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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2024-001671

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

BRIEF OF PETITIONERS

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January 27, 2025.

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2. Did the court of appeals err in affirming the circuit court's ruling that Moraru's individual personal guarantee was valid and enforceable as a matter of law?
3. Did the court of appeals err in affirming the circuit court's entering of a directed verdict and judgment against Moraru as guarantor where there was sufficient evidence supporting Moraru's position to create a question of fact?
4. Did the court of appeals err in affirming the circuit court entering judgment against Moraru in an amount exceeding $5,000?

STATEMENT OF THE CASE

Respondent ScanSource, Inc., initiated this action on September 13, 2019 by the filing of a Summons and Complaint. Petitioners Dependable Technology Center, LLC, and George G. Moraru filed a timely Answer. 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. 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 and J. Falkner Wilkes joined the appeal on behalf of the Petitioners. The Court of Appeals issued an unpublished opinion on July 17, 2024, affirming the decision of the circuit court. (2024-UP-260). A timely Petition for Rehearing was filed from which a final order denying rehearing was issued on September 18, 2024. Robert Alan Pohl substituted as counsel for Respondents. This Court granted Petitioner's Petition for Writ of Certiorari and this brief follows.

STATEMENT OF FACTS

On April 12, 2013, in an attempt to obtain trade credit, Dependable Technology Center, LLC, submitted a "Customer Application" to ScanSource, Inc. (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 Moraru'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). 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 May 21, 2013. (R. p. 62-64; R. p. 99). There were no credit sales to Dependable in 2013. (R. 67).

On December 7, 2013, eight months after the denial of the 2013 application, Dependable again attempted to obtain credit 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 Customer 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 Customer

Application on which the Complaint is based. (R. p. 4-11; R. p. 68-71; R. p. 99). The Complaint refers only to the Customer Application of September 10, 2014. (R. p. 8-9). ScanSource's claims against Moraru are based solely on the IPG that was submitted as a part of Dependable's Customer 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 Moraru offered or issued a Individual Personal Guarantee with the December 7, 2013 Customer Application or the September 10, 2014 Customer Application.

During Petitioners' cross-examination of the Scansource's first witness, Steven Zielinski, Scansource's counsel raised an objection as to the scope of Petitioners' cross-examination. (R. P. 60). During the discussions that followed Petitioners maintained that Moraru's Individual Personal Guarantee from 2013 became invalid when ScanSource rejected the 2013 Customer Application with which it was submitted.. (R. p. 41-69). The court instructed the Respondents to proffer their cross-examination of Zielinski "so we can see what he's trying to do." (R. P. 62, l. 16-18. During Respondents' proffer of Zielinski the court interrupted asking questions of Zielinski. (R. p. 68) Further discussions led to the court stating: "Well, there is nothing in this personal guarantee that ties it to the April '13 application." (R. p. 70, l. 24-25). Respondents argued that the personal guarantee was invalid as it lacked consideration when ScanSource denied Dependable credit on May 21, 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). Prior to the Petitioners being afforded an opportunity to present testimony or evidence to support their case, the Court entered a ruling that the April 12, 2013 personal guarantee was valid and binding against the Petitioner (Moraru) as a matter of law. (R. p. 71). The Court subsequently granted ScanSource's motion for a directed verdict against Petitioners and entered

judgment against both Dependable and Moraru in the amount of $149,379.07. (R. p. 1; R. p. 77).

ARGUMENT

I. THE CIRCUIT COURT ENTERED A DISPOSITIVE RULING PRIOR TO PETITIONERS BEING ALLOWED AN OPPORTUNITY TO PRESENT EVIDENCE.

Standard of Review

The decision of the lower courts are contrary to this Court's holding in Halsey v. Simmons, 432 S.C. 54, 849 S.E.2d 578 (S.C. 2020).

Discussion

As to Petitioner Moraru, the issue for trial was whether the April 12, 2013 personal guarantee, which was part of Dependable's rejected April 12, 2013 Customer Application for trade credit, could be resurrected and applied to Dependable's obligations arising out of its 2014 Customer Application for credit. At the very beginning of the trial there was an objection by ScanSource over the scope of Petitioners' cross-examination of ScanSource's first witness, employee Steven Zielinski. Following the objection, discussions between counsel and the court led to Petitioners proffering their cross-examination of Zielinski. In the middle of the proffer the trial court abruptly ended Petitioners' cross-examination of Zielinski and ruled that the alleged personal guarantee of Moraru was valid and binding as a matter of law. In so ruling the court removed any defense Moraru had, and effectively ended the case as to Moraru without Moraru ever having the opportunity to offer testimony or evidence on the issue. The court's ruling therefore 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. Petitioners had not even reached their case, or been allowed to present Moraru's testimony 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 on his behalf. Halsey is controlling and requires the decision of the trial court be reversed and a new trial granted.

In its opinion the court of appeals distinguished Halsey finding that "nothing in the record suggests Petitioners were denied the opportunity to continue with the cross-examination, present evidence, or offer additional argument before voluntarily confessing judgement." *Opinion 2024-UP-260*. The court of appeal's opinion misconstrues the facts and fails to appreciate the finality of the trial court's ruling. First, Moraru never confessed judgment. Second, the record

shows that the circuit court made a clear, definitive, and final ruling on the validity of the guarantee before Moraru was allowed to testify or put up other evidence: "So I'm going to rule as a matter of law that that guarantee is valid. Okay? All right." (R. 71, l. 21-23). After pointing out that the Court had ruled *sua sponte* Petitioners' counsel inquired as to the record "for the purposes of appealing that issue," to which the court interrupted and said: "Everything is on the record, –". (R. 53, l.1-6). The court' ruling on the validity of the personal guarantee was clearly a final ruling.

