NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4959-09T4

FRANK A. LEO,

Plaintiff-Respondent/
Cross-Appellant,

v.

SPOTTED ZEBRA, INC., ANNMARIE GIANCONTIERI, as President of SPOTTED ZEBRA, INC., BRUCE M. BRIGANDI, individually and as a shareholder of PASEGES FOOD DISTRIBUTION, INC., PASEGES FOOD DISTRIBUTION, INC., NICK MEINTANAS, CHIEF EXECUTIVE OFFICER OF PASEGES FOOD DISTRIBUTION, INC.,

Defendants,

and

BERNARD J. PERINI, individually and as a shareholder of PASEGES FOOD DISTRIBUTION, INC.,

Defendant-Appellant/
Cross-Respondent.

Argued February 1, 2011 - Decided April 27, 2011

Before Judges Messano and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-6053-07.

Michael D. Cassell argued the cause for appellant/cross-respondent (Lefkowitz, Hogan

& Cassell, LLP, attorneys; Mr. Cassell, on the brief).

David M. Paris argued the cause for respondent/cross-appellant (Piro, Zinna, Cifelli, Paris & Genitempo, P.C., attorneys; Mr. Paris, on the brief).

PER CURIAM

Following a bench trial, the judge entered an order for judgment in favor of plaintiff Frank A. Leo against defendant Bernard J. Perini in the amount of $219,057.28. Defendant now appeals asserting various claims of error. Plaintiff cross-appeals, arguing that the judge improperly entered judgment for an amount that was less than the amount he was entitled to pursuant to the guaranty that was the subject of the suit.

We have considered these arguments in light of the record and applicable legal standards. We reverse.

Plaintiff filed his complaint in the Law Division on December 26, 2007. The first count sought recovery on a promissory note allegedly in default. The note, dated January 10, 2006, was in the principal amount of $307,500, which, together with interest in the amount of $22,500, was due and payable in full on March 11, 2006 (the January 10 note). The note provided that upon failure to make payment, further interest would accrue at 18% per annum on the unpaid balance. Defendant Spotted Zebra, Inc. (Spotted Zebra) was the payor, and

the note was executed by AnnMarie Giancontieri, its president. Pursuant to the terms of the note, Spotted Zebra granted plaintiff a security interest "in 100% of its assets."

Pursuant to the note, defendant and co-defendant Bruce M. Brigandi also guaranteed Spotted Zebra's obligations. Defendant and Brigandi pledged as security for the guaranty "their individual 20% interests in Paseges Food Distribution, Inc. [(Paseges)]." The note provided a signature line for defendant Nick Meintanas, the chief executive officer of Paseges, to consent to the pledge. The guaranty was executed by defendant and Brigandi in counterparts; Paseges never executed the document. The second count of plaintiff's complaint sought judgment based upon defendant's and Brigandi's guaranty.

Defendant filed an answer generally denying plaintiff's allegations. Little discovery ensued, and plaintiff moved for summary judgment on September 24, 2009. However, the matter had already received a trial date that preceded the return date of the motion. The motion was apparently denied as "moot."

On October 5, 2009, Brigandi entered into a consent judgment with plaintiff in the amount of $377,500. On October 9, the judge entered default judgment against Spotted Zebra in

the amount of $416,290.13. Trial commenced on October 13 solely against defendant.[1]

Before any testimony, defendant advised the judge that he intended to introduce evidence that 1) Meintanas never executed the consent; and 2) that plaintiff's counsel had agreed to escrow all monies and not forward any to Spotted Zebra until the consent was executed. Plaintiff's counsel argued that Meintanas' consent was irrelevant to defendant's obligations under the guaranty because it was "fully integrated" with the note. Without expressly ruling on the issue, the judge determined that he "need[ed] to take some testimony."

Defense counsel also advised the judge that he intended to introduce two draft promissory notes that were circulated before the first note was executed. He argued the proffered evidence did not violate the parol evidence rule. Plaintiff's counsel, in opposition, noted there was a "subsequent promissory note for more money that [defendant] executed with a personal guarantee." Claiming not to have obtained a copy of the second note until recently, plaintiff's counsel argued, "if we're going to say that other promissory notes are evidentiary, then I've got a $392,000 promissory [note] signed by [defendant]. I may seek to

[1] Meintanas apparently sought dismissal on jurisdictional grounds since he was a citizen of Greece. It is unclear how the litigation against him and Paseges was resolved.

amend our complaint to conform with the proofs, because this appears to be a subsequent note also personally guaranteed." When defense counsel asked if plaintiff was formally amending the complaint, plaintiff's counsel responded, "[n]ot at this point in time. It depends on the proofs . . . ."

Plaintiff testified and identified the January 10 note and the payments he had received from Spotted Zebra on account of the note, totaling $85,500. On cross-examination, plaintiff acknowledged that Brigandi "brought [him] into the deal." He further admitted that he had previously loaned Brigandi personally "[s]omewhere in the neighborhood of [$]180,000, $200,000." The $85,500 that had been repaid on the January 10 note "came from [Brigandi] for Spotted Zebra['s] obligation."

