DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NORTHSIGHT SHOPPING CENTER 04A, LLC, an Arizona limited liability company; NORTHSIGHT SHOPPING CENTER 04B, an Arizona limited liability company; NORTHSIGHT SHOPPING CENTER 04C, LLC, an Arizona limited liability company; NORTHSIGHT SHOPPING CENTER 04D, LLC, an Arizona limited liability company; NORTHSIGHT SHOPPING CENTER 04E, LLC, an Arizona limited liability company; and ACF Property Management, Inc., a California corporation; Plaintiff-Appellee, v. JEFFREY LEHRER, a single man, Defendant-Appellant.	1 CA-CV 09-0451 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-006060

The Honorable Barbara A. Hamner, Judge

AFFIRMED

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W E I S B E R G, Judge

¶1 Appellant, Jeffrey Lehrer, appeals from a judgment entered against him as guarantor of a commercial lease in favor of Appellees, Northsight Shopping Center 04 A, Northsight Shopping Center 04 B, Northsight Shopping Center 04 C, Northsight Shopping Center 04 E, and Northsight Shopping Center 04 F, all Arizona limited liability companies (collectively "the landlord"), and ACF Property Management, a California Corporation ("ACF"). For reasons that follow, we affirm.

PROCEDURAL BACKGROUND

¶2 The landlord owned commercial space (“the premises”) in a shopping center in Scottsdale that was managed by ACF. On May 30, 2007, the landlord entered into an agreement to lease the premises ("the lease") to the Posh Puppy Store, Inc., an Arizona corporation, the original tenant. As part of the agreement, Randi and Robert Patterson ("Pattersons") and Sandra Kay and Larry J. Parker ("Parkers") executed a guarantee of the lease. On September 17, 2007, the landlord entered into a second amendment to lease with the Posh Puppy Store, Inc., the Pattersons, the Parkers and Lehrer, an additional guarantor of

the lease. The second amendment to lease contained these provisions:

> 3. CHANGE IN OWNERSHIP OF TENANT'S BUSINESS INTERESTS. The Parties hereby acknowledge and agree that this Amendment memorializes the fact that 50% of Tenant's business interest has been sold by Mrs. Randi Patterson, an individual, to Mr. Jeffrey Lehrer, an individual, so that 50% of Tenant's business interest is now owned by Mr. Jeffrey Lehrer, while the other 50% interest remains owned by Mrs. Sandra Kay Parker.
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> 4. RELEASE OF GUARANTORS. Due to the change in ownership of Tenant's business interest as noted herein, Landlord hereby releases Randi Patterson and Robert Patterson, individually and as a married couple . . . from any and all claims, liabilities, rights and obligations . . . relating to the Guarantee dated and executed as of May 30, 2007 . . . and confirms that all . . . obligations under the Guarantee dated and executed as of May 30, 2007 have been terminated.
>
> 5. ADDITION OF GUARANTOR. The release noted in Paragraph 4 above is contingent upon the full execution of the Guarantee attached hereto as Exhibit A by Jeffrey Lehrer, an individual. The Parties hereby acknowledge that upon execution of the Guarantee as set forth in Exhibit A, Jeffrey Lehrer assumes all liabilities of an additional Guarantor on the Lease.

As part of that agreement, Lehrer executed a guarantee of the lease in which he "unconditionally and irrevocably guarantee[ed] the prompt and faithful performance of all terms and provisions of the Lease by Tenant." The guarantee expressly stated that

Guarantor "warrants and represents that . . . it owns a majority interest in Tenant."

¶3 On or about July 16, 2008, the landlord entered into an assignment and assumption agreement with the Posh Puppy Store, Inc. whereby that entity assigned all of its right, title and interest in the lease and second amendment to lease to Kimberly Sobotka, d/b/a, the Posh Puppy Store, LLC. The assignment signed by Lehrer provided that the obligations of the guarantors, the Parkers and Lehrer, would remain in "full force and effect."

¶4 After Sobotka defaulted on the lease, on January 15, 2009, ACF, on behalf of the landlord, gave notice to Sobotka and the guarantors of its intent to repossess the premises and pursue legal remedies to collect all sums due under the lease if rent was not paid within five days. When payment was not forthcoming, on February 10, 2009, the landlord and ACF filed a forcible entry and detainer ("FED") action against the Posh Puppy Store, Inc.; Kimberly Sobotka d/b/a, the Posh Puppy Store, LLC; and the Parkers and Lehrer as guarantors. The landlord sought possession of the premises and damages in the amount of $38,997.20, but stated in its complaint that if "all amounts for March 2009 are not timely paid, Defendants will owe at least $64,584.27 as of March 2009."

