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 REPLY BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

THE UNDISPUTED FACTS

The Appellant-Respondent (Seller) makes several factual arguments in its Respondent's Brief, particularly on the issue of equitable estoppel. Before demonstrating the error in those arguments, it is first necessary to review the undisputed facts in this case, because these undisputed facts establish the backdrop for any factual argument.

At the end of June 2010, Genesis Press (Customer) had two existing financial obligations to Seller: (1) the commercial account under which Customer purchased materials from Seller; and (2) a commercial note under which Customer owed Seller for past purchases from Seller that had been rolled out of the commercial account and into the commercial note. Also at this time, there existed two separate personal guarantees under which Respondent-Appellant (Larry Kudeviz) personally guaranteed Customer's payment of the commercial account and the commercial note.

In July 2010, Customer paid off the note and the account. As a matter of law and fact, the satisfaction of the note automatically extinguished Larry Kudeviz's personal guaranty of the note, because there was nothing to guarantee. Although the account had a zero balance, his personal guaranty of the account remained in place.

After Customer paid off the note and the account, Larry Kudeviz met with Craig Boortz, the general sales manager for Seller in South Carolina who personally handled Customer's account. Kudeviz told Boortz that he wanted out of his personal guaranty. Kudeviz used the term "personal note," but Boortz admitted that he knew that Kudeviz was talking about Kudeviz's personal guaranty.

On July 12, 2010, Kudeviz emailed Boortz to inquire about the status of his personal guaranty being removed, asking whether "Tanya [Tonja van Zandt] working on

releasing my personal note [*i.e.* his personal guaranty]?" (Exh. 9). "Tanya" is "Tonja van Zandt," the vice-president and overall credit manager of Seller working in Seller's headquarters in Jacksonville, Florida. Boortz immediately responded that: "Yes she [Tonja] is." (Pl. Exh. 9). Thus, it is undisputed that, on July 12, 2010, Boortz told Kudeviz that Tonja van Zandt was aware of Kudeviz's decision to terminate his personal guaranty and was working on it. All of this happened when there was a zero balance on Customer's commercial account.

REPLY ARGUMENT

I. The July 2010 conversations and email exchange between Larry Kudeviz and Craig Boortz were sufficient to terminate Kudeviz's personal guaranty, because Seller had actual notice and actual knowledge of the termination.

As argued in Kudeviz's Brief of Appellant, Seller had actual knowledge that Kudeviz was terminating his personal guaranty of Customer's commercial account, and this was sufficient to terminate the personal guaranty despite any failure to comply with the formal requirements of the personal guaranty agreement. Seller responds that the purpose of those formal requirements was to "ensure that [Seller's] headquarters in Jacksonville, Florida [*i.e.* Tonja van Zandt], 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 [*i.e.*, Craig Boortz]." (App-Resp. Resp. Br. at 3). Importantly, Seller does not argue that actual knowledge in the Florida headquarters would be insufficient to trigger a release of the personal guaranty. Rather, Seller argues that its Florida headquarters did not have actual knowledge. This is a classic example of proving too much.

It is undisputed that Boortz (the "regional sales office") told Kudeviz that Tonja van Zandt (the Florida "headquarters") was aware of Kudeviz's decision to terminate his personal guaranty and was working on it. Thus, if Boortz was telling the truth to Kudeviz, then Seller's Florida headquarters had actual knowledge and, therefore, Kudeviz's personal guaranty was terminated. If, as Seller argues, its Florida headquarters did not have this actual knowledge, then Boortz lied to Kudeviz. Assuming this was a lie, and assuming further that this lie would insulate Seller from the imputed actual knowledge held by its regional sales manager, and it does not, it demonstrates that Kudeviz was entitled to judgment on his equitable defense of equitable estoppel. (See Arg. II, *infra*).

To support its argument, Seller cites the decision in *Marriott Corp. v. Dasta Constr. Co.*, 26 F.3d 1057 (11th Cir. 1994) for the proposition that "Florida law *often* requires strict compliance with notice contractual provisions." (App-Resp. Resp. Br. at 3-4) (emphasis added). Putting aside the qualifier of "often" and the implicit recognition that Florida does not always require strict compliance, the decision in *Marriott* does not support Seller's argument.