Plaintiff also admitted that he did not loan Spotted Zebra the full amount reflected on the note. Instead, the $307,500 "encompassed some of . . . Brigandi's prior obligations." Plaintiff explained that when Brigandi approached him for a loan on behalf of Spotted Zebra, "[plaintiff] said unless the . . . note encompasse[d] past obligations, [he] wouldn't loan the money." The first note "superseded everything" regarding Brigandi's prior debts, and, as a result, plaintiff believed defendant had "responsibility for monies that [he] loaned on a personal basis to . . . Brigandi."

Plaintiff identified two notices confirming the wire transfers of $212,500 from his account to Spotted Zebra -- $127,500 on January 11, 2006, and for $85,000 on January 27. This was the full amount of money he actually loaned the corporation. Plaintiff rested without calling any other witnesses.

Defendant testified that he was involved in the incorporation of Spotted Zebra in December 2005. Defendant claimed his attorney advised that the January 10 note and his guaranty would have no legal effect without Meintanas' signature. Defendant personally invested more than $150,000 in Spotted Zebra "in cash and in kind," and resigned as an officer because he "couldn't get any straight answers from . . . Brigandi." Defendant was aware that plaintiff had loaned money to Brigandi "over the years," but he never intended to "obligate [him]self to pay [plaintiff] any of the personal loans that he [made] to . . . Brigandi."

On cross-examination, it was revealed that defendant was a sophisticated businessman who had interests in myriad companies acquired since his retirement from the New York City police department. Spotted Zebra was created to "do business with Paseges," which could "provide a variety of [food] products" for exclusive distribution. Defendant explained that the proceeds

from the January 10 note were to be used "to purchase one container of [olive] oil" from Paseges, and "then have enough money to hire a . . . salesperson, warehouse the oil, have a car, and be able to merchandise the oil . . . and sell it."

Defendant identified a second promissory note between plaintiff and Spotted Zebra for $392,500 dated January 24, 2006 (the January 24 note). The second note included a guaranty executed by defendant and Brigandi; it did not, however, require Meintanas' consent or contain a pledge of security by defendant. Pursuant to the guaranty in the second note, Brigandi pledged the interest he owned in Paseges as security. Defendant testified that this note "had provisions to buy two containers of oil," with additional funds to do the other things previously identified. Defendant testified that the full amount of money was necessary to finance these additional costs above the actual cost of obtaining the oil. Defendant presumed the money reflected in the January 24 note was all going to Spotted Zebra, and he would not have provided his guarantee if some of the money were used to forgive Brigandi's prior debt to plaintiff.

Defendant rested after finishing his testimony. Plaintiff's counsel moved to admit the January 24 note in evidence and amend the complaint "to conform to the evidence in the case." Defendant objected. The judge reserved judgment on

the motion, and requested that counsel address the issue in their written summations.

The judge issued a written opinion on March 3, 2010. Initially, the judge permitted amendment of the complaint to essentially substitute the January 24 note for the January 10 note, concluding "the claims and defenses asserted under the subsequent [n]ote are the same as those asserted under the first [n]ote." Finding no prejudice to defendant, the judge concluded "the amounts owed, if any, will be based on the [January 24] [n]ote."

The judge summarized the contentions of each side. Plaintiff sought recovery of $649,796.89, which reflected the "balance and interest due on the [January 24] [n]ote . . . with an addition of per diem interest of $169.89 . . . [through] the date of the execution of Final Judgment," together with counsel fees and costs permitted under the terms of the note. Defendant argued that the first note was void ab initio because Meintanas never signed the consent; alternatively, he argued there was "no meeting of the minds" as to either note because he understood Spotted Zebra was receiving the full amount under the notes; lastly, defendant contended that he could not be liable for any more than $127,500, the difference between the amount actually

loaned by plaintiff to the corporation, and the payments made by the corporation on account of the note balance.

The judge rejected defendant's first argument, noting that the second note did not require Meintanas' consent. However, as to the second argument, the judge concluded:

> [T]here was clearly no meeting of the minds between [plaintiff] and [defendant] as to what [defendant] was personally guaranteeing. [Defendant] testified that he was guaranteeing the amount of the loan made to Spotted Zebra and not the personal debt of Brigandi; [plaintiff] testified that his intent was that the [n]ote be a guarantee for both. [Plaintiff] and [defendant] testified as to two very different understandings when they executed the [n]ote. The Court finds that there was no meeting of the minds sufficient to enforce the [n]ote. Moreover, it is unfathomable why [defendant] would have guaranteed Brigandi's personal debt absent some reason or incentive which is not discernible from this record. . . .
>
> As to what remedy the Court will impose, while it is clear that [defendant] did not intend to guarantee Brigandi's personal debt, it is equally clear that he did intend to guarantee any loan made to Spotted Zebra. The Court therefore enters judgment in favor of [plaintiff] in the amount of $127,500[] plus 18% interest per annum. The Court denies [plaintiff's] request to enter a separate judgment against [defendant] for attorney's fees and costs.

