[Cite as *Prokos v. Jones*, 2019-Ohio-519.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

DEMETRIOS PROKOS	:	
	:	Case No. 18CA8
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
JERRY W. JONES	:	
	:	
Defendant-Appellant.	:	**Released: 02/05/19**

APPEARANCES:

Andrew J. Mollica, Mollica Gall Sloan & Sillery Co., LPA, Ohio, Athens, Ohio, for Appellant.

Robert R. Rittenhouse and John P. Lavelle, Lavelle and Associates, Athens, Ohio, for Appellee.

McFarland, J.

{¶1} Jerry W. Jones appeals the March 21, 2018 decision and judgment entry of the Athens County Court of Common Pleas, which granted judgment to Demetrios Prokos. Appellant asserts the trial court erred in granting judgment to Appellee. Having reviewed the record, we agree with the trial court's conclusion that when the parties entered into a lease agreement, they mutually intended that Appellant would personally guarantee performance of the lease obligations. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTS

{¶2} On March 3, 2016, Appellee Demetrios Prokos filed a complaint against Appellant Jerry W. Jones[1] in the Athens County Court of Common Pleas. In the complaint, Appellee alleged that Appellant breached a ten-year commercial lease agreement the parties entered in 2006. The lease agreement concerned two convenience store properties owned by Appellee: one in Athens, Ohio, and one in Nelsonville, Ohio.

{¶3} Appellee alleged that Appellant had breached the lease agreement by failing to pay rent since May 2008, as well as failing to pay real estate taxes, licensing fees, and maintenance costs. Appellee further alleged that Appellant had vacated the premises and had allowed waste to occur. Appellee claimed as a result of Appellant's actions, he had sustained damages, incurred further expenses in an attempt to mitigate his damages, and that Appellant had been unjustly enriched. The sole issue in this appeal is whether Appellant executed a handwritten addendum to the formal typewritten lease agreement with the intent to be personally bound on the lease obligations.

{¶4} Appellee attached two exhibits to his complaint, "A" the lease agreement, and "B," a "last minute additional agreement." Exhibit A is a formal typewritten 12-page lease agreement. The first paragraph of the lease agreement

[1] Although this case is captioned *Demetrios Prokos v. Jerry W. Jones,* an affidavit signed and attached to one of Appellant's responsive pleadings reflects his name is "Jarrett W. Jones."

reflects a date of July 1, 2006 as the date the parties entered into the agreement. The first paragraph also identifies the parties as Demetrios Prokos, "LANDLORD," and "JJARRET LLC," "TENANTS."[2] Page seven of the agreement reflects the signatures of Demetrios Prokos and Jerry Jones, and their signatures are notarized. Each page of this agreement contains the initials "DP" and "JJ" also identifying the parties.

{¶5} Exhibit B is captioned "Nelsonville." This handwritten exhibit contains four additional pages. The second page of this exhibit is captioned "Last Minute Additional Agreement." The paragraphs are not numbered but are identified with asterisks. At the 14th asterisk, the paragraph states:

"All Papers Signed as JJARRETT LLC

I Guarantee payment to D.P.

In Person Also."

{¶6} On April 6, 2016, Appellant filed an answer to the complaint in which he admitted only that JJARRETT LLC was a party to the lease agreement. Appellant denied that he had signed the lease in his individual capacity thereby personally guaranteeing all payments due to Appellee. The parties engaged in limited discovery. An attempt at mediation failed.

[2] We observe that the formal typewritten lease agreement reflects the name of the entity Appellant attempted to incorporate spelled "JJARRET LLC." However, the handwritten addendum, penned by Appellant, reflects the spelling of the entity's name as: "JJARRETT LLC." In this decision, we have spelled the name exactly as we have found it in the entries and trial transcript.

