

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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 is Respondent/Appellant.

FINAL APPELLANT'S BRIEF OF APPELLANT / RESPONDENT

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OCT 25 2017

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN FINDING THAT THE 1991 GUARANTY WAS LIMITED BY GENESIS' CREDIT APPLICATION
- II. DID THE CIRCUIT COURT ERR IN FINDING THAT MAC PAPERS FAILED TO PROVE THAT KUDEVIZ INTENDED TO BE LIABLE FOR AN AMOUNT IN EXCESS OF SEVENTY THOUSAND DOLLARS (\$70,000.00)
- III. DID THE CIRCUIT COURT ERR IN NOT ADDRESSING KUDEVIZ'S LIABILITY UNDER THE 2008 GUARANTY AGREEMENT

STATEMENT OF THE CASE

On or about September 5, 2012, Appellant/Respondent Mac Papers, Inc. ("Mac Papers") brought this action against Genesis Press, Inc. ("Genesis"), Respondent/Appellant Lawrence I. Kudeviz ("Kudeviz"), Barry Zisook and Lewis Levin. Mac Papers brought causes of action against Genesis for breach of contract, quantum meruit, and account stated in the amount of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60). Mac Papers brought causes of action against Kudeviz, Barry Zisook and Lewis Levin for breach of personal guaranty agreements for the same amount. The only cause of action at issue at trial was Mac Papers' cause of action against Kudeviz for breach of his personal guaranty agreements as: Lewis Levin, unknown to Mac Papers, was deceased at the time of the suit; Genesis filed for bankruptcy protection under the United States' Bankruptcy Code after the commencement of the action; and Mac Papers settled with Barry Zisook during the pendency of the action.

In defense to his liability under the personal guaranty agreements, Kudeviz raised several defenses. First, Kudeviz asserted that his guaranty had been released by Mac Papers. Second, Kudeviz asserted that Mac Papers should be estopped from enforcing the guaranty due to leading Kudeviz to believe his guaranty had been terminated. Third, Kudeviz asserted that the guaranty, if not terminated, was limited in time and amount.

On or about June 28, 2013, Mac Papers filed a Motion for Default Judgment or, in the alternative, Summary Judgment as to Kudeviz. That motion was denied by order dated September 13, 2013. On or about September 23, 2014, Kudeviz filed a Motion for Summary Judgment as to Mac Papers's claims and Mac Papers, thereafter on September 26, 2014, filed a cross- Motion for Summary Judgment as to Kudeviz. Both Kudeviz and Mac Papers's motions were denied by order dated March 9, 2015. By order dated June 11, 2015, this matter was transferred to the non-jury

roster for trial. On November 18, 2015, this matter was tried in the Greenville County Court of Common Pleas before the Honorable Letitia H. Verdin. On January 8, 2016, the Court issued an order awarding Mac Papers a judgment against Kudeviz in the amount of Seventy Thousand Dollars (\$70,000.00) against Kudeviz. Mac Papers and Kudeviz received notice of the Court's order on January 26, 2016.

On February 4, 2016, Mac Papers filed its Motion to Alter or Amend the Court's order seeking the Court to award it the full amount of its damages. On February 9, 2016, Kudeviz filed his Motion to Alter or Amend the Court's order seeking the Court to absolve Kudeviz from any liability. Both Kudeviz and Mac Papers's motions were denied by order dated May 16, 2016. On June 13, 2016, Mac Papers filed and served its Notice of Appeal. On June 20, 2016, Kudeviz filed and served his Notice of Cross-Appeal

STATEMENT OF FACTS

Mac Papers, based in Jacksonville, Florida, is a leading merchant distributor for paper and print, packaging, facility supplies and office products in the southeastern United States. Genesis was a printing and publishing company founded in Miami, Florida by Kudeviz, Barry Zisook and Lewis Levin. In October 1991, Genesis approached Mac Papers about becoming a supplier for Genesis and, at that time, submitted a credit application (the "Credit Application") to Mac Papers regarding same. (R. 266). The Credit Application lists an amount of credit desired of Seventy Thousand Dollars (\$70,000.00). (Id). After Mac Papers reviewed Genesis' Credit Application, Mac Papers determined that it needed personal guarantees from Genesis's principals in order to supply to Genesis on a credit basis. Accordingly, on December 2, 1991, Kudeviz, Barry Zisook and Lewis Levin signed continuing guarantees wherein they agreed to guarantee Genesis's obligations to Mac Papers (the "1991 Guaranty"). (R. 267). The 1991 Guaranty states that "This

