

[Cite as *McInnis v. Spin Cycle-Euclid, L.L.C.*, 2009-Ohio-2370.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91905**

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**MALCOLM A. McINNIS, TRUSTEE, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**SPIN CYCLE-EUCLID, LLC, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-626880

**BEFORE:** Rocco, P.J., Blackmon, J., and Dyke, J.

**RELEASED:** May 21, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and

26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendants-appellants, Spin Cycle-Euclid, LLC and Thomas M. Thomas, appeal from common pleas court judgments awarding plaintiffs-appellees, Malcolm A. and Jane D. McInnis, Trustees of the McInnis Family Trust, damages in the amount of \$125,871.37 for amounts due pursuant to a lease and guaranty, as well as attorney's fees in the amount of \$67,000 and costs. Appellants urge that the common pleas court erred by denying them judgment because appellees failed to attach to their pleadings a copy of the documents demonstrating that they were the assignees of the lease and guaranty. They further assert that the court erred by limiting their ability to cross-examine appellees' former counsel on the question whether the assignment of the lease and guaranty existed at the time the complaint was filed. Appellants claim the trial court erred by considering parol evidence regarding the consideration for the guaranty, and erred by finding the guaranty to be enforceable when the admissible evidence showed that there was no valid consideration. Finally, appellants contend that the court erred by awarding appellees attorney's fees.

We find no prejudicial error in the proceedings below and affirm the trial court's decision.

{¶ 2} The complaint in this case was filed on June 12, 2007. It alleged that appellees were the owners of premises located at 14252 Euclid Avenue in East Cleveland, Ohio. Appellant Spin Cycle-Euclid was the lessee. The complaint recited the history of the ownership of the building and assignments of the leasehold to the respective parties. Appellees claimed that Spin Cycle-Euclid was in default of payment of the rent and taxes for which it was liable under the terms of the lease. A second count claimed that appellant Thomas was liable for the amounts due from Spin Cycle-Euclid pursuant to a guaranty. A supplemental complaint was filed with leave of court alleging that additional damages accrued during the pendency of the action.

{¶ 3} Attached to the complaint was a copy of a lease originally entered into between SpinCycle, Inc., as tenant, and SpinDevCo, LLC as the landlord, on December 30, 1997, together with three amendments to the lease, an assignment of the lease to appellant Spin Cycle-Euclid, and a guaranty executed by Thomas.

{¶ 4} Appellants moved for summary judgment on January 2, 2008 and again, with leave of court, on February 4, 2008. Both motions asserted that the guaranty was not assigned to appellees, and in any event, was invalid for lack of consideration. The court denied both motions on February 12, 2008.

{¶ 5} The case proceeded to a bench trial on February 20, 2008. At trial, the court heard the testimony of appellee Malcolm McInnis, appellant Thomas (as if on cross-examination), Cuyahoga County Chief Deputy Treasurer Robin Thomas, who testified regarding the taxes due on the premises, and one of appellee's attorneys, Jack Curtis. At the conclusion of the trial, the court granted judgment for appellees and against appellants in the total amount of \$125,871.37. The court further determined that appellees were entitled to attorney's fees and costs pursuant to the lease, and scheduled a hearing regarding the reasonableness of the fees.

{¶ 6} The court conducted the hearing regarding attorney's fees on June 6, 2008. Attorneys Todd Sleggs and Michael Cohan, expert witness Steven Gardner, Esq., and appellee Malcolm McInnis all testified. On July 9, 2008, the court entered judgment for appellees for attorney's fees in the amount of \$67,000 plus costs of \$460. Appellants then filed the instant appeal.

{¶ 7} In their first assignment of error, appellants argue that the court should have granted their motion for summary judgment and/or their motion for a directed verdict because appellees did not attach to their complaint a copy of the documents assigning the lease and guaranty to them, as required by Civ.R. 10(D)(1). Appellants did not raise this issue in their motion for summary judgment, although they did argue it in their motion for a directed verdict.