{¶7} Appellee filed Plaintiff Demetrios Prokos' Motion for Partial Summary Judgment on February 28, 2017. Appellee argued that (1) JJARRET LLC was never registered as a limited liability company; (2) Appellant signed on behalf of JJARRETT LLC; (3) Appellant was personally liable for tenant obligations on the lease agreement; (4) Appellant was jointly and severally liable; and (5) the facts demonstrated that Appellant had materially breached the lease agreement. Attached to Appellee's motion was the Affidavit of Demetrios Prokos, in which he itemized his damages and set forth a total amount of $1,055.271.10.

{¶8} On April 28, 2017, Appellant filed Defendant's Memorandum Opposing Plaintiff Demetrios Prokos'Motion for Partial Summary Judgment. In this pleading, Appellant asserted that the language of Exhibit B served only to insure that Appellant would make payment "in person." Appellant argued under the summary judgment standard of review, the language must be construed in favor of himself. Appellant concluded that there was a genuine issue of material fact as to the meaning of the "guarantee" provision sought to be enforced.

{¶9} Appellee filed a reply brief, in which he argued that to suggest the language at issue meant only that Appellant would make his payments "in person" was completely unreasonable in light of the fact Appellee was a seasoned landlord who would never require "in person" payments. Appellee also scrutinized the language of Appellant's affidavit as being "carefully worded to avoid stating,

under oath, that the Defendant actually believed that it was the intent of this clause to require him to make in-person payments of rent checks."

{¶10} The trial court denied partial summary judgment. The court held that having reviewed the case, it required extrinsic evidence beyond that which had been submitted. On August 30, 2017, Appellee filed a second motion for summary judgment. This motion was supported additionally by the affidavit of Catherine Stotts, Appellee's property manager, and a copy of Appellant's responses to request for admissions. Appellant filed a memorandum opposing the motion for partial summary judgment. Appellee then filed a reply. On October 13, 2017, the court again denied the motion for partial summary judgment.

{¶11} A bench trial was held on November 28, 2017 and on December 11, 2017. Appellee testified he owned the properties subject of the lease, two gas stations. One was located in Athens, Ohio, and the other was located in Nelsonville, Ohio. Appellee testified that he has owned various companies and the purpose of having a corporate entity established is to avoid personal liability. It was a typical business practice for him to establish corporate entities. He also required tenants to sign individually as well as on behalf of a company if the company had "no backing" or if it had not yet been created.[3]

[3] Appellee identified Exhibit C, a copy of a formal typewritten lease with a tenant subsequent to Appellant, which contained formal typewritten guarantee language.

{¶12} Appellee recalled the negotiations with Appellant which culminated in the signing of the formal lease and the handwritten addendum. Appellee testified that he had prior dealings with Appellant and considered him a sophisticated business person in that Appellant had worked in his family business and in real estate as long as or longer than Appellee. Appellee explained that he did not include guarantee language in the formal typewritten lease with Appellant because as they were negotiating, he understood Appellant to have already established a legal corporation or an LLC.

{¶13} At the time the formal lease was being prepared, Appellee thought he was dealing with a corporation. Then by the time of the signing of the lease, "a lot of stuff came to light." Appellee learned that Appellant was signing for a corporation not even in existence. Therefore, to protect himself, he required that Appellant be personally liable. The exhibit reflects, and Appellee testified, that the typewritten lease does not contain evidence that Appellant was signing as an agent or an officer of a corporate entity.

{¶14} Relating to the handwritten addendum, Appellee testified:

> "* * * Everything on that last minute, last minute additional agreement, okay, which was signed with the lease, that was [*sic*] little items that we had to go over individually. There's no single place to say a corporation here or (inaudible) or LLC. * * * And there's not one area here that says anything about any corporation. All the liabilities here, all the dealings here, and all the payments were to be coming from Jerry to Demetrios."

{¶15} Similarly, Appellee testified:

"Yes. I mean when we wrote all the items that were going to be included on the lease we wrote that Mr. Jones will personally pay for everything he has signed, he be personally responsible. That was the last sentence on that handwritten addition to the lease. That particular sentence like most of all the other sentences, are done by Mr. Jones handwriting, his own."