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 of its termination is received by registered mail by Mac Papers, Inc., its successors or assigns, at its office in Jacksonville, Florida, except the written termination of this guaranty by the undersigned shall be effective only as to future credit from and after the date Mac Papers, Inc., its successors or assigns, receives the aforesaid notice..." (Id). The 1991 Guaranty further states that "THIS GUARNTY TO BE REVIEWED BY THE GUARANTORS AND MAC PAPERS, INC ON OR BEFORE MARCH 31, 1992." (Id).

Genesis moved its operations to Greenville, South Carolina and continued to do business in Greenville until it filed for bankruptcy protection in 2013. In March 2008, Genesis suffered a devastating casualty event which severely interrupted Genesis' operations. Despite the casualty event's effect on Genesis' operations, Mac Papers continued to do business with Genesis and between March 2008 and July 2010 extended credit to Genesis of around Seven Hundred Thousand Dollars (\$700,000.00). In November 2008, Mac Papers reached out to Genesis in order to shift some of Genesis's indebtedness to a promissory note, get collateral for the indebtedness, get a new credit application, and get a new guaranty agreement. (R. 268). On December 9, 2008, Genesis signed a promissory note for Three Hundred Three Thousand, Eight Hundred Thirty-Six and 32/100ths Dollars (\$303,836.32) which was personally guaranteed by Kudeviz and Genesis executed a security agreement giving Mac Papers a security interest in, among other things, any settlement monies or insurance proceeds received by Genesis. (R. 269).

On December 11, 2008, Kudeviz executed a separate continuing guaranty agreement (the "2008 Guaranty"). (R. 273). The 2008 Guaranty stated the same modification and termination language as the 1991 Guaranty. (Id.). Shortly after Kudeviz's execution of the 2008 Guaranty, in

February 2009, when Genesis became unable to perform under the December 9, 2008 promissory note, Mac Papers agreed to restructure the arrangement and Genesis executed a new security agreement and promissory note for Four Hundred One Thousand, Eight Hundred Fifty-Two and 51/100ths Dollars (\$401,852.51) which was also personally guaranteed by Kudeviz. (R. 274). In July 2010, after prevailing in their suit related to the casualty event, Genesis paid Mac Papers in full. On July 12, 2010, Kudeviz sent Mac Papers' Craig Boortz an email which, among other things, asked if Mac Papers' Tonja Van Zandt was "working on releasing my personal note". (R. 300). In reply, Mac Papers' Craig Boortz stated "Yes she is and feel free to call her on anything related to the note. Her direct line is 904-348-3387". (*Id.*). Kudeviz never followed up with Mac Papers' Tonja Van Zandt regarding the release of his personal note and Mac Papers never received a registered letter from Kudeviz terminating the guaranty. (R. 10).

Thereafter, Mac Papers and Genesis continued to do business with each other, but by September 2012 Genesis was unable to pay Mac Papers the amount due and owing of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60). (R. 301). Accordingly, on September 5, 2012, Mac Papers commenced this action. At trial, the Court found that Florida law controlled, Kudeviz did not terminate his personal guaranty, that Kudeviz's defense of equitable estoppel was inapplicable, and that Kudeviz's guaranty was limited to Seventy Thousand Dollars (\$70,000.00) by Kudeviz's initial credit application. (R. 9).

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN FINDING THAT THE 1991 GUARANTY WAS LIMITED BY GENESIS' CREDIT APPLICATION

As properly stated in the January 8, 2016 Order, the 1991 Guaranty had a provision wherein it stated that there were "no limitations or conditions except within the guaranty". (R. 10). As also properly stated in the January 8, 2016 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. (R. 13). The only evidence within the guaranty or the Credit Application with respect to a Seventy Thousand Dollars (\$70,000.00) figure is Genesis' "credit desired" of Seventy Thousand Dollars (\$70,000.00) within the Credit Application. (R. 9).