¶5 At the initial appearance on February 27, 2009, the Posh Puppy Store, Inc. and the Parkers entered a plea of guilty and the court entered judgment against them for $38,997.20, together with interest, costs and attorneys' fees. Sobotka pled guilty, but requested a trial on damages. Counsel for Lehrer advised the court that "[w]e would . . . also plead guilty as to liability. But we contest damages and that Mr. Lehrer is asking for a trial only as to the extent of damages. Not as to immediate possession of the property." The court set a trial on damages for April 1, 2009, ordered an exchange of witnesses and exhibits one week prior to the trial, and "one week prior to that, filing of an answer."

¶6 The day before trial, Lehrer filed an answer, in which he alleged, among other affirmative defenses, that the landlord's claims may be barred "due to a failure of consideration for any alleged contract, lease or personal guarantee sued upon" or "due to unilateral or mutual mistake." The same day, he filed a list of witnesses and exhibits. The landlord and ACF filed its list of witnesses and exhibits on the day of trial.

¶7 At the forcible detainer trial, the court noted that the minute entry of the initial appearance reflected that Lehrer

pled guilty, "but wants a trial on damages."[1] Lehrer's counsel told the court that "We plead guilty to the extent of the eviction proceeding, terms of the immediate possession, but not as to the liability for the damages." Counsel explained that "the guarantee is a separate contract . . . [a]nd we've been given no chance to fight the liability on the guarantee." He added that the liability case is a "full blown contract case [which] allows discovery and trial . . ." and that "we would object to any judgment against Mr. Lehrer without a proper trial on the contract issues."

¶8 The landlord's counsel stated that "Arizona law is clear that guarantors may be included in an F-E-D action as part of not only a judgment for possession, but a judgment for damages . . . and this is the–-frankly the first I've heard of this being an issue, so I'm surprised by it." He also stated that "we're prepared today to proceed to judgment against Mr. Lehrer, on the basis of the guarantee within the context of the F-E-D action." Counsel remarked that the parties had previously discussed the amount of damages, but that he "never before heard this argument about we're not–-we're in the wrong court. The Court can't enter judgment. The first I've heard of it." After Lehrer's counsel admitted he never raised the issue before, the

[1]Sobotka did not appear at the trial on damages and the court entered a default judgment against Sobotka and the Posh Puppy Store, LLC on April 1, 2009.

court noted that the landlord's counsel "is coming in preparing for something and then having this sprung on him when it wasn't raised earlier and it wasn't raised in any kind of pleading prior to today."

¶9 The parties and the court discussed the case of *Staffco, Inc. v. Maricopa Trading Co.,* 122 Ariz. 353, 357, 595 P.2d 31, 35 (1979), which held that a guarantor on a lease is properly joined in an FED action and the court has jurisdiction to enter a judgment against the guarantor for back rent. Lehrer's counsel stated that *Staffco* merely gave the court jurisdiction to eventually decide the issue of damages for back rent, but it did not give the court power to "accelerate that proceeding to a 30 day[] action . . ." and decide a contract case in an "abbreviated" setting. The landlord's counsel replied that a breach of contract claim is not properly an issue in an FED action because such actions are "summary, they're quick" and that the deadlines for conducting a trial are "mandatory." He stated that under *Staffco,* it was appropriate to adjudicate the liability of a guarantor in an FED action and that he was prepared to proceed with the trial.

¶10 The judge observed that at the initial appearance, Lehrer, pled guilty to liability. Acknowledging that Lehrer might have a separate civil action for breach of contract, the judge concluded that it was proper to join Lehrer in the FED

action and that "based on what happened at the initial hearing, I think it's appropriate that the Plaintiff be allowed to proceed today on the issue of damages." Lehrer's counsel indicated that Lehrer had several legal defenses to enforceability of the guarantee. When asked by the court what Lehrer disputed about the guarantee, Lehrer explained that he never received ownership and management powers in the Posh Puppy Store, as promised, and thus, there was either a unilateral or a mutual mistake of fact or a failure of consideration rendering the guarantee invalid.