{¶16} Specifically, as to the guaranty clause and language at issue, Appellee testified as follows:

Q: If you could look at page two, the last line, that last paragraph.

A: All papers signed it as J. Jarret LLC I guarantee payments to D.P. in person also.

Q: What was the intent of that paragraph?

A: All papers (inaudible) and by the way the lease is the only papers [*sic*], that's been signed as J.J. Jarret LLC. I guarantee payment to D.P. in person also. He guarantees personally that this payment is going to be made.

Q: It wasn't that he was going to personally deliver it?

A: Of course not. With two stores and he was still working at C&E I would never ask somebody to do that. And there's not any reason to ask that. * * *.

Q: Okay. The, whose handwriting is that?

A: This whole sentence except the, the initials on the right it is Jerry's, including the initial on the left is Jerry's.

{¶17} Appellant testified he resides in Athens, Ohio, and is employed by

C&E Hardware as a store manager. C&E is a business owned by his parents. In 2005 or 2006, Appellant was solicited by someone in Prokos' office to look for someone to purchase, manage, and continue the operations of the two convenience stores subject of the lease. Appellant testified getting involved in the lease with Appellee was a first time venture for him and he had not previously signed commercial leases. His parents had handled all previous business dealings.

{¶18} Appellee provided Appellant the typewritten lease beforehand and he took it to his attorney for review. At that time, Appellant was in the process of organizing a limited liability company. However, by the time he executed the formal typed lease, a limited liability company was not yet in existence. Appellant testified that Appellee was well aware of the company's non-existent status. Appellant testified he wrote Appellee a personal check because the LLC checkbook had not been issued.

{¶19} Appellant identified Exhibits 3 and 4, respectively, the formal typewritten lease and the handwritten addendum.[4] He admitted that at the time the lease was signed, July 1, 2006, J Jarret LLC did not exist and was not formed with that name. The handwritten addendum was prepared the same day he signed the lease in Appellee's office. He testified that the language "All papers signed as J.

[4] These exhibits were formerly identified as Exhibit A and B when attached to the complaint.

Jarett LLC I guarantee payment to D.P. in person also" referenced himself. Appellant testified specifically:

> Q: * * * Was it your intention when that was executed to guarantee the obligations of the LLC under the lease?
>
> A: It was my understanding I was acting as a member of the LLC.
>
> Q: So what was your intent in signing that handwritten addendum?
>
> A: I'm not sure I understand. Did I, did I intend to sign it personally?
>
> Q: Yes.
>
> A: No. I was signing as an agent of the LLC. * * *
>
> Q: Jarrett, I'm going to hand you the document that's been circulated and used as part of this proceeding. And basically my question for you, if you look it over you will note that it's, if I can try to fairly describe it for the record here, a guarantee as a part of another commercial lease executed with a tenant of Mr. Prokos. Did you sign anything similar to this on this particular, lease, a typewritten witnessed and notarized separate document with personal guarantee language?
>
> A: Nothing that was this formal, no.

{¶20} Catherine Stotts, Appellee's property manager, testified she had worked for Prokos Rentals since May 1996. She was familiar with Exhibit 3, the typewritten standard commercial lease that both parties signed. Ms. Stotts testified that she was not present when the lease was signed. However, she testified she had overheard prior conversations when the parties were negotiating the lease. Regarding Appellant, she testified: "What was his intent? He had to pay himself if

J.Jarrett didn't pay." On cross-examination, Ms. Stotts admitted her only knowledge was based upon the alleged prior conversations.

{¶21} The parties filed post-trial briefs. On March 21, 2018, the trial court journalized its decision and judgment entry finding that Appellant was personally liable under the terms of the agreement. This timely appeal followed.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED IN FINDING THAT THE JULY 1, 2006 LEASE AGREEMENT WAS INTENDED BY THE PARTIES TO BE PERSONALLY BINDING UPON APPELLANT JONES."

