THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2016-001296
Case No. 2012-CP-23-5740

Mac Papers, Inc.,.....Appellant-Respondent,

v.

Genesis Press, Inc. and Lawrence I. Kudeviz,..... Defendants,

OF WHOM Lawrence I. Kudeviz is,.....Respondent-Appellant.

INITIAL APPELLANT'S BRIEF OF RESPONDENT-APPELLANT

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1. The trial court erred in finding that Respondent-Appellant had not terminated his personal guaranty.

2. The trial court erred in finding that Respondent-Appellant had not proven equitable estoppel.

3. The trial court erred in finding that Respondent-Appellant had not proven waiver.

STATEMENT OF THE CASE

This is an action on a personal guaranty for a commercial business account. The Appellant-Respondent (Seller) opened a commercial account with defendant Genesis Papers (Customer) for the purchase of paper used in Customer's printing business. (Pl. Exh. 1). Respondent-Appellant (Guarantor) and others executed a personal guaranty for Customer's commercial account. (Pl. Exh. 2).

Seller sued Customer, Guarantor, and the other guarantors to recover $432,185.60 owed on the account. (Tr. 59). Customer went bankrupt; one of the other guarantors died; and the other guarantor settled for $32,500.00. (Tr. 59). Thus, the trial proceeded against Guarantor only for $399,685.60. (Tr. 59-60).

Seller contended that Guarantor was liable under the personal guaranty for the entire amount remaining due on the account, $399,685.60. Guarantor defended on the following grounds: (1) he had terminated the guaranty when the account balance was zero; (2) assuming he had not properly terminated the guaranty, Seller's action was barred by the doctrines of promissory estoppel, equitable estoppel, and/or waiver; and (3) assuming Guarantor owed anything under the guaranty, his liability was limited to $70,000.00.

The trial court held a non-jury trial and ruled that Guarantor had not terminated the guaranty and had not proven promissory estoppel, equitable estoppel, or waiver. (Order at 2-5; Kudeviz 59(e) motion; Order denying Kudeviz 59(e) motion). The trial court also held that Guarantor's liability under the personal guaranty was limited to $70,000.00. (Order at 5). Both parties filed 59(e) motions, and the trial court denied both motions. (59(e) motions; Order denying 59(e) motions). Seller timely appealed, and Guarantor timely cross-appealed.

STATEMENT OF FACTS

Seller is a distributor of printing paper with its principal office in Florida. Customer was a printing business that first opened in Florida. In October 1991, Customer submitted a credit application to Seller for a $70,000.00 account. (Pl. Exh. 1). Guarantor and others also signed a personal guaranty in support of the $70,000.00 credit application. (Pl. Exh. 2). The personal guaranty provided that it remained in effect until terminated by Guarantor by giving written notice to Seller by registered mail. (Pl. Exh. 2).

In 2007, Customer moved its business to Greenville, South Carolina. (Tr. 154-155). Craig Boortz was the general manager of Seller's business operations in Greenville, became direct salesperson on Customer's account, and was Customer's primary contact with Seller. (Tr. 96-98, 101; 155). On March 28, 2008, Customer's business facility was destroyed by a fire. (Tr. 36; 156-157).

Customers' fire insurer denied coverage, but a federal jury ultimately ruled in favor of Guarantor. (Tr. 157). The fire and resulting insurance coverage dispute disrupted Customer's business and cash-flow. To address this, Seller and Customer agreed in December 2008 to roll over much of the account balance into a note that was personally guaranteed by Guarantor in a separate personal guaranty of the note and secured by UCC filings. (Tr. 25, 29-30; Pl. Exh. 4). The payment schedule proved difficult, so the parties restructured and replaced this note in February 2009 with a new note, new personal guaranty for the note, and new UCC filings. (Tr. 34-37; Pl. Exh. 6).[1]

[1] As part of the December 2008 note transactions, Seller requested that Guarantor execute an updated personal guaranty on the account in order to update Guarantor's personal information, *e.g.*, his new address in Greenville, South Carolina. (Pl. Exh. 5; see also Pl. Exh. 3, stating that documents on file with Seller bore Guarantor's prior Florida address). It is undisputed that the personal guaranty at issue here is the original 1991 personal guaranty for Customer's account as updated at Seller's request in 2008.

