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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Hon. Edward W. Miller, Judge

Appellate Court Case No.: 2022-001619

ScanSource, Inc., Respondent
v.
Dependable Technology Center, LLC
and George G. Moraru, Appellants,

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

1. Did the trial court err when it issued judgment against Moraru before giving the appellant an opportunity to present evidence in support of his position?

2. Did the trial court err in ruling Moraru's individual personal guarantee valid and enforceable as a matter of law?

3. Did the trial court err in granting a directed verdict and entering judgement against Moraru as guarantor where there was evidence supporting Moraru's position?

4. Did the trial court err in granting judgement against Moraru in an amount exceeding $5,000?

STATEMENT OF THE CASE

Plaintiff/Respondent ScanSource, Inc., initiated this case on September 13, 2019 by the filing of a Summons and Complaint to which the Defendants/Appellants Dependable Technology Center, LLC, and George G. Moraru filed a timely Answer and demanded a jury trial. A jury trial was held on October 17, 2022, the Hon. Edward W. Miller presiding. Plaintiff was represented at trial by Craig H. Allen. Defendants were represented by William R. McKibbon and Melissa Adorno. As a result of the jury trial a judgment in the amount of $147,379.07 was entered against the Dependable Technology Center, LLC, and George G. Moraru. Defendants timely appealed. J. Falkner Wilkes joined the appeal on behalf of the Defendants. This brief follows.

STATEMENT OF FACTS

On April 12, 2013, Dependable Technology Center, LLC, submitted a "Customer Application" to ScanSource, Inc., in an attempt to obtain trade credit. (R. p. 40). On the same day Dependable submitted an "Independent Personal Guarantee" (IPG) executed by George G. Moraru, an officer of Dependable. (R. p. 41-42, 82). ScanSource employee Steven Zielinski testified that the Appellant's personal guarantee was a part of Dependable's April 12, 2013 application for credit. (R. 66, l. 13-17). The IPG specifically identifies the acceptance and issuance of credit as consideration for Moraru's personal guarantee: "for getting valuable consideration, including the extension of trade credit together, which I hereby acknowledge as *having been received*..." (R. p. 4-11; R. p. 42, l. 14-16; R. p. 79; 80; 82 (*emphasis added*). While originally testifying that ScanSource opened a credit account for Dependable based on the April 13, 2013 Customer Application and IPG, on cross-examination Zielinski admitted that ScanSource declined Dependable's April 12, 2013 application for credit and as a result was unable to open an account for Dependable. (R. p. 62-63; 66, l. 13-17; R. p. 99). ScanSource's rejection of credit and required notices under federal law were conveyed by email to Dependable on April 19, 2013. (R. p. 62-64; R. p. 99). There were no credit sales to Dependable in 2013. (R. 67).

Dependable attempted to obtain credit again on December 7, 2013, eight months after the denial of the 2013 application, by submitting a new Customer Application for credit. (R. p. 4-6; R. p. 68-71; R. p. 99). A third Customer Application was submitted on September 10, 2014, a year and a half after the rejection of the April 12, 2013 Credit Application and IPG. (R. p. 4-11; R. p. 68-71; R. p. 99; R. p. 79-82). No personal guarantee was submitted with the December 7, 2013, or any subsequent Customer Application, including the September 2014 Application on which the Complaint is based. (R. p. 4-11; R. p. 68-71; R. p. 99). Other than the Customer Agreement of September 10, 2014, the Complaint fails to refer to any Customer Application specifically. (Ex. A, Complaint). ScanSource's claims against Appellant are based solely on the IPG that was part of Dependable's credit application dated April 12, 2013. (R. p. 4-11; R. p. 68-71; R. p. 79-82; R. p. 99). There is no evidence that the Appellant offered or issued a Individual Personal Guarantee with the December 7, 2013, September 10, 2014, or any other attempt by Dependable to obtain credit.

Dependable and Moraru argued at trial that the Customer Application of September 10, 2014, alleged in the Complaint as the basis for Appellant's liability, had no associated valid personal guarantee. (R. p. 69). In discussions arising out of

an objection to the scope of the Appellant's cross-examination of Zielinski, ScanSources' first witness, the Court stated: "Well, there is nothing in this personal guarantee that ties it to the April '13 application." (R. p. 70, l. 24-25). Defendants argued that the personal guarantee was invalid as it lacked consideration when ScanSource denied Dependable credit on April 19, 2013, and that granting credit based on a new application submitted over a year and a half later could not constitute consideration for the IPG. (R. p. 70-71). During the discussion as to the scope of cross-examination of Zielinski, and prior to the Appellant being afforded an opportunity to present evidence to support his case, the Court made a credibility ruling and entered a ruling that as a matter of law the April 12, 2013 personal guarantee was valid and binding against the Appellant. (R. p. 71). The Court subsequently granted ScanSource's motion for a directed verdict against Appellant and entered judgment against both Dependable and Appellant in the amount of $149,379.07. (R. p. 77; Judgment).