STANDARD OF REVIEW

{¶22} "[L]eases are contracts and are subject to the traditional rules of contract interpretation." *Lang v. Piersol*, 4th Dist. Washington No. 17CA19, 2018-Ohio-2156, at ¶ 16, quoting *Mark–It Place Foods, Inc. v. New Plan Excel Realty Trust,* 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 29 (4th Dist.). "The interpretation of a written contract * * * is a matter of law that we review de novo." *Willis v. Gall*, 2015-Ohio-1696, 31 N.E.3d 678, ¶ 10 (4th Dist.). "Under Ohio law, '[a] guaranty is a contract through which one party guarantees payment for debts incurred by another person or entity.' " *Beaver*, ¶ 23, quoting *LB–RPR REO Holdings, L.L.C. v. Ranieri*, 10th Dist. Franklin No. 11AP–471, 2012-Ohio-2865, ¶ 23, quoting *Thayer v. Diver*, 6th Dist. Lucas No. L–07–1415, 2009–Ohio–2053, ¶ 77, citing *Nesco Sales & Rental v. Superior Elec. Co.*, 10th Dist. Franklin

No. 06AP–435, 2007–Ohio–844, ¶ 10. "In general, Ohio courts construe guaranties, and releases thereof, 'in the same manner as they interpret other contracts.' " *Id.* (Internal and other quotations omitted.)

LEGAL ANALYSIS

{¶23} Appellant makes several arguments under the sole assignment of error. Because these arguments are interrelated, we consider them jointly. Appellant first asserts that the trial court's decision imposing personal liability is contrary to the manifest weight of the evidence. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) *State ex rel. DeWine v. Ashworth,* 4th Dist. Lawrence No. 11CA16, 2012-Ohio-5632, at ¶ 39; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶24} When conducting a manifest weight review:

> "The [reviewing] court * * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines

> whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 1992-Ohio-95, 604 N.E.2d 138, at ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001).

{¶25} In weighing the evidence, the court of appeals must remain mindful of the presumption in favor of the finder of fact:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id.* at ¶ 21, 604 N.E.2d 138, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶26} Judgments supported by some competent and credible evidence should not be reversed on appeal as being against the manifest weight of the evidence. *Loop v. Hall*, 4th Dist. Scioto No. 05CA3041, 2006-Ohio-4363, at ¶ 10. *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 10, 722 N.E.2d 1018 (2000); *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578, (1978), at the syllabus. This standard of review is highly deferential and even "some" evidence is sufficient to sustain the judgment and to prevent a reversal. *See Barkley v. Barkley*, 119 Ohio App.3d 155, 159, 694 N.E.2d 989 (1997); *Simms v. Heskett*, 4th Dist. Athens No. 00CA20, 2000 WL 1357654, (Sep. 18, 2000).

{¶27} Appellant asserts that the trial court's finding that he intended to be

personally bound is not supported by the manifest weight of the evidence. We have weighed the evidence and all reasonable inferences and have considered the credibility of witnesses. For the reasons which will follow, we disagree with Appellant.

{¶28} Appellant asserts that he did not intend to enter a personal guarantee; that the parties did not mutually consent to the personal guarantee provision; and that the trial court's determination is contrary to his trial testimony. Appellant emphasizes that he had had the formal typewritten lease reviewed by his attorney; however, on the date of execution, Appellee requested significant changes which were eventually reduced into the handwritten addendum. Due to the timing, Appellant did not have the opportunity to consult with his counsel regarding the proposed changes and he did not understand that he was obligating himself personally instead of the limited liability company he was trying to form. Appellant argues he acted under "perceived duress" in hastily executing the handwritten addendum with varied materially from the negotiated form typewritten version.