The federal jury returned its verdict in the fire case in favor of Customer and against the fire insurer in May 2010. (Tr. 157). Customer received payment from the insurer in early July 2010 and immediately paid off the 2009 note owed to Seller, which automatically extinguished the note and the personal guaranty for the note. (Tr. 157-158). Customer also paid off the account with Seller. (Tr. 158). A few days later, Guarantor met with Craig Boortz, the general manager and salesman, and told him that he wanted out of the personal guaranty for the account, which was the only personal guaranty that continued to exist. (Tr. 158, 159-160, 190). Guarantor would pay COD, find another vendor, or close the business, but he would longer agree to a personal guaranty. (Tr. 158, 190).

Thereafter, on July 12, 2010, Guarantor emailed Craig Boortz and asked: "[I]s Tanya [Tonja] working on releasing my personal note?" (Exh. 9). Craig Boortz knew and admitted that Guarantor's reference to "my personal note" was in fact a reference to Guarantor's personal guaranty as discussed in the prior meeting. (Tr. 111). "Tanya" is "Tonja van Zandt," the vice-president and overall credit manager of Seller working in Seller's Florida headquarters. (Tr. 61; 99). She was the lead person for Seller in the creation and execution of the 2008 and 2009 notes and related documents. (See Pl. Exh. 3).

Craig Boortz immediately responded to Guarantor's July 12 email, stating that: "Yes she [Tonja] is." (Pl. Exh. 9). Knowing that Tonja was the right person to be working on it, Guarantor correctly believed he had done everything needed to terminate the personal guaranty. (Tr. 160-161, 166, 191-193). Neither Craig Boortz nor Tonja ever told Guarantor that the July 12 email exchange was insufficient to terminate the personal guaranty. (Tr. 161-162, 166).

In 2012, Guarantor began negotiating the sale of Customer to a third-party, and he advised Seller of this. (Tr. 49-50; 162). At this time, Customer's account balance with Seller was approximately $300,000.00. (Tr. 51). Under the proposed sale terms, the third-party buyer would assume the debt of Customer owed to Seller and continue the business operations of Customer. (Tr. 51). Ultimately, Seller would not agree to the buyer assuming Customer's debt. (Tr. 51-52). In an ensuing conversation between Guarantor and Tonja (the vice-president of Seller), Guarantor told Tonja that if Seller agreed to the sale, he promised that Seller would be paid. (Tr. 52). Tonja responded that she was not worried about getting paid, because she had Guarantor's personal guaranty on file. (Tr. 52). Guarantor responded that the personal guaranty had earlier been terminated and released in 2010. (Tr. 52). Tonja denied this, apparently mistakenly believing at the time that Seller had to actually release the guaranty before it could be terminated by Guarantor. (Tr. 52). The sale never occurred, and Customer never paid Seller the amount owed on its account. Seller later commenced the present action, seeking to collect the amount by Customer from Guarantor under his personal guaranty. Customer filed for bankruptcy protection.

ARGUMENT

As held by the trial court, the personal guaranty is a continuing guaranty created under Florida law and could therefore be terminated unilaterally by Guarantor without Seller's consent or approval. (Order at 2-3, *citing Fidelity Nat'l Bank of South Miami v. Melo*, 366 So.2d 1218 (Fla. Dist. Ct. App. 1979) *and Brann v. Flagship Bank of Pinellas, N.A.*, 450 So.2d 237 (Fla. Dist. Ct. App. 1984). The trial court held, however, that the personal guaranty could not be terminated absent strict compliance with the notice requirements, *i.e.*, without sending written notice via registered mail. (Order at 4).

I. The July 2010 conversations and email exchange between Guarantor and Craig Boortz, Seller's general manager in Greenville, South Carolina, was sufficient to terminate the personal guaranty, because Seller had actual notice and actual knowledge of the termination.

