[Cite as *Baltes Commercial Realty v. Harrison*, 2009-Ohio-5868.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BALTES COMMERCIAL REALTY, et al. :

Plaintiffs-Appellees : C.A. CASE NO. 23177

v. : T.C. NO. 2006 CV 9262

DARRYL HARRISON, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellants :

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O P I N I O N

Rendered on the 6th day of November, 2009.

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FROELICH, J.

{¶ 1} Darryl Harrison appeals from a judgment of the Montgomery County Court of Common Pleas, which affirmed the magistrate's decision finding, after a trial, that Harrison and 4A Capital Group ("4A") were jointly and severally liable to Yankee Business Centre Ltd. in the amount of $61,836.10. Harrison alleges that the court erred in finding

him liable based on a guaranty signed by him. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} On August 30, 2006, Yankee and 4A entered into a commercial lease whereby 4A would rent approximately 6,000 square feet of space located at 8150 Washington Village Drive within the building known as Yankee Business Centre. Baltes Commercial Realty is the managing agent for Yankee Business Centre and has an ownership interest in the property. According to the lease, 4A's rent during the first year was $5,500 per month. 4A also agreed to pay outstanding sums due from a Greenline Capital Funding lease in the amount of $1,287.93 per month. The lease was signed by Katherine Stanton for Yankee and by Harrison as President of 4A. Specifically, the signature lines showed:

"LESSOR: Yankee Business Centre, LTD.,

"an Ohio limited liability company

"Katherine Stanton [signature]

"By: Katherine Stanton [printed handwriting]

"Its: Property Manager [printed handwriting]

"LESSEE: 4A Capital Group, LLC, an Ohio

"limited liability company

"Daryl Harrison [signature] 4A Capital Group LLC [printed handwriting]

"By: Daryl Harrison [printed handwriting]

"Its: President 4A Capital Group LLC [printed handwriting]"

{¶ 3} On November 22, 2006, Yankee brought suit against Harrison and 4A,

seeking restitution of the premises and $14,150,86 plus "back reasonable rental value and damages and all other rent and damages and repair costs up to and including the time the Defendant vacates the premises." In the caption of the Complaint, Harrison and 4A are identified as "Guarantor/Defendant(s)." Yankee attached to its Complaint a notice under the Fair Debt Collection Practices Act and a copy of the August 30 lease between 4A and Yankee.

{¶ 4} In their Answer, Harrison and 4A asserted as affirmative defenses that Harrison had been misjoined and that the complaint constituted "[s]lander of Defendant, Darryl Harrison's good name by calling him a 'Guarantor' which is fictitious, denoted his personal liability, and which was intended to ruin his credit in the financial industry."

{¶ 5} In December 2006, a trial was held before a magistrate on Yankee's claim for a writ of restitution, after which the magistrate granted restitution of the property to Yankee. The case remained active due to Yankee's pending claim for damages.

{¶ 6} In January 2007, Harrison moved to dismiss the claim against him, arguing that he signed the lease as President of 4A, a limited liability company, that Yankee made no allegations against him regarding a guaranty, and that such a claim is not supported by the statute of frauds because there is no written guaranty agreement. He supported his motion with an affidavit, in which he stated that he signed the lease in his capacity as President of 4A and that it was not agreed that he would be personally responsible for the payment of any debt which might arise pursuant to the lease. Yankee opposed Harrison's motion, arguing that the "corporate veil" may be pierced and dismissal at that juncture would be premature.

{¶ 7} Because Harrison had supported his motion with an affidavit, the magistrate

converted the motion to one for summary judgment, and she granted the parties 14 days to submit any additional response. No additional materials were filed.

{¶ 8} On September 27, 2007, the magistrate granted summary judgment to Harrison, stating that no facts had been submitted to refute Harrison's affidavit. That day, which was the scheduled trial date, the magistrate held a hearing during which the guaranty was apparently presented and entered into evidence. The record does not include a transcript for this hearing, and the nature of the hearing is not clear from the record.

{¶ 9} Yankee filed objections to the magistrate's ruling and moved for a new trial. It stated that a guaranty document was presented at the restitution trial, and the document should have been in the original trial documents that the court reviewed. In response, Harrison argued that the complaint did not put him on notice that his "personal guarantee" was an issue in the case, that Yankee did not request to pierce the corporate veil in its complaint, and that Yankee failed to state a claim against him. Treating Yankee's motion as a motion for reconsideration, the magistrate noted that the guaranty "has been misplaced and was not included in the Court's file." Thus, in the interests of justice, the magistrate vacated its decision granting summary judgment to Harrison and stated that the motion would be reconsidered. Harrison objected to the magistrate's decision granting the motion for reconsideration. The trial court overruled Harrison's objection. There is no indication in the record that the magistrate ever "re-ruled" on the motion for summary judgment prior to the trial on the merits.