ARGUMENT

I. THE COURT ERRED WHEN IT ISSUED JUDGMENT AGAINST APPELLANT BEFORE GIVING THE APPELLANT AN OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF HIS POSITION.

Standard of Review

This case is controlled by the decision in Halsey v. Simmons, 432 S.C. 54, 849 S.E.2d 578 (S.C. 2020).

Discussion

ScanSource's case against Moraru is based on the allegation that Moraru entered into a valid and binding personal guarantee of Dependable's debt, which Moraru denied. Moraru's liability in the case turned entirely on the issue of the validity of the alleged personal guarantee. At the very beginning of the trial there was an objection by ScanSource over the scope of cross-examination of ScanSource's first witness, Steven Zielinski. Discussions followed which resulted in Appellant being allowed to proffer his cross-examination of Zielinski. In the middle of proffering cross-examination of Zielinski the trial court abruptly ended the proffer and ruled that the alleged personal guarantee of Moraru was valid and binding. In so ruling the court removed any defense Moraru had and effectively ended the case without Moraru ever having the opportunity to offer Moraru's

testimony or any other evidence on the issue. The court's ruling constitutes a clear violation of Moraru's right to due process: "The law, however, does not permit a court to issue judgment against a party before giving that party an opportunity to present evidence in support of her position." Halsey v. Simmons, 432 S.C. 54, 849 S.E.2d 578 (S.C. 2020).

Here the trial judge made factual findings and issued judgment during the cross-examination of the Plaintiff's first witness. Moraru had not even reached his case or been allowed to present his own testimony or other evidence on the issue. In Halsey the same facts were found so blatantly erroneous that the Court ruled:

> We grant the petition, dispense with briefing, reverse the court of appeals, and remand to the circuit court for a new trial. Rule 43(a) of the South Carolina Rules of Civil Procedure requires, "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." The Due Process Clause requires all parties be given "an opportunity to be heard in a meaningful way." Kurschner v. City of Camden Planning Comm'n , 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses." Smith v. S.C. Dep't of Mental Health , 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997), aff'd , 335 S.C. 396, 517 S.E.2d 694 (1999) ; *see also* Brown v. S.C. State Bd. of Educ. , 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) ("Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

Halsey v. Simmons, 432 S.C. 54, 849 S.E.2d 578 (S.C. 2020).

The trial court's ruling deprived Moraru of due process, including the right

to be heard and the right to present witnesses and other evidence. Halsey is controlling and requires the decision of the trial court be reversed and a new trial granted.

II. THE COURT ERRED IN RULING MORARU'S INDIVIDUAL PERSONAL GUARANTEE VALID AND ENFORCEABLE AS A MATTER OF LAW.

Standard of Review

"This Court reviews all questions of law *de novo*. *E.g.*, Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Review of the trial court's factual findings, however, depends on the whether the underlying action is an action at law or an action in equity. *See* Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775-76 (1976) (setting forth standards of review to apply in actions at law and actions in equity)." Fesmire v. Digh, 683 S.E.2d 803, 385 S.C. 296 (S.C. App. 2009). Where the existence of a contract is in dispute the action is one in equity. *See* Fesmire v. Digh, 683 S.E.2d 803, 385 S.C. 296 (S.C. App. 2009). "In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. *See* Wilder Corp. v. Wilke, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App.1996)..." Fesmire v. Digh, 683 S.E.2d 803, 385 S.C. 296 (S.C. App. 2009).

Discussion

As pled in its Complaint, ScanSource's claims are related to Dependable's Credit Application dated September 10, 2014. "Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions." Johnson v. Alexander , 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015). As a general rule "the parties to an action are judicially concluded and bound by [the pleadings] unless withdrawn, altered[,] or stricken by amendment or otherwise. The allegations, statements[,] or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts [that] are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible." Elrod v. All, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964). Here, by way of its Complaint ScanSource specifically relied on Dependable's Customer Application dated September 10, 2014, as the basis for its underlying claim against Moraru. Accordingly, its claim against Moraru requires a valid and binding personal guarantee for Dependable's 2014 Customer Application for credit. Since there was none, ScanSource attempts to rely on the April 12, 2013 IPG that was rejected by ScanSource when it denied Dependable's

request for credit.

The April 12, 2013 IPG, on which ScanSource bases its claims against Moraru, was part and parcel of Dependable's April 2013 Customer Application. Both were submitted together on April 12, 2013. Had credit been granted to Dependable in 2013, it would have constituted consideration for, and been a condition of, the Moraru's IPG. Yet when the ScanSource denied Dependable credit on April 19, 2013, it left the Moraru's IPG without consideration. When Dependable's application for credit died on April 19, 2013, Moraru's IPG died along with it. Lacking consideration no contract formed and the personal guarantee by Moraru became unenforceable.

