

[Cite as *Artz v. Kasubick*, 2009-Ohio-3104.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92296**

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**PHILIP ARTZ, LTD.**

PLAINTIFF-APPELLANT

VS.

**MARK KASUBICK, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-655589

**BEFORE:** McMonagle, J., Rocco, P.J., and Boyle, J.

**RELEASED:** June 25, 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).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant, Philip Artz, Ltd., appeals the trial court's judgment granting the motion to dismiss of defendant-appellee Mark Kasubick. We affirm.

{¶ 2} On July 11, 2002, Philip Artz, Ltd. and Chagrin River Gillies entered into a lease. The introductory portion of that lease reads as follows:

{¶ 3} **"This lease ('Lease') made as of this 11<sup>th</sup> day of July, 2002, between Philip Artz, Ltd., an Ohio limited liability company ("Landlord") and Chagrin River Gillies and ----- (together, Tenant )."**<sup>1</sup>

{¶ 4} The lease was signed "Philip Artz Ltd., an Ohio Limited Liability Company," and "Mark Kasubick, Individually and as President of Chagrin River Gillies." Clearly, and by its very terms, Mark Kasubick was not a party to the lease.

{¶ 5} On February 13, 2003, the parties signed an addendum to the lease. The addendum reads:

{¶ 6} **"This is an addendum to the Lease ('Lease'), dated July 11, 2002 between Philip Artz Ltd., an Ohio limited liability company ('Landlord') and River Gillies (Tenant)."**

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<sup>1</sup>This was a pre-printed lease form; the portions that are underlined are filled-in blanks. Of particular note is the blank portion that allows for the insertion of a second tenant name; a line was drawn through this portion, an affirmation that there was only one tenant to this lease, River Gillies.

{¶ 7} This addendum was signed “Philip Artz Ltd., an Ohio Limited Liability Co.,” and “Mark Kasubick, Individually and as President of River Gillies.” Clearly, and by its very terms, Mark Kasubick was not a party to the addendum to the lease.

{¶ 8} Finally, there is a one sentence letter (undated) that is the subject of this appeal. This letter reads as follows:

{¶ 9} **“This letter will serve as notice that I would like to exercise my lease option for the period of 24 months, beginning august [sic]1, 2003 at a rent of \$19,800 per annum.”**

{¶ 10} This letter, unlike the previous lease and addendum, is signed “Mark A. Kasubick, President, Chagrin River Gillies.” It contains no language that Kasubick was signing in his individual capacity.

{¶ 11} Ultimately, during the period of extension, Chagrin River Gillies defaulted on the rent, and Philip Artz Ltd. sued Mark Kasubick and Chagrin River Gillies on April 1, 2008. Artz appropriately attached to its complaint the three documents referenced above under Civ.R. 10.

{¶ 12} On July 8, 2008, Mark Kasubick filed a motion to dismiss under Civ.R. 12(B)(6), alleging that the lease under which he might have had liability to Artz had expired, that upon the extension he had no individual liability, and that this fact is apparent upon the face of the appended documents. Simultaneously, Chagrin River Gillies filed an answer. Both sides briefed the issue of Kasubick’s individual liability upon the lease. The trial court found on August 13, 2008 that “Mark Kasubick is not personally liable for the corporate obligation,” and granted his motion to dismiss. On

September 24, 2008, Artz voluntarily dismissed Chagrin River Gillies and filed this appeal.

{¶ 13} In its two assignments of error, Artz contends that the trial court erred in granting Kasubick's motion to dismiss because the company stated a viable breach of contract claim against Kasubick individually, and because the lease extension was ambiguous and susceptible to more than one interpretation. We disagree.

{¶ 14} In *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, the Ohio Supreme Court held that for a court to dismiss a complaint for failing to state a claim upon which relief can be granted, it must appear beyond doubt that the allegations in the complaint can prove no set of facts, which when construed most favorably to the plaintiff would entitle him to relief. *Id.* at syllabus.

{¶ 15} In this case, it is clear that Mark Kasubick was not, nor had he ever been, a tenant under this lease. The only tenant under this lease was Chagrin River Gillies. Mark Kasubick's signature as Mark Kasubick, President, was in fact, the signature of the tenant. What then of his signature marked "individually" on the initial lease and the addendum? As he was not a tenant, his individual signature was either meaningless, or was as a guarantor of Chagrin River Gillies. Obviously, if his signature "individually" was meaningless, Mark Kasubick the individual was not and never had been liable as either a principal or as a guarantor. But what if Kasubick could be deemed a guarantor?

{¶ 16} Even if deemed a guarantor of the original lease and addendum, Kasubick did not sign in his individual capacity to the extension. "A guarantee will not

be construed as continuing without express language providing therefore.” *Nelsonville Elec. & Mfg. Co. v. Marshall* (1957), 76 Ohio Law Abs. 289, 146 N.E.2d 643. And while appellant asserts that any ambiguity should be resolved in favor of Artz, the law surrounding guaranty provides that “ambiguity is construed in favor of the guarantor.” *Liquidating Midland Bank v. Stecker* (1930), 40 Ohio App. 510, 516, 179 N.E. 504.

{¶ 17} There is no ambiguity at all; on the two initial lease documents, Kasubick clearly signed in his individual capacity; in the lease document in question, he clearly did not.

{¶ 18} Accordingly, Artz’s two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

CHRISTINE T. McMONAGLE, JUDGE

MARY J. BOYLE, J., CONCURS

KENNETH A. ROCCO, P.J., DISSENTS WITH OPINION.

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 19} In my opinion, the majority ignores a fundamental principle on review of an order granting a motion to dismiss for failure to state a claim: “we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiffs.” *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 465, 2004-Ohio-5717, ¶11. Accordingly, I dissent.

{¶ 20} I, for one, cannot determine that Kasubick may not be individually liable on the face of the complaint alone. The majority seems confident that Chagrin River Gillies is the only entity that could be held liable. However, I cannot determine what kind of entity Chagrin River Gillies (or River Gillies, the entity named in the lease addendum) is. Nowhere in the complaint or the attached documents is it identified as a corporation. It could be a fictitious business name under which Kasubick is doing business, cf. R.C. 1329.10(C), or a partnership in which Kasubick is a partner. In either of these instances, Kasubick could, indeed, be personally liable.

{¶ 21} Even accepting the allegation in the answer that Chagrin River Gillies is a defunct corporation (a matter we should not be considering on a motion to dismiss for failure to state a claim), Kasubick could still be individually liable. We have no way of knowing when the corporation dissolved, but we must make all reasonable inferences in plaintiff’s favor. If Kasubick entered into a contract in Chagrin River Gillies’ name after it dissolved, he could be personally liable for the new obligation he incurred in its name. See, e.g., *Thomas v. Price* (1999), 133 Ohio App.3d 585, 589.

Moreover, depending on his relationship to the corporation (a matter we also cannot determine from the face of the complaint), Kasubick could be liable under an alter-ego theory, i.e., “piercing the corporate veil.”

{¶ 22} In short, I am unable to conclude that the plaintiff can prove no set of facts that would entitle it to relief. Therefore, I would reverse the common pleas court’s decision and remand for further proceedings.