{¶ 10} Trial on Yankee's damages claim was held before the magistrate on April 2, 2008. Before the presentation of testimony, Harrison's counsel asked the magistrate to

reinstate her original summary judgment decision if no guaranty were found to exist. Yankee responded that, "from the very outset of this case, the Plaintiff has sought to pursue the Defendant, Darryl Harrison, personally. It is reflected in the Complaint when it was originally filed in 2006." Yankee further stated that there was a personal guaranty, which it would present again during the trial. Yankee also asked for a default judgment against Harrison and 4A, who were absent but whose counsel was present. The magistrate denied the motion for a default judgment.

{¶ 11} During the trial, the magistrate heard evidence from Stanton (the signatory for Yankee) about 4A's obligations under the lease and the company's default from October 2006 until July 2007, when the property was leased to new tenant. When Stanton was asked about the preparation of a guaranty, Harrison's counsel objected to testimony regarding the guaranty on the grounds that it was not pled in the complaint and he would have negotiated the case differently had he known it was an issue in the case. The magistrate overruled Harrison's counsel's objection and allowed Yankee's counsel to ask Stanton about the guaranty. Stanton identified a guaranty signed by Harrison and testified regarding the preparation and signing of that agreement. The guaranty was admitted into evidence over Harrison's counsel's objection.

{¶ 12} On April 25, 2008, the magistrate granted judgment for Yankee and against Harrison and 4A, and awarded damages, jointly and severally, in the amount of $62,836.10. As to Harrison, the magistrate stated: "[I]t is undisputed that Darryl Harrison read the guaranty, understood it and subsequently signed it with the intention of binding himself personally to the terms of the guarany. No testimony was offered to establish he was

deceived, misled, that he failed to understand the guaranty or that he did not intend to bind himself personally. The text of the guaranty is clear and unambiguous."

{¶ 13} Harrison objected to the magistrate's decision, claiming that the Complaint did not allege any type of guaranty and did not put him on notice that his "personal guarantee" was an issue in the case. Harrison also asserted that the magistrate's decision treated him as a surety, not a guarantor, and that the guaranty was signed by Harrison in his corporate capacity.

{¶ 14} The trial court overruled Harrison's objections and adopted the magistrate's decision. With respect to the guaranty, the trial court found:

{¶ 15} "In the case at bar, Harrison argues that Plaintiffs' Commercial Complaint in Forcible Entry and Detainer does not refer to the Guaranty and did not put Harrison on notice that Plaintiffs sought to hold him personally liable. Ohio Civ.R. 8(A) requires that a complaint set forth 'a short and plain statement of the claim showing that the party is entitled to relief.' The Court notes that Harrison was named as an individual defendant in the Complaint. Further, although the guaranty in question was not attached to the Complaint at the time of its filing, the guaranty was produced to the Court and entered into evidence during the initial trial in this matter on September 27, 2007. On this set of facts, the Court finds that the Complaint sufficiently informed Harrison of the claims against him and his claim that he was unfairly surprised at the April 2, 2008 trial by the guaranty is without merit.

{¶ 16} "***

{¶ 17} "Harrison argues that he signed the guaranty in his capacity as president of

4A, and he therefore has not [sic] personal liability. However, the evidence demonstrates that Harrison read and understood that the guaranty held him personally liable for 4A's obligations under the lease. Harrison's argument requires this Court to believe that Plaintiffs required 4A to guarantee its own obligations under the lease. To the contrary, Stanton gave unrefuted testimony that a special appointment with Harrison was made to execute the guaranty and that Harrison knew that his personal guarantee was required to induce Yankee to enter into the lease with 4A."

{¶ 18} Harrison appeals from the trial court's judgment, raising two assignments of error.