The record is clear that Moraru's IPG was submitted on April 12, 2013, in conjunction with Dependable's Customer Application of the same date which ScanSource rejected on April 19, 2013, by its denial of credit. The record also shows that the refusal to grant credit was a final one as evidenced by the emails dated May 21, 2013, which contained what appears to be the ScanSource's attempt at providing notices required under state and federal law when there is a denial of credit. Having made a final decision to deny credit on May 19, 2013, there was no consideration for the IPG. "A guaranty must be supported by sufficient legal consideration, either a benefit to the principal obligor or guarantor on the one

hand, or some detriment to the obligee on the other." Hope Petty Motors of Columbia, Inc. v. Hyatt, 310 S.C. 171, 178, 425 S.E.2d 786, 791 (Ct. App. 1992). A mere promise to pay the debt of another without any consideration for such promise is void." *Id.* Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." McPeters v. Yeargin Constr. Co., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986). Gen. Heating & Air Conditioning Co. of Greenville v. SMD Constr. (S.C. App. 2005). Once the April 12, 2013 credit application was denied, consideration for Moraru's IPG failed and no contract formed. At that point Moraru had further obligation relating to his offer to guarantee Dependable's debts. Moraru's offer to guarantee under the IPG is therefore unenforceable.

Credit granted to Dependable subsequent to April 19, 2013 is not subject to a personal guarantee of Moraru. The record shows a Customer Application submitted by Dependable submitted in December of 2013, and another on September 10, 2014. The existence of either fails to alter the analysis as both were submitted subsequent to Moraru's offer of personal guarantee becoming unenforceable due to a failure of consideration. Credit granted on any Customer Application subsequent to the one submitted in April of 2013 was therefore

granted free any obligation on the part of Moraru based on his April 12, 2013 offer of personal guarantee, and where no subsequent IPG was submitted by Moraru, he has no liability for the debts of Dependable.

ScanSource's case is based on an attempt to unilaterally revive Moraru's the April 12, 2013 IPG that it clearly and unequivocally rejected in writing on April 19, 2013. There is no evidence in record that Moraru intended or consented to personally guarantee Dependable's subsequent attempts to gain credit. Nor is there any presumption that he intended the April 2013 IPG to apply to Dependable's subsequent attempts to gain credit, especially one and a half years later. The record clearly shows that Moraru's IPG and a Customer Application for credit were both executed and submitted on April 12, 2013, and rejected shortly thereafter on April 19, 2013. The Customer Application pled in the Complaint was executed in September of 2014, after the failure of consideration for IPG. Although there is also a Customer Application in evidence dated December 7, 2013, it was also executed after the failure of consideration for Moraru's IPG. As a result, there is no presumption that the granting of credit in 2014 was consideration for a personal guarantee offered and rejected in 2013. "If a note and guaranty are executed simultaneously, the consideration of the note functions as consideration for the guaranty; however, if the documents are not executed simultaneously, there is no

presumption of consideration, and the consideration must be proved. *See id. at* 351, 550 S.E.2d at 907." Branch Banking v. Carolina Crank & Core, Inc., 362 S.C. 647, 608 S.E.2d 896 (S.C. App. 2005).

ScanSource has failed to prove by presumption of law or by evidence that consideration was given for the April 12, 2013 IPG on which its claims against Moraru are based. The record lacks evidence to show that Moraru knew, intended, or consented to the revival of a personal guarantee that had been previously rejected by the ScanSource. "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties." Crafton v. Brown, 346 S.C. 347 at 354, 550 S.E.2d 904, 907 (Ct App. 2001). "'If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract.' *Id*." Branch Banking v. Carolina Crank & Core, Inc., 362 S.C. 647, 608 S.E.2d 896 (S.C. App. 2005). Here any agreement to provide credit to Dependable was subsequent to the offer and rejection by Moraru of a personal guarantee. Absent evidence that Moraru assented to the revival of the rejected April 12, 2013 IPG, any offer of a personal guarantee it made is invalid and unenforceable for lack of consideration, knowledge and consent. The trial court therefore erred in ruling Moraru's IPG was

valid as a matter of law prior.

III. THE COURT ERRED IN GRANTING A DIRECTED VERDICT AND ENTERING JUDGEMENT AGAINST APPELLANT AS GUARANTOR WHERE THERE WAS EVIDENCE SUPPORTING MORARU'S POSITION.