¶11 The landlord's counsel referred to Lehrer's avowals in the second amendment to lease and guarantee stating that he had an ownership interest in the Posh Puppy Store, Inc. Counsel indicated that the landlord agreed to release the Pattersons as guarantors only on condition that Lehrer become a guarantor; thus, any issues Lehrer had "relative to breach of contract" were not against the landlord, but against other parties. He stated, however, that if Lehrer believed the guarantee was unenforceable, he could put on whatever evidence he had at the trial. Lehrer's counsel replied that if the landlord obtained a judgment against him for damages, Lehrer was precluded from litigating the contract case "to its full extent." The court ruled that:

> the *Staffco* case I think clearly states that it's appropriate to join a guarantor in a forcible detainer action, and it's appropriate for the Court to enter judgment, if it finds so against the guarantor. And I don't see that this case makes any distinction as to the whether the guarantor acknowledges the guarantee or not . . . I'm going to find that [the landlord] appropriately is pursuing damages against the guarantor . . . . I think you [Lehrer] certainly have other civil means of addressing some of your concerns.
>
> But the very nature—and of course this is obvious to everyone-–the nature of this forcible detainer action . . . is to be an efficient means of regaining possession and then securing damages. And I think that this situation is no different than the *Staffco* case, which clearly says that . . . the guarantor guaranteed the rent. There was a default, and so the guarantor thus became liable for the debt.

¶12 The landlord presented evidence at the hearing reflecting that as of April 1, 2000, it had sustained damages in the amount of $103,447.29. Lehrer did not offer any evidence. On June 2, 2009, the court entered judgment against Lehrer for $103,447.29, together with pre-judgment and post-judgment interest, costs and attorneys' fees. Lehrer timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-1182 and 12-2101(B)(2003).

DISCUSSION

¶13 On appeal, Lehrer claims the trial court erred by entering a judgment against him for damages when he alleged affirmative defenses which created a genuine dispute as to the validity of the guarantee and that such issues cannot be determined in an FED action. He also argues that due process requires that he have a full and fair opportunity to prove his defenses. He asks that this court to vacate the judgment and remand the matter to the trial court to dismiss the action.

¶14 The landlord and ACF respond that the validity of a lease or guarantee should be resolved in an ordinary civil action; that under certain circumstances, the issue may be litigated in an FED action; but that Lehrer waived this claim when he pled guilty as to liability. They contend that Lehrer had an opportunity to present his defenses in the context of the FED trial, but did not utilize FED procedural rules or present evidence of the defenses and cannot now complain about lack of due process. Finally, they contend that Lehrer's affirmative defenses of mutual mistake of fact and/or failure of consideration are not genuine disputes preventing the enforcement of the guarantee and that the judgment should not be vacated.

A. Standard of Review

¶15 We will not set aside the trial court's factual findings unless they are clearly erroneous or unsupportable by any credible evidence. *Kocher v. Ariz. Dep't of Revenue,* 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). Where the facts are undisputed, we determine *de novo* whether the trial court correctly applied the law to those facts. *In re Estate of Headstream,* 214 Ariz. 530, 532, ¶ 9, 155 P.3d 1054, 1056 (App. 2007. We review the trial court's legal conclusions *de novo. Id.*

B. Validity of Guarantee

¶16 Relying on *Colonial Tri-City Ltd. Partnership v. Ben Franklin Stores,* 179 Ariz. 428, 880 P.2d 648 (App. 1993), and *RREEF Management Co. v. Camex Productions, Inc.,* 190 Ariz. 75, 945 P.2d 386 (App. 1997), Lehrer argues that when there is a genuine dispute over the existence of lease obligations, such dispute cannot be resolved in an FED action. In *Colonial,* the landlord brought an FED action against Ben Franklin for possession and unpaid rent. 179 Ariz. at 430, 880 P.2d at650. Ben Franklin filed a Rule 12(b)(6) motion to dismiss contending that it was no longer a tenant because it completely assigned it rights and obligations under the lease to another entity. *Id.* The trial court denied the motion, conducted a jury trial and entered judgment against Ben Franklin. On appeal, this court

reversed. *Id.* at 431, 880 P.2d at 651. We held that under the forcible detainer statutes, A.R.S. §§ 12-1171 -1183 (2003 & Supp. 2009) and A.R.S. § 33-361,[2] an FED action "is a statutory proceeding whose object is to provide a summary, speedy and adequate means for obtaining possession of premises by one entitled to actual possession." *Colonial,* 179 Ariz. at 433, 880 P.2d at 653. We further held that an FED action is not "intended to provide a remedy to a party seeking what is, in effect, a declaratory judgment that a valid lease exists between the parties." *Id.* We concluded that whether the parties had a valid lease was an issue "whose resolution is a *prerequisite* to determining which party is entitled to possession"; a dispute about whether a lease exists cannot be resolved in a summary proceeding, but must be resolved in a general civil action with "all the procedural safeguards." *Id.*

¶17 *RREEF Management* clarified the holding in *Colonial*. First, this court explained that although a trial court in an

[2]Under A.R.S. 12-1171(3)(2003), "a person is guilty of forcible entry and detainer . . . if he: [w]ilfully and without force holds over any . . . real property after termination of the time for which such . . . real property [was] let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession." Under A.R.S. § 33-361(B), the FED action "shall be commenced, conducted and governed as provided for actions for forcible entry or detainer and shall be tried not less than five nor more than thirty days after its commencement. In addition to determining the right to actual possession, the court may assess damages, attorney fees and costs pursuant to § 12-1178."

