[Cite as *Fairview Realty Investors, Ltd. v. SeaAir, Inc.*, 2002-Ohio-6819.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 81296

FAIRVIEW REALTY INVESTORS, LTD.	:	Accelerated Docket
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
SEAAIR, INC., DBA, CLUTTERBUCK NAPA	:	OPINION
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		DECEMBER 12, 2002
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-455392
JUDGMENT	:	AFFIRMED, REMANDED FOR UNRESOLVED CLAIMS
DATE OF JOURNALIZATION	:	

APPEARANCES:

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ANNE L. KILBANE, J.:

{¶1} This is an appeal from an order of Judge Stuart A. Friedman that granted appellees Linda Tancek's and Frederick Lemieux's motion to dismiss the breach of a lease extension claim filed against them by appellant Fairview Realty Investors, Inc. ("Fairview"). Fairview contends that the lease extension required that Tancek and Lemieux, signing only as corporate officers of lessee Seaair Inc., ("Seaair"), also guarantee the rental payments. We affirm and remand.

{¶2} On January 31, 1996, Fairview and Seaair entered into a five-year lease, with an option for an additional five-year term, for commercial space in the Fairview Village Plaza, in Fairview Park. Both Tancek and Lemieux signed the agreement as officers of the corporate lessee and as individual guarantors. Seaair exercised its option and, on January 30, 2001, entered into an Addendum to Lease Agreement that incorporated by reference all the terms and conditions of the earlier lease, increased the rent and required only that Tancek and Lemieux endorse it in their corporate capacity as officers of Seaair, the lessee.

{¶3} During October of 2001, Seaair moved its Clutterbuck Napa Auto Parts business to a nearby building Tancek and Lemieux had purchased, and sold the business to an unidentified third party.

Seaair then notified Fairview that it was insolvent and would not make any further payments under the lease, and Tancek and Lemieux individually denied any liability to Fairview as well.

{¶4} Fairview filed a complaint against Seaair, and Tancek and Lemieux individually, alleging breach of contract and fraud, and moved for an order restraining them from transferring any monies from the sale of the business or selling their building.

{¶5} Tancek and Lemieux moved to dismiss Fairview's breach of contract claim under Civ.R. 12(B)(6), claiming that because each had not individually guaranteed the lease extension attached to the complaint neither had any personal liability for Seaair's obligations thereunder. Fairview countered that the 1996 signature page acknowledged the personal guarantees of performance by the corporate officers and, therefore, was one of the terms and conditions of the original lease. When the lease extension incorporated the same terms and conditions by reference, Fairview contends, it was not necessary for Tancek and Lemieux to again affirm the individual liability each had earlier guaranteed.

{¶6} The judge granted the motion and, in his opinion, reasoned that because the lease and extension did not contain language reflecting the intent of the parties that the guarantees provided by Tancek and Lemieux in 1996 would not apply to any extension of it, the guarantees applied only to the original lease term, and not to any extension. Following that ruling, he issued

an order stating that there was no just reason for delay, under Civ.R. 54, allowing this interlocutory appeal to proceed.[1]

{¶7} Fairview's sole assignment of error submits that the addendum to the lease agreement was not ambiguous and that the corporate officers are liable under the contract as individuals.

{¶8} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo.[2] A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint,[3] and one looks only to the complaint or, in a proper case, the copy of a written instrument upon which a claim is predicated to determine whether the allegations are legally sufficient.[4] Such a motion should be granted "only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover," or, in the case of a complaint seeking relief under a contract, attached pursuant to Civ.R. 10(D), where the "writing presents an insuperable bar to relief."[5] Dismissals under Civ.R.

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[1] The judge stayed the case and the unresolved claims against Seaair, Tancek and Lemieux pending resolution of this appeal.

[2] *Hunt v. Marksman Products* (1995), 101 Ohio App.3d 760, 762, 656 N.E.2d 726.

[3] *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378.

[4] Id., *Slife v. Kundtz Properties* (1974), 40 Ohio App.2d 179, 185-186, 318 N.E.2d 557.

[5] *Maines Paper & Food Service, Inc.* (Sept. 28, 2000), Cuyahoga

12(B)(6) are proper where the language of the writing is clear and unambiguous.[6]

{¶9} "Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement.[7] Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions.[8] When the terms in a contract are unambiguous, courts will not create a new contract by finding an intent not expressed in the clear language employed by the parties.[9]"[10]

{¶10} Courts construe guaranty agreements in the same manner as

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App. No. 77301, *Slife v. Kundtz Properties*, 40 Ohio App.2d at 186, *Grosko v. Dana Commercial Credit Corp.* (September 1, 2000), Lucas App. No. L-00-1060.

