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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2914-12T3

WOODHAVEN LUMBER & MILLWORK, INC.,

Plaintiff-Appellant,

v.

MONMOUTH DESIGN & DEVELOPMENT CO., INC.,
ROBERT J. PETILLO, Individually, and
JOHN J. PETILLO, Individually,

Defendants-Respondents.

Submitted March 18, 2014 – Decided April 4, 2014

Before Judges Alvarez and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3386-11.

Peter C. Lucas, LLC, attorneys for appellant (Mr. Lucas and Jessica S. Strugibenetti, on the briefs).

Arbus, Maybruch & Goode, attorneys for respondents (Matthew R. Goode, on the brief).

PER CURIAM

On October 19, 2011, plaintiff Woodhaven Lumber & Millwork, Inc. (Woodhaven) filed a complaint alleging that defendant Monmouth Design and Development Co., Inc. (Monmouth) owed it $203,941.76 on a book account for goods sold and delivered by

plaintiff to Monmouth. Plaintiff also sought reasonable attorney's fees of $50,985.44 as provided in the parties' credit agreement. In the second and third counts of the complaint, plaintiff sought the same amounts from defendants Robert J. Petillo (Robert) and John J. Petillo (John), respectively, on the basis that they had personally guaranteed Monmouth's indebtedness.[1]

Following a bench trial in the Law Division, on January 28, 2013, the court entered judgment in favor of plaintiff against Monmouth for $203,941.76, and against John for $10,000. The court dismissed the complaint against Robert with prejudice. Plaintiff appeals, challenging the court's failure to award attorney's fees, and limiting John's obligation under the personal guaranty to $10,000. For the reasons that follow, we affirm the judgment against John, and remand the matter to the trial court to determine a reasonable counsel fee award.

I.

At the outset, the parties stipulated that $203,941.76 was due on the book account between plaintiff and Monmouth. That sum included interest and late fees, but not the attorney's fees that were also being sought by plaintiff under the parties'

[1] Since the individual defendants share a common surname, we sometimes refer to them by their first names in this opinion for ease of reference. In so doing, we intend no disrespect.

credit agreement. The primary focus of the ensuing trial was upon the liability of the individual defendants for Monmouth's indebtedness pursuant to their personal guaranty.

Monmouth is a construction company that was established in late 1988. It was originally owned by two brothers, Robert and John Petillo. On July 16, 1990, Monmouth submitted a credit application to plaintiff to purchase building supplies.

William Bove, plaintiff's Corporate Manager, who had previously served as its Credit Manager, testified that it was plaintiff's standard business practice to require a new customer to submit a credit application. That application would then be reviewed for credit worthiness, and based upon the applicant's credit rating, plaintiff would then establish a "guideline" for extending credit to the new account. This "guideline" would then be readjusted later depending on the customer's orders and payment history. Plaintiff would notify the customer that a monthly credit line had been established, so the customer could commence its purchase orders. That normal practice, Bove stated, was followed when Monmouth submitted its application.

On the credit application form submitted by Monmouth, the line next to "Amount of Credit Requested" was left blank by the applicants. However, at the bottom of the form, next to the words, "Cr. Limit," there appeared a handwritten notation of

$10,000. That bottom section, Bove indicated, was for Woodhaven's internal use only, and was completed by Woodhaven "after the credit application was sent in."

The credit application also included a printed personal guarantee section signed by both John and Robert. It was located immediately above the section with the handwritten $10,000 credit limit notation, and provided:

> AS AN INDUCEMENT TO WOODHAVEN LUMBER MILLWORK, INC. TO SUPPLY GOODS ON CREDIT, THE UNDERSIGNED AGREE(S) TO GUARANTEE PERSONALLY PROMPT PAYMENT OF ALL INVOICES AND A LATE CHARGE OF 2% PER MONTH ON ANY PAST DUE BALANCES TOGETHER WITH ALL COSTS OF COLLECTION, INCLUDING ATTORNEY'S FEES OF 25% OF THE TOTAL INDEBTEDNESS.