In *Marriott*, there was a dispute between an owner and a contractor over a construction project. Time was of the essence, and the construction contract had a specific completion date. 26 F.3d at 1065-1066. To alter the contract's completion date and obtain an extension of it, the contractor was required to submit its request in writing with a detailed explanation of why the contractor needed an extension and for how long. This was necessary, because the owner was not subject to any claim for damages resulting from a delay unless it unreasonably refused to grant the extension, *i.e.*, the owner had to decide whether to grant the request to modify the contract's completion date. *Id.* at 1067.

Here, in stark contrast to *Marriott*, there was no need for Kudeviz to give any reason for terminating his personal guaranty. More importantly, Seller had no right to refuse or challenge his decision to terminate the personal guaranty. As held by the trial court, and not challenged by Seller on appeal, Kudeviz could unilaterally terminate his personal guaranty 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)).

II. The evidence established the equitable defense of equitable estoppel.

Seller argues the equitable estoppel issue as if the existence of some minor conflict in the evidence ended appellate inquiry. Equitable estoppel, however, even when raised as a defense in an action at law, retains its equitable nature and is to be decided by the trial court under its equitable jurisdiction. *Bateman v.Rouse*, 596 S.E.2d 386, 389 (S.C. App. 2004); *accord Hann v. Carolina Cas. Ins. Co.*, 167 S.E.2d 420, 424 (S.C. 1969). Since this is an issue in equity, this Court undertakes a *de novo* review and takes its own view of the evidence. *Oskin v. Johnson*, 735 S.E.2d 459, 463 (S.C. 2012).

Here, Craig Boortz was either telling the truth or not when he told Larry Kudeviz that Tonja van Zandt was aware of Kudeviz's decision to terminate his personal guaranty. If Boortz was telling the truth, then Seller had actual knowledge sufficient to terminate the personal guaranty. If he was not telling the truth, then Seller must be estopped from enforcing the guaranty based on Boortz's intentionally false representation to Kudeviz.[1]

[1] The same is true with respect to the issue of waiver. If, as Boortz told Kudeviz, van Zandt knew about Kudeviz's decision to terminate his personal guaranty, then waiver arises. If Boortz was lying to Kudeviz, then equitable estoppel arises. In short, it matters not what the truth is, because under either version of Seller's story, Kudeviz was and is entitled to the termination of his personal guaranty.

To avoid these results, Seller "invokes" several maxims of equity. Contrary to Seller's argument, Kudeviz did not slumber on his rights – he simply believed Boortz (Seller's agent) when he told Kudeviz that the matter was being handled. Contrary to Seller's argument, it is not Kudeviz that is seeking equity without doing equity. To the contrary, either Tonja van Zandt or Craig Boortz lied about Seller's actual knowledge of Kudeviz's termination of his personal guaranty, so it is Seller that has failed to do equity. Finally, and again contrary to Seller's argument, there was nothing "deceitful" about Kudeviz dealing with Boortz on the termination of his personal guaranty. Rather, one of Seller's agents is being deceitful, and it matters not which of them is being so. Under either scenario, Kudeviz was and remains entitled to the termination of his personal guaranty.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Appellant's Brief of Respondent-Appellant, it is respectfully submitted that this Court should reverse the trial court and remand for the entry of judgment in favor of Respondent-Appellant.

Respectfully Submitted,

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By AS w/Permission

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Columbia, SC
May 11, 2017

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Barry Zisook, and Lewis Levin,..... Defendants,

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 Respondent/Appellant's Initial Reply Brief, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Appellant/Respondent's counsel at the address shown below, on May 11, 2017:

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Re: Mac Papers v. Genesis Press
Appellate Case No. 2016-001296

Dear Madam Clerk:

Enclosed for filing, please find the original and one copy of the Respondent/Appellant's Initial Reply Brief. Please file the Reply Brief in your office and return the file stamped extra copy to me via our courier.

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

Respectfully yours,

McNAIR LAW FIRM, P.A.

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