[6]*Slife v. Kundtz Properties*, 40 Ohio App.2d at 184.

[7]*Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus.

[8]*Kelly*, supra, at 132, 509 N.E.2d at 413.

[9]*Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146, 150.

[10]*Shifrin v. Forest City Enterprises* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499, 501.

they interpret contracts.[11] One need not go beyond the plain language of the agreement to determine the parties' rights and obligations if a contract is clear and unambiguous.[12] A guarantor is bound only by the precise words of his contract.[13] The guarantee must clearly manifest an intent to bind the defendant.[14] The clear and unambiguous terms of an instrument of guaranty will not be extended by construction or implication to cover a period of time not embraced within those terms.[15] Indeed, if a contract is ambiguous so that it may either extend or limit a guarantor's obligation, such contract should be construed to limit the obligation.[16] As this court has specifically stated in *Singer v.*

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[11]*G.F. Business Equip. v. Liston* (1982), 7 Ohio App.3d 223, 224, 454 N.E.2d 1358, *Stone v. National City Bank* (1995), 106 Ohio App. 3d 212, 665 N.E.2d 746.

[12]*Uebelacker v. Cincom, Inc.* (1988), 48 Ohio App.3d 268, 271, 549 N.E.2d 1210, *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 725 N.E.2d 1193.

[13]*G.F. Business Equip., Inc. v. Liston*, supra, at 224, 454 N.E.2d 1358, *American Hardware Supply, Inc. v. Alan Supply, Inc.* (1989), 63 Ohio App.3d 838, 844, 580 N.E.2d 473, *Harcros Lumber & Bldg. Supplies, Inc. v. Swabado* (June 30, 1998), Belmont App. No. 96-BA-66.

[14]*G.F. Business Equip.*, supra, *Harcros Lumber*, supra, *Yearling Properties, Inc. v. Tedder* (1988), 53 Ohio App.3d 52, 557 N.E.2d 1231.

[15]*Jules P. Storm & Sons, Inc. V. Blanchett* (1929), 120 Ohio St. 13, 165 N.E. 353, at paragraph 1 of the syllabus.

[16]*Yearling Properties, Inc. v. Tedder* (1988), 53 Ohio App.3d 54, 557 N.E.2d 1231.

Bergsman,[17]

{¶11} "Where a lease agreement does not clearly and unambiguously express the intention of the parties that the guarantor of rent payments is liable for such payments beyond the original term of the lease, the guarantor's liability terminates at the expiration of the original lease. *** Moreover, a guaranty described as unconditional and/or absolute cannot, without more, be construed to be continuing."

{¶12} Under the facts of this case, it is apparent from the face of the original, integrated lease that there is no requirement that Tancek and Lemieux sign the lease in a personal capacity. The mere fact that they did so cannot serve to imply that in the absence of such signature, Fairview would have not executed the lease, and there is nothing to indicate that the personal guaranty signatures provided were anything other than voluntary. While Fairview presented an affidavit from its managing partner to support its contention that a personal, continuing guarantee was intended by the parties although not included in the extension, "[i]n resolving a Civ.R. 12(B)(6) motion, courts are confined to the averments set forth in the complaint and cannot consider outside evidentiary materials unless the motion is converted, with appropriate notice, into one for summary judgment under Civ.R.

[17](Jan. 23, 1992), Cuyahoga App. No. 59682.

56."[18] Additionally, because Fairview drafted the extension, the explicit omission of any personal guaranty requirement in the document lends further support to the result we reach here. If no personal guarantees were executed on the extension, the limited enforcement of continuing guarantees mandated by precedent compels our conclusion that Tancek and Lemieux's personal guarantees on the original lease are enforceable as to that lease term only, and not to any extension.

{¶13} Judgment affirmed, and case remanded for resolution of the unresolved claims against Seaair, Tancek and Lemieux.

{¶14} It is ordered that appellee shall recover of appellant costs herein taxed.

{¶15} The court finds that there were reasonable grounds for this appeal.

{¶16} It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

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

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[18]*State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 563 N.E.2d 713. We further note that since the original lease contained an integration clause, any effort by Fairview to introduce evidence of a prior or contemporaneous agreement between the parties, as to either the lease or the extension, would have been barred by the evidentiary rule against the admission of parol evidence, since the lease contracts at issue here contain no ambiguity.

MICHAEL J. CORRIGAN, P.J., CONCURS IN JUDGMENT ONLY

FRANK D. CELEBREZZE JR., J., DISSENTS WITH SEPARATE OPINION

ANNE L. KILBANE
JUDGE

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶18} For the following reasons, I respectfully dissent from the majority's decision and would hereby vacate the trial court's grant of appellees' Motion to Dismiss and remand for further proceedings.