The credit limit, Bove explained, was a "monthly guideline based on the terms of the credit application and paying the bills in thirty days . . . . [to determine] how much [Monmouth] could purchase each month, $10,000 in the beginning." He stated that though the limit was increased at some unidentified point, "it's been [$]10,000 a month. As long as the next payment was coming in to pay the previous one, we'd always exceed it. In other words, if you bought something . . . for $9,000 and that payment is not due until next month, you had another [$9,000] or $10,000 order, we would let the order go through based on our history with that customer . . . ."

Plaintiff would also unilaterally increase the initial credit limit without any formalities or additional applications from its customers. Bove testified that after prospective customers submitted their credit application, plaintiff's self-calculated and recalibrated credit guidelines became information for its internal records, and were not shared with the customers. He reported that though he frequently communicated with the customers, such as Monmouth, he would only discuss with them their pending payments, which would shape plaintiff's internal decision to increase credit.

Bove stated that as credit manager, he believed that Monmouth submitted a blank credit limit because "the credit limit [was] not requested by them . . . . It[] [was] unlimited." In 1990, when Monmouth applied for credit, he asserted that there was no "max[imum] line of credit that [plaintiff] would provide to a new company," and that the "max credit . . . . depended on information [it] received back from [its] credit service . . . ."

On the other hand, John Petillo, who had known plaintiff's owners for years, did not believe that plaintiff would issue them unlimited credit when they applied. Instead, he testified that his conversations with one of Woodhaven's owners led him to believe that the maximum initial credit line plaintiff would

extend to Monmouth, then a new company, would be $10,000. On cross-examination, John confirmed that he did not know what the maximum credit line would be when he submitted the credit application. It was only after the application was submitted, he said, that plaintiff "sent you back the app[lication] and said, 'Ten Thousand dollars is your credit line.'"

John also testified that he had no knowledge that Monmouth's credit limit with Woodhaven was extended or raised. He believed that $10,000 was Monmouth's "total" credit line. His assumption was that as long as he paid off the invoices which were sent to him, "the [$]10,000 [would] just ke[ep] revolving." Similarly, he believed that $10,000 was also the amount guaranteed by the personal guarantee section. He admitted that although he knew Monmouth owed Woodhaven in excess of $200,000, no one from Woodhaven ever notified him or Monmouth that the credit limit was increased.

The judge quizzed John on how Monmouth was able to purchase above the $10,000 limit over time, without him ever asking someone at Woodhaven about the increased credit. The judge asked him, ". . . you owe twenty times more than the credit limit . . . . Did you ever have any conversation with anybody [at Woodhaven] saying . . . 'I'm ordering more stuff, but my credit limit is limited to $10,000. You're allowing the company

to order more material, but I'm only limiting my [personal] guarantee to [$]10,000?'" John responded that although he talked to Bove once a month, Bove never discussed any change in Monmouth's credit or the corresponding increase in the Petillos' personal liability. Ultimately, John believed that the credit limit remained at $10,000 and also that he was only personally liable for that amount.

Robert Petillo testified next, and confirmed that he and his brother, John, applied for a credit line with Woodhaven. He too discussed the credit line with one of Woodhaven's owners, with whom he had "a nice relationship." As a result of his conversations with Woodhaven, Robert also understood that $10,000 was the maximum line of credit, and that the brothers were "personally guaranteeing" that amount.

The two brothers also testified about how Robert disassociated himself from Monmouth sometime in 2002. John spoke with Woodhaven's owners or "principals" "plenty of times," and conveyed to them that Robert and he were "splitting up," and that John "would not be responsible for anything that [Robert] purchased; he would be on his own." He also informed Woodhaven that Robert "would be no longer responsible after [2002] for any of the material" Monmouth purchased, and Robert would no longer be personally liable on the personal guarantee. John stated

that he informed one of Woodhaven's "principals" of this, "personally, face to face, not over the phone[.]" However, he never sent Woodhaven any formal letter memorializing Robert's dissociation, as the Petillo rupture was well-known — "it was a little scuttlebutt all over the whole industry."

