, Liguori, not the landlord.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Samuel Barresi, relies on the Facts and Procedural History set forth in his Opening Brief at Pb3-14, and supplements that, as follows.

On March 2, 2022 counsel for Defendants, Kromish and Vinson, issued correspondence to the Court requesting permission to submit to the Court (as part of the Cross-Motion for Summary Judgment), the Lease entered into between Plaintiff and the immediately prior tenant at the leased premises. KVDb001. In response, thereto, counsel for Plaintiff, Barresi, filed correspondence with the Court opposing the request of Defendants and attaching a document that was part of the Lease with the prior tenant. Copies are attached in Plaintiff's Reply Appendix at Pra1.

LEGAL ARGUMENT

I. GUARANTEES ARE TO BE STRICTLY CONSTRUED AGAINST THE PARTIES SEEKING ENFORCEMENT AND AGAINST THE PARTY WHO DRAFTED THE GUARANTEE AND IN LIGHT OF COMMERCIAL REALITY AND IN ACCORDANCE WITH THE REASONABLE EXPECTATION OF THE PARTIES INVOLVED.

Defendants, Kromish and Vinson argue "guarantees are to be strictly construed against the party seeking enforcement and against the party who drafted the guarantee". KVDb14 citing Ctr. 48 Ltd. P'ship vs. May Dept. Stores, 355 N.J. Super. 390, 405 (App. Div. 2002); Peoples Nat'l Bank vs. Fowler, 73 N.J. 88, 101 (1977); Monmouth Lumber Co. vs. Indemnity Ins. Co. of N. Am., 21 N.J. 439, 452

(1956). In general, Defendants correctly quote the law except they fail to appreciate the key language from Ct. 48 Ltd. P'Ship, supra, "the guarantee agreement must be read in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved." Id. at 405-406. In Center 48 Ltd., supra, the Court found that but for the execution of the lease guarantee, Plaintiff's predecessor would not have entered into the lease with Caldor which was Associated's subsidiary. Similarly, in Benjamin vs. Garden Operations Corp., 2013 WL 6508491 (App. Div. 2013) (unpublished) Pa239, the Court held "the purpose of requiring an individual guarantee from the owner of a corporation ... is to have security greater than the corporation's gossamer assurances of payment." Id. at *7, citing Shelter System Group Corporation vs. Lanni Builders, Inc., 263 N.J. Super. 373, 376 (App. Div. 1993). "When a corporate debtor defaults in payment to a supplier the personal guarantor is frequently the only available source of funds..." Id. Thus, the Court must take into consideration commercial reality and reasonable expectations of the parties in the present case. Barresi testified he would require personal guarantees, and would not give possession to a $2 million dollar building without personal guarantees. Plaintiffs Statement of Undisputed Facts, ¶6, Pa53, Barresi Deposition, 177-24 to 178-16, Pa90-91.

Defendants, Kromish and Vinson, also argue that a second applicable rule of construction is that "ambiguous terms are generally construed against the drafter of the contract." citing Malick vs. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008). However, Defendants leave off the following language: "... however, the parties may introduce parol evidence concerning their negotiations and their respective understandings of the agreement, in order to assist the court in construing an ambiguous term ..." Id. 187, citing Driscoll Construction Co. Inc. vs. State, 371 N.J. Super. 304, at 313-314 (App. Div. 2004).

Here there is no question that this was a common commercial transaction where an LLC tenant (FZG) provided guarantees of the three principals, Liguori, Vinson and Kromish, in order to induce Barresi to lease the property to FZG. It would not be commercially reasonable for Barresi to entrust a $2 million dollar property to a LLC with absolutely no assets, according to Center 48 Ltd. P'ship, supra at 407, or Shelter System Group Corporation vs. Lanni Builders, Inc., supra, at 376. See also Benjamin and DLC Services Corp. vs. Garden Operations Corp., supra, where the court found officer of corporation signed individual guarantees on 22 separate leases for bakery equipment used in the production of bagels by the various business entities. Id at *6. Moreover, the court found there was nothing ambiguous about the language that appears above the officer's signatures: "We (I)

hereby guarantee the punctual payment of the rental stipulated and the performance of the covenants …" Id at *2.

II. DEFENDANTS ZANE KROMISH, FRED VINSON AND GARY LIGUORI DID PERSONALLY GUARANTEE THE OBLIGATIONS OF FZG ENTERPRISES, LLC UNDER THE FEBRUARY 20, 2015 LEASE.

At KVDb15-22, Defendants Kromish and Vinson argue that they did not personally guarantee the obligations of FZG[1]. They acknowledge that the following language appears directly above the signatures of Zane Kromish, Fred Vinson, and Gary Liguori. "Additionally, the undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant herein." The signature lines read "Zane Kromish – FXG Enterprises"[2], 6 Union Circle, Marlton, NJ, 08053, "Fred Vinson – FXG Enterprises", 18 Erywood Avenue, Marlton, NJ, 08053, and Gary Liguori – FXG Enterprises, LLC, 50 Lexington Circle, Marlton, NJ, 08053. Pa70. Taken together, this language clearly indicates that Zane Kromish, Fred Vinson, and Gary Liguori, are signing on behalf of the tenant, FZG, and they are agreeing to jointly and severally each personally guarantee the obligations of FZG.

Defendants, Kromish, Vinson, and Ligouri, argue that there has to be a separate guarantee agreement or even a separate page or paragraph of the Lease that

[1] Defendant, Gary Ligouri, joins in all of Kromish and Vinson's arguments.
[2] The signature lines for Kromish and Vinson do not include the term "LLC" as mistakenly stated in their Brief. KVDb16. See Pa70.

further speaks to the alleged personal guarantee. However, nothing in the case law requires a guarantor's signature to be on a separate line. Defendants also argue that since there is no guarantee language under the paragraph 9 Lease heading "Insurance and Guarantees" there is no guarantee language. However, this ignores Paragraph 18 of the Lease which states: "Any heading preceding the text of the several paragraphs hereof are inserted solely for the convenience of reference and shall not constitute a part of the lease nor shall they affect its meaning, construction and effect". Pa68. Regardless, when read as a whole, the Lease agreement clearly states that the Lease is between Barresi and FZG and it clearly states that Liguori, Kromish and Vinson are signing as representatives of FZG and are each personally guaranteeing the obligations of the Tenant. That is the plain meaning of the language that appears directly above the signature lines.

Defendants, Kromish and Vinson, state at KVDb17, that "under New Jersey law the absence of such a signature line for either of these individuals is fatal to Plaintiff's claim of personal guaranty." This is a misstatement of the law. In support of this statement, Defendants rely on two unreported New Jersey Appellate Division cases, Herz vs. 141 Bloomfield Ave. Corp., 2015 WL 2465027 (N.J. App. Div. 2015) Pa145, and Lawyers Guild Realty, Inc. vs. ICSD, L.L.C., 2009 WL 3429755 (App. Div. 2009) Pa150. Defendants rely on two unreported decisions, even though

"no unpublished opinion shall constitute precedent or be binding upon any court." R.1:36-3.

Moreover, a close reading of the cases cited does not support the proposition that a separate signature line is required for the Defendants to be personally liable on their guarantees.

In Herz vs. 141 Bloomfield Ave. Corp., supra, plaintiffs in that case argued that the omission of a separate signature line was a clerical error. The court in that case found that appellants cannot rely on a clerical error as a basis to make someone liable to something that they never signed on the line for.