{¶19} As stated by the majority, the instant matter stems from a lease agreement signed between the parties in 1996. Fairview Realty owns property located at 22301-22037 Lorain Road in the City of Fairview Park. Fairview Realty and Seaair entered into a commercial lease agreement for said property, which was signed by both parties. Specifically, Linda Tancek and Fred Lemieux were the President and Vice President of Seaair. In signing the lease agreement, Tancek and Lemieux signed as President and Vice President, but also personally guaranteed the agreement by signing separately in their individual capacity. In doing so, Tancek and Lemieux became personally obligated to pay the rents due in the event that Seaair was unable to pay.

{¶20} The parties operated under the lease agreement for the

next five years without incident. In 2001, the parties entered into an Addendum to the Lease Agreement. The addendum to the original lease agreement extended the lease for an additional five years and increased the rent. Importantly, the addendum stated that the addendum was subject to the "*same terms and conditions of the original lease except for a rental increase*." (Emphasis added).

Both parties signed the addendum but, unlike the original lease agreement, Lemieux and Tancek signed only in their capacity as President and Vice President of Seaair.

{¶21} Within a year of signing this addendum, and through a series of orchestrated moves, the appellees, in their individual capacities, bought the building across the street from their current location. They then moved their business to that location thereby breaking their lease with the appellant. Next, the appellees sold their business to another individual, thereby causing Seaair to no longer exist for all intents and purposes.

{¶22} Understandably, Fairview Realty filed suit against Seaair and against Tancek and Lemieux, in their individual capacities, seeking the rent due under the lease agreement. The appellees filed their answer to the complaint and filed a motion to dismiss the claims against Lemieux and Tancek arguing that the addendum did not contain a personal guarantee signed in their individual capacities. Since there was no personal guarantee, Lemieux and Tancek argued that they were not personally liable for the rent.

{¶23} Under the original lease agreement, the appellees personally guaranteed the lease. There is no ambiguity in this fact. In signing the lease addendum, the appellees signed only in their capacity as President and Vice President of Seaair; however, the lease addendum clearly states that the addendum was subject to the "same terms and conditions of the original lease except for the rental increase."

{¶24} Accordingly, in giving this statement its plain and ordinary reading, it is clear that, except for the rental increase, all other terms and conditions of the original lease apply, including the personal guarantee. The majority relies on *Singer v. Bergsman* (Jan. 23, 1992), Cuyahoga App. No. 59682, in reaching its conclusion. In *Singer*, this court determined that "where a lease does not clearly and unambiguously express the intention of the parties that the guarantor of rent payments is liable for such payments beyond the original lease term of the lease, the guarantor's liability terminates at the expiration of the original lease."

{¶25} I believe this case to be clearly distinguishable from *Singer* in that the lease in *Singer* called for an automatic extension at the termination of the lease if the parties did not notify the landlord/owner of their intent to vacate or hold-over. In *Singer*, the lessee did not notify the landlord/owner of their intention to vacate, therefore, the landlord/owner attempted to

hold the lessee liable for rents due. This court determined that since the renewal was automatic, it would be inequitable to attempt to enforce the original lease terms beyond the expiration of the original lease term.

{¶26} Unlike *Singer*, we do not have an automatic renewal or hold-over situation. In the case at hand, the appellees clearly expressed an intent to renew the lease as evidenced by the addendum to renew the lease for an additional five-years. Further, the addendum clearly states that all terms and conditions of the original lease apply except for the rental increase. Last, and unlike *Singer*, the parties to the addendum were the exact parties to the original lease terms.[19] Accordingly, I can only conclude that the appellees were well aware of all the terms and conditions inherent to the lease. As such, I would conclude that all terms of the original lease apply, including the personal guarantee.

{¶27} Further, is worth noting that within one year of signing the lease addendum, the appellees breached their lease agreement with the appellant. I would conclude that the appellees acted in bad faith in renewing said lease since it is clear, as evidenced by the series of orchestrated moves, that the intent of the appellees was to vacate their original location, move the business to the newly acquired location, and then sell the business, thereby

[19]In *Singer*, the lease went through a series of assignments during the original lease term.

causing Seaair to no longer exist and arguably become uncollectible. The actions of the appellees were, in my opinion, made in bad faith.

{¶28} Therefore, I respectfully dissent from the majority, as the facts in the case at hand are distinguishable from *Singer*, and I find no ambiguity with regard to the intention of the parties in signing the lease addendum. By the terms of the lease addendum the same terms and conditions of the original lease apply except for the rental increase. Accordingly, I respectfully dissent from the determination of the majority, and would hereby vacate the judgment of the trial court and remand for further proceedings.

KEYWORDS:

Guaranty, Motion To Dismiss, Contract