FED action could not resolve a dispute over a contractual relationship between the parties, it did not mean the court lacked jurisdiction over the matter; FED was "appropriate for the limited purpose of allowing the owner to obtain immediate possession of the premises." *RREEF,* 190 Ariz. at 79, 945 P.2d at 390. Second, the court held that a defendant could not merely deny the existence of a lease to "avoid the summary FED proceedings"; rather, "there must be a *genuine* dispute." *Id. See also United Effort Plan Trust v. Holm,* 209 Ariz. 347, 351, ¶ 21, 101 P.3d 641, 645 (App. 2004) (only a "real" dispute regarding existence of landlord-tenant relationship must be tried in a general civil action). Lehrer argues that under the reasoning of these cases, the court should have dismissed the FED action to allow him to litigate the underlying issue of the validity of the guarantee in an ordinary civil action. He distinguishes these cases from *Staffco* in which the validity of the lease was undisputed and the court properly entered a judgment for damages against the guarantor.

¶18 The Landlord and ACF argue that Lehrer waived his right to raise this issue by (1) entering a plea of guilty as to liability at the initial appearance; (2) failing to file a Rule 12(b)(6) motion to dismiss as was done in *Colonial*; (3) failing to utilize the pretrial procedures available to him in the Rules of Procedure for Eviction Actions effective January 1, 2009; and

(4) failing to present any evidence during the trial to support his alleged defenses as was done in *RREEF*. They also allege that there is no genuine dispute about the validity of the guarantee. In reply, Lehrer contends that the landlord waived his waiver argument by not making it below and that his affirmative defenses to the validity of the guarantee are "plausible."

¶19 We need not decide, however, whether any or all of the acts or omissions by Lehrer constituted a waiver of his right to challenge the validity of the guarantee either at the FED trial or on appeal because Lehrer's assertions of mutual mistake of fact and/or failure of consideration here are not valid defenses against the landlord's enforcement of the guarantee. Under the facts of this case, there was no *genuine* dispute concerning the validity of the guarantee.[3]

¶20 In order to set aside a contract on the basis of a mutual mistake of fact, "the mistake must be as to a 'basic assumption on which both parties made the contract.'" *Emmons v.*

[3]The guarantee states that "Guarantor shall not set up or claim, any defense, counterclaim, setoff or other objection of any kind to any demand or claim, or to any action or proceeding, at law, in equity or otherwise, made or brought at any time hereunder by landlord." A guarantor can expressly waive any suretyship defenses in a guaranty contract. *Data Sales Co., Inc. v. Diamond Z. Mfg.,* 205 Ariz. 594, 598-99, ¶¶ 16-21, 74 P.3d 268, 272-73 (App. 2003). Although not argued, Lehrer may have expressly waived all defenses against the landlord in the guarantee contract itself.

Superior Court (Warner-Lambert Co.), 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998) (citation omitted). Further, the mistake must not be one on which the party seeking relief bears the risk of mistake. *Estate of Nelson v. Rice,* 198 Ariz. 563, 566, ¶ 7, 12 P.3d 238, 241 (App. 2000) A "party bears the risk of mistake when '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.'" *Id.* at ¶ 8 (*quoting* Restatement (Second) of Contracts § 154(b)(1979)) (where estate sold paintings for $60 and purchasers resold them for over $1 million, sale contract could not be set aside because sellers knew they had limited knowledge as to value of the paintings and bore the risk of the mistake).

¶21 Here, Lehrer knew at the time he executed the guarantee that he did not own a fifty percent or a majority interest in the Posh Puppy Store, Inc. Although he may have believed that he would acquire such interest, Lehrer entered into the contract bearing the risk that he might be mistaken as to his future acquisition of such interest. A party has a right to allocate risks by contracting to make payments regardless of future conditions. *See Kintner v. Wolfe,* 102 Ariz. 164, 168-69, 426 P.2d 798, 802-03 (1967) (where guarantor agreed to guarantee lease of liquor license for ten years "without respect to future

changes," guarantor's obligations not excused even though intervening statute made leasing of liquor licenses illegal); *Pac. Am. Leasing Corp. v. S.P.E. Bldg Sys.s, Inc*., 152 Ariz. 96, 99-100, 730 P.2d 273, 276-77 (App. 1986) (lessee of computer equipment liable for all lease payments even though computer system failed to function, where lessor disclaimed all warranties in contract and lessee agreed to such allocation of risk). Lehrer has no genuine dispute about the validity of the guarantee based on mutual mistake of fact.

