

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 12 2017

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Letitia H. Verdin

2012-CP-23-05740

Mac Papers, Inc., Plaintiff.....Appellant/Respondent

v.

Genesis Press, Inc., Lawrence I. Kudeviz, Barry Zisook, and Lewis Levin,
Defendants

Of whom Lawrence I. Kudeviz isRespondent/Appellant.

APPELLANT/RESPONDENT MAC PAPERS, INC.'S INITIAL RESPONDENT'S BRIEF

Townes B. Johnson III (SC Bar# 75412)
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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT PROPERLY FOUND THAT KUDEVIZ HAD NOT TERMINATED HIS PERSONAL GUARANTY.
- II. THE TRIAL COURT PROPERLY DETERMINED THAT MAC PAPERS WAS NOT EQUITABLY ESTOPPED FROM PURSUING ITS CLAIMS.
- III. THE TRIAL COURT PROPERLY DETERMINED THAT MAC PAPERS HAD NOT WAIVED ITS CONTRACTUAL NOTICE RIGHTS.
- IV. AFFIRMANCE ON ANY GROUND APPEARING IN RECORD

STATEMENT OF THE CASE

Appellant/Respondent Mac Papers, Inc. (“Mac Papers”) incorporates its Statement of the Case from its Initial Appellant’s Brief as if restated herein verbatim.

STATEMENT OF FACTS

Mac Papers incorporates its Statement of Facts from its Initial Appellant’s Brief as if restated herein verbatim. In addition, Mac Papers would state that:

1) Mac Papers’ Craig Boortz told Lawrence I. Kudeviz (“Kudeviz”) that he did not have authority for Mac Papers related to Kudeviz’s personal guarantees and Kudeviz needed to contact Mac Papers’ Tonja Van Zandt at Mac Papers’ headquarters regarding same. [Transcript pg. 103, ln. 10-18];

2) Mac Papers’ Craig Boortz thought when Kudeviz was asking about his “personal note” Kudeviz was referring to Kudeviz’s personal guaranty of his note, not of the account. [Transcript pg. 105, ln. 2 - 16];

3) Similarly, Kudeviz did not even know what he was asking about when we asked about his “personal note”, testifying:

Q Okay. So your personal note was – could have been a personal guaranty on the note, could have been a personal guaranty on the account?

A Right. Well, again, I didn’t know the differentiation between the two of them. [Transcript pg. 188, ln. 20 - 24];

4) Kudeviz agreed he was in control of how much credit orders Genesis Press, Inc. placed to Mac Papers. [Transcript pg. 203, ln. 13 - 17];

5) Despite Kudeviz testifying that “[t]here’s no way I will ever accept another personal guaranty, period, after I paid everything off” and “ I mean, I wouldn’t even take out

another credit card... I swore I would never take any other kind of guaranty”, after being confronted with his credit report showing Kudeviz opened at least six (6) personal obligations after he “paid everything off”, he capitulated and testified “[a]fter 2010, I took out a couple of personal obligations. The answer is yes.” [Transcript pg. 179, ln. 2 – pg. 186, ln. 18].

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT KUDEVIZ HAD NOT TERMINATED HIS PERSONAL GUARANTY.

Mac Papers incorporates the arguments from the Trial Court’s January 8, 2016 Order as if restated herein verbatim.

Kudeviz argues that the manifest purpose of the notice requirement in the personal guaranty was to ensure that Mac Papers had actual notice and actual knowledge of a guarantor terminating their personal guaranty. Despite Kudeviz’s contention, the clear manifest purpose of the notice requirement in the personal guaranty was to ensure that Mac Papers’ headquarters in Jacksonville, Florida, where credit decisions are made, had actual notice and actual knowledge of a guarantor terminating their personal guaranty; not regional sales offices with limited credit authority. [Transcript pg. 98, ln. 22 – pg. 99, ln. 19]. In the matter at hand, Mac Papers’ headquarters had neither notice nor knowledge of Kudeviz’s intent to terminate his personal guaranty; specifically because Kudeviz failed to provide agreed upon notice to terminate the guaranty. [Transcript pg. 52, ln. 3 – pg. 53, ln. 8].

Kudeviz further argues that since “actual knowledge” is a valid substitute for compliance with statutory notice provisions as a prerequisite for making a claim against a governmental entity, it would be inconsistent to hold that “actual knowledge” is not a substitute for compliance with a contractual notice provision. Assuming, *arguendo*, that Mac Papers had “actual knowledge”, which Mac Papers disputes, Mac Papers would assert that Florida law often

requires strict compliance with notice contractual provisions. *See e.g. Marriott Corporation v. Dasta Construction Company*, 26 F. 3d 1057 (11th Cir. 1994) (*holding that the general contractor's oral communications for extensions of time to the contract was not sufficient to constitute the contractually required written request for an extension of time.*) In the matter at hand, the evidence is undisputed that Kudeviz failed to comply with the termination language of the personal guaranty.