The personal guaranty provided that Guarantor could terminate the guaranty by sending written notice to Seller's headquarters in Florida via registered mail. (Pl. Exh. 2). Nothing in the personal guaranty required any approval, consent, or other action by Seller to effectuate the termination. (Pl. Exh. 2). The manifest purpose of the notice requirement in the personal guaranty was to ensure that Seller had actual notice and actual knowledge that Guarantor was terminating the personal guaranty. The undisputed evidence in this case is that Seller received actual notice and actual knowledge of Guarantor's termination of the personal guaranty as a result of the July 2010 conversation between Guarantor and Craig Boortz. It is also undisputed that Craig Boortz confirmed this actual notice and actual knowledge in the written email exchange between Guarantor and Craig Boortz in July 2012, in which Craig Boortz told Guarantor that Tonja at Florida headquarters was working on the termination of the personal guaranty. In short, the actual notice and knowledge purpose of the notice provisions in the personal guaranty were fully satisfied in July 2010 and, therefore, the personal guaranty was terminated in July 2010 when Customer had a zero balance on its account with Seller.

Research reveals no Florida authority directly on point with the question of whether the notice provisions in a continuing personal guaranty are to be strictly enforced, even if the holder of the guaranty (Seller here) has actual knowledge that the guarantor has terminated the guaranty. Florida law, however, expressly holds that "actual knowledge" is a valid substitute for compliance with statutory notice provisions as a prerequisite for making a claim against a governmental entity. *Rabinowitz v Bay Harbor Islands,* 178 So.2d

9, 12-13 (Fla. 1965). Florida law also indicates that "actual knowledge" could be a substitute for complying with a notice provision in a guaranty, depending on the circumstances of the case. *Causeway Lumber Co. v. King*, 502 So.2d 80, 81 (Fla. Dist. Ct. App. 1987) (holding that ex-wife remained liable on guaranty executed when married, even though creditor had actual knowledge of her subsequent divorce from her husband, because a divorce did not automatically release the ex-wife from responsibility for her husband's debt). It would be completely inconsistent to hold that "actual knowledge" is not a substitute for compliance with a contractual provision on notice, when it is a substitute for complying with a statutory provision on notice. This is particularly true when, as here, termination is a unilateral right held by Guarantor, Seller actually knew that Guarantor had exercised its unilateral right, and Seller thereby acquired the actual knowledge that was the sole objective of the termination provision in the guaranty.

In short, the manifest purpose of the notice provision in the guaranty was to ensure that Seller received actual notice of and acquired actual knowledge that Guarantor had exercised its unilateral right to terminate the guaranty. The undisputed evidence in this case established that Seller received this actual notice and acquired this actual knowledge at a time when Customer had a zero balance with Seller. Florida law holds that actual knowledge is a valid substitute for providing statutory notice, and there is no rational basis for applying a different rule to contractual notice. This is particularly true when, as here, Seller never insisted on strict compliance with the notice provisions after acquiring this actual knowledge and assured Guarantor that Seller was working on the termination of the guaranty. Accordingly, the trial court erred in finding that Guarantor did not terminate the guaranty in July 2010, when Customer owed nothing to Seller.

II. Assuming Guarantor did not properly terminate the personal guaranty in July 2010, Seller is precluded from enforcing the guaranty under the equitable doctrines of equitable estoppel and/or waiver.

The trial court held that South Carolina precluded any equitable relief to Guarantor, "because the estoppel claim is in direct conflict with a specific contract term." (Order at 5). In making this ruling, the trial court relied solely on a Fourth Circuit case holding that a "promissory estoppel" claim was precluded if it conflicted with a specific contract term. (Order at 5, *citing Volvo Constr. Equip. North America, Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581 (4th Cir. 2004)). Nothing in *Volvo*, however, supports the application of this promissory estoppel rule to a claim for equitable estoppel. This is not surprising, because promissory estoppel is essentially a contract claim under equitable principles, and it therefore makes sense that a specific contract term would control any contrary promissory estoppel claim. Equitable estoppel, however, is not a quasi-contract theory and, therefore, the rule in *Volvo* has no bearing on it.