No such argument is being made in the present case. Plaintiff is not arguing that there was a clerical error; Plaintiff is arguing that the plain language above the signature line binds Liguori, Kromish and Vinson to personal liability. The court in Herz did not require a separate line for a personal guarantee. In Herz, the court simply stated that under the facts of that case the signature of MacEvoy did not create personal liability because a clerical mistake cannot create liability. MacEvoy also introduced evidence that the parties never intended to personally obligate him. Id at *3.

In the second case cited, Lawyers Guild Realty, Inc. vs ICSD, L.L.C., the court found that the signatures on the sublease were contained within the space

between the typed headings "Courthouse Medical Group LLC" and "Guarantors"; no signatures appeared beneath the word "Guarantors".

In the present case, the signatures of Liguori, Kromish and Vinson all appear below the guarantee language on page 11 of the Lease. Therefore, Herz and Lawyers Guild are inapplicable on their facts in addition to not being binding under R.1:36-3.

Defendants, Kromish, Vinson, and Liguori, cite the case of City of Millville vs. Rock, 683 F. Supp. 2d. 319 (D.N.J. 2010). That is a Federal case out of the District of New Jersey which is not technically binding on this court. Of course, the Federal District Court attempts to predict how New Jersey Courts would rule. The court states, at 326, that "the parties have not identified any New Jersey Supreme Court precedent directly on point". The court then goes to cite two unreported cases, Home Buyers Warranty vs. Roblyn Dev. Corp., 2006 WL 2190742 (App. Div. 2006) Pa157, and American Furniture Manufacturing Inc. vs. Value Furniture & Mattress Warehouse, 2009 WL 88922 (App. Div. 2008) Pa247 for the proposition that the contract had to have more than one signature line to impose individual liability. However, clearly this court should not follow a Federal Court decision based on two unreported decisions that cannot be cited pursuant to R.1:36-3. The Federal Court also relies on a New York case, Salzman Sign Co. vs. Beck, 10 N.Y. 2d. 63, 217 N.Y.S. 2d 55, 176 N.E. 2d 74, 76 (1961) which is not binding on this court.

However, City of Millville vs. Rock was not decided factually on the basis that the contract did not require two signature lines to impose personal liability. Two notes were involved. The first note stated in pertinent part "the borrower shall personally guarantee the repayment of all funds borrowed". However, the "borrower" was defined as "Glass Group, Inc.", and, therefore, the first guarantee was simply a guarantee of the Glass Group, Inc. by the Glass Group, Inc., not by the defendant, Rock. The second note contained a clause stating "the undersigned hereby personally guarantees repayment of this loan made to the aforesaid corporation". The word "personally" was crossed out and the word "trusts" was put in its place. The notes were signed by the corporation, Glass Group, Inc., and by two trusts. So there was no personal guarantee on either note because the language did not indicate that the defendants Rock or Nave personally guaranteed the repayment of the loan. Id at 326-327.

In the present case the language above the signatures clearly states that the "undersigned [Liguori, Vinson and Kromish], "jointly and severally each hereby personally guarantee the obligations of the Tenant [FZG] herein".

The language in the present case does not state that the Tenant is personally guaranteeing the obligations of the Tenant as in the first note in Rock, supra, and the word "personally" was not crossed out as in the second note in Rock, supra. In fact, the finding in Rock raises the question that if Liguori, Kromish and Vinson did not

want to be personally held liable why did they not object to the word "personally" appearing right above their signatures and why did they not cross out the word "personally"? Defendants offer no explanation why they allowed the language "the undersigned jointly and severally each hereby personally guarantee the obligations of the Tenant herein" to appear directly above their signatures. They did not protest the language, they did not ask it to be changed. Plaintiff's Response to Defendants' Statement of Undisputed Facts ¶6, Pa200; Barresi Deposition 155-14 to 157-25; Pa214-216; Kromish Deposition 10-19 to 21, Pa132; Kromish Deposition 13-7 to 14-22, Pa133-134; Vinson Deposition 21-5 to 25, Pa135. Moreover, when Barresi wrote to Liguori, Kromish and Vinson in January of 2019 regarding their personal liability, Vinson's response was not that they did not enter into a guarantee. Vinson's response was that the lease had been allegedly terminated and, therefore, their guarantees were no longer effective, and they were no longer a part of the LLC and, therefore, they had no liability on their guarantee. In response to Barresi's letter of January 2019, neither Liguori, Kromish nor Vinson suggested the original guarantees were not valid at the time the Lease was signed. Pa79-88. Never did Liguori, Kromish or Vinson argue that they did not sign the Lease as guarantors, prior to the filing of the present action.

With respect to the Home Buyers Warranty vs. Roblyn Dev. Corp., 2006 Wl 2190742 (App. Div. 2006) (unreported) cited by Kromish and Vinson, again this case cannot constitute precedent or be binding upon this Court. R.1:36-3. However, once again under the facts, Home Buyers Warranty can be distinguished. In that case, NHIC sought arbitration with Roblyn Development regarding three homes that Roblyn constructed in Pennington. The notices of these arbitration proceedings designated the claimant as NHIC and the respondent as Roblyn Development. The notices did not indicate or remotely suggest the decision would be considered or rendered regarding the liability of Merrick Wilson, the president of Roblyn. The hearings were adjourned but later occurred in the absence of Roblyn Development and Merrick Wilson. The arbitrator rendered decisions regarding each of the three homes in question collectively obligating Roblyn Development, and Merrick Wilson "personally as guarantor", in the combined amount of $81,739.47. Plaintiffs thereafter filed a complaint in the Law Division seeking confirmation of the arbitration award. On summary judgment motion filed by plaintiffs, Wilson responded that he was not a party to the contract and was not a personal guarantor of the corporation's performance of its contractual obligation. The trial judge rejected Wilson's arguments by emphasizing that Wilson signed the contract and thus had obligated himself personally to perform because he did not use the title "President" or "Vice President", he signed it as the "Owner". The trial court entered

summary judgment and the Appellate Division reversed. The Appellate Division found no words of guarantee in the contract and that when Wilson signed as "owner" he was not agreeing to personal liability.

Home Buyer's Warranty is distinguishable because the contract in that case did not contain any language of guarantee, let alone language of guarantee directly over the signature line of the defendants as in the present case. In Home Buyer's Warranty, it is clear that no guarantee language whatsoever was included in the contract and, therefore, under the totality of the circumstances Wilson was signing as owner and a corporate representative and not as an individual guarantor to the contract.

Contrary to Defendants' assertions, there are Appellate Division cases where the court ruled separate lines were not required for personal guarantees. For instance, in HLP Associates, L.P. vs. Carpet City, Inc., 2015 WL 1181271 (App. Div. 2015) (unpublished), Pa162, plaintiff entered into a commercial lease agreement with City Carpet, Inc. Defendant, Iqbal, was the president of the company. Defendant Iqbal signed the lease on behalf of the corporation. Id at *1. The lease contained a provision requiring Iqbal to personally guarantee the rent payments in the event the lessee fails to pay them. The personal guarantee provision

was contained within the lease and there was no separate signature line for a personal guarantee. The court enforced the guarantee against Iqbal stating:

> … we discern no basis for disturbing Judge Kenny's conclusion that the terms of section 16 of the lease were clear and unambiguous. Under the plain language of this provision, defendant's guaranty of the lessee's rent payments would continue … Id at *6.