In Florida, an objective test is used to determine the agreement of the parties. *Fivecoat v. Publix Super Markets, Inc.*, 928 So.2d 402, 403 (Fla. 1st DCA 2006). The agreement of the parties "is ascertained from the language used in the instrument and the objects to be accomplished" *Rylander v. Sears Roebuck & Co.*, 302 So.2d 478, 479 (Fla. 3d DCA 1974); *Jones v. Treasure*, 984 So.2d 634, 638 (Fla. 4th DCA 2008). When determining the agreement of the parties, a court need not consider whether or not the parties reached a subjective meeting of the minds as to the terms of a contract. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." *Id.* (quoting *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957)). Accordingly, the plain meaning of the language used by the parties controls as the best indication of the parties' agreement. *SPP Real Estate (Grand Bay), Inc. v. Portuondo, P.A.*, 756 So.2d 182, 184 (Fla. 3d DCA 2000). Thus, the terms in a contract should be interpreted in accordance with their plain and ordinary meaning. *Kel Homes, LLC, v. Burris*, 933 So.2d 699, 702 (Fla. 2d DCA 2006).

As an initial matter, the 1991 Guaranty, itself, states that there were no limitations except those listed in the guaranty. (R. 267). The plain and ordinary meaning of the 1991 Guaranty, therefore, has to be that there is not a Seventy Thousand Dollars (\$70,000.00) credit limit since that was not a provision to the 1991 Guaranty and, instead, Kudeviz agreed to be liable for any and all indebtedness. (*Id.*) Likewise, even if the plain and ordinary meaning of the 1991 Guaranty,

stating that there were no limitations except those listed in the guaranty, includes the provisions of the Credit Application since they must be construed together, the plain and ordinary meaning of the 1991 Guaranty and Credit Application together cannot be construed to create a Seventy Thousand Dollars (\$70,000.00) credit limit either since the actual language Credit Application, stating “credit desired”, does not create any limitations whatsoever. (R. 266).

Furthermore, pursuant to Florida law, even if the plain meaning of “credit desired” language of the Credit Application could be construed to create a credit limitation, that limitation is applicable when a guarantor has agreed to guaranty “all debts”. *See e.g Paper Corp. of America v. Sandow*, 558 So. 2d 75 (1990) (*wherein guarantor of buyer’s corporate account with seller was liable to entire debt incurred by buyer under credit application, although seller had initially approved only \$1,500 credit limit*). In *Paper Corp. of America v. Sandow*, Helen Sandow (“Sandow”) was held to be¹ the personal guarantor of Continental Graphic, Inc. (“Continental Graphic”)’s corporate obligations to Paper Corporation of America d/b/a Saxon Paper-Florida (“Paper Corp.”) and, in the lower court, found to be liable for One Thousand, Five Hundred Dollars (\$1,500) of Continental Graphic’s Forty-One Thousand, Nine Hundred One and 16/100ths Dollars (\$41,901.16) obligation, due to the seller’s credit limitation on Continental Graphic of One Thousand, Five Hundred Dollars (\$1,500). *Id.* at 76. The Florida Court of Appeals, however, found that even though Paper Corp., the seller, had limited Continental Graphic’s credit to One Thousand, Five Hundred Dollars (\$1,500) and Continental Graphic stated its purchases would be minimal, Sandow was liable to Paper Corp. for Continental Graphic’s full obligation of Forty-One Thousand, Nine Hundred One and 16/100ths Dollars (\$41,901.16) since she agreed to guaranty all Continental Graphic’s debts. *Id.*

¹ Florida has since changed its law such that Sandow would not be a personal guarantor for merely being the “undersigned” on the Continental Graphic, Inc. corporate credit application.

In the matter at hand, Kudeviz similarly agreed to guaranty “any and all indebtedness of any kind” to Mac Papers. (R. 267). Pursuant to *Paper Corp. of America*, therefore, even if the plain meaning of “credit desired” in the 1991 Guaranty could be construed to create a credit limit, Kudeviz is still liable for the full amount of Genesis’ obligation to Mac Papers, Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60), since he agreed to guaranty all Genesis’ debts. *Paper Corp. of America*, 558 So. 2d at 76.

For the foregoing reasons, the Circuit Court erred in finding that the 1991 Guaranty was limited by Genesis’ Credit Application and Mac Papers respectfully asks this Court to reverse the Circuit Court and remand this matter back for the issuance of a judgment against Kudeviz in the amount of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60).