Robert also testified that he too had notified his Woodhaven contact, one of the company's owners, sometime between 2001 and 2002, that he "was no longer with [Monmouth]," and that henceforth he would not be responsible for any of Monmouth's debts. He conceded that he did not specifically talk about his liability under the personal guarantee. But, he stated, he was reassured by Woodhaven that he would no longer be associated with Monmouth Design. He recalled that his friend at Woodhaven, one of the owners, told him, "[a]bsolutely not a problem. I'll take care of it."

Bove, on the other hand, testified that he was never informed about Robert's conversation with Woodhaven's owner. Though Bove stated that as the credit manager he should have been informed about the change, he admitted that Woodhaven's owners did not always tell him "everything and every conversation" they had with each customer.

Beginning in November 2007, Monmouth began accruing outstanding balances on Woodhaven's invoices. Eventually by

July 31, 2011, the unpaid invoices amounted to $203,941.76, which included interest and late fees. As noted, defendants stipulated to that outstanding balance at trial.

Following written submissions, the court issued an oral decision on January 18, 2013. Finding no dispute, the court first entered judgment against Monmouth for $203,941.76. The judge then analyzed the personal guarantee issue, i.e., whether it was capped at $10,000 or whether it increased over the many years the parties conducted business. The judge stated that there was no question that at the time Woodhaven approved Monmouth's application, the Petillos were personally liable for up to $10,000, which reflected the credit limit at the time.

But, the judge stated, he did not hear any testimony, or receive any proofs of "what was the [final] credit limit, [and] how it increased over the course of time," or of any correspondence from Woodhaven regarding increased credit. He found that while Bove, as Woodhaven's credit manager, was familiar with the account and could at least testify that the credit limit was raised, even "he could not provide . . . any history of the [Monmouth] account in terms of the personal guarantee." The judge referred to case law which directed that the language of a guarantee agreement be interpreted against the entity that prepared the form and at whose insistence the

ambiguous language was included. He explained that it was clear that any ambiguity in the guarantee agreement should be construed in favor of the guarantors.

The judge found that Robert was no longer personally liable, as he had informed a Woodhaven executive about his separation from Monmouth, and had thereby effectively revoked his personal guarantee long before the outstanding indebtedness accrued. Regarding John's personal guarantee, the judge found that "[h]ere there was clearly a limit of $10,000, and . . . it was the expectation of both parties when this was entered into that that would be the limit." On the other hand, the judge found, there was no proof submitted by Woodhaven that the Petillos were agreeing to be personally liable for the entire amount claimed by it:

> What this [c]ourt doesn't have is any kind of correspondence, any kind of agreement, any kind of acknowledgment that the [Monmouth] principals here were agreeing or would have accepted to be personally obligated for the amounts that are now being claimed by Woodhaven. It could have been easily done with a letter to Mr. Petillo or both Mr. Petillos at the time, saying, "Okay. We're increasing your credit limit to $20,000, and, oh, by the way, your personal guarantee is also going to be increased." Perhaps that Woodhaven believed that . . . they had a good relationship — apparently they did for a number of years — and that perhaps it wouldn't be necessary to have the personal guarantee for the total amount because obviously the credit limit

was extended. There's no question about that. I mean, they ordered and Woodhaven allowed them to build this account up to over $200,000 over the period between 2007 and 2011. But what this [c]ourt doesn't see any proof — and even [] Bove can't provide us with any testimony that there was any specific agreement by the [Monmouth] principal or principals . . . that they agreed to be on the hook for anything more than the $10,000 . . . .

So you can interpret what happened here two different ways. You could interpret it, as Woodhaven would have this [c]ourt believe, that as the credit limit was...increased over the $10,000 limit, the personal guarantee also increased correspondingly. Or you could take the position taken by the defendants that, okay, the credit limit to the corporation — which was, after all, that was the entity that made the application — increased, but the personal guarantee did not. Certainly there was no understanding on their part that their personal obligation increased accordingly, as well, and there's no proof otherwise. So there's clearly an ambiguity here. This could have been interpreted either way by the parties, and I think Woodhaven was in the best position to do away with that ambiguity by simply just sending a letter that, "If you want more money, your personal guarantee is going to go up and you have the obligation to contact us if that's not your understanding, as well." They are businesspeople. I don't think it was necessary to have them sign a new form at any time, but it certainly was incumbent upon Woodhaven to advise the principals that their personal guarantee was being increased, and that apparently was not done.