{¶ 8} Civ.R. 10(D)(1) provides that “[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account is not attached, the reason for the omission must be stated in the pleading.” “[T]here is no language in Civ.R. 10(D)(1) that the account or written instrument is required to establish the adequacy of the complaint.” Therefore, “any failure to attach the required copies is properly addressed by a motion for a more definite statement under Civ.R. 12(E). In short, a party can still plead a prima facie case in such circumstances even without attaching the account or written agreement to the complaint.” *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶11. A defendant who fails to file a motion for a more definite statement before filing his answer has waived the right to assert the plaintiff’s failure to attach a copy of a written instrument as a basis for dismissing the complaint. *Castle Hill Holdings, LLC v. Al Hut, Inc.*, Cuyahoga App. No. 86442, 2006-Ohio-1353, ¶29. Therefore, the trial court properly refused to grant judgment for appellants on this basis. We overrule the first assignment of error.

{¶ 9} Next, in assignment of error “Ia,” appellants complain that the court erred by preventing them from thoroughly cross-examining appellee’s counsel, Jack Curtis. The court quashed appellants’ subpoena for Curtis to testify at trial, but called Curtis as the court’s witness on the limited question whether a

fraud was perpetrated on the court. Appellants argue the court did not allow them to thoroughly cross-examine Curtis on this question.

{¶ 10} At trial, appellants claimed that the appellees committed a fraud on the court when they filed their complaint without attaching the document assigning the lease to them. Apparently, appellants wished to infer that the assignment did not exist when the complaint was filed, that appellants and their counsel knew it, and that they created the assignment after the complaint was filed and back-dated it. The mere fact that the assignment was not filed with the complaint does not warrant this extraordinary series of inferences. Nevertheless, the court allowed a limited examination of attorney Curtis to explore the issue.

{¶ 11} Curtis testified that he had no personal knowledge as to when the assignment was executed. On cross-examination by appellants' counsel, he testified that he did not remember whether he had the assignment in his possession when he filed the complaint, that he had no knowledge that anyone back-dated that document, nor did he discuss backdating an assignment with anyone. “The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge. Thus, when the trial court determines that certain evidence will be admitted or excluded from trial, it is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse

of discretion.” *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 222, quoting *O’Brien v. Angley* (1980), 63 Ohio St.2d 159, 163. We cannot say that the court abused its considerable discretion by limiting examination beyond this point.

{¶ 12} Appellants’ second assignment of error complains that the court erred by considering parol evidence concerning the consideration for Thomas’s guaranty. We disagree. “[T]he parol evidence rule does not exclude oral testimony with respect to proof of consideration on a written instrument.” *Paul Ford, Inc. v. Rupe* (1993), 90 Ohio App.3d 638, 644. “As long as the evidence of additional consideration is not inconsistent with or contradictory of the writing, the parol evidence rule is not violated. See *Ayres v. Cook* (1942), 140 Ohio St. 281, 284.” *Id.*

{¶ 13} Next, appellants argue that the guaranty was unenforceable because the only admissible evidence of consideration was in the guaranty itself, and the guaranty recited only past consideration. The guaranty stated that it was given “in consideration of the mutual promises contained in that certain premises lease dated December 30, 1997 between SpinDevCo, LLC, (‘Original Lessor’), and SpinCycle, Inc. (‘Original Lessee’) for the premises located at 14236-54 Euclid Ave. E. Cleveland, OH 44112.” It identified Orams Enterprises as the “Lessor,” and the successor in interest to the Original Lessor. Appellant Spin Cycle-Euclid was identified as the “Lessee” and the purchaser of the coin laundry



business operated on those premises. Thomas executed the guaranty not only as the guarantor but also as the managing member of Spin Cycle-Euclid.

{¶ 14} At trial, Thomas testified about the purchase agreement he executed as the “Buyer” and pursuant to which he acquired this and other businesses. This agreement provided:

“Buyer shall execute an assignment of Lease form and return it to Seller along with a personal financial statement suitable to obtain the landlord’s consent to the Assignment of Lease no later than 4/6/05. If Buyer chooses to form an entity for the purchase of this business, Buyer must finalize and provide to Seller this entity’s information no later than the date indicated above. *Buyer agrees and acknowledges that the landlord and the lender, if any, will require the personal guaranty of Buyer[.]*” (Emphasis added.)