II

{¶ 19} Harrison's first assignment of error states:

{¶ 20} "THE DECISION, ORDER AND ENTRY OVERRULING DEFENDANT'S OBJECTIONS TO MAGISTRATE'S DEICISON; AFFIRMING MAGISTRATE'S DECISION IS CONTRARY TO LAW BECAUSE THE COMPLAINT DID NOT GIVE DEFENDANT HARRISON SUFFICIENT NOTICE THAT HE WAS BEING SUED AS A GUARANTOR, AND THAT HE WOULD BE HELD PERSONALLY LIABLE FOR THE DEBTS OF THE LIMITED LIABILITY CORPORATION."

{¶ 21} In his first assignment of error, Harrison claims that the trial court erred in granting judgment against him in his individual capacity, because the Complaint did not allege the existence of a guaranty, did not raise the guaranty as an issue in the case, and the guaranty was not attached to the Complaint. Harrison asserts that the Complaint alleged only breach of a lease agreement and not a claim based on a guaranty.

{¶ 22} As in the trial court, Yankee responds that the complaint sufficiently put Harrison on notice that it was pursuing him in his individual capacity based on the guaranty. Yankee notes that Harrison's Answer claims that Yankee slandered him by referring to him as a guarantor. Yankee further contends that Harrison was given notice of the claim based on the guaranty at various hearings before the magistrate.

{¶ 23} Civ.R. 8(A) requires that a pleading that sets forth a claim for relief contain "a short and plain statement of the claim showing that the party is entitled to relief" and "a demand for judgment for the relief to which the party claims to be entitled." When a claim is based on a written document, a copy of that document must be attached to the pleading. Civ.R. 10(D). If the document is not attached, the pleading must state the reason for its omission. Id.

{¶ 24} Yankee's Complaint alleges, in its entirety:

{¶ 25} "**COUNT ONE**

{¶ 26} "1. Plaintiff is the landlord of the commercial premises located at 8150 Washington Village Drive and described below Defendant's name in the above caption, and Defendant presently operates a business therein. The Lease for said premises is attached hereto as Plaintiff's Exhibit 1.

{¶ 27} "2. Plaintiff [sic] has failed to pay the required rental for said premises and is now in arrears in the amount of **FOURTEEN THOUSAND ONE HUNDRED FIFTY DOLLARS AND 86/100 ($14,150.86)**.

{¶ 28} "3. Defendant refuses to leave said premises and surrender possession thereof.

{¶ 29} "**COUNT TWO**

{¶ 30} "4. Plaintiff restates all the allegations above herein.

{¶ 31} "5. Plaintiff asks for a money judgment in the amount claimed above of **$14,150.86** plus back reasonable rental value and damages and all other rent and damages and repair costs up to and including the time the Defendant vacates the premises.

{¶ 32} "**WHEREFORE**, Plaintiff prays for restitution of said premises; for reasonable rental value and repair costs at the conclusion of the case.

{¶ 33} "If you are depositing rent with the Clerk of this Court, you shall continue to deposit such rent until the time of the court hearing. The failure to continue to deposit such rent may result in your eviction. You may request a trial by jury. You have the right to seek legal assistance. If you cannot afford a lawyer, you may contact your local Legal Aid or legal services office. If none is available, you may contact your local Bar Association.

{¶ 34} "This is an attempt to collect a debt. Any information given will be used for that purpose.

{¶ 35} "[Attorney signature and address]

{¶ 36} "**The amount stated in the Complaint is presumed to be correct unless an Answer is filed within thirty (30) days.**"

{¶ 37} Nothing in the body of Yankee's Complaint suggests that Harrison had been sued in his individual capacity. The Complaint refers to "Defendant" in the singular, not to Defendants, and alleges that Defendant operates a business at 8150 Washington Village Drive pursuant to a lease agreement, which was attached to the Complaint. The lease indicated that it was entered into by and between Yankee and 4A; Harrison signed the lease

as President of 4A. Thus, the Complaint simply asserted that 4A had failed to pay the required rent and had refused to vacate the premises. The body of the Complaint is devoid of any reference to Harrison having signed a guaranty, nor has Yankee included "a short and plain statement" alleging a claim for relief against Harrison based on an alleged guaranty.

{¶ 38} Nor can Yankee rely on the caption of its Complaint to assert that it has stated a claim against Harrison. The caption identifies the defendants as "DARRYL HARRISON AND DARRYL HARRISON d/b/a 4A CAPITAL GROUP, LLC AND ALL OTHERS, 8150 Washington Village Drive, Dayton, OH 45459, Guarantor/Defendant(s)." Although Harrison is named separately (along with "all others") and the group is identified as "guarantor/defendant(s)," the caption of the Complaint does not control the nature of the claims. *Morris v. Children's Hosp. Med. Ctr.* (1991), 73 Ohio App.3d 437, 440-41. "It is, instead, the substance of the pleading that determines its operative effect." Id. In the absence of any allegations in the body of the Complaint that Harrison was being sued in an individual capacity as a guarantor of 4A's debt, Harrison was not put on notice by the Complaint that Yankee was raising that claim against him.