{¶29} Related to this argument, Appellant argues that it was his intent for the limited liability company to be the tenant under the lease. Although he signed it individually, his signature was on behalf of the company and he had no intention to be personally bound. Appellant points to his subsequent conduct of operating

his business, paying rent, filing taxes, and daily operations, which is supported in his testimony, which arguably demonstrates that he acted as a limited liability company.

{¶30} "In construing a written instrument, the primary and paramount objective is to ascertain the intent of the parties so as to give effect to that intent." *Lang, supra,* at ¶ 17, quoting *Shafer v. Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013-Ohio-885, 2013 WL 967793, ¶ 10, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "Courts must give common words their ordinary meaning unless manifest absurdity would result or some other meaning is clearly evidenced from the face or overall contents of the written instrument." *Shafer* at ¶ 10, citing *In re All Kelley & Ferraro Asbestos Cases,* 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 29. " 'If a contract is clear and unambiguous, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead, the court must give effect to the agreement's express terms.' " *Lang, supra,* at 18, quoting *Uebelacker v. Cincom Sys., Inc.,* 48 Ohio App.3d 268, 271, 549 N.E.2d 1210 (1st Dist.1988). "Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller–Gonzalez,* 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶ 16.

{¶31} In this case, during motion practice, the trial court found that the guaranty clause was ambiguous and susceptible of two interpretations. The express language "All Papers Signed as JJARRETT LLC I guarantee payment to D.P. In person Also," could be interpreted as requiring Appellant to be personally responsible for payment of the contract obligations. It could also, arguably, be interpreted as requiring that Appellant *deliver* payment to Appellee himself "personally." Because of this ambiguity, the trial court denied Appellee's motions for partial summary judgment on two occasions and found that the case required extrinsic evidence "beyond that already submitted." "Extrinsic evidence is admissible to ascertain the intent of the parties only when the contract is unclear or ambiguous, or where surrounding circumstances give plain language special meaning." *Highland Drilling, Inc. v. McAlester Fuel Co.,* 4th Dist. Washington No. 99CA08, 1999 WL 1058785, *3 (Nov. 16, 1999).

{¶32} Upon listening to the testimony at trial, in finding that Appellant had agreed to be personally liable on the contract, the court also implicitly found that the parties had a "meeting of the minds" as to the guarantee language in the handwritten addendum. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Altercare Village of Mayfield, Inc. v. Berner,* 2017-Ohio-958, 86 N.E.3d 649 (8th Dist.) at ¶ 28; *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58 at ¶ 16. A meeting of

the minds occurs where " 'a reasonable person would find that the parties manifested a present intention to be bound to an agreement.' " *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 2008-Ohio-5642, 900 N.E.2d 231, ¶ 12 (2nd Dist.), quoting *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.). Thus, courts will only consider objective manifestations of intent. *Nilavar v. Osborn,* 127 Ohio App.3d 1, 12, 711 N.E.2d 726 (2nd Dist.1998). Moreover, the parties must have a "distinct and common intention" that is communicated by each party to the other. *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 (8th Dist.1993). Regarding the handwritten addendum, Appellant testified as follows:

> Q: Okay. So specifically how did that go, the logistics of how that handwritten addendum was prepared?
>
> A: Some of the things on there we had talked about prior and they hadn't been added to the typewritten part. Some of the stuff was discussed that day so it was added on there. * * *
>
> Q: Okay. Did you negotiate those terms with him or did you simply write down additional terms?
>
> A: There wasn't a lot of negotiating to the stuff that's on that list. * * * I forget the specific details on it. But mostly I was just penning the list.
>
> Q: Of what he told you to write down?
>
> A: For the most part.

Q: Alright. * * * Did you have an opportunity to review these handwritten changes with Mr. Mollica, Sr.?
A: No. They were written the day that we had scheduled to sign the lease in the office so I didn't have a chance to then forward those back to him.

Q: Well why would you do that if you had seen, sought legal counsel before?

