

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Mac Papers, Inc.,)
)
Plaintiff,)
)
v.)
)
Genesis Press Inc., Lawrence I. Kudeviz)
)
Defendant)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2012-CP-23-5740

ORDER

RECEIVED

JUN 20 2016

SC Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WOODRUM, JR.
2016 JAN 8 PM 1 23

This matter arises out of a breach of contract dispute between the Plaintiff, Mac Papers, Inc., and the Defendants Genesis Press Inc., and Lawrence I. Kudeviz. This matter came before the Court as a non-jury trial on Wednesday, November 18, 2015. At trial, testimony was taken from the Defendant as well as the Plaintiff and exhibits were entered into evidence by stipulation of the parties. In his complaint, Plaintiff Mac Papers seeks judgment against Defendants Genesis Press and Lawrence Kudeviz in the amount of \$432,195.60. Based upon the testimony, evidence, arguments of counsel, and applicable law, this Court hereby finds that Defendant Lawrence I. Kudeviz did not terminate his personal guaranty, that promissory and equitable estoppel are not appropriate in this case, and that Mr. Kudeviz's personal liability to Mac Papers is limited to \$70,000.

FINDINGS OF FACT

In October of 1991, Genesis Press, a publishing company, approached Mac Papers, a merchant distributor for office supplies, with a credit application to open an account for a desired amount of \$70,000. In order to supply Genesis, Mac Papers required personal guaranty agreements from the three principals of Genesis Press, Lawrence Kudeviz, Barry Zissok, and Lewis Levin. Mr. Kudeviz signed a personal guaranty on December 2, 1991. Genesis Press



moved their headquarters to South Carolina in 2007. In 2008, Genesis suffered a devastating fire and ultimately sued its insurer when the insurer refused to pay Genesis' claim. In the aftermath of the fire, Mac Papers continued to supply Genesis between the years of 2008 and 2011.

In 2010, Genesis paid Mac Papers its debt in full after receiving the payout for the fire from its insurance company. On July 12, 2010, Mr. Kudeviz sent an email to Craig Boortz, a general manager of Mac Papers and in charge of Genesis' account. In one part of this email, Kudeviz asked if "Tonja" (Mac Paper's credit manager) was "working on releasing [his] personal note." Mr. Boortz replied "Yes she is, and feel free to call her on anything related to the note," and provided Tonja's phone number. *See Plaintiff's Exhibit 9.* Mr. Kudeviz never followed up with Tonja regarding the release of his personal note. The release provision of the personal guaranty contained a provision that stated there were no limitations or conditions except within the guaranty, and it would remain in full force and effect until written notice was received in certified mail at Mac Papers' office in Jacksonville, Florida. Mac Papers never received a registered letter from Mr. Kudeviz at his office in Jacksonville, only the email conversation between Mr. Kudeviz and Mr. Boortz about Tonja working on the release of the note. Mr. Levin is deceased and Barry Zissok settled separately; therefore, Mr. Kudeviz is the only remaining defendant in the case.

Genesis and Mac Papers continued to do business, and by December 2012, Genesis was indebted to Mac Papers in the sum of \$432,185.60.

CONCLUSIONS OF LAW

1. Guaranty Not Terminated

The original signed personal guaranty took place in Florida, and therefore Florida law applies to the creation of the guaranty in this case. Defendant argues that the guaranty he agreed



to was a continuing guaranty. A conventional guaranty generally involves one person guaranteeing the debt of another for a particular amount. A guaranty is a promise to pay some debt (or to perform some obligation) of another on the default of the person primarily liable for payment or performance. *New Holland, Inc. v. Trunk*, 579 So. 2d 215, 216-17 (Fla. Dist. Ct. App. 1991).

A continuing guaranty is a special type of guaranty that covers all transactions including those arising in the future which are within the terms of the agreement. *Fidelity Natl' Bank of South Miami v. Melo*, 366 So.2d 1218, 1221 (Fla. Dist. Ct. App. 1979). However, the guarantor may terminate the guaranty at will for all future transactions and only remains liable for debts incurred prior to the termination of the guaranty. Thus, with a continuing guaranty, the guarantor's right to terminate is not subject to the creditor's consent or approval. *See Brann v. Flagship Bank of Pinellas, N.A.* 450 So.2d 237, 238 (Fla. Dist. Ct. App. 1984).