A. Equitable Estoppel

The elements of equitable estoppel are divided into two parts, the first being the elements from the perspective of the party estopped (Seller here), and the second being from the perspective of the party claiming estoppel (Guarantor here). *Regions Bank v. Schmauch*, 582 S.E.2d 432, 446 (S.C. App. 2003). There are three elements as to each party. *Id.*

As to Seller, the first element is conduct amounting to a false representation or concealment of material facts, but it need not be an intentional misrepresentation. *Regions Bank*, 582 S.E.2d at 446. Here, the undisputed evidence establishes this element, because Seller represented that it was working on the termination of the personal guaranty in its

Florida headquarters when, in fact, it was not doing so. Moreover, Seller never mentioned the notice provision in the guaranty, and never insisted on compliance with it. The second element is the intention that such conduct be acted upon by the other party. *Id.* Here, the undisputed evidence establishes this element, because Seller specifically told Guarantor that it was working on the termination in response to a specific inquiry from Guarantor about terminating the guaranty. As a result, and as Seller also knew, Guarantor did not start paying COD, did not seek an alternative supplier, and did not shut down the business at a time when Customer did not owe anything to Seller. The third element is knowledge, actual or constructive, of the true facts. *Id.* Manifestly, Seller knew that it was not terminating the guaranty or acting on the specific request by Guarantor that Seller terminate the guaranty. Moreover, Seller never insisted on compliance with the notice provisions before or after acknowledging that Guarantor wanted to terminate the guaranty and, to the contrary, assured Guarantor that it was moving forward with the termination of the guaranty.

As to Guarantor, the first element is lack of knowledge or means of knowledge of the truth of the facts in question. *Regions Bank*, 582 S.E.2d at 446. Here, Guarantor had no reason to know that Craig Boortz's assertion that Seller was working on the termination of the guaranty was false. Moreover, given that termination of the guaranty was a unilateral right held by Guarantor, he had no reason to make any further inquiry once Boortz told him that Seller knew that he was terminating the guaranty. The second element is reliance by Guarantor on Seller's conduct. *Id.* Here, the undisputed evidence establishes that Guarantor relied on Seller's conduct, because he caused Customer to continue doing business with Seller rather than paying COD, finding another supplier, or shutting down

Customer entirely. The third element is a prejudicial change in position by Guarantor. *Id.* Here, the undisputed evidence establishes a prejudicial change in position in that Guarantor caused Customer to continue doing business with Seller rather than paying COD, finding another supplier, or shutting down Customer entirely. This prejudiced Guarantor by making him personally liable for Customer's debt, even though Seller knew that Guarantor had sought to terminate the personal guaranty, and even though Seller had told Guarantor that Seller was working on terminating the personal guaranty.

In short, the undisputed evidence in this case fully establishes the elements of equitable estoppel. Seller knew that Guarantor intended to terminate his personal guaranty and assured Guarantor that it was working on the termination. In reliance thereon, Guarantor caused Customer to continue doing business with Seller. Under the particular circumstances of this case, therefore, the trial court erred in finding that Guarantor had not established the elements of equitable estoppel.

B. Waiver

Waiver is the "voluntary relinquishment of a known right." *Strickland v. Strickland*, 650 S.E.2d 465, 470-471 (S.C. 2007). Seller manifestly knew of its right to receive notice of termination by registered mail. Seller voluntarily relinquished the right to insist on compliance with this notice provision when it acknowledged that Guarantor intended to terminate the guaranty, assured Guarantor that it was working on the termination, and never told Guarantor that he nevertheless had to comply with the notice provision in the guaranty. This is particularly true when, as here, it is undisputed that Seller had actual knowledge of the termination by Guarantor at all relevant times. In theory, Seller might have the right to remain silent when it acquired actual knowledge and nevertheless rely on the notice

provisions, but it lost that right when it expressly acknowledged that Guarantor had exercised his unilateral right to terminate, assured Guarantor that it was working on the termination, and never mentioned nor insisted upon compliance with the notice provision in the guaranty.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should reverse the trial court.

Respectfully Submitted,

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