Similarly, in Benjamin vs. Garden Operations Corp., 2013 WL 6508491 (App. Div. 2013), (unpublished), Pa239, Toro, the principal of various corporations that leased bagel making equipment, argued that he considered himself responsible only in his capacity as an officer of the business entity based on his understanding that unless he signed a document, once as an officer and once as an individual, he did not assume personal liability. The court found that a single signature line made him both liable as corporate representative and individually. The court held:

> the defendants also contend that the judgment against Toro was issued in error because a corporate officer becomes individually liable only if he or she signs a guarantee twice. This argument lacks merit. Id. at *6.

The Appellate Division agreed with the trial court's observation that:

> In viewing the transaction in its entirety and reading the terms of the guaranty in the light of commercial reality, and in accordance with reasonable expectations of persons in the business community …. the guarantee and the circumstances surrounding them demonstrate that Mr. Helmer Toro intended

> to be personally responsible for guaranteeing
> all of the leases.
> Id. at *7.

The court went on to reject defendant's argument that in order for personal liability to be imposed upon Toro, he needed to sign the guarantee twice. The court distinguished City of Millville vs. Rock, 683 F. Supp. 2d 319 (D.N.J. 2010). The court found that in City of Millville, there was independent evidence beyond the notes themselves, that Rock and Nave did not intend to become personally obligated on the notes. The court went on to find Toro signed as president of the relevant corporation, as officer of the limited partnership lessee, and individually. Id. at *8.

The court also found that Toro intended to assume personal liability because plaintiff, Benjamin, had required it as a condition of leases the parties entered into over many years. In other words, the evidence established that at the time Toro signed each guarantee both parties assumed his signature would have the effect of constituting a personal guarantee of the lease payments as had been the practice over many years of doing business. Id.

HL and Benjamin are for illustration only. Both are unpublished opinions. However, the Court should be aware that the unpublished opinions cited by Defendants, Liguori, Kromish and Vinson, which are not binding on this Court, are contradicted by other unreported decisions, not binding on this Court. The bottom line is the Court is left with the general rules of construction set forth in the reported

cases set forth above. Under those decisions, the clear language above the signatures of Liguori, Kromish and Vinson states that Defendants agreed to personally guarantee the lease, and commercial reality indicates that no reasonable lessor would hand over a $2 million dollar building to a LLC with no assets, without the personal guarantee of the principals. Center 48 Ltd. Partnership vs. May Dept. Stores Co., supra at 407; Shelter System Group Corporation vs. Lanni Builder's, Inc., supra at 376; Benjamin vs. Garden Operations Corp., supra at *7.

Finally, Respondents argue the trial court erred because it failed to give any consideration to the terms of the "prior Lease". First of all, Defendants submitted the "prior Lease" document with a request for leave to supplement the summary judgment record. Defendants had filed a Cross-Motion for Summary Judgment, Plaintiff had filed timely opposition to the Cross-Motion, and no further papers were allowed under R.4:46-1 (last sentence).

In response, Plaintiff filed a letter dated March 8, 2022, Pra1. In his response, Barresi argued the "prior Lease" between Barresi and BLD, was with a totally different legal entity and not relevant to the issues in the case before the Court.

Barresi argued:

> I would object to the submission of the BLD Lease on the basis of relevancy.
>
> Relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401. In this case, Mr.

Asselta is suggesting the form of a lease between Samuel Barresi and a different entity is relevant to the legal issue of whether two signature lines are required for a corporate officer as an individual guaranteeing the obligations of the entity. However, that is an issue of law, not an issue of fact. The only relevant evidence is the language used in the FZG Lease and whether the language used binds the individuals or guarantors. The fact that Mr. Barresi may have used a different form with separate lines in another transaction in which defendants were not involved does not have any tendency in reason to prove or disprove any fact of consequence to determination of this action. This issue was specifically addressed by the Court in Benjamin vs. Garden Operations Corp., 2013 W.L. 6508491 discussed in (above at Prb16-17). In that case, the principal Toro signed his name on the guarantee's signature line on behalf of the corporation and individually. The Court found that the signature was enforceable as against the corporation and the individual. Subsequently, Mr. Toro borrowed another $100,000.00 from Benjamin and Toro executed a promissory note for the loan. Toro signed that document twice, once on his own behalf and once on behalf of the corporation. The Court found that the fact that the second document was structured in a different fashion than the first did not nullify Toro's personal obligation on the leases he signed on one line on behalf of the corporation and individually. Id. at *8. For the same reason the fact that a prior lease that Barresi entered into with BLD was structured differently has no bearing on the interpretation of the FZG Lease. Pra1-2 [3]

[3] Original Footnote 2 reads: "All three individual defendants testified they were unaware of the terms of the BLD Lease and had not seen it. As such, they could have not relied on it."

It is not clear whether the Court had ruled on Defendants' Motion for leave to supplement the record, or Barresi's objection. However, the Court agreed with Barresi's position that the BLD Lease was irrelevant. 1T 21-3 to 22-1; 22-18 to 24-11.

As such, regardless of the Motion to supplement, the Court definitively held that the "prior Lease" was irrelevant and the only document before the Court was the Lease itself. Pa59. The Court's ruling was correct based on the legal argument quoted from Barresi's submission, Pra1.

After hearing and argument, the trial court found the language on page 11 of the Lease was clear and unequivocal and established a guarantee agreement between Liguori, Kromish, and Vinson, and the landlord, Barresi, 1T63-10 to IT64-11. The court distinguished the case of City of Millville vs. Rock, 687 F. Supp. 2d 319 (D.N.J. 2010) 1T64-12 to 1T65-1. Moreover, during oral argument the court stated:

> ...I'm looking at the last paragraph of what they signed and it says, it witness whereof the parties hereto have caused these ---- these present to be executed on the day and year first above written. Additionally, the undersigned jointly and severally each have personally guaranteed the obligations of the tenant herein.
>
> How do I read that any other way?
> 1T15-13 to 20.

The court goes on to observe that their home addresses are beneath their signature lines. 1T16-12 to 13.

The court goes on to rhetorically ask,

> ...I should negate the fact that it says --- the undersigned is jointly and severally each hereby personally guarantee.

Based on all of the foregoing, it is clear that the trial court's ruling was correct, and Defendants, Kromish, Vinson, and Liguori guaranteed the obligations of FZG under the February 20, 2015 Lease.

III. THE GUARANTEES WERE NOT TERMINATED ON APRIL 11, 2016.

Plaintiff/Appellant relies on the arguments set forth in Plaintiff's Opening Brief at Point IV (Pb16-29). In addition, Plaintiff/Appellant makes the following arguments in reply to Defendants, Kromish and Vinson's arguments.

Defendants argue that Plaintiff can produce no writing signed by any member of FZG that rescinds the notice of termination. However, Plaintiff has demonstrated that no writing is necessary as the Statute of Frauds does not apply. Pb21-23, and based on the conduct of the parties the notice of termination was rescinded before it could take effect on May 31, 2016. In particular, the parties met on May 5, 2016 and FZG agreed to rescind the termination in exchange for Barresi's promise to reduce the rent by $3,000.00 per month for the months of May through August (later extended to September). The subsequent conduct of the parties was consistent with their agreement as Barresi in fact gave $3,000.00 monthly discounts from May to August 2016 for a total of $12,000.00 and an additional $3,000.00 monthly discount

in September. FZG accepted these discounts in exchange for rescinding the termination notice, and never vacated the premises. FZG continuously occupied the property for four (4) more years, through April 19, 2020. FZG continued to make rental payments from May 2016 through April 19, 2020. Moreover, FZG entered into a Consent Order in April 2019 confirming the Lease agreement of February 20, 2015 remained in effect, and when FZG finally terminated the Lease in 2020, it acknowledged and gave notice of its termination of the February 2015 Lease.