II. DID THE CIRCUIT COURT ERR IN FINDING THAT MAC PAPERS FAILED TO PROVE THAT KUDEVIZ INTENDED TO BE LIABLE FOR AN AMOUNT IN EXCESS OF SEVENTY THOUSAND DOLLARS (\$70,000.00)

The plain language of the 1991 Guaranty states that Kudeviz agreed to guaranty “any and all indebtedness of any kind” to Mac Papers. (R. 267). The 1991 Guaranty further stated that there were “no limitations or conditions except within the guaranty”. (*Id.*) Accordingly, it is clear from the 1991 Guaranty that Kudeviz contracted to be liable for any and all of Genesis’ obligations to Mac Papers.

Furthermore, assuming, *arguendo*, that the “amount of credit desired” language of the Credit Application created a limitation of credit, pursuant to Florida law, when a guarantor agrees to guaranty all debts, an initial credit limit does not create a maximum credit limit. See e.g. *Paper Corp. of America*, 558 So. 2d 75 (“[The] facts do not, in our view, serve to limit the [Guarantor’s] liability to... the amount of credit initially allowed; they simply indicate that [Defendant Company]

anticipated “minimal” purchases of paper from the [Seller] (an erroneous anticipation as it turned out), and that the credit line extended for \$1,500 was an initial credit line, not a maximum credit line”.) Accordingly, in the matter at hand, since Kudeviz agreed to guaranty “any and all indebtedness of any kind”, Mac Papers was not required to prove any further intent by Kudeviz to be liable for more than Seventy Thousand Dollars (\$70,000.00).

Mac Papers, additionally, proffered evidence that Genesis, by and through Kudeviz, was in control of the amount of credit it desired throughout its entire contractual relationship with Mac Papers since Kudeviz was in control of the credit orders it placed to Mac Papers. The final contractual balance of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60), therefore, represents the amount of credit Genesis desired at that time. Pursuant to Florida law, Genesis’ increased desire for credit is imputable to Kudeviz as the guarantor of all debts. (*Id.*)

For the foregoing reasons, the Circuit Court erred in finding that Mac Papers failed to prove that Kudeviz intended to be liable for an amount in excess of Seventy Thousand Dollars (\$70,000.00) and Mac Papers respectfully asks this Court to reverse the Circuit Court and remand this matter back for the issuance of a judgment against Kudeviz in the amount of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60).

III. DID THE CIRCUIT COURT ERR IN NOT ADDRESSING KUDEVIZ’S LIABILITY UNDER THE 2008 GUARANTY AGREEMENT

Assuming, *arguendo*, that the 1991 Guaranty was limited to \$70,000 by the language of the Credit Application, Kudeviz’s 2008 Guaranty was not bound by any such “credit desired” language and would entitle Mac Papers to recover its full amount against Kudeviz. At trial, Mac Papers testified that it would not have continued to extend credit to Genesis if the 2008 Guaranty

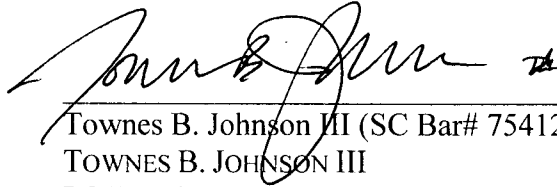
had not been provided. Transcript, pp. 32-33. Accordingly, if the 1991 Guaranty was limited in any way, there was sufficient consideration to support the unlimited nature of the 2008 Guaranty.

For the foregoing reasons, the Circuit Court erred in finding that Kudeviz's liability was limited to Seventy Thousand Dollars (\$70,000.00) and Mac Papers respectfully asks this Court to reverse the Circuit Court and remand this matter back for the issuance of a judgment against Kudeviz in the amount of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60).

CONCLUSION

For the foregoing reasons, Mac Papers respectfully asks this Court to reverse the Circuit Court and remand this matter back for the issuance of a judgment against Kudeviz in the amount of Four Hundred Thirty-Two Thousand, One Hundred Eighty-Five and 60/100ths Dollars (\$432,185.60).

Respectfully submitted,



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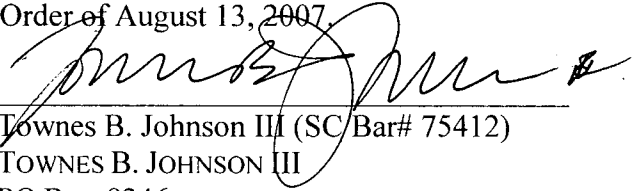
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant/Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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