DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FOOTBRIDGE CAPITAL, L.L.C., a Delaware limited liability company, Plaintiff/Appellee, v. ALAN OTTO, a married man, Defendant/Appellant.	1 CA-CV 09-0777 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2002-012039

The Honorable Jeanne Garcia, Judge

AFFIRMED

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I R V I N E, Judge

¶1 Alan Otto ("Otto") appeals the trial court's judgment awarding Footbridge Capital, L.L.C. ("Footbridge") $5,000,000

for breach of contract plus attorneys' fees, costs and prejudgment interest. For the reasons that follow, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

¶2 Otto Trucking, Inc. ("Otto Trucking") provided trucking services to Alleco Stone ("Alleco"). As of November 2000, Alleco owed Otto Trucking over $600,000 for unpaid invoices. To generate capital and refinance debt, Alleco received a series of loans from Cambridge Holdings Group, Inc. ("Cambridge").[1] The last of the series of loans ("Alleco V") was issued to preclude foreclosure of Alleco's assets by another lender. Due to continued non-payment by Alleco, Cambridge required a personal guaranty of Alleco V before it funded the loan.[2] Cambridge requested Otto guaranty Alleco V and an earlier loan, Alleco III. Footbridge was successor-in-interest to Cambridge's interest in Alleco V.

¶3 After negotiation, Otto executed a guaranty on December 27, 2000, with an effective date of December 7, 2000,

[1] Alleco was one of a group of entities to which Cambridge issued the series of loans. The other entities are not parties to this appeal.

[2] Cambridge's lien on Alleco's assets was subordinate to that of another lender, who was attempting to foreclose on the assets. In part, Cambridge funded Alleco V to preclude foreclosure of Alleco's assets by another lender to avoid forfeiting the collateral securing its series of loans.

in which he personally guaranteed the Alleco III and V loans up to $5,000,000 (the "Guaranty"). In exchange for the Guaranty, Cambridge agreed to pay Otto Trucking $600,000 from Alleco V to offset Otto Trucking's unpaid invoices. The Guaranty document itself, however, did not reference any payment to Otto or Otto Trucking, or when any such payment was due. The Guaranty provided that in the event of Alleco's default, Otto could, at his option, assume control of, sell or restructure Alleco.

¶4 Otto requested that Gary Fry ("Fry"), who was the attorney for Cambridge and Footbridge at the time, draft a separate agreement in connection with the Guaranty. Under the separate agreement, Otto Trucking received half of the agreed amount upon execution of the Guaranty and would receive the remaining $300,000 on or before March 31, 2001. John Howe ("Howe"), a representative of Footbridge, spoke with Fry and indicated that Fry could inform Otto that he would receive his second payment of $300,000 on or before March 31, 2001. Otto did not discuss with Howe or Eric Cummings ("Cummings"), the principal of Cambridge, what would happen if the second payment was not made by March 31, 2001. Fry created a separate handwritten document outlining Otto's requests ("Letter Agreement"). The Letter Agreement stated, in pertinent part:

> This will acknowledge that Hienton Fry will hold in escrow your Guaranty Agreement dated as of December 7, 2000 until you have

> received from Cambridge Holdings Group, Inc. or its loan participants, on or before March 31, 2001, the further sum of $300,000 for your trucking invoice(s), when Hienton Fry will be authorized to deliver the Guaranty Agreement to the lender.

¶5 The Letter Agreement was not signed by Otto, Cambridge or Footbridge. Upon execution of the Guaranty, Fry gave Otto a $300,000 check made payable to "Alan Otto/Otto Trucking, Inc." in partial satisfaction of the $600,000 payment. Otto did not receive the second $300,000 on or before March 31, 2001. By letter addressed to Fry dated May 31, 2001, Otto confirmed his understanding that the Letter Agreement "was never honored and subsequently defaulted."

¶6 Prior to execution of the Guaranty, on or about November 29, 2000, Otto Trucking filed a Uniform Commercial Code Financing Statement ("UCC-1") covering Alleco's inventory. After learning of Otto Trucking's UCC-1, Cambridge and Footbridge requested Otto subordinate the UCC-1, which was accomplished on June 11, 2001. After subordinating the UCC-1, Otto Trucking received $300,000.

¶7 Alleco defaulted on their obligations under Alleco V. Footbridge made a demand on Otto to perform his obligations under the terms of the Guaranty. Otto made no payments and did not exercise his option to assume control of Alleco and/or restructure Alleco. Footbridge exhausted all of its remedies

against Alleco and again demanded Otto perform his obligations under the Guaranty.

¶8 Otto refused, arguing the Guaranty was not enforceable against him. Footbridge brought an action to enforce the Guaranty. The matter was tried without a jury, and the trial court ruled the Guaranty was valid and enforceable against Otto. The trial court awarded Footbridge $5,000,000 for breach of contract plus attorneys' fees, costs and prejudgment interest. Otto timely appealed.

DISCUSSION

¶9 Otto challenges numerous aspects of the trial court's findings. His challenges center on one issue: whether the Guaranty is valid and enforceable against him.