Defendants next argued that the court did not rely on the Statue of Frauds, but rather relied on the point that once the Lease was terminated, there was no evidence that the individuals sought to be charged agreed to reinstate any personal guarantees that were created by the Lease. However, as set forth above, the Lease was not terminated. The parties came to an agreement to rescind the termination notice in exchange for $12,000.00 in rent concessions. There was no guarantee to "reinstate" because the guarantees were never terminated. The guarantees have no provisions which allow them to be unilaterally terminated and as long as the Lease continues, the guarantee of the "obligations of the Tenant herein" continue.

In response to footnote 3 at KVDb24, where Defendants argue a recission of the Lease termination notice would materially enlarge the obligations of the guarantors, as a matter of fact, the modification of the Lease resulted in a material

diminishment of the guarantors' exposure, by $12,000.00. (Later the diminishment was increased to $15,000.00).

At KVDb26-27, Defendants quote the transcript of the Motion for Reconsideration where the Court seemed to back off its Statue of Frauds analysis. Instead the Court found "insufficient" evidence to find a reinstatement of the guarantee. However, as set forth above, there was no termination of the guarantee, because by its terms, the guarantee is of the "obligations of the Tenant herein". The Lease obligations continued and the termination was rescinded because there was a modification of the Lease as set forth above. The Judge ignored substantial evidence that the Lease was modified, not terminated, including the Barresi letter of May 6, 2016, in which FZG agreed to rescind the termination notice and Barresi agreed to a $3,000.00 per month rent reduction for the months of May through August (later extended to September); and the subsequent conduct of the parties consistent with this agreement, in particular, the monthly discount given by Barresi and accepted by FZG, the continuous occupation of the property by FZG, rental payments by FZG from May 2016 to April 2020; the Consent Order of April 17, 2019 in which FZG confirmed the Lease was in effect; and the March 2020 termination notice of the Lease.

Of note is the Trial Court's statement quoted at KVDb27 that:

> Because … when you have personal guarantees out there and they … have an ability to get out on … a 30 day notice, and they provide that notice through the tenant …"

The Trial Court is assuming there was a guarantee with an ability to get out on a 30 day notice. This demonstrates the Court's lack of understanding of the facts.

First of all, there is no 30 day termination clause with respect to the guarantee. The guarantee simply states that the guarantors are personally liable for the "obligations of the Tenant herein". As long as there is a Lease and obligations thereunder, the guarantors are liable. So the Court is mistaken to the effect it thinks there is a 30 day termination clause in the guarantee separate and apart from the Lease month to month term.

Secondly, the trial Court seems to think this was an attempt by the guarantors to terminate the guarantees. Again, this is not consistent with the undisputed facts. FZG simply gave notice of the termination of the Lease because the business was suffering. After speaking on May 5, 2016, the Landlord, Barresi, and Tenant, FZG, came to an agreement to lower the rent for 4 months and rescind the termination notice. Both parties agreed to this and acted accordingly. There was no testimony that this termination notice was motivated by the guarantors. In fact, the termination

notice was not even signed by the guarantors, other than Liguori as "managing partner" for FZG.[4]

The Court also infers that Kromish and Vinson were leaving the business and wanted to terminate their guarantees. This assumption is also not borne out by the facts. Kromish and Vinson remained as active partners in the business until November and December of 2016. They benefited from the modification of the Lease because it helped FZG, their LLC, by reducing its rent, and the modification reduced Kromish, Vinson and Liguori's potential exposure on the guarantees. Kromish and Vinson were active members of FZG when it received $3,000.00 in rental reduction in each of May, June, July, August, and September. It was not until November and December that they left the business.[5]

In sum, the Court came to a conclusion totally unsupported by the undisputed facts.

At KVDb27-28, Defendants brush aside Plaintiff's arguments regarding practical construction and waiver of a writing.

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[4] Note that the Lease was signed by all three members of FZG. Arguably the termination notice was ineffective because it was only signed by one member of FZG.

5 Even if we use August 31, 2016 as the "effective date" of Kromish and Vinson's exit from the business, they benefited from the rental concessions in May, June, July, and August, totaling $12,000.00.

Defendants argue "practical construction" only applies to a signed contract. Here the contract (Lease) was signed and the modification was placed in writing by Barresi; and the parties' conduct was consistent with that written modification.

With respect to waiver of Paragraph 17 of the Lease, Defendants argued their conduct did not amount to a waiver. However, the actions of FZG as recounted above, clearly showed a waiver of the requirement that any modifications of the Lease be in writing, i.e. the failure of FZG to vacate or surrender the premises, the reduction of $3,000.00 per month by Barresi, and the acceptance of the reduction of $3,000.00 per month by Defendants, and the continued occupation of the property, the continued payment of rent through 2020, the written Consent Order where FZG confirmed the Lease was in effect, the termination in 2020 making reference to the February 20, 2015 Lease.

Defendants failed to respond to Plaintiff's arguments regarding offer and acceptance and partial performance at Pb25-26. Plaintiff will not repeat those arguments here.

Based on all of the foregoing, it is clear that the guarantees were not terminated on April 11, 2016.

IV. THE GUARANTEE WAS NOT REVOKED BEFORE PLAINTIFF AND FZG ENTERED INTO A CONSENT JUDGMENT FOR PAYMENTS OF AMOUNTS DUE.

Defendants Kromish and Vinson next argue that even if the guarantee was not terminated with the alleged termination of the lease in 2016, such guarantee was revoked before Plaintiff and FZG Enterprises, LLC entered into a Consent Judgment for payment of amounts due.

Defendants begin their argument by stating that the guarantee in this case is a continuing guarantee, not limited to a particular transaction but intended to cover future transactions citing Swift & Co. vs. Smigel, 115 N.J. Super. 391, 394 (App. Div. 1971) and Fidelity Union Trust Co. vs. Galm, 109 N.J.L. 111, 116 (E. & A. 1932). Defendants go on to state "Typically a conditional guaranty reserves in the guarantor the power to revoke it unilaterally prior to action by way of acceptance by the creditor", again citing Swift & Co., supra. First of all, the guarantee in this case guarantees all of Tenant's obligations set forth in the lease. Not only does this include the rent it includes Tenant's obligation to surrender the premises at the end of the term (Paragraph 3) to maintain, repair the premises and building and keep same in good repair and condition (Paragraph 6), payment of water and sewer rents, municipal improvement assessments, and any other charges made by any public authority (Paragraph 7), payment of utilities (Paragraph 8), and maintenance of

insurance (Paragraph 9), among other things. It is a much broader guarantee than the typical continuing loan guaranty.