Standard of Review

"The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

Discussion

In ruling on the Plaintiff's motion for directed verdict the trial court failed to consider all evidence and inferences in favor of Moraru. Here, the IPG was issued in conjunction with Dependable's Customer Application for credit on April 12, 2013. Dependable's Application was rejected on April 19, 2013 and credit denied. Once credit was denied, the contemplated and stated consideration for the IPG failed. Lacking consideration, no contract for credit and guarantee was formed. The record fails to show by presumption of law or evidence that Moraru intended, offered or agreed that the IPG rejected by the ScanSource and therefore unenforceable as of April 19, 2013 would subsequently be revived by subsequent

attempts of Dependable to obtain credit. The lack of the IPG at issue, or any other IPG, being provided by Moraru contemporaneously with any subsequent attempt by Dependable to obtain credit, combined with the lack of any testimony that Moraru actually offered or intended to guarantee Dependable's debts subsequent to the rejection gives rise to the inference that Moraru never intended the IPG to extend past its rejection in 2013 or apply to subsequent attempts of Dependable to obtain credit.

"When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). "The trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt." *id*. "When considering a directed verdict motion, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *id. at* 188-89, 691 S.E.2d at 173. "An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed verdict." Graves v. Horry-Georgetown Tech. Coll., 391 S.C. 1, 7, 704 S.E.2d 350, 354 (Ct. App. 2010). Here, the record

contains evidence from which inferences can be drawn that support the claim that Moraru never intended, agreed, or assented to the creation, continuation, or revival of a personal guarantee past the 2013 rejection of credit by ScanSource. The trial court therefore erred in directing a verdict.

IV. THE COURT ERRED IN GRANTING JUDGEMENT AGAINST MORARU IN AN AMOUNT EXCEEDING $5,000.

Assuming *arguendo* that the 2013 IPG rejected in 2013 could somehow be revived and applicable under the September 10, 2014 Customer Application as pled in this case, Moraru's liability should be limited to the amount of credit requested by Dependable in the Customer Application. A review of September 10, 2014 Customer Application for credit shows that Dependable requested a credit limit of only $5,000. (R. p. 8). Given Dependable's request for credit was clearly limited to $5,000, it is reasonable to infer that if consented to the application of the April 12, 2013 IPA, any resulting personal guarantee should be limited to the $5,000 for which Dependable applied.

A guarantee is a contract. TranSouth Fin. Corp. v. Cochran, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996). A note and guarantee are two separate contracts. First Sav. Bank, FSB v. Capital Investors, 318 S.C. 555, 557, 459

S.E.2d 307, 308 (1995). However, "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." Klutts Resort Realty, Inc., *et al.*, 268 S.C. 80, at 88, 232 S.E.2d 20, at 24 (1977). "Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." *Id. at* 88-89, 232 S.E.2d at 24. Conversely, when the terms of a written guarantee agreement are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms. Pee Dee State Bank v. Nat'l Fiber Corp., 287 S.C. 640, 643, 340 S.E.2d 569, 570-71 (Ct. App. 1986).

Here the IPG at issue provides that Moraru is individually responsible for "any indebtedness of Debtor to Creditor now due and/or which may hereafter become due to Creditor...” The guarantee also indicates that it is "for good and valuable consideration, including the extension of trade credit to debtor..." and expressly references Dependable’s Customer Application “[i]n conjunction with

my IPG and customer application to ScanSource, Inc., and its subsidiaries and/or affiliates (hereinafter "Creditor") on behalf of Dependable Tech Center (hereinafter "Debtor")...." (R. p. 11; R. p. 82). Even though a guarantee is considered to be a separate contract, both the original Customer Application for credit April of 2013 and the IPG were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, all of which create an inference that the documents should be read together. *See* First Sav. Bank, 318 S.C. at 557, 459 S.E.2d at 308; Klutts, 268 S.C. at 88, 232 S.E.2d at 24. The IPA also references Dependable's credit application, which further supports the inference that the two documents are to be read together. Additionally, neither the Customer Application nor the IPG contain any language indicating that they should not be read together. As a result, if the September 10, 2014 Customer Application is the operative agreement, then Moraru's IPG should be read in conjunction with its terms and conditions, including the $5,000 limit.

Ultimately, if the documents are construed together, there is more than one inference that may be drawn them. ScanSource views the terms of the guarantee as insuring payment of "any indebtedness of Debtor to Creditor now due and/or which may hereafter become due to Creditor." Moraru, views the agreements as a whole and believes that any liability should be no greater than the credit limit of

$5,000 indicated in the September 10, 2013 Customer Application pled in the Complaint. Because there is more than one inference arising from the record as to the amount of liability created under the alleged personal guarantee, the directed verdict should be reversed and the judgment awarding damages in the amount of $149,379.07 modified so as not to exceed $5,000.

CONCLUSION

Based on the foregoing the decision of the trial court granting a directed verdict and judgement against Appellants should therefore be reversed.

Respectfully submitted,

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