For the foregoing reasons, the Trial Court properly found that Kudeviz had not terminated his personal guaranty and the Court should affirm same.

II. THE TRIAL COURT PROPERLY DETERMINED THAT MAC PAPERS WAS NOT EQUITABLY ESTOPPED FROM PURSUING ITS CLAIMS.

Mac Papers incorporates the arguments from the Trial Court's January 8, 2016 Order as if restated herein verbatim.

In addition to failing to meet the elements to establish an equitable estoppel defense, Kudeviz's violation of several equitable maxims; specifically, "Equity aids the vigilant, not those who slumber on their rights" and "He who seeks equity must do equity". As discussed above, it is indisputable that Kudeviz had the contractual right to send a termination of his personal guaranty pursuant to the terms therein, but he instead slumbered on his rights failed himself if it indeed was his intent to terminate the personal guaranty, which Mac Papers disputes. Further, in the matter at hand, Kudeviz has not done equity by: 1) ordering Four Hundred Thousand Dollars (\$400,000.00) worth of materials from Mac Papers with complete disregard for repaying them; 2) misrepresenting to the Court his aversion to personal liabilities until faced with his credit report; and 3) if it indeed was his intent to terminate his personal guaranty, which Mac Papers disputes, deceitfully informing a sales person in whom he knew did not have authority instead of the credit manager as directed and required.

As stated above, in the matter at hand, neither Mac Papers' Craig Boortz nor Kudeviz had a clear understanding of what Kudeviz meant when he asked about his "personal note" and for that reason alone, none of the three elements of equitable estoppel can be met. Regardless, even if the "personal note" language unequivocally meant Kudeviz's personal guaranty there was no conduct by Mac Papers which amounts to a false representation because Kudeviz knew that he needed to be in touch with Mac Papers' Tonja Van Zandt regarding any release and he simply chose not to.

For the foregoing reasons, the Trial Court properly determined that Mac Papers was not equitable estopped from pursuing its claims and the Court should affirm same.

III. THE TRIAL COURT PROPERLY DETERMINED THAT MAC PAPERS HAD NOT WAIVED ITS CONTRACTUAL NOTICE RIGHTS.

Mac Papers incorporates the arguments from the Trial Court's January 8, 2016 Order and from Section II, above, as if restated herein verbatim.

As stated above, no one at Mac Papers' headquarters had any actual knowledge of Kudeviz's alleged intent to terminate his personal guaranty. Accordingly, no one at Mac Papers' headquarters could have voluntarily relinquished any right.

For the foregoing reasons, the Trial Court properly determined that Mac Papers had not waived its contractual notice rights and the Court should affirm same.

IV. AFFIRMANCE ON ANY GROUND APPEARING IN RECORD

Mac Papers expressly asks that the Court affirm the Trial Court's January 8, 2016 Order as it relates to Kudeviz's issues on appeal upon any grounds appearing in the Record on Appeal pursuant to Rule 220(c).

CONCLUSION

For the foregoing reasons, Mac Papers respectfully asks this Court to affirm the Trial Court's findings that Kudeviz's personal guaranty was not terminated and the doctrines of equitable estoppel and waiver do not bar Mac Papers' claims.

Respectfully submitted,



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April 10, 2017
Greenville, SC

STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin

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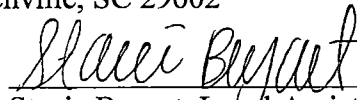
Of whom Lawrence I. Kudeviz isRespondent/Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Appellant Mac Papers, Inc.'s Motion for Extension of Time to File Brief and Appellant/Respondent Mac Papers, Inc.'s Initial Respondent's Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 10th day of April 2017, addressed as follows:

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April 10, 2017

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SC Court of Appeals

Re: *Mac Papers, Inc. v. Genesis Press*
Case No.: 2012-CP-23-05740

Dear Madam Clerk:

Please find enclosed original and one copy of the following, in connection to the above referenced matter:

1. Appellant Mac Paper, Inc.'s Motion for Extension of Time to File Reply Brief;
2. Appellant/Respondent Mac Papers, Inc.'s Initial Respondent's Brief; and
3. Proof of Service.

I would ask that you please file the originals and return the clocked copies to me in the envelope provided for same. I have also enclosed a check in the amount of \$25.00 for your filing fees for same.

Should you have any questions or concerns, please let me know.

Respectfully yours,

Stacie Bryant, Legal Assistant to:
Townes B. Johnson III

Enclosures
CC. Robert L. Widener, Esq.
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