With respect to termination of a continuing guarantee, Swift & Co. states that "typically", a conditional guarantee may reserve in the guarantor the power to revoke it unilaterally. In the two cases cited, Swift & Co. supra., and Fidelity Union Trust Co, supra, the continuing guarantees in those cases contained language that specifically provided a power to revoke unilaterally as to future advances.[6] However, in the present case, no such power to revoke the guarantee is provided within the four corners of the Lease. The guarantee unconditionally guarantees the "obligations of the Tenant herein".. There is no provision allowing for the termination of the guarantee. As long as there are "obligations of the Tenant herein", the guarantors are liable. As set forth above, the lease was terminated as of April 19, 2020. Pursuant to the Restatement (Third) of Suretyship and Guaranty, Section 16, "[a] continuing guaranty is a contract pursuant to which a person agrees to be a

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[6] See also, Mount Holly State Bank vs. Mount Holly Washington Hotel, Inc., 220 N.J. Super. 506, 511 (App. Div. 1987). (Defendants arguments seem to assume that notice of the sale of their ownership interest in hotel amounts to a notice of revocation. Nothing could be further from the fact…"). Defendants attempt to distinguish Mount Holly State Bank, at Footnote 5 of their Brief, KVDb29, stating that in Mount Holly, the guarantor retained a financial interest in the corporate debtor after sale of his interest (as a creditor of the corporation) and, therefore, benefited from the continued advancement of funds. Here, Kromish and Vinson benefited from the continued advancement of funds after revocation of the Lease termination and before they left the business. They benefited from the $3,000.00 monthly concessions in May, June, July, August and September, which reduced their potential exposure by $15,000.00 and they remained active participants in the business until November and December of 2016.

secondary obligor of all future obligations of the principal obligor to the obligee." "A person can agree to become a secondary obligor for subsequent obligations of another person while in some cases such an agreement is for specific, identifiable obligations that are planned for the future, it is also possible for a person to agree to a more open ended obligation pursuant to which unspecified future obligations are covered." Id. comment a (1996).

Defendants, Kromish and Vinson, argue that they revoked the alleged continuing guarantee in 2016 when Plaintiff became aware that Kromish and Vinson had sold all of their interest in FZG. However, Kromish and Vinson have provided no evidence that this information was transmitted to Barresi, other than the deposition of Liguori where he claims he advised Barresi of the fact sometime in 2016. Liguori Deposition, 61-1 to 9, 61-24 to 62-16, Pa136-137. This was denied by Barresi. Plaintiff's Statement of Additional Facts, ¶7, Pa204, Barresi Deposition, 160-11 to 24, Pa218; 162-9 to 163-4, Pa219-220. However, neither Kromish, Vinson or Liguori stated that 2016 communication included a revocation of the guarantee. The jist of the alleged communication was simply that Kromish and Vinson had left the business.

The second alleged revocation occurred in January of 2019 when Mr. Vinson stated to Plaintiff in an email that he and Kromish had sold all of their interest in FZG "several years ago" and, therefore, they had no further responsibility for any

lease guarantee. Again, absent from this communication, is a statement of revocation. Pa79–Pa88. Vinson merely argues that because he and Kromish sold their interests to Liguori they were no longer responsible under any lease guarantee. He does not affirmatively say he revoked or is now revoking the guarantee. Thirdly, Defendants rely on letter of March 27, 2019 from counsel for Kromish and Vinson to Plaintiff. In that letter counsel states that Kromish and Vinson revoked their guarantee by reason of the alleged lease termination of April 2016. However, as set forth above, the lease termination was not effective as the notice of termination was rescinded. The letter of counsel of March 27, 2019 goes on to "revoke again any personal guarantee that they have issued in the past". Again, as set forth above, nothing in the terms of the Lease agreement would allow a unilateral termination of the guarantee, (Section 17 provides that any modification must be in writing and signed by both of the parties). Secondly, as set forth above, the terms of the guarantee are open ended and cover all obligations of the Tenant. Such a wide ranging guarantee was necessary because the Landlord was giving possession of a $2 million dollar building to an LLC with no assets, and his only security for the Tenant meeting the obligations of the lease and returning the property to the Landlord was the personal guarantees of Liguori, Kromish and Vinson. Barresi Deposition 177-24 to 178-16, Pa90–91.

In the case of First New Jersey Bank vs. F.L.M. Business Machines, Inc., 130 N.J. Super. 151 (Law Div. 1974), the court found that an attempt to terminate liability of the guarantor was not effective. In that case, although the contract provided that the guarantor could revoke the guarantee as to future advances, the guarantor remained liable with respect to the obligations incurred before the revocation. (In the present case, there is no provision that allows for termination of the guarantee). In First New Jersey Bank, supra, MacMahon was liable for the original obligations and any renewals, extensions or other liabilities arising out of the original obligations, even if those renewals, extensions, or other liabilities arose after notice of revocation.

In First New Jersey Bank, the defendants argued that they should be given the benefit of equitable considerations in construing and applying the guarantee agreement. In response, the court stated:

> While it is true that the courts of this state have long possessed the power, both in law and in equity, to relieve a party from the burden of the agreement .... this is not a case for the application of such power. The parties freely entered into the guarantee agreement knowing full well of the impact of the same. This was a business transaction, and there were other sources of financing which could have been explored (such as other banks, private lenders, commercial factors, etc.) if defendants did not wish to sign such an all inclusive guaranty agreement. Although in the appropriate case the mere existence of the

> commercial setting need not preclude the court's exercise of its equitable jurisdiction, the facts here do not entitle defendants to such relief ... Defendants were not powerless to protect themselves against F.L.M.'s deteriorating financial position. If at any time they (or either of them) determined that their best interests were served by paying the balance to the bank, and becoming subrogated to the banks, they could have cut their losses. They chose not to do so....
> Id at 162-163.

The words of the court in First New Jersey Bank are equally applicable to the present case. Kromish and Vinson had other alternatives. They could have provided third party security such as a letter of credit. They could have prevailed upon FZG to surrender the premises and stop any further rental or other obligations under the Lease. They could have paid off FZG's obligations to Barresi and proceeded against Liguori under the agreement with Liguori. Pa112–116.

Following First New Jersey Bank, supra, this court should similarly uphold the personal guarantees and find that there was no right to revoke the guarantees nor was there a valid revocation of the guarantees.

In the unlikely event that the Court should find the letter of March 27, 2019 was effective to terminate the guarantee, the Court should find that the amount owed at that time was guaranteed by Vinson and Kromish in the amount of $76,179.00 as set forth in Schmidt Certification, paragraph 12 and 13, Pa205; and Barresi Certification, Pa206-207.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court reverse so much of the Trial Court's Order of August 1, 2022, that finds the guarantees were terminated on May 11, 2016, and enter judgment in favor of Barresi and against Liguori, Kromish, and Vinson, jointly, severally, or in the alternative, for $100,965.77 through April 20, 2020, and for $37,649.31 in attorney's fees, and remand the matter to the Trial Court to determine any amounts due on Barresi's remaining claims Pa12-15, and dismiss the Cross-Appeal.

LAW OFFICE OF McINERNEY AND SCHMIDT, L.L.C.
Attorneys for Plaintiff/Appellant, Samuel Barresi

BY: _____
SANDFORD F. SCHMIDT

Dated: December 18, 2023

SAMUEL BARRESI, PLAINTIFF/APPELLANT VS. FZG ENTERPRISES, LLC d/b/a BIG LEAGUE DREAMS a/k/a FGZ ENTERPRISES, LLC, GARY LIGUORI, ZANE KROMISH, AND FRED VINSON, DEFENDANTS/RESPONDENTS/ CROSS APPELLANTS	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002159-22 On Appeal From: SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION DOCKET NO. BUR-L-1201-20 SAT BELOW: Honorable Eric G. Fikry, J.S.C. Honorable Sander Friedman, J.S.C. CIVIL ACTION

REPLY BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS ZANE KROMISH AND FRED VINSON

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PRELIMINARY STATEMENT

This office represents Defendants Zane Kromish ("Kromish") and Fred Vison ("Vinson"). In this action Plaintiff Samuel Barresi ("Barresi") alleges that Kromish and Vinson are liable (along with Defendant Gary Liguori ("Liguori")) as personal guarantors for the obligations of Defendant FZG Enterprises, LLC, a New Jersey limited liability company ("FZG") under a month to month commercial lease that was entered into between FZG and Barresi. The appeal and cross-appeal in this matter present three issues: (1) Did Kromish, Vinson and Liguori personally guarantee the obligations of FZG under the month to month lease: (2) if there was a personal guaranty was the guaranty terminated as of May 11, 2016 when the month to month lease was terminated (as ruled by the Trial Court) and (3) if there was a personal guaranty and the guaranty was not terminated as of May 11, 2016, was the guaranty revoked prior to the consent judgment that Barresi relies upon for its claim for rent and other amounts due under the month to month lease.