{¶ 15} Appellants contend that the consideration recited in the guaranty was inadequate as a matter of law. They also argue that there was no evidence that the recipient of the guaranty, Orams Enterprises, furnished any consideration. As noted above, we may consider additional evidence of consideration outside the guaranty so long as it is not inconsistent with or contradictory to the terms of the guaranty. The purchase agreement demonstrates that the guaranty was given to induce the landlord to consent to the assignment of the lease.

{¶ 16} “Generally, consideration which supports the underlying agreement is sufficient to bind the guarantor. “The consideration running from the creditor to the debtor is deemed sufficient to support the surety's promise to make the

debt good.’ *Solon Family Physicians, Inc. v. Buckles* (1994), 96 Ohio App.3d 460, at 464, quoting *United States v. Tilleras* (C.A.6, 1983), 709 F.2d 1088, 1091. ‘The obligation of the surety rests upon a consideration as adequate as that of the principal; for, though he receive no pecuniary or other benefit for his undertaking, credit is extended to the principal, and advantages are obtained by him, upon the faith of the surety's engagement.’ *Neininger v. State* (1893), 50 Ohio St. 394, 400-401.” *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 853. Thus, the landlord’s consent to the assignment of the lease was ample consideration for Thomas’s guaranty. Therefore, we overrule the second assignment of error.

{¶ 17} Next, appellants argue that the court erred by awarding attorney’s fees to appellees. Appellants claim that, under Ohio common law, a contractual provision for the payment of attorney’s fees is not enforceable if the terms of the provision were not freely negotiable. Because they took possession of the property under an existing lease, appellants claim they had no opportunity to negotiate the attorney’s fee provision, and therefore it is unenforceable.

{¶ 18} Appellants devote a considerable portion of their brief to an explanation why Ohio common law has not been superseded by R.C. 1301.21. Under certain conditions, R.C. 1301.21 now makes enforceable a commitment to pay attorney’s fees that is part of a commercial “contract of indebtedness.” We need not address this issue, however, because, even if R.C. 1301.21 does not

apply, appellants have not demonstrated that the attorney's fees provision in the lease is unenforceable under the common law.

{¶ 19} “[A]ttorney fee provisions are unenforceable in those commercial situations where there is uneven bargaining position, the promotion of litigation and illegal acts such as evading the usury laws, the provision acts as a penalty, and the terms of the provision are not freely negotiable. However, we find attorney fee provisions are enforceable in situations where there is equal bargaining position, the parties are of similar sophistication, and both parties had the opportunity to obtain counsel to review the provision and negotiate its terms.” *First Capital Corp. v. G&J Indus., Inc.* (1999), 131 Ohio App.3d 106, 113.

{¶ 20} In this case, appellants were not the original parties who bargained for this contract. Rather, the attorney's fee term was part of the contract appellants agreed to assume. Appellants could not pick and choose the contract terms it wished to keep; assignment of the contract was an all-or-nothing proposition, and they assumed all rights and obligations under it. Therefore, appellants have no ground for asserting that the contract was unconscionable as to them. We do not consider whether appellants could assert any unenforceability argument that the original parties may have had; appellants have not addressed that issue.

{¶ 21} Finally, appellants argue that the amount of the fee award was excessive and unreasonable. Appellants stipulated that attorney's fees charged by attorney Tod Sleggs of \$5,209.24 were reasonable. The managing partner of appellees' trial attorneys' firm testified that their firm was retained by appellees in December 2007. He reviewed the firm's billing for this matter, which reflected a balance due for attorney's fees of \$80,692.90. He further testified that the hourly rates charged were the firm's standard rates. The expert witness testified that the fees were reasonable. He also testified that it was normal and reasonable for more than one attorney to attend events such as depositions and settlement conferences. The court's award of \$67,000 represented a reduced fee because "the hours spent preparing for depositions were in excess." Appellants have not demonstrated that the court abused its discretion in awarding attorney's fees. Therefore, assignment of error IIIa is overruled.

Affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J. and  
ANN DYKE, J. CONCUR