Plaintiff submitted a proposed form of judgment that included interest on the judgment's principal amount, i.e., $127,500, at 18% from the date of the second note, i.e., January

24, 2006. Defendant objected and argued, among other things, that interest should only accrue from the date of the judge's decision. In a letter dated April 14, 2010, the judge settled the dispute over the form of the judgment and awarded plaintiff interest from March 24, 2006. He entered an order of final judgment the same day in the amount of $219,057.28, plus per diem interest in the amount of $62.88 thereafter. This appeal followed.

Defendant contends that the judgment should be vacated because "there was no meeting of the minds and because the guaranty was procured through fraud"; that the judge erred in permitting the amendment of the complaint to include the second note; that it was error to award pre- and post-judgment interest at the rate of 18%; and that the judge erred "by failing to take into account that the judgment provides a windfall to [plaintiff]."

Plaintiff counters by arguing defendant never raised the issue of fraud at trial, and, even if he had, defendant failed to prove fraud by clear and convincing evidence; that the judge properly permitted amendment of the complaint to conform to the proofs at trial; that the grant of interest was appropriate; and that the judgment provided no windfall to him. In his cross-appeal, plaintiff argues that in fixing the amount of the

judgment, the judge "erred in permitting extrinsic evidence to interpret or vary the clear and unambiguous terms [of the note and guaranty] to give them new meanings," and therefore "the guarantee should be enforced as written."

Our review of the factual findings made by the trial judge in a non-jury trial is quite limited. Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). "Thus, '[w]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (alteration in original) (quoting State v. Barone, 147 N.J. 599, 615 (1997)). In general, the judge's factual "findings . . . should not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (quotations omitted). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

We defer to two critical factual findings made by the trial judge: 1) that defendant did not intend to guarantee the repayment of any amount that included Brigandi's prior debts to

plaintiff; and 2) that defendant would not have executed the guaranty had he known it included those amounts. However, we part company with the trial judge thereafter because the legal conclusion to be drawn from those findings is that the guaranty could not be enforced.

We note some general principles regarding the law of suretyship and guaranty.

> When resolving questions as to the interpretation of contracts of guarantee, we look to the rules governing construction of contracts generally. Guarantee agreements should be strictly construed and their language interpreted most strongly against the party at whose insistence such language was included. . . .
>
> It is fundamental that a guarantor is not bound beyond the strict terms of its promise and its obligation cannot be extended by implication. For example, an agreement guaranteeing the particular debt of another does not extend to any other indebtedness not within the intention of the parties. 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. While any ambiguity should be construed in favor of the guarantor, the agreement should be interpreted according to its clear terms so as to effect the objective expectations of the parties.
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> Of course, a meeting of the minds is an essential element to the valid consummation of any contract. While a unilateral mistake by a guarantor as to the nature of the

> underlying transaction is not a basis for relief, if the mistake is such that the parties never mutually agreed to the terms of the guarantee contract, then the document will not be enforced against the guarantor.
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> [Ctr. 48 Ltd. P'ship v. May Dep't Stores Co., 355 N.J. Super. 390, 405-06 (App. Div. 2002) (emphasis added) (citations omitted).]

Even when the contract of guaranty is properly formed, "[i]f the secondary obligor's assent to the secondary obligation is induced by a fraudulent or material misrepresentation by the obligee upon which the secondary obligor is justified in relying, the secondary obligation is voidable by the secondary obligor." Restatement (Third) of Suretyship & Guaranty § 12(1) (1999). The misrepresentation need not be fraudulent if it is material. Id. comment a. "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." Restatement (Second) of Contracts § 162(2)(1981).

Applying these principles to the facts as found by the judge, it is clear that defendant's guaranty was unenforceable. The judge concluded that there was "no meeting of the minds." We agree. Plaintiff believed that defendant was personally guaranteeing repayment of $392,000, even though plaintiff did not loan Spotted Zebra that amount. Defendant, meanwhile, was

prepared to guarantee the money loaned by plaintiff to Spotted Zebra, but not monies plaintiff previously loaned to Brigandi. Therefore, a contract of guaranty was never formed.

Plaintiff's complaint, as amended, asserted only two causes of action, recovery under the January 24 note and/or recovery under defendant's guaranty. In the written summation submitted to the judge, plaintiff contended that he was entitled to a judgment based upon the clear and unambiguous language of the guaranty; he never asserted any other theory. Indeed, in his cross-appeal, plaintiff continues to argue that he was entitled to a judgment based upon the face amount of the January 24 note, minus payments made by Spotted Zebra. However, having found there was no "meeting of the minds" as to the formation of the guaranty contract in the first instance, the judge should have concluded that there was no enforceable contract.

Even if the guaranty contract was properly formed, it was voidable because of the material misrepresentation regarding plaintiff's loan to Spotted Zebra. The face amount of the note was $392,000; however, plaintiff candidly admitted that he intentionally only loaned the company $212,500. The judge concluded that defendant would not have entered into the guaranty contract if he knew this. The misrepresentation was

material to the formation of the contract, hence, the guaranty was voidable.

For the foregoing reasons, we reverse the judgment under review. We do not address the remainder of defendant's points on appeal. Plaintiff's cross-appeal is dismissed.