A: It seemed like we needed to get the lease signed that day. I was signing the handwritten stuff as an extension of what I thought was the first paragraph. It just defines Demetrios as one side and the LLC as the other. So I didn't, I mean I'd never really done it so I didn't think it was a big deal.

Q: Okay. Was there a reason for needing to sign or execute the lease that day?

A: I don't remember a specific reason. I did feel some pressure to get it done and get operations of the gas stations.

Q: So Mr. Prokos wanted to get the lease done?

A: I would assume so, yes.

{¶33} Appellant further testified on cross examination as follows:

Q: (Referencing Exhibit 3, the formal typewritten lease agreement) * * * Would you agree with me that the lease is signed and it doesn't reflect any capacity that you're signing that in?

A: It just has my signature, yes.

Q: And then in the notary section who does it identify signed?

A: Jerry Jones.

Q: The written addendum, we'll turn to Exhibit 4. I believe you indicated this was signed the same day as the lease? Is that right?

A: Yes sir.

Q: Was it the same meeting?

A: It was the same meeting.

Q: And you had indicated you mostly, that Mr. Prokos dictated this and you write it down?

A: I think the vast majority, yes.

Q: As you were writing this down did you note that you were, there's multiple places where it's referring to you individually, with you as me, I, rather than the LLC?

A: That is correct. I do notice that.

Q: Was there a reason that you didn't, if this was your intent to make it just between the LLC and Mr. Prokos it doesn't say the LLC and Mr. Prokos?

A: I didn't know any better, to word it a different way.

Q: Alright. Take a moment and look at Exhibit 4.

A: Okay.

Q: Can you identify any spot in this document that reflects that this was intended to be between Mr. Prokos and an LLC and not you individually?

A: I do not.

Q: * * * Let me see if I read this right. All papers signed as J Jarrett LLC I guarantee payment to DP in person also. What did you believe that meant? What was your intent by that paragraph?

A: That the LLC would make the payments and I would make sure that they happened.

> Q: You personally would make sure it was paid.
>
> A: Not personally, no. I didn't have any money. The LLC would make it happen.
>
> Q: It says in person also. What did you think that meant, in personal also"
>
> A: I don't know what that means specifically at the time. I mean I know what it means now or what were' discussing now. But at the time I didn't realize that it meant I would have to get out a personal check book and pay it.

{¶34} In this case, Appellee and Ms. Stotts testified that there were numerous prior conversations and contract negotiations between Appellee and Appellant. Ms. Stotts credibly testified to Appellant's intent that "he had to pay himself if JJarrett didn't pay." Appellant's testimony minimized the number or volume of prior contract negotiations.

{¶35} Appellant's testimony indicated some items on the handwritten agreement had been discussed previously and some were added that day. Appellant admitted "penning" the additional language. Appellant testified that he didn't know what "in person also" meant "specifically at the time. I mean, I know what it means now or what we're discussing now."

{¶36} Appellant's testimony also downplayed his business experience and acumen with regard to negotiation and execution of contracts. Generally, triers of fact resolve questions concerning the weight of the evidence and witness credibility. *Loop v. Hall, supra*, at 11; *Cole v. Complete Auto Transit, Inc.*, 119

Ohio App.3d 771, 777-778, 696 N.E.2d 289 (1997); *Jacobs v. Jacobs*, 4th Dist. Scioto No. 02CA2846, 2003-Ohio-3466 at ¶ 31. The underlying rationale for deferring to the trier of fact on these issues is that the trier of fact is best positioned to view witnesses, to observe witness demeanor, gestures and voice inflections, and to use those observations to weigh witness credibility. *See Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Thus, a trier of fact may believe all, part or none of the testimony of any witness who appears before it. *Rogers v. Hill*, 124 Ohio App.3d 468, 470, 706 N.E.2d 438 (1998); *Stewart v. B.F. Goodrich Co*., 89 Ohio App.3d 35, 42, 623 N.E.2d 591 (1993).