Subsequent discussions between counsel and the court only further confirmed that the earlier ruling was final. When asked by the court if Moraru was also confessing judgment counsel stated that he was not, but pointed out that there was nothing left to litigate as to Moraru: "And since you had ruled the guarantee is valid and enforceable, I don't know how there's an issue left. (R. 76, l. 20-21). Further discussions led to counsel again asking the court if it had ruled that the Guarantee is valid and enforceable, to which the court clearly responded that it had. (R. 75, l. 16-18). The court's initial ruling was therefore intended by the court, and considered by counsel, as final.

The court of appeals' refusal to apply Halsey rests on a finding that "Petitioners did not attempt to proffer any additional evidence, though they now argue on appeal they were prejudiced by the lack of such opportunity." This overlooks the fact once a final ruling was issued counsel was prohibited from attempting to argue the point further: "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." Rule 43(i), SCRCP. Since it would have been inappropriate for the Petitioners to continue to argue the point after a final ruling, it was error for the court of appeals to fault

Moraru in its analysis for not doing so.

The court of appeals opinion also distinguishes Halsey based on the Petitioners' failure to set forth the facts and theories in a Rule 59(e) motion. This is also error. Nothing in the holding of Halsey requires a Rule 59(e) motion be filed to preserve issues when a party is denied an opportunity to present witnesses and evidence prior to a court's ruling. Halsey merely mentioned the Rule 59(e) motion in its procedural history of the case, it was not necessary to or a part of the holding. The court of appeals therefore erred in its application of Halsey to the facts of this case.

II. THE TRIAL COURT ERRED IN RULING MORARU'S INDIVIDUAL PERSONAL GUARANTEE WAS 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[1]

The record fails to support the trial court's ruling on the validity of the personal guarantee as a matter of law. 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.

The April 12, 2013 IPG, on which ScanSource bases its claims against Moraru, was part of Dependable's April 2013 Customer Application. Both were submitted together on April 12, 2013 and rejected on May 21, 2013. The record 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

[1]Petitioners' maintain that the ruling was in error as set forth in Petitioners' I. But in the event that the Court rejects Petitioners' argument on that issue, Petitioners further argue here that the ruling was in error given the record that existed at the time of the ruling.

ScanSource's attempt at providing notices required under state and federal law when there is a denial of credit. Having clearly indicated a final decision to deny credit there was no consideration for Moraru's IPG which resulted in no contract being formed. Moraru's guarantee became unenforceable. "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). The IPG was part of Dependable's 2013 Customer Application which was rejected by Scansource in 2013. When Dependable's Credit Application died on May 21, 2013, Moraru's IPG died along with it.

The record fails to show Moraru intended the offer of guarantee to be revived and applied to the 2014 Customer Application. The 2014 Customer Application was submitted without any specific reference to the 2013 IPG. The record also 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). Nor is there a presumption that granting credit under the 2014 Credit Application was consideration for Moraru's IPG since the Credit Application was

submitted a year and a half after Moraru's IPG. "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). The record is therefore sufficient to create a question of fact as to Moraru's intent as to the application of the 2013 IPG to the 2014 Customer Agreement. The court of appeals therefore erred in affirming the circuit court's ruling that the IPG was binding as a matter of law.

III. THE COURT ERRED IN GRANTING A DIRECTED VERDICT AND ENTERING JUDGEMENT AGAINST MORARU 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). "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).

Discussion

In ruling on the Plaintiff's motion for directed verdict the lower courts 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 May 21, 2013 and credit denied. Once credit was denied, the contemplated and stated consideration for the IPG failed. Lacking consideration, no contract for credit and personal guarantee was formed. "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.* The record fails to show that Moraru intended, offered or agreed that the IPG rejected by the ScanSource and therefore unenforceable as of May 21, 2013, would subsequently be revived through later attempts of Dependable to obtain credit. "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). The fact that the IPG at issue was not provided by the Petitioners contemporaneously with any subsequent attempts 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 its rejection a year and a half earlier, gives rise to an inference that Moraru never consented to, or intended, the IPG to extend

past its rejection in 2013 to subsequent attempts of Dependable to obtain credit. The court of appeals therefore erred in affirming the trial court's decision as to the directed verdict.

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

Assuming *arguendo* that the 2013 IPG rejected in 2013 can be revived and applicable to the September 10, 2014 Customer Application, under which the Respondent seeks recovery, Moraru's liability should then be limited to the amount of credit requested by Dependable in the September 10, 2014 Customer Application.

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.

Facsimile transmittal information on the Guarantee and Customer Application submitted in 2013 show that both documents were executed and submitted simultaneously, by the same parties, for the same purpose, and in the course of the same transaction. R. 81-83. "The 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, 268 S.C. at 88, 232 S.E.2d at 24. Respondent's employee Steven Zeilinski testified that the IPG was a part of the Customer Application. The record therefore shows that the Guarantee and Customer Application are so closely connected that they must be construed in light of each other. The Court's application of the Moraru's 2013 IPG to the 2014 Customer Agreement does nothing to change that fact that the Guarantee must be construed in light of the Agreement to which it is being applied.

Moraru's Guarantee 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 Guarantee also references Dependable's credit application, which further supports the inference that the IPG and Customer Application to which it is applied are intended to be read together. Additionally, neither the Customer Application nor the Guarantee 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 under which credit was extended, then Moraru's Guarantee should be read in conjunction with its terms and conditions, including the Customer Application's $5,000 credit limit. (R. p. 8). If the IPG creates liability on the part of Moraru it should not exceed $5,000.

CONCLUSION

Based on the foregoing this Court should reverse and set aside the directed verdict and judgement against the Petitioners.

Respectfully submitted,
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