The signed guaranty agreement between Mr. Kudeviz and Mac Papers contained instructions for termination of the guaranty. The guaranty agreement states "[t]his guaranty contains no limitations or conditions except as written herein, may be modified only in writing signed by the parties hereto, and is to remain in full force and effect until written notice of its termination is received by registered mail by Mac Papers, Inc., its successors or assigns, at its office in Jacksonville, Florida." *See Plaintiff's Exhibit 2.*

Defendant argues that he effectively terminated the guaranty in an email to Craig Boortz. In an email from July 12, 2010, Mr. Kudeviz asked Mr. Boortz "On a separate subject is Tanja working on releasing my personal note?" Mr. Boortz replied, "Yes she is and feel free to call her on anything related to the note. Her direct line is 904-348-3387." *See Plaintiff's Exhibit 9.* Nothing in the record reflects any further action taken by Mr. Kudeviz to terminate the guaranty.



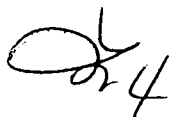
The guaranty agreement clearly states the process in which Mr. Kudeviz could terminate the guaranty. While the guaranty was a continuing one, and Mac Papers did not have to consent to its termination, the termination must have been in writing, and sent by registered mail to Mac Papers office in Jacksonville, Florida, pursuant to the guaranty agreement. Therefore, because no notice was sent by registered mail to Mac Papers' office in Jacksonville, Mr. Kudeviz did not terminate the personal guaranty.

2. Promissory and Equitable Estoppel

Defendant argues that even if the guaranty was not effectively terminated, the principle of equitable estoppel prevents the guaranty from only being terminated by registered mail and the principle of promissory estoppel modifies the contract.

The elements of equitable estoppel under South Carolina law as to the party estopped are (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. *Regions Bank v. Schmauch* 582 S.E.2d 432 (Ct. App. 2003).

The elements of promissory estoppel under South Carolina law are (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *Satcher v. Satcher*, 570 S.E.2d 535, 538 (Ct. App. 2002).



In South Carolina "equitable relief is precluded under a theory of promissory estoppel if the estoppel claim is in direct conflict with a specific contract term." *Volvo Construction Equipment North America, Inc., v. CLM Equipment Company, Inc.*, 386 F.3d 581, 599 (4th Cir. 2004).

Here, Mr. Kudeviz is precluded from equitable relief because the estoppel claim is in direct conflict with a specific contract term. The guaranty agreement is clear that the only way to terminate the guaranty is by registered mail to Mac Papers' office in Jacksonville, Florida. This specific contract term precludes Mr. Kudeviz from equitable relief.

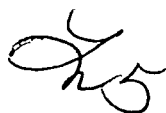
3. Guaranty is Limited to \$70,000

Defendant argues that if the foregoing doctrines do not apply and the Court strictly applies the language of the guaranty, then the guaranty should be limited to the \$70,000 credit limit set forth in the credit application because this was executed at the same time as the personal guaranty.

"Two documents executed by the same parties as part of a single transaction regarding the same subject matter must be read and construed together." *Sims v. New Falls Corp.*, 37 So.3d 358, 361 (Fla. Dist. Ct. App. 2010).

The guaranty and the credit application are both part of the same transaction involving the same subject matter, and therefore are construed together. Plaintiff was unable to prove that Defendant Kudeviz intended to be personally liable for an amount in excess of \$70,000. Thus, the guaranty is limited to the \$70,000 credit limit that Mr. Kudeviz sought in the credit application, *See Plaintiff's Exhibit 1*.

CONCLUSION AND ORDER

A handwritten signature in black ink, appearing to be 'J. S.', is located at the bottom center of the page.

The Court hereby finds that Defendant Lawrence Kudeviz did not terminate the personal guaranty, that promissory and equitable estoppel are not appropriate in this case, and that Mr. Kudeviz's personal liability to the Plaintiff is limited to \$70,000.

IT IS SO ORDERED.

January 8, 2016



Letitia H. Verdin
Circuit Judge



FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012-CP-23-5740

Mac Papers, Inc.

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKEN
 2016 JAN 8 PM 1:29

RECEIVED
 Genesis Press, Inc
 Lawrence I. Kudeviz
 Barry Zissok
 20 2016
 Lewis Levin

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Mac Papers, Inc.	Lawrence I. Kudeviz	\$70,000

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


 Circuit Court Judge

2162

Judge Code

1/8/2016

Date

For Clerk of Court Office Use Only



This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Townes B. Johnson, III Kenison, Dudley, Crawford LLC
704 E. McBee Avenue Greenville, SC 29601

Bernie W. Ellis McNair Law Firm, P.A.
P.O. Box 447 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Drj