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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3743-09T4

ANDREW E. HALL & SON, INC.,

Plaintiff-Respondent,

v.

K & K BUILDERS, INC., and
JOHN KOSLOWSKI,

Defendants-Appellants.

Submitted November 17, 2010 - Decided April 12, 2011

Before Judges Gilroy and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1195-07 and L-1294-07.

Lawrence J. Fox, attorney for appellants.

Anthony J. Sposaro, attorney for respondents.

PER CURIAM

In this consolidated book account action, defendant John Koslowski appeals from the March 9, 2010 order that entered judgment against him personally and against defendant K&K Builders, Inc. (collectively, the defendants) in the amount of $76,457.38. We affirm.

On May 1, 2007, plaintiff Andrew E. Hall & Son, Inc., filed a complaint against defendants seeking damages in the amount of $56,030.99 for breach of contract under docket number L-1195-07. On May 7, 2007, plaintiff filed a second complaint against defendants seeking additional damages in the amount of $20,426.39 for breach of contract under docket number L-1294-07. On February 1, 2008, the trial court entered an order consolidating the two cases. The matter was tried before the court sitting without a jury on February 24, 2010. The only person to testify at the trial was plaintiff's president, Andrew E. Hall (Hall). On March 9, 2010, the trial court entered an order supported by a two-page statement of reasons entering judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $76,457.38.

Plaintiff is a heating and plumbing contractor. Koslowski is the president and principal owner of K&K Builders, Inc., a home improvement contractor. The parties did business together for approximately fifteen years. Plaintiff provided goods and services to K&K Builders on a time and material basis for use by K&K Builders in constructing various building projects. Prior to 2004, the parties enjoyed a good working relationship, and K&K Builders never complained about the cost of plaintiff's services or of its work.

On May 7, 2004, K&K Builders owed plaintiff $82,606.83. Because Hall became wary of the large debt and refused to provide additional goods or services, or to extend further credit, Koslowski agreed to execute a personal guarantee. The parties signed an agreement dated May 7, 2004, that stated:

> I, John Koslowski, hereby acknowledge that as of May 7, 2004, I presently owe Andrew E. Hall & Son, Inc. a balance of $82,606.83. I agree to pay Andrew E. Hall & Son, Inc. in a timely manner the full amount of monies owed. I also understand that I am not to incur and [sic] additional debt with Andrew E. Hall & Son, Inc. All future monies are to be paid upon receipt or within a 30-day grace period.

Adjacent to Koslowski's signature appears the term "personally." Hall understood the agreement to be a personal guarantee by Koslowski to not only pay the outstanding balance of $82,606.83, but to also personally guarantee all future debt incurred by K&K Builders for plaintiff's goods or services. K&K Builders subsequently paid the $82,606.83 owed to plaintiff.

Between May and November 2006, plaintiff provided an additional $76,457.38 worth of goods and services to K&K Builders. Because defendants failed to timely pay the $76,457.38, plaintiff's two lawsuits followed.

In finding favorably for plaintiff, the court stated in relevant part:

> Mr. Hall testified that he was unwilling to continue to do business with K&K Builders, Inc.[,] unless its principal, John Koslowski, executed this document. Mr. Hall indicated that his understanding of this document was a promise by Mr. Koslowski personally that he would no longer fail to pay timely the amounts due and that it was a personal guarantee that Mr. Koslowski would be personally bound to any future amounts as well as the $82,606.83. Mr. Hall testified that ultimately the $82,606.83 was paid.
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> No testimony was provided by the defendant[s]. The [c]ourt, therefore, concludes that Andrew E. Hall & Son, Inc.[,] did provide plumbing supplies, goods and services in the total amount of $76,457.38. Judgment, therefore, is entered against K&K Builders, Inc.[,] for that amount as no defense was presented.
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> The [c]ourt also accepts Mr. Hall's explanation of the May 7, 2004 agreement, P-37 in evidence. Mr. Hall[] stated that he would not have continued doing business with K&K Builders, Inc.[,] unless Mr. Koslowski signed a personal guarantee and agreed to [pay] all bills . . . in timely fashion. Defendant[s] did not dispute this assertion and so the [c]ourt accepts plaintiff's version. Consequently, judgment is entered by the [c]ourt against John Koslowski personally for this amount.

On appeal, appellant argues that the May 7, 2004 agreement did not constitute a continuing personal guarantee. Although appellant does not contest that K&K Builders owes plaintiff $76,457.38, he asserts that the judgment should not have been entered against him because the third sentence of the agreement only constituted a promise not to incur further debt until the

$82,606.83 was satisfied, not that he would personally guarantee all future debt of K&K Builders.