{¶ 39} Yankee emphasizes that its claim against Harrison based on the guaranty was raised numerous times before the trial court and, thus, Harrison had actual knowledge of Yankee's intent to raise that issue.

{¶ 40} Civ.R. 15(B) allows pleadings to be constructively amended to conform to evidence. That rule provides:

{¶ 41} "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the

pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence." (Emphasis added.)

{¶ 42} In order for an objecting party to prevent the amendment of a pleading under Civ.R. 15, the party must establish that he will be subject to "serious disadvantage" if the amendment were allowed. *Hall v. Bunn* (1984), 11 Ohio St.3d 118, 122. "Mere surprise" is generally an insufficient basis for precluding the evidence, and "[i]n determining whether surprise actually exists, the extent to which the objecting party had knowledge of the disputed evidence is often considered." Id.

{¶ 43} A trial court's decision on whether to allow the amendment of a pleading is reviewed for an abuse of discretion. *State ex rel. Askew v. Goldhart* (1996), 75 Ohio St.3d 608, 610. An abuse of discretion connotes more than a mere error of law or judgment; it implies an attitude on the part of the trial court that is arbitrary, capricious, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 44} At the April 2, 2008, trial, Harrison's counsel objected to testimony regarding the guaranty, stating:

{¶ 45} "Your Honor, this Complaint is about a breach of a Lease. It looks like maybe six – five paragraphs – Attorney Lasky is trying to introduce a Guaranty. Pursuant to the Rules of Civil Procedure, one, the Guaranty had to be attached to the Complaint to put my client on notice.

{¶ 46} "Also, suretyship has to be pled specifically. There is absolutely nothing said on the Complaint about a Guaranty. And if in the beginning I knew that a Guaranty was at issue, I would have taken a very different view in regards to how we should negotiate this case. But because it wasn't attached and we had absolutely no notice, you know, it would be unfair to introduce a Guaranty at this stage."

{¶ 47} Yankee's counsel responded that the Complaint identified the defendants as "Darryl Harrison and Darryl Harrison, dba 4A Capital Group, LLC." He asserted that the issue of the guaranty had been raised in prior hearings, including the original restitution hearing.

{¶ 48} Although Yankee did not expressly ask to amend its complaint to include a claim against Harrison as guarantor, that motion was implicit in Yankee's argument that Harrison had been aware of its claim against him individually based on the guaranty and that proceeding on the guaranty issue would not prejudice him. By permitting Yankee to introduce evidence on the guaranty issue, the magistrate allowed Yankee to amend its pleading, in accordance with Civ.R. 15(B), and to proceed on its claim against Harrison individually based on the guaranty.

{¶ 49} We conclude that the magistrate did not abuse her discretion when she permitted Yankee to try a claim against Harrison individually based on the guaranty. In its

October 10, 2007, objection to the magistrate's September 27, 2007, decision granting summary judgment to Harrison, Yankee asserted that the guaranty document had been signed by Harrison and that Yankee relied upon Harrison's financial strength in agreeing to lease its property to 4A. At that time, Yankee asked for the magistrate to vacate its grant of summary judgment to Harrison and to reinstate him as a party due to the guaranty; the summary judgment was vacated and Harrison was reinstated, which decision was upheld by the court over Harrison's objection. At that juncture, even if not by the Complaint or at the restitution hearing, Harrison was aware that Yankee was attempting to hold him individually liable based on the guaranty; he was not subject to undue prejudice, serious disadvantage, or surprise when Yankee attempted to raise that claim at trial. Considering that the guaranty had previously been presented as evidence at a prior hearing, the magistrate could have reasonably concluded that allowing Yankee to proceed on this claim as part of this litigation was desirable and that Harrison would not be prejudiced thereby.

{¶ 50} The first assignment of error is overruled.