Though Woodhaven's complaint also included a demand for attorney's fees, which would have brought the total amount it sought to $254,927.20, the trial judge denied the request. He remarked:

> There was no proof of any — or actually even a request, I believe, at the trial for any attorneys' fees on top of that even though there is some reference in the guarantee to additional monies that are due. But there was no proofs [sic] of any attorneys' fees or reasonable attorneys' fees that would be due on top of that.

On January 28, 2013, the trial court entered judgment memorializing its oral decision. This appeal follows.

II.

When reviewing a decision resulting from a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We do not disturb the factual findings of the trial judge unless we are "convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 412 (quoting Rova Farms, supra, 65 N.J. at 484) (internal quotation marks omitted); see also Beck v. Beck, 86 N.J. 480, 496 (1981).

However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo. State v. Parker, 212 N.J. 269, 278 (2012); Mountain Hill, L.L.C. v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008), certif. denied, 199 N.J. 129 (2009). We also review mixed questions of law and fact de novo. In re Malone, 381 N.J. Super. 344, 349 (App. Div. 2005).

A.

We first consider plaintiff's contention that the trial court erred in limiting John's liability under the personal guaranty to $10,000.[2]

A guaranty is the promise to be liable for the obligation of another person. Garfield Trust Co. v. Teichmann, 24 N.J. Super. 519, 526-27 (App. Div. 1953). Essentially, "[u]nder a guaranty contract, the guarantor, in a separate contract with the obligee, promises to answer for the primary obligor's debt on the default of the primary obligor." Feigenbaum v. Guaracini, 402 N.J. Super. 7, 18 (App. Div. 2008); Great Falls Bank v. Pardo, 263 N.J. Super. 388, 398 n.5 (Ch. Div. 1993) ("A guaranty is a separate and independent contract." (citation omitted)), aff'd, 273 N.J. Super. 542 (App. Div. 1994).

[2] In its brief, plaintiff does not challenge the dismissal of its complaint against Robert.

Therefore, when resolving questions regarding the interpretation of a guaranty, 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); Garfield Trust Co., supra, 24 N.J. Super. at 526.

Interpretation of a contract is a question of law. E.g., Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy, 210 N.J. 597, 605 (2012). The court's ultimate goal is to determine the intent of the parties, as expressed in the language they used in the contract. Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 183-84 (1981); Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). In divining the parties' intent, the contract should be read as a whole, in "accord with justice and common sense." Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.) (quoting Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956)) (internal quotation marks omitted), certif. denied, 177 N.J. 222 (2003); accord 495 Corp. v. N.J. Ins. Underwriting Assoc., 86 N.J. 159, 164 (1981).

Unambiguous language controls the rights and obligations of the parties, even if it was unwise in hindsight. The court will not make a "more sensible contract than the one" the parties

made for themselves. Kotkin v. Aronson, 175 N.J. 453, 455 (2003); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). The parties, especially sophisticated ones, are generally in the best position to determine their respective needs and obligations in negotiating a contract. Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008).

A contract is ambiguous if its terms are "susceptible to at least two reasonable alternative interpretations," Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997), or when it contains conflicting terms, Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577, 581 (App. Div.), certif. denied, 181 N.J. 545 (2004). Where ambiguity exists, "courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation." Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998). In the absence of definitive conduct by the parties, the court should summon all available evidence in service of the "ultimate goal of discovering the intent of the parties." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 270 (2006). If the meaning of an ambiguous provision depends upon the resolution of factual disputes, then the meaning of the doubtful provision is itself a question of fact. Anthony L.

Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 27-28 (App. Div. 1985).