The appeal filed by Barresi relates to issue (2) only since the Trial Court ruled in Barresi's favor as to issue (1) and did not make a ruling as to issue (3). The Cross-Appeals filed by Kromish and Vinson and by Liguori, relate to issues (1) and (3). Since this is a reply brief on the Cross – Appeal, this brief addresses issues (1) and (3) only. As to issue (2), Kromish and Vinson stand on their arguments as set forth in their initial brief as may be supplemented at oral argument.

Because there is substantial ambiguity in the lease drafted by Barresi as to whether a personal guaranty was created thereunder, since guaranties are to be strictly construed against the party asserting the guaranty and against the drafter of an ambiguous document, since Barresi has ignored important points in the reported decision cited by both sides, since Kromish and Vinson have supported their position with case authority that includes very similar facts as the case at bar, and since Barresi has failed to cite any case law that supports his position, the Court should find that no personal guaranty has been created, or if necessary find that the guaranty was terminated as of May 11, 2016 or was revoked prior to the entry of the Consent Judgment relied upon by Barresi.

PROCEDURAL HISTORY

Kromish and Vinson rely upon the procedural history set forth in their initial appeal brief.

FACTS

Kromish and Vinson rely upon the recitation of facts set forth in their initial appeal brief.

LEGAL ARGUMENT

A. Defendants Kromish and Vinson Did Not Personally Guarantee the Obligations of FZG Enterprises, LLC Under the February 20, 2015 Lease

1. The Month to Month Lease Drafted by Barresi is Ambiguous as to Whether It Created a Personal Guaranty by Kromish, Vinson and Liguori and Therefore the Strict Rules of Construction Against the Finding of a Guaranty Apply.

Barresi's position that that there are enforceable personal guaranties against Kromish Vinson and Liguori hinges on the contention that the lease language that is asserted to create the personal guaranties was "clear and unequivocal." Plaintiff Reply Brief at 2. This assertion is not correct. Rather, the language is ambiguous and because it is ambiguous the rules of construction that apply to enforcement of guaranties and to construing documents against the drafter, dictate that this Court make a ruling that there was no personal guaranty.

Under New Jersey law "[a]n ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, (N.J. 2002). Whether the terms of a contract are clear and unambiguous is a question of law and is suitable to be considered at summary judgment. Driscoll Const. Co., Inc. v. State, Dept. of Transp., 371 N.J. Super. 304, 853 A.2d 270, 276 (N.J. Super. Ct. App. Div. 2004).

Here the lease language is ambiguous and allows for the alternate interpretation that no personal guaranty was formed due to at least the following:

- There is nothing in any of the numbered paragraphs of the lease that states that a signing of the lease by a member of the LLC tenant, creates a personal guaranty of the lease obligations by the signing member. For example, paragraph 9 of the lease which is headed "Insurance and Guaranties" includes no language at all as to guaranties.

- The single sentence relied upon by Barresi is tucked away in a "IN WITNESS WHEREOF" clause which comes after all of the substantive paragraphs of the lease are stated and which clause is typically not the place in a document where substantive and important provisions of a lease are placed. Moreover, the single sentence relied upon appears in regular type and is not bolded, underlined, place in all CAPS or otherwise highlighted. A lay reader can easily (and apparently did) skip over such language.

- At the place where the lease is signed, the name of each tenant signor is typed directly below the signature line followed by "- FXG Enterprises." Importantly, at the place of each signature the word "guaranty" does appear, the word "individually" does not appear and the word "personally' does not appear. In short at the place of signature there is absolutely no indication that the signing of the lease as a representative of the LLC would result as a personal guaranty of the obligations of the LLC under the lease.

- Kromish, Vinson and Liguori only signed the lease once, as described above. There were no separate sets of signatures on the document.

- The lease was the only document signed by Kromish, Vinson and Liguori. There was no separate guaranty document, or even a separate page or even a separate paragraph marked guaranty.

The confusing and "buried' guaranty language in the Lease is in sharp contrast to the clear and unequivocal language that Barresi used to state a personal guaranty in the lease Barresi used for the immediately preceding tenant for the Leased Premises (the "Prior Lease"). DKV003. The Prior Lease includes a separate page announcing in Block Caps: "INDIVIDUAL PERSONAL GUARANTIES". The separate page then includes the following language as a separate paragraph and not buried in a "WITNESS WREREOF" clause:

"The undersigned jointly and severally each hereby personally guaranty the obligations of the Tenant hereunder, including but not limited to the Tenant's obligations for rent and additional rent."

DKVa015.

The Prior Lease then goes on to include a separate set of signature lines to evidence the agreement by the signatories to be personally liable for the obligations under the lease. Id. Notably, in the Prior Lease the members of the tenant LLC **signed in two places**, once to evidence the LLC's agreement as tenant to be bound by the lease (DKVa014) and a second time on the personal guaranty page to evidence agreement to be personally liable for the obligations of the LLC tenant under the lease DKVa015. The contrast of the two leases, which are virtually identical in form except for the guaranty language, clearly demonstrates that Plaintiff knew how to draft a clear personal guaranty provision if Plaintiff wanted to but that Plaintiff simply choose not to do so for the Lease in the case at bar.

Since the language of the lease signed by Kromish, Vinson and Liguori is definitively not "clear and unequivocal", the Court is to apply the well-established rules of construction, described in prior briefing by the parties: (1) that guaranties are to be strictly construed against the party seeking to establish the guaranty and (2) that ambiguous documents are to be construed against the drafter of the document.

These rules of construction dictate a finding that the lease signed by Kromish, Vinson and Liguori included no personal guaranties.

2. Barresi Has Misapplied the Language Included in Ctr. 48 Ltd. P'ship v. May Dept. Stores Co. which States that "the terms of a guaranty agreement must be read in light of commercial reality and in accordance with the reasonable expectations' of the parties."

In his reply brief Barresi agrees with the two rules of construction discussed above but asserts that the Defendants "fail to appreciate the key language from [Ctr. 48 Ltd. P'ship vs. May Dept. Stores, 355 N.J. Super 390, 405, 406 (App. Div. 2002)] the guaranty agreement must be read in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved." Plaintiff Reply Brief, p. 5. Barresi interprets this language to mean that the issue of whether a personal guaranty is to be found turns on whether it would have made economic sense to request such a guaranty. For example, in his reply brief Barresi argues "It would not be commercially reasonable for Barresi to entrust a $2-million-dollar property to a LLC with absolutely no assets …." Plaintiff Reply Brief, at 6. According to Barresi's argument, the above test is controlling and displaces the well-established rules of construction discussed above.[1]

The language counted upon by Barresi seems to have been originated by the Court in Mount Holly State Bank v. Mount Holly Washington Hotel, Inc., 220 N.J.