III

{¶ 51} Harrison's second assignment of error states:

{¶ 52} "THE DECISION, ORDER AND ENTRY OVERRULING DEFENDANT'S OBJECTIONS TO MAGISTRATE'S DECISION; AFFIRMING MAGISTRATE'S DECISION IS CONTRARY TO LAW BECAUSE THE GUARANTY WAS NOT SIGNED IN ACCORDANCE WITH THE OHIO STATUTE OF FRAUDS, AND WAS THUS INEFFECTIVE TO HOLD DEFENDANT HARRISON PERSONALLY LIABLE."

{¶ 53} In his second assignment of error, Harrison asserts that the trial court erred in

holding him individually liable under the guaranty, because that document was signed in his corporate, not personal, capacity. Stated in terms of the statute of frauds, Harrison claims that he, in his individual capacity, was not the "party to be charged." See R.C. 1335.05. Harrison notes that the guaranty provided for a substitute guarantor should he leave the company, which, he argues, supports an interpretation that he signed the document in his corporate capacity.

{¶ 54} "Generally, a party signing a contract as a corporate officer is not individually liable. However, if a corporate officer executes an agreement in a way that indicates personal liability, then that officer is personally liable regardless of his intention. Whether a corporate officer is personally liable upon a contract depends upon the form of the promise and the form of the signature." *Spicer v. James* (1985), 21 Ohio App.3d 222, 223 (internal citations omitted).

{¶ 55} When an officer of a company signs his or her name along with the name of her corporate title, "the general rule of interpretation governing this kind of signature is that such words as 'president' are merely descriptive of the character or capacity of the person signing the document," and the individual signing the guaranty cannot deny personal liability if the language of the guaranty is clear and unambiguous. *Westgate Village Shopping Ctr. v. Parker*, Lucas App. No. L-08-1017, 2008-Ohio-2571, at ¶8, quoting *S-S-C Co. v. Hobby Ctr.* (Dec. 4, 1992), Lucas App. No. L-92-049; *Wells Fargo Bank, N.A. v. WSW Franchising, Inc.*, Franklin App. No. 09AP-26, 2009-Ohio-3845.

{¶ 56} "The signature itself represents a clear indication that the signator is acting as an agent if: (1) the name of the principal is disclosed, (2) the signature is preceded by words

of agency such as 'by' or 'per' or 'on behalf of', and (3) the signature is followed by the title which represents the capacity in which the signator is executing the document, e.g., 'Pres.' or 'V.P.' or 'Agent.'" *George Ballas Leasing, Inc. v. State Sec. Serv., Inc.* (Dec. 31, 1991), Lucas App. No. L-91-069, citing *Spicer*, supra.

{¶ 57} The guaranty signed by Harrison obligated him, as follows:

{¶ 58} "NOW, THEREFORE, in consideration of the lease to Lessee [4A] of the Premises described in the Lease and for other good and valuable consideration, the Guarantor does hereby guarantee to Lessor [Yankee], its successors and assigns, the due, regular, and punctual payment by Lessee of the rentals and all other sums payable by Lessee as specified in the Lease and does further guarantee that Lessee shall faithfully perform and fulfill all the agreements and obligations provided for in the Lease at the time and in the manner therein agreed."

{¶ 59} The guaranty was signed by "Daryl Harrison, President," as the guarantor. It further provided that, if "Guarantor should leave 4A Capital Group, LLC for any reason, then a substitute Guarantor must be provided within five (5) days to Lessor to sign a new lease guaranty."

{¶ 60} Although Harrison signed the guaranty agreement with the title, President, his signature does not indicate that he signed the guaranty on behalf of 4A. Rather, the agreement identifies Harrison, not 4A, as the guarantor, and the inclusion of "President" does not mean that he was acting as 4A's agent. The guaranty's language stating a substitute guarantor must be provided should Harrison leave 4A does not require a finding that Harrison was not personally liable. Rather, that language merely indicates that

Harrison would be released from his obligation as guarantor upon his departure from 4A, and that a new guarantor would need to be provided. Moreover, we agree with the trial court that it does not make common sense, let alone business sense, for Yankee to request that 4A, the lessee, guarantee its own lease obligations.

{¶ 61} Finally, we note that the trial court did not improperly hold Harrison liable as a surety, rather than as a guarantor. Yankee was not required to pursue 4A before proceeding against Harrison, the guarantor. *Campco Distributors, Inc. v. Fries* (1987), 42 Ohio App.3d 200, 201 (stating "creditor need not pursue and exhaust the principal before proceeding against the guarantor").

{¶ 62} The second assignment of error is overruled.

IV

{¶ 63} The judgment of the trial court will be affirmed.

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FAIN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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