Even where the language of the contract is clear on its face, courts may determine its meaning by looking to extrinsic evidence, such as "the situation of the parties, the attendant circumstances, and the objects they were . . . striving to attain." Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). In Sachau v. Sachau, 206 N.J. 1, 5-6 (2011), the Court stated: "[a] court's role is to consider what is 'written in the context of the circumstances' at the time of drafting and to apply 'a rational meaning in keeping with the expressed general purpose.'" (quoting Schwimmer, supra, 12 N.J. at 302).

Moreover, "[g]uarantee agreements should be strictly construed and their language interpreted most strongly against the party at whose insistence such language was included." Center 48 Ltd., supra, 355 N.J. Super. at 405 (internal citations omitted). "It is fundamental that a guarantor is not bound beyond the strict terms of its promise and its obligation cannot be extended by implication." Ibid. (citing Housatonic Bank v. Fleming, 234 N.J. Super. 79, 82 (App. Div. 1989).

Guided by these principles, we discern no error in the trial court's conclusion that John's obligation under the personal guaranty was limited to $10,000. The uncontroverted

evidence at trial established that this credit limit, which is handwritten into the agreement, was initially approved by plaintiff, and communicated to the Petillos. At no time thereafter were the Petillos given notice that their credit limit was increased, or more importantly, that their personal guaranty of Monmouth's account was so drastically expanded.

We also reject plaintiff's argument, raised for the first time on appeal, that John should be held liable for the full amount due plaintiff on the basis that he was unjustly enriched at plaintiff's expense. Plaintiff did not plead unjust enrichment in its complaint, or argue this as a basis for recovery before the trial court. "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

B.

We part company with the trial court's failure to consider an award of counsel fees to plaintiff, which appears to have

been based on its misapprehension that there was no proof offered, or "even a request" made for them, at trial.

In its complaint, in addition to the amount owed on the book account, plaintiff sought an award of "reasonable attorney's fees." The amount claimed was $50,985.44, which was "25% of the total indebtedness," as provided in the credit agreement.

At trial, the credit agreement was introduced in evidence. In the opening colloquy between the court and plaintiff's counsel, counsel advised that plaintiff was seeking "the assessed counsel fees and costs which were part of the agreement." Thus, the court was plainly made aware that attorney's fees were being sought in accordance with the terms of the credit agreement between the parties that was submitted in evidence during the trial.

A prevailing party may only seek attorney fees "if they are expressly provided for by statute, court rule, or contract." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385 (2009) (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001)). A party seeking attorney fees in a contract case must successfully bring a breach of contract claim, and the contract must have included a provision stipulating that the opposing party is liable for attorney

fees. Id. at 386. Therefore, if a party has prevailed on a breach of contract claim over a contract that included an attorney fee provision, that party may seek attorney fees under the contract. After establishing that the party seeking fees is entitled to recover, a reasonable fee must be determined. The same test for a reasonable fee is used in contract cases as is used in other cases awarding attorneys' fees. Ibid. Here it is clear that plaintiff prevailed in its action against Monmouth and, to a lesser extent, against John. Accordingly, plaintiff established its right to an attorney fee award. While we do not necessarily suggest that the trial court must pay blind allegiance to the 25% preprinted language contained in the credit contract, the court remained ultimately responsible to determine a reasonable fee award. Where the agreement to pay attorney's fees states a specific or reasonably ascertainable sum, the court is not bound thereby, but must make its own determination, upon appropriate proofs, of the amount to be allowed. Pressler & Verniero, Current N.J. Court Rules, Comment 4:42-9[2.10] (2014).

Here, the proceeding before the trial court dealt primarily with the issue of the personal guaranty, and only incidentally with the claim for attorney's fees. While we agree with the trial court that there was a paucity of proof presented as to

that claim, nonetheless under these particular circumstances the interests of justice will best be served by remanding the matter to the trial court to determine whether, under the totality of the circumstances, the 25% attorney fee provision contained in the contract between these two business entities is reasonable. The trial judge may consider counsel's affidavit of services, supplemented by such plenary proofs as deemed appropriate, in arriving at this determination.

The judgment of the trial court is affirmed, except that the issue of attorney's fees is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.