¶22 Similarly, Lehrer has not raised a genuine dispute as to failure of consideration. The second amendment to the lease specifically stated that "the Parties hereby acknowledge and agree that this Amendment memoralizes the fact that 50% of Tenant's business interest has been sold by Mrs. Randi Patterson . . . to Mr. Jeffrey Lehrer . . . so that 50% of Tenant's business is now owned by Mr. Jeffrey Lehrer." It further provided that due to the change of ownership, the landlord released the Pattersons from any and all claims, rights and liabilities under the lease and that the release of the Patterson's was "contingent upon the full execution of the Guarantee" by Lehrer, who shall assume "all liabilities of an additional guarantor on the Lease."

¶23 The guarantee contains the recital that the landlord is willing to execute the second amendment to lease "on

condition of receiving this Guarantee" and that Guarantor acknowledges "receipt and sufficiency" of "good and valuable consideration." [4] The guarantee further states that "Guarantor represents and warrants to Landlord that . . . it owns a majority interest in Tenant."

¶24 The guarantee was clearly supported by consideration. "Consideration is a benefit to the promissor or a loss or detriment to the promisee." *Phil Bramsen Distrib., Inc. v. Mastroni,* 151 Ariz. 194, 199, 726 P.2d 610, 615 (App. 1986) (guaranty supported by consideration where guarantors promised to guarantee lease payments if two lessors permitted other lessors to transfer their lease and joint venture interests to guarantors); *Crown Life Ins. Co. v. Howard,* 170 Ariz. 130, 132-33, 822 P.2d 483, 485-86 (App. 1991) (assumption agreement under which a limited partnership obtained an interest in a loan and guarantor signed the assumption agreement and guaranteed the loan was sufficient consideration for the guaranty agreement).

¶25 Here, the consideration given by the landlord was its execution of the second amendment to the lease and its release of the Pattersons from their obligations as guarantors. In return, Lehrer executed the second amendment and personally

[4] "A recital to a contract is an expression of the reasons for the transaction and [is] an important indication of the parties' intent." *Fugate v. Town of Payson,* 164 Ariz. 209, 211, 791 P.2d 1092, 1094 (App. 1990).

guaranteed the lessee's obligations. This mutual consideration was completed and sufficient to support the guarantee. The fact that Lehrer did not have or acquire an interest in the Posh Puppy Store, Inc. is not a defense to the validity of the guarantee. Lehrer has no genuine dispute about the validity of the guarantee based on failure of consideration between the landlord and him.

¶26 Lehrer nonetheless suggests his defenses are plausible because it is possible the landlord intended to rescind the guarantee if Lehrer did not receive an ownership interest in the Posh Puppy Store, Inc. and that discovery is necessary to determine if this is so. However, nothing in the language of the second amendment, the guarantee, or in the record even remotely suggests that such a possibility existed. When parties bind themselves "by a lawful contract the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Grubb & Ellis Mgmt. Serv.s, Inc. v. 407417 B.C., LLC,* 213 Ariz. 83, 86, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). The trial court did not abuse its discretion in refusing to dismiss the FED action, conducting the trial and entering judgment against Lehrer.

C. Attorneys' Fees

¶27 Both parties seek attorneys' fees in this appeal. Paragraph 6(b) of the second amendment provides that "in the

event of any litigation arising out of or in connection with this Amendment, the prevailing party shall be awarded reasonable attorney's fees, costs and expenses." Paragraph 3 of the guarantee provides that "[i]f any suit is commenced by Landlord to enforce this Guarantee, the prevailing party shall also be entitled to recover all reasonable costs incurred in connection therewith, including reasonable attorney's fees." This court enforces a contractual provision for attorneys' fees according to its terms. *First Fed. Sav. & Loan Ass'n of Phoenix v. Ram*, 135 Ariz. 178, 181, 659 P.2d 1323, 1326 (App. 1982). The landlord and ACF are the prevailing parties in this appeal, and we award them reasonable attorneys' fees and costs, subject to compliance with Arizona Rule of Civil Appellate Procedure Rule 21.

CONCLUSION

¶28 For the foregoing reasons, we affirm the judgment of the trial court.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge