

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-23-05740

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

v.

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

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

INITIAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES

1. The trial court correctly held that Guarantor's liability under the guaranty was limited to \$70,000.00.
2. The trial court correctly ruled that Seller failed to prove that Guarantor intended to be liable for any amount beyond \$70,000.00.
3. The 2008 guaranty has no effect on the trial court's ruling.

STATEMENT OF THE CASE

The Respondent-Appellant (Guarantor) incorporates herein the Statement of the Case from his Brief of Appellant. Guarantor submits this Respondent's Brief in response to the Appellant's Brief of Appellant-Respondent (Seller) subject to the arguments in Guarantor's Brief of Appellant that his guaranty was terminated and, therefore, he has no liability for the debts of Mac Papers (Customer).

ARGUMENT

- I. The trial court correctly held that Guarantor's liability under the guaranty was limited to \$70,000.00.**

It is undisputed that the credit application submitted by Customer and the guaranty signed by Guarantor must be read and construed together. The trial court so ruled,¹ and Seller does not dispute this ruling on appeal.² Moreover, Seller conceded this before the trial court³ and has also conceded this before this Court.⁴

¹ Order at 5, *citing Sims v. New Falls Corp.*, 37 So.3d 358, 361 (Fla. Dist. Ct. App. 2010).

² See Init. App. Br. of App-Resp., *passim*.

³ See App-Resp. 59(e) motion at 1, conceding that: "As also properly stated in the Order, the guaranty and credit application are both part of the same transaction involving the same subject matter, and therefore are construed together."

⁴ See Init. App. Br. of App-Resp. at 6, conceding that: "As also properly stated in the [appealed] Order, the guaranty and the Credit Application are both part of the same transaction involving the same subject matter, and therefore are construed together under Florida law."

By the express terms of the credit application, Customer sought a \$70,000.00 line of credit. (Pl. Exh. 1). By the express terms of the guaranty, read in light of the terms of the credit application, Guarantor guaranteed Customer's performance under the \$70,000 credit application. (Pl. Exh. 2). Thus, the trial court correctly held that Guarantor's liability under the guaranty was limited to the \$70,000 stated in the credit application. (Order at 5). To overcome the trial court's manifestly correct reading of the documents, Seller makes several arguments in its Argument I. (Init. App-Resp. App. Br. at 6-8). As demonstrated below, these arguments have no merit.

A. Seller's "no limitation" argument is without merit.

Seller first argues that the guaranty states that "there were no limitations except those stated in the guaranty." (Init. App-Resp. App. Br. at 7). This argument is fatally flawed, because it rests upon reading the guaranty in isolation and without reference to the credit application. (*Id.*). It is undisputed, however, that the meaning of the guaranty is to be determined by reading it in conjunction with the credit application. Thus, Seller's argument falls of its own weight. Indeed, since the documents must be construed together, any extension of the guaranty beyond the \$70,000 requested in the credit application would require a separate writing signed by both parties under the express terms of the guaranty. (See Pl. Exh. 2, stating that modification of the guaranty required a "writing signed by the parties").

Recognizing this, Seller also argues that the \$70,000 credit application does not limit the guaranty, because the \$70,000 figure was denoted as "credit desired" and therefore did not create any limitation on the guaranty. (Init. App-Resp. App. Br. at 7). This "credit desired" language plainly shows that Customer applied for a \$70,000 line of credit. It is

indisputable that the only thing guaranteed by Guarantor was this \$70,000 line of credit, because that was the only thing sought in the credit application. Thus, construing the documents together demonstrates that the trial court correctly limited the guaranty to the \$70,000 line of credit requested in the credit application.

B. Seller's argument under *Sadow* has no merit.

Seller argues that, if the \$70,000 in the credit application created "credit limit," it nevertheless did not limit the guaranty, because Guarantor "agreed to guaranty all [of Seller's] debts." (Init. App-Resp. App. Br. at 7-8). This is nothing more than a thinly-veiled attempt to again argue the meaning of the guaranty without reference to the credit application. The only authority cited by Seller for this argument is the decision in *Paper Corp. of America v. Sadow*, 558 So.2d 75 (Fla. Ct. App. 3rd Dist. 1990). (*Id.*). Seller has misread *Sadow*.

Contrary to the implications in Seller's argument, *Sadow* did not involve the interpretation and application of a personal guaranty agreement coupled with a credit application. Rather, the individual defendant in *Sadow* was directly and individually liable for the debts of the corporation, because the defendant signed the credit application and the purchases from the seller with her individual name as well as the name of the corporate purchaser. Under then-existing Florida law, this made the defendant directly and individually liable for the purchases, regardless of any credit limit stated in the credit application. 558 So.2d at 75-76. Moreover, the credit application was subsequently amended by written notation to increase the credit limit so that the corporation could make purchases in excess of the original credit limit and, therefore, the individual defendant was

individually liable for those purchases, because she had signed the purchase orders and the credit application in her individual capacity under Florida law. *Id.* at 76.

Here, Guarantor's liability rests solely upon his status as a guarantor. Seller never sought to impose direct and individual liability on Guarantor as having signed the credit application or subsequent purchases in his individual capacity under Florida law. Moreover, the credit application was never amended to increase the requested line of credit. Thus, *Sandow* provides no basis for imposing liability upon Guarantor beyond \$70,000.00.

To the extent Seller now seeks to make a "*Sandow*" argument on direct and individual liability based on Guarantor having signed the credit application in his individual capacity under Florida law, it fails as a matter of law. Seller did not plead this liability theory – the only claim against Guarantor was based solely on the guaranty – and Seller did not otherwise raise this liability theory to the trial court by argument or motion to amend the pleadings. (Cmplnt. at 6-7, ¶¶ 39-47; Tr. 6-12, 142-148; 204-209, 220-221). Thus, the issue cannot be raised for the first time on appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006).⁵

In any event, the argument has no merit, because Guarantor did not sign the credit application. (Pl. Exh. 1). It was signed by one of his partners, Barry Zisook, and there is no argument that his signature is the equivalent of Guarantor signing the credit application.

⁵ Seller cited *Sandow* in its motion to alter or amend the appealed order. (App-Resp. 59(e) Motion at 3). This did not preserve the issue for appellate review, because it is axiomatic that a 59(e) motion cannot be used to raise an issue for the first time. *Johnson v. Sonoco Prods. Co.*, 672 S.E.2d 567, 570 (S.C. 2009). Moreover, Seller did not make any "direct/individual" liability arguments in its 59(e) motion – it mistakenly described *Sandow* as involving a "guarantor of buyer's corporate account". (App-Resp. 59(e) Motion at 3). As shown above, however, the defendant in *Sandow* was individually and directly liable because of the manner in which she signed the credit application and the purchase orders. Nothing in the *Sandow* opinion shows that the defendant signed a guaranty – the court simply used "guarantee" in the generic sense in discussing the defendant's direct and individual liability under then-existing Florida law on liability arising directly and individually from the manner in which the defendant signed the credit application and purchase orders.

II. The trial court correctly ruled that Seller failed to prove that Guarantor intended to be liable for any amount beyond \$70,000.00.

The trial court ruled that Seller “was unable to prove that [Guarantor] intended to be personally liable for an amount in excess of \$70,000.00.” (Order at 5). Seller challenges this ruling in its Argument II, making two basic arguments. (Init. App-Resp. App. Br. at 8-10). These arguments have no merit.

First, Seller makes the same arguments that it makes in its Argument I, including its mistaken reading of *Sadow, supra*. (Compare Init. App-Resp. Br. 6-8 with 8-9). Those arguments fail for the same reasons demonstrated above. (See Arg. I, *supra*).

Second, Seller argues the following: (1) Customer, “*by and through* [Guarantor]”, was in control of the amount of credit desired; (2) Customer increased this desired credit by making purchases in excess of the credit desired; and (3) this increased desire was “*imputable* to [Guarantor] as the guarantor of all debts.” (Init. App-Resp. Br. 9) (emphasis added). This argument fails for the following reasons:

1. Seller again relies on its mistaken reading of *Sadow, supra*. (Init. App-Resp. Br. 9, using “*Id.*” to reference back to an earlier parenthetical citation and quotation of *Sadow*).
2. Seller did not plead this “*by and through*” / “*imputable*” increased credit desire claim or issue as a basis for imposing liability in excess of \$70,000.00 upon Guarantor, and Seller therefore cannot raise it for the first time on appeal. (Cmplnt., *passim*). *Pye*, 633 S.E.2d at 510.
3. Seller did not otherwise raise this “*by and through*” / “*imputable*” increased credit desire theory to the trial court by argument or motion to amend the pleadings, and Seller therefore cannot raise this issue for the first time on appeal. (Tr. 6-12, 142-148; 204-209, 220-221). *Pye*, 633 S.E.2d at 510.⁶

⁶ Seller made a “*by and through*” argument in its motion to alter or amend the appealed order. (App-Resp. 59(e) Motion at 3, Arg. II). This did not preserve the issue for appellate review, because it is axiomatic that a 59(e) motion cannot be used to raise an issue for the first time. *Johnson*, 672 S.E.2d at 570. Moreover, Seller never made any “*imputation*” argument in its 59(e) motion. (App-Resp. 59(e) Motion, *passim*).

In any event, this argument has no merit. Seller's argument hinges on the notion of imputing Customer's actions to Guarantor. Customer, however, was not the agent of Guarantor and, therefore, its actions and its liability for those actions cannot be imputed to Guarantor.

III. The 2008 guaranty has no effect on the trial court's ruling.

At Seller's request, Guarantor signed a corrected guaranty in 2008. This occurred under the following circumstances:

1. In 2007, Customer moved its business from Florida to Greenville, South Carolina. (Tr. 154-155).
2. On March 28, 2008, Customer's business facility was destroyed by a fire. (Tr. 36; 156-157).
3. Customers' fire insurer denied coverage, but a federal jury ultimately ruled in favor of Customer. (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).⁷
4. 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).
5. Guarantor executed and returned the updated guaranty. (Pl. Exh. 5). This guaranty had the identical terms as the original guaranty except for the corrected address, etc. (*Compare* Pl. Exh. 2 *with* Pl. Exh. 5). The parties did not enter a new credit application or new credit agreement. Nothing in the 2008 guaranty purported to change the terms of the original credit application. (Pl. Exh. 5, *passim*).

⁷ 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). It is undisputed that Customer paid off this note in early July 2010, thereby extinguishing the 2008 and 2009 notes, the guarantees of those notes, and the UCC filings. (Tr. 157-158).

On appeal, Seller argues that this guaranty was not “bound” by the \$70,000 credit limitation and would therefore entitle it to recovery of the full debt. Seller also argues there was sufficient consideration for this 2008 guaranty, because Seller testified it would not have continued to extend credit to Customer if Guarantor had not provided the 2008 guaranty. (Init. App-Resp. App. Br. at 10, Arg. III). This argument has no merit for numerous reasons.

First, the only reason for the 2008 updated guaranty that Seller communicated to Guarantor was to update Seller’s files with Guarantor’s new address. The email sending the 2008 documents to Guarantor specifically stated: “After speaking with you yesterday I realized the application on file *reflects your previous address in Florida* and Lewis Levin as guarantor. *Please update this information* in addition to signing the Note related documents.” (Pl. Exh. 3) (emphasis added).⁸

Second, although Seller testified at trial that the 2008 guaranty was necessary for continuing to extend credit to Customer (Tr. 32-33), there is no evidence that Seller ever told Guarantor this or that the 2008 guaranty was intended to change the original guaranty in any manner whatsoever. Guarantor testified that when Seller’s local representative (Craig Boortz) picked up the signed 2008 guaranty, he was told that the purpose of the 2008 guaranty was to update Guarantor’s personal information. (Tr. 164-165, 167, 172). Craig Boortz never disputed this testimony. (Tr. 96-125). Tonja Van Zandt, the author of the above-quoted email, never testified that she told Guarantor that the 2008 guaranty was

⁸ The package of the 2008 documents also included a credit application for which Seller also sought updated address information, etc. Guarantor did not sign or return the application. Seller never insisted that he do so, nor did Seller ever advise Guarantor the application was necessary for extending future credit or that it otherwise impacted the original application and original guaranty.

for anything other than getting updated personal information. (See generally Tr. 17-95; see specifically Tr. 71-73).


Third, nothing in the 2008 guaranty purports to change the operative terms in the original guaranty. Moreover, nothing in the 2008 guaranty purports to change or replace the original credit application.

In short, the 2008 guaranty is nothing more than the original guaranty with updated personal information. It provides no basis greater than the original guaranty for any recovery against Guarantor, and Seller's argument to the contrary has no merit.

CONCLUSION

For the reasons set forth in Guarantor's Brief of Appellant, it is respectfully submitted that this Court should reverse the appealed order and remand for the entry of judgment that Guarantor owes nothing to Seller. Absent that relief, for the reasons set forth herein, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,



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March 29, 2017
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2016-001296

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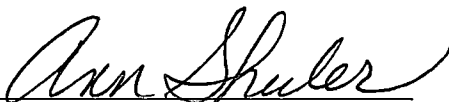
Of whom Lawrence I. Kudeviz is the Respondent/Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Initial Respondent's Brief of Respondent/Appellant, by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to Appellant/Respondent's counsel at the address shown below, on March 29, 2017:

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Re: Mac Papers v. Genesis Press
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Dear Madam Clerk:

Enclosed for filing, please find the original and one copy of the *Initial Respondent's Brief of the Respondent/Appellant*. Please file the Brief in your office and return the file stamped extra copy to me in the return envelope provided. Respondent/Appellant has no additional designations and therefore is not filing a Designation of Matter with this brief.

By copy of this letter, we are serving a copy of the brief on counsel for the Appellant/Respondent.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
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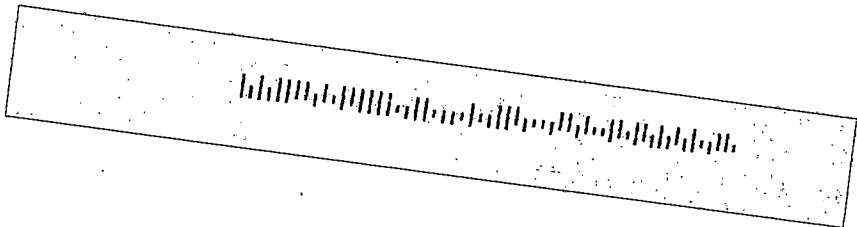
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