A judgment shall not be overturned except where, after a careful review of the record and weighing of the evidence, the appellate court determines that "continued viability of the judgment would constitute a manifest denial of justice." In re Adoption of a Child by P.F.R., 308 N.J. Super. 250, 255 (App. Div. 1998) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977)). We will not disturb the factual findings and legal conclusions of a trial court unless they are "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). However, the same level of deference is not required when we are reviewing a legal conclusion. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"When resolving questions as to the interpretation of contracts of guarantee, we look to the rules governing construction of contracts generally." Ctr. 48 Ltd. P'ship v. May Dep't Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002). "Interpretation and construction of a contract is a matter of

law for the court subject to de novo review." Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). "In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain." Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (2009).

Our scope of review includes deciding whether a term is clear or ambiguous. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). "The court should examine the document as a whole and the 'court should not torture the language of [a contract] to create ambiguity.'" Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (quoting Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div 1990)). "Absent ambiguity, the intention of the parties is to be ascertained by the language of the contract." CSFB 2001-CP-4 Princeton Park Corp. Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 120 (App. Div. 2009).

"'An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations.'" Nester, supra, 301 N.J. Super. at 210 (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp.

275, 282 (D. N.J. 1992)). "If contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties." Hall v. Bd. of Educ., 125 N.J. 299, 305 (1991).

A guaranty is a collateral agreement "to be answerable personally for the debt of another." Roxbury State Bank v. Clarendon, 129 N.J. Super. 358, 376-77 (App. Div.), certif. denied, 66 N.J. 316 (1974). "[A]n agreement guaranteeing the particular debt of another does not extend to any other indebtedness not within the intention of the parties." Ctr. 48 Ltd. P'ship, supra, 355 N.J. Super. at 405. "Nevertheless, the terms of a 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 405-06.

A continuing guarantee "'is not limited to a particular transaction . . . [it] is intended to cover future transactions.'" Swift & Co. v. Smigel, 115 N.J. Super. 391, 394 (App. Div. 1971), (quoting Fid. Union Trust Co. v. Galm, 109 N.J.L. 111, 116 (E. & A. 1932)), aff'd, 60 N.J. 348 (1972). "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)." Ibid. (emphasis omitted).

Here, it is undisputed the agreement contains a personal guarantee. Because appellant disputes the trial court's interpretation of the agreement as a continuing personal guarantee, the construction and interpretation of the agreement is subject to de novo review. We conclude that the terms of the agreement are ambiguous.

A plain reading of the first two sentences of the agreement constitutes a personal guarantee by appellant to pay the $82,606.83 debt that was outstanding when he executed the agreement. The last two sentences, however, are susceptible to two reasonable interpretations. First, when read in conjunction with the first two sentences, the last two sentences suggest that the personal guarantee was a continuing one. The fourth sentence references "all future monies," suggesting that the parties considered not just the original obligation of $82,606.83, but also any debt that might be incurred in the future. Second, the last two sentences when read by themselves could also be interpreted to mean that defendants were to pay for future goods and services within thirty days of the date any goods are delivered or services rendered. Under this latter interpretation, the fourth sentence provides the manner in which

K&K Builders, Inc., would continue doing business with plaintiff by adhering to the circumstances described in the third sentence, rather than relating to the guarantee provided in the first two sentences.

The trial court ascertained the parties' intent in executing the agreement by accepting parol evidence. Hall testified without objection that appellant's guarantee was a continuing guarantee of future debt.

> [Plaintiff's Counsel] - Can you tell us the circumstances that resulted in that document being executed by Mr. Ko[s]lowski, it indicates personally and by you?
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> [Hall] - At one point John [Koslowski] was getting too far behind. And he wanted me to do more work[,] and I told him I couldn't do anymore. And at that time he had offered me--he said, I will personally guarantee this.
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> And I said, John, it's not a matter of the guarantee. [It's]--over $80,000[;] I can't continue. He assured me that he would personally guarantee everything that was due and everything that would go on from there.
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> . . . .
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> [Plaintiff's Counsel] - Would you have extended credit to the defendants in 2004 and perform work without it being paid in advance or some other arrangement being made without this--without this document having been signed by Mr. Ko[s]lowski, individually?
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> [Hall] - No. I would not go any further.

We conclude that the trial court's determination that the agreement contained Koslowski's personal guarantee of future debt is supported by credible evidence in the record. R. 2:11-3(e)(1)(A). Accordingly, we affirm.

Affirmed.