[1] The Trial Court below did not make any finding as to whether the test espoused by Barresi was met under the facts of the case and otherwise did not indicate that it needed to make such a finding.

Super. 506 (App. Div. 1987). In Mount Holly individuals signed a separate guaranty agreement for notes signed by a corporate entity. There was no dispute in the case as to the validity of the personal guaranty. Rather, the issue in the case was whether a restructuring of the underlying notes and changes in the ownership of the corporate entity affected the continued validity of the guaranties. Accordingly, the Court in Mount Holly did not announce a new test to determine whether a personal guaranty was in effect in the first place, that was admitted by the parties..

The language relied upon by Barresi also appears in Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002) which is the case directly cited by Barresi for his argument. Ctr. 48 involved the personal guaranty of lease obligations under a commercial lease. But, once again, the existence of the personal guaranty was not in dispute as the issue to be decided by the Court was whether subsequent changes in the underlying lease affected the guaranty.

Finally, the Court in City of Millville v. Rock, 683 F. Supp. 2d. 319 (D.N.J. 2010) cites to the language relied upon by Barresi. The Court in the City of Millville case was required to determine whether personal guaranties were created in the first place. The Court, however, did not engage in any sort of analysis as to whether it made commercial sense for the Plaintiff to require a personal guaranty for the type of transactions involved. That was not part of its analysis at all. Instead the Court relied upon the quoted language solely to support its conclusion that it was necessary

to find evidence that the alleged guarantor intended to be bound by a personal guaranty (picking up on the reasonable expectations part of the language). 683 F. Supp. 2d. 319, 328.

The above discussion clearly demonstrates that Barresi has misapplied the language quoted from Ctr. 48 in order to distract from the correct analysis which is to focus on whether the alleged personal guaranty is clear and unequivocal or ambiguous and whether the alleged guarantor intended to be personally bound. Nothing in Ctr. 48 suggests any other analysis for the determination of whether a personal guaranty exists in the first place.

3. Barresi and the Trial Court Have Ignored Important Principles Relied Upon in City of Millville v. Rock.

The City of Millville case has been cited by both Barresi and the Defendants in both trial and appeal briefs and was discussed at length at the oral argument in the cross motions for summary judgment before the Trial Court. Both Barresi and the Trial Court, however, have improperly discounted the significance of the case by attempting to distinguish the case on its facts. What Barresi and the Trial Court have ignored is that in the City of Millville case, as part of its analysis of New Jersey law, the Court sets forth two important factors that must be considered when determining whether there is a binding personal guaranty: (1) whether the individual sought to be held personally liable signed the document a second time in their individual capacity and (2) whether there was evidence that the individuals sought to be found

personally liable intended to be personally liable. 683 F. Supp. 2nd at 327-28. The Court found that neither of these factors were satisfied which was an alternate basis for the Court's finding of no personal guaranty.

As set forth in the initial appeal brief of Kromish and Vinson, here there is no separate signature line and there is absolutely no evidence that any of the individual defendants intended to be personally bound. Accordingly, the finding of the Trial Court that there is personal liability must be reversed.

4. Cases Cited By Kromish and Vinson Fully Support a Finding That There Has Been No Personal Guaranty

As set forth in the initial appeal brief of Kromish and Vinson, and as set forth above, the Court's decision in City of Millville v. Rock, 683 F. Supp. 2d. 319 (D.N.J. 2010) directly supports the position that Kromish, Vinson and Liquori did not personally guaranty the obligations of FZG Enterprises, LLC under the lease. When the two principles set forth by the Court in the City of Millville case are applied to the facts in this case it is clear that no enforceable personal guaranty was created when the lease was signed by each as members of the LLC only.

Barresi attempts to sidestep the import of the City of Millville case by arguing that its facts are distinguishable from the fact here. Barresi's position is fatally flawed because Barresi simply chooses to ignore the two guiding principles that were a large part of the Court's decision to find no personal guaranty in that case. He

offers no arguments at all as to how the two principles should be applied to the case at bar.

In their initial brief, Kromish and Vinson also cite to two unpublished Appellate Division cases with facts that are very similar to the case at bar and in which the Court had to address ambiguities in the document that was alleged to create the personal guaranty. In each case there is language in the document that states that a personal guaranty was being created but at the place of signature the alleged guarantors only singed in their corporate capacities.

The first case is Herz v. 141 Bloomfield Ave. Corp., No. A-2954-13T2, 2015 WL 2465027, at *2 (N.J. Super. Ct. App. Div. June 1, 2015) (Pa 145) which also involved an alleged personal guaranty of a commercial lease. The lease included the following language: "In the event of a default on the within Lease, John P. MacEvoy will be personally liable for all obligations, rents (past and future) and damages [etc.], due in connection with said Lease." Id. at *1 (emphasis added).

Mr. MacEvoy's signature appears once on the lease, on the following line:

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141 BLOOMFIELD AVENUE CORPORATION, Tenant
By John P. MacEvoy, President

The Trial Court granted Mr. MacEvoy summary judgment, finding no personal liability under the lease. This was affirmed by the Appellate Division without difficulty on appeal. The Appellate Division's decision was solidly based on the principle that there was only one signature line and that you can't "make someone liable for something that they never signed on the line for." Id. at *2.

In his reply brief Barresi tries to distinguish Herz by arguing that in Herz the plaintiff claimed it was a clerical error to fail to include a second signature line whereas in this case Barresi is not claiming a clerical error.[2] The argument fails because it is clear that the Court's decision did not turn on the clerical error point but on the single signature line, how the lease was signed at the place of signature and the requirement of strict construction of guaranty agreements. See excerpt of the Court's decision at Kromish Vinson initial appeal brief at p. 19.

A second Appellate Division case cited in the Kromish Vinson initial brief is Lawyers Guild Realty, Inc. v. ICSD, L.L.C., No. A-4908-07T2, 2009 WL 3429755, at *4-6 (N.J. Super. Ct. App. Div. Oct. 6, 2009) (Pa150). This case involved a dispute over whether Mauro and Sinha, two principals of a LLC subtenant of office space, were personally liable for the obligations of the LLC under the sublease. A rider to the sublease contained the following language:

[2] The fact that the litigant claimed that the omission of a second signature line was a clerical error actually shows a recognition that a second signature line was required in order to establish an enforceable personal guaranty.

"The undersigned individuals personally guaranty the performance of the obligations of the Sub-Tenant in favor of the Tenant unconditionally and fully." The signature line of the Sub-Tenant under the sublease, as described by the Court was as follows: "The names Alfred Mauro and Binod Sinha are handwritten twice under the typed name, "COURTHOUSE MEDICAL GROUP, L.L.C." Each is written once in cursive form and once in printed form. Underneath those signatures appears the word "GUARANTORS:." No signatures are written beneath that word and there are no separate guaranties appended to the sublease as are appended to [the prime lease]". Id. at *4.

The Trial Court granted summary judgment for Mauro and dismissed all claims against him. This holding was affirmed on appeal.

Barresi's attempt to distinguish Lawyers Guild is also weak. The argument is that in Lawyers Guild there was the word Guaranty below the signature line and no signature is placed below that word, whereas in the case at bar the word Guaranty was not underneath the signature line. The argument fails to address the fact that the lease in Lawyers Guild included virtually the same language as included here and that language was found insufficient given the precise wording as to how the document was signed at the place of signature.