{¶37} The trial court was in the best position to determine the witnesses' credibility. The trial court apparently found that Ms. Stotts' testimony about numerous prior conversations and negotiations of terms was credible. The trial court also may have found that Appellant's down-playing of his business experience and acumen was not credible, given that he had taken the formal handwritten contract to his attorney for review yet testified "I mean I'd never really do it so I didn't think it was a big deal."

{¶38} The trial court also noted that the handwritten addendum contained various additional items which had been initialed by both parties. The trial court's decision found:

> "The record developed at trial reflects that the parties mutually intended that Defendant would personally guarantee performance of the Agreement. As part of the overall Agreement, the parties executed a three-page handwritten addendum titled 'Last Minute Additional Agreement.' The document contained numerous additional items, with each of the terms contained therein initialed by each party. At the conclusion of the document, each party signed in his individual capacity.
>
> One of the agreements contained within the document stated that, '[a]ll papers signed as JJARETT, LLC. I guarantee payment to D.P. in person also.' The Court initially found this provision on its face was sufficiently ambiguous as to require the consideration of extrinsic evidence to establish the parties' intent. Having considered the testimony put forth at trial, the Court finds that both parties were aware at the time of the Agreement's execution that its terms would be personally binding upon the Defendant, and that such was their mutual intent. Accordingly, the Court finds that the Defendant is properly held liable under the Agreement."

{¶39} Based upon our review of the record, we find that some credible evidence supports the trial court's judgment that both Appellant and Appellee intended that the obligations of the lease would be personally binding upon Appellant. As such, the court's decision is not against the manifest weight of the evidence. We find no merit to Appellant's argument that the testimony in the record supports the conclusion that he did not intend to be personally bound.

{¶40} Appellant also asserts that he misunderstood the guaranty clause of the lease, arguing that if we deem the last minute handwritten addendum to be a personal guarantee, then Appellant's execution of the document is a unilateral mistake relieving him from performance. The subject of unilateral mistake is

addressed in 1 Restatement of the Law 2d, Contracts (1981) 394, Section 153, as follows:

> "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." The mistaken party must bear the risk of the mistake if: "(a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." *Id.* at § 154. *See Southern Ohio Medical Center v. Trinidad,* 4th Dist. Scioto No. 03CA2870, 2003Ohio-4416 at ¶ 26.

{¶41} Appellant argues that the testimony developed at trial demonstrates that he did not appreciate the fact that he was personally guaranteeing the lease as this was not his intent during the negotiation process. Appellant points out he took steps to understand his rights by having the typewritten contract, which did not contain the personal guarantee language, reviewed by legal counsel. Appellant asserts that the personal guarantee provision was forced upon him in last minute fashion and that he failed to discover the mistake because he had no appreciation he was being personally bound. Furthermore, Appellant contends that Appellee most certainly knew of Appellant's mistake since he was the one who caused it to occur by forcing a material change from the typewritten document.

{¶42} Appellee responds by pointing out that Appellant is presumed to have read and understood the lease agreement and the handwritten addendum he willingly signed. Appellee also maintains that Appellant could have asked for more time to take the handwritten addendum to his attorney for additional review. In both respects, execution of the agreement was not forced upon Appellant. Moreover, there is no indication in the record that Appellee knew that Appellant misunderstood the guaranty language and took advantage of this mistake. We agree with Appellee.

{¶43} In *Bender v. Logan,* 4th Dist. Scioto No. 2016-Ohio-5317, 76 N.E.3d 336, at ¶ 56, we observed: "[P]arties to contracts are presumed to have read and understood them and * * * a signatory is bound by a contract that he or she willingly signed." *Preferred Capital, Inc. v. Power Eng. Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶ 10, citing *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). Here, despite his testimony that he didn't have a chance to forward the handwritten addendum to her attorney, the record does not indicate Appellant expressed any hesitation over the terms expressed in the handwritten addendum. Indeed, he was the one who drafted the items and initialed each term.