5. Cases Cited by Barresi Fail to Support a Finding that Has Been a Personal Guaranty

In contrast to Kromish and Vinson, Barresi has been unable to provide the Court with any case authority with similar facts, published or unpublished that supports his positon. Barresi cites to the following cases: Ctr. 48 Ltd. P'ship v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002); Mount Holly State Bank v. Mount Holly Washington Hotel, Inc., 220 N.J. Super. 506 (App. Div. 1987); Housatonic Bank & Trust Co. v. Fleming, 234 N.J. Super. 79 (App. Div. 1989) and HLP Associates, L.P v. Carpet City, Inc., 2015 WL 1181271 (App. Div. 2015). None of these cases support Barresi's position because (1) all have separate guaranty documents or extensive guaranty provisions within the lease and (2) more importantly, the existence of a personal guaranty was admitted by both parties in each case, so the Courts in all of these cases did not have to resolve the issue of whether there was a personal guaranty in the first place.

The only case cited by Barresi which included the issue of whether a personal guaranty was created in the first place is Benjamin and DLC Services Corp. v. Garden Operations Corp. No. A-2315-11T2 2013 WL 6508491 (N.J. Super. Ct. App. Div. Dec. 13, 2013) (Pa 239). In Benjamin the issue was whether the president of a corporation had personally guaranteed the obligations of the corporation under several separate equipment leases. The lease contained the following signature line that was contended to create the personal guaranty:

> We (I) hereby guaranty the punctual payment of the rental stipulated and the performance of the covenants set forth in the foregoing to be paid and/or performed by the said:
>
> THE SIXTH TORO FAMILY LIMITED PARTNERSHIP

Dated: 02/01/07

By: SIXTH TORO CORP., GP, Helmer Toro, President, INDIVIDUALLY and as an officer of THE SIXTH TORO FAMILY LIMITED PARTNERSHIP

The Court found that the above signature line was sufficient to constitute a personal guaranty because (1) at the signature line the language underneath the signature expressly stated in bold caps that the corporate officer was signing in his corporate capacity and in his individual capacity and (2) the evidence established that at the time the document was signed "both parties assumed his signature would have the effect of constituting a personal guaranty of the lease payments, as had been the practice over many years." Id. at *8 (emphasis added).

Benjamin is properly distinguished from the case at bar because (1) at the signature line in this case there is no language that states that Kromish, Vinson and Liguori were signing both in their corporate capacity and in their individual capacity and (2) there is no evidence that Kromish, Vinson or Liguori understood they were personally guarantying the obligations of the LLC under the lease. In fact, Kromish and Vinson affirmatively testified they had no belief they were personally

guarantying the obligations of the LLC by signing the lease as a representatives of the LLC. Deposition of Kromish 10:16-21, (Pa 132), 13:25-14:13 (Pa 133-34); Deposition of Vinson 21:5-11 (Pa135).

The Benjamin Court itself indicated that it would have decided the case differently on different facts:

> "This was not a scenario in which the language purporting to make a corporate individually responsible was buried in small print in the middle of the text. Rather, the language was in large print, and placed prominently below the signature line."
>
> Id. at *8.

The facts at bar exactly fit the Benjamin admonition. Accordingly, even the only case cited by Barresi supports the position of Kromish and Vinson that there has been no personal guaranty.

B. Even if Zane Kromish and Fred Vinson Did Personally Guarantee the Obligations of FZG Enterprises, LLC Under the February 20, 2015 Lease, And Even if Such Guaranty Was Not Terminated With the Termination of the Lease in 2016, Such Guaranty Was Revoked Before Plaintiff and FZG Enterprises, LLC Entered into A Consent Judgment For Payment of Amounts Due.

As an alternate basis for finding that Kromish and Vinson are not liable for the obligations claimed by Barresi against FZG Enterprises, LLC, Kromish and Vinson argue that any continuing guaranty made by them was revoked on at least three separate occasions: (1) in 2016 when Barresi became aware that Zane Kromish and Fred Vinson had sold all of their interests in FZG and retained absolutely no

interest in the entity; (2) in an exchange of e-mail correspondence between Barresi and Vinson that took place in January, 2019 in which Vinson clearly stated to Barresi that he and Mr. Kromish had sold all of their interests in FZG "several years ago" and that they had no further responsibility under any lease guaranty (if there ever was such a guaranty). Pa79-88; (3) on March 27, 2019 counsel for Mr. Kromish and Mr. Vinson issued correspondence to Barresi which clearly and unequivocally revoked any existing guaranty. All of these revocations took place before April 17, 2019 which was the date of the entry of the Consent to Enter Judgement which is the document under which Barresi claims his damages. As such, even if a personal guaranty was made by Kromish and Vinson and even if the guaranty was not terminated upon the termination of the month to month lease, Kromish and Vinson are still not liable for any sums claims due because the guaranty was effectively revoked prior to the entry of the relied upon Consent Judgment.

Notably, in his reply brief Barresi does not deny that he received the January, 2019 emails from Vinson and that he received the March 27, 2019 letter from counsel for Kromish and Vinson. Barresi also does not deny that the foregoing events all took place before the entry of the Consent Judgment relied upon. Finally, Barresi does not deny that any personal guaranty signed by Kromish, Vinson and Liquori was in the nature of a continuing guaranty since the underlying lease was a month to month lease that could be terminated at any time by either party and thus

each month that the lease was not terminated constituted an extension of additional consideration by Barresi. Rather, Barresi defends this claim based only on the following two arguments: (1) the alleged guaranty in the month to month lease did not expressly reserve the right to revoke the guaranty prior to the extension of time under the month to month lease[3] and (2) the communications made in 2016, and in January, 2019 did not expressly claim revocation when the communication was made. Like the other arguments made by Barresi these two arguments are fatally flawed.

As to the first argument, even though the guaranties in Swift & Co., Fidelity Union Trust Co. and Mount Holly State Bank all contain right to revoke language there is nothing in any of the cases that states that such language is required in order to claim revocation under a continuing guaranty, especially when the guaranty language relied upon does not expressly state any guaranty was irrevocable. The strict construction of guaranties and the principle of construing ambiguities against the draft tilt this point against Barresi.

Regarding the second argument, again there is nothing in any case cited by Barresi that requires use of the word revocation to constitute an effective revocation. Thus in Swift & Co. notice of the mental incompetence of the guarantor alone was

[3] It is not surprising that the once sentence that is alleged to constitute the personal guaranty in this case does not include an express provision allowing revocation as no substantive terms of the guaranty are included anywhere in the Lease. Conversely, it is also accurate to state that the one sentence relied upon does not state that any guaranty made is irrevocable.

deemed potentially sufficient to work a revocation. In Mount Holly State Bank the Court ruled that notice of the guarantor's sale of its interest in the corporation alone could potentially work a revocation. In any event, if use of the word revocation was required under applicable law there is no dispute that counsel's letter of March 27, 2019 liberally used the term "revocation".

In light of the above, should the Court reach this issue, which was not addressed in the Trial Court's summary judgment ruling below, the Court should find revocation and issue a ruling that Kromish and Vinson are not liable for any amounts claimed due from FZG Enterprises, LLC.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Trial Court's ruling that the execution of the Lease by Defendants Kromish, Vinson and Liquori created personal liability by them for the obligations of FZG under the Lease. In the alternative the Court should affirm the Trial Court's ruling that any personal guaranties were terminated as of May 11, 2016 or were revoked prior to the accrual of the obligation sought to be enforced.

BROWN & CONNERY, LLP
Attorneys for defendants Zane Kromish and Fred Vinson

/s/ Mark P. Asselta
By: Mark P. Asselta

Dated: January 10, 2024