{¶44} In *Amerisourcebergen v. Hallmark*, 10th Dist. Franklin No. 05AP-1250, 2006-Ohio-2746, the appellant argued the theory of unilateral mistake.

Appellant Ferguson was vice-president of Hallmark Pharmacies. Hallmark purchased pharmaceutical supplies from Amerisourcebergen Drug Corporation, Appellee. Ferguson filled out a credit application through which Hallmark sought to be able to purchase pharmaceuticals on credit from appellee for resale to the public. In the course of doing so, Ferguson executed a personal guaranty clause.

{¶45} The drug corporation eventually filed suit for nonpayment against Hallmark and Ferguson. Specifically, the drug company alleged that Ferguson had personally guaranteed Hallmark's debt but had failed to pay Hallmark's outstanding obligations. The trial court eventually found that the language of the guaranty clause Ferguson had executed was clear and unambiguous.

{¶46} On appeal Ferguson argued that the language of the credit application because that language was ambiguous because Hallmark was the applicant and Ferguson signed the application only in her representative capacity. Ferguson argued that she was only providing information and never intended to personally guarantee the future debt. Because her intent was not apparent from the document, she reasoned that her affidavit statement that she did not intend to guarantee the debt created a genuine issue of material fact that precluded summary judgment. The appellate court held at ¶ 14:

> "Appellant asks this court to disregard this clear language and find the existence of a genuine issue of material fact based upon her self-serving statement that she did not intend to personally guarantee Hallmark's debts to appellee. But, "[c]ourts must presume that the

> language of a contract between competent persons accurately reflects the intentions of the parties." *Fairway Manor, Inc. v. Bd. of Commrs.*, 36 Ohio St.3d 85, 87, 521 N.E.2d 818 (1988), citing *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411, (1987), paragraph one of the syllabus. "The purpose of this presumption is to protect a right considered basic in our society: the right to freely contract. A necessary means of preserving this right is the long-standing tradition of judicial reluctance to reform or rescind a contract absent a compelling reason to do so." Ibid. Appellant's unilateral mistake is not a compelling reason to rewrite this contract. "A unilateral mistake by a guarantor as to the nature of his obligation may not relieve him from his guaranty contract." *Campco Distributors, Inc. v. Fries*, 42 Ohio App.3d 200, 537 N.E.2d 661, (1987), paragraph two of the syllabus."

{¶47} In this case, there is some credible evidence that Appellant had a degree of sophistication in business as he intelligently decided to have an attorney review the formal lease agreement. This evidence belies his later testimony that he "didn't think" the handwritten terms were a "big deal." Given the evidence that Appellant was aware of his lack of understanding at the time he penned the terms of the handwritten addendum and the lack of evidence that Appellee had reason to know of Appellant's asserted lack of understanding, we cannot find that Appellant's asserted unilateral mistake should excuse him.

{¶48} Finally, Appellant asserts that the trial court narrowly construed the language he penned against him. No special rule of construction resolves ambiguities against the author of an individual guaranty. *G.F. Business Equipment, Inc., v. Liston,* 10th Dist. Franklin No. 82-AP-283, 1982 WL 4323, (Aug. 5, 1982); *Morgan v. Boyer*, 39 Ohio St. 324. 1883 WL 183. In this case, the trial court

undertook to hear extrinsic evidence as to the parties' intent. Having determined the parties' intent from review of the exhibits and testimony at the bench trial, the matter is settled and neither the trial court, nor we, have reason to consider additional argument relating to secondary rules of construction.

{¶49} For the foregoing reasons, we find no merit to the arguments raised in Appellant's sole assignment of error. Accordingly, we overrule the assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶50} I concur in Judgment and Opinion except for ¶ 48.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs with Concurring Opinion.
Hoover, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.