¶10 Contract interpretation presents a question of law, which we review de novo. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). 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). We review the trial court's legal conclusions de novo. *In re Estate of Headstream*, 214 Ariz. 530, 532, ¶ 9, 155 P.3d 1054, 1056 (App. 2007).

Guaranty is enforceable against Otto

¶11 Otto argues the Guaranty never "c[a]me into existence" because the terms in the Letter Agreement were not met. "[W]e will give effect to a contract as written where the terms of the contract are clear and unambiguous." *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008). The trial court found the "Guaranty was effective on execution." The Guaranty's provisions are clear and unambiguous. The Guaranty states that it "is executed and effective for all purposes as of this 7th day of December 2000, by Alan Otto." Additionally, Howe testified that the full proceeds of Alleco V would not have funded unless the Guaranty was effective and enforceable. The Guaranty itself stated that Cambridge "is not willing to make the Loan to be evidenced by the Note unless Guarantor[3] unconditionally guarantees payment . . . in the maximum aggregate amount up to $5,000,000." Otto testified that he was aware that but for his guaranty Alleco V would not have funded. Howe testified that if the Guaranty was unenforceable as of June 11, 2001, the date of the second payment of $300,000, he would not have paid out the money. We agree that the Guaranty was effective when executed.

[3] The Guaranty defines Otto as the "Guarantor."

The Letter Agreement

¶12 Otto asserts that the Letter Agreement set forth two conditions precedent to the effectiveness of the Guaranty. Specifically, he contends that the Guaranty would only be enforceable against him if he received a second payment of $300,000 on or before March 31, 2001.

¶13 A condition precedent is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." Black's Law Dictionary 312 (8th ed. 2004). "Generally, a construction of provisions as conditions precedent is not favored when construing conditional provisions in a contract." *Angle v. Mario Builders, Inc.*, 128 Ariz. 396, 399, 626 P.2d 126, 129 (1981).

¶14 The trial court found the language in the Guaranty was "clear, unambiguous and states no condition relating to timing of payments" from Footbridge to Otto. The court quoted key portions of the Guaranty supporting its finding that Otto's personal guaranty was unconditional. The Guaranty stated that Cambridge was "not willing to make the Loan to be evidenced by the Note unless Guarantor unconditionally guarantees payment" and that Otto "irrevocably and unconditionally covenants and agrees that he . . . is . . . liable for the Guaranteed Debt." Further, under the terms of the Guaranty, Otto's obligations

"shall not be released, diminished, impaired, reduced or affected by any event or omission."

¶15 The trial court found the second payment of $300,000 was "a condition of delivery," and the March 31, 2001 date was a "benchmark" target date and not a condition of effectiveness of the Guaranty. It found that the second payment of $300,000 was paid "in satisfaction of the agreement with Otto to pay Otto Trucking $600,000.00 in exchange for Otto's Guaranty." The trial court also found that Fry, Cummings and Howe never intended the Letter Agreement to set forth conditions precedent to the enforceability of the Guaranty. The trial court's factual findings are supported by credible evidence.

¶16 Cummings, Howe and Fry all testified that Fry did not have the authority to agree to a condition that would affect the enforceability of the Guaranty. Additionally, Howe and Cummings never agreed that the Guaranty would be void or unenforceable if the second payment of $300,000 was not received on or before March 31, 2001. Fry testified, and Howe and Cummings agreed, that Fry had no authority to enter into an agreement that would invalidate the Guaranty.

¶17 The trial court also reasoned that because the Guaranty was a promise to pay upon the default of another, the Guaranty was required to satisfy the statute of frauds. *See* Ariz. Rev. Stat. ("A.R.S.") § 44-101(2) (2003). Any contract

that modifies a material term of the Guaranty would also need to satisfy the statute of frauds. *See Best v. Edwards*, 217 Ariz. 497, 500, ¶ 13, 176 P.3d 695, 698 (2008).

¶18 The court found that the Guaranty did "not reference any payment to Otto Trucking while the Letter Agreement references a $300,000 payment;" that "Footbridge was the party to be charged and under the Letter Agreement Fry did not have lawful authority to modify any provision in the . . . Guaranty, much less to impose time conditions on the enforceability of the . . . Guaranty;" also that a "modification to the terms of an agreement must set forth the essential terms of the agreement to modify;" and, that the Letter Agreement did "not set forth modification, nullification, voidability, unenforceability or cancellation of the . . . Guaranty as an effect of non-receipt of the $300,000.00 payment by March 31, 2001." We agree.

¶19 Even if the two terms in the Letter Agreement were construed as conditions precedent to the effectiveness of the Guaranty, Otto would have to show that the non-performance of the conditions caused him prejudice. Arizona law states that in a contract containing a condition precedent in which the contract fails to state the effect of failure to perform the condition, a showing of prejudice is required before performance is excused for non-compliance with the condition. *State Farm Mut. Auto. Ins. Co. v. Palmer*, 237 F.2d 887, 891 (9th Cir. 1956)

(citing *Massachusetts Bonding & Ins. Co. v. Ariz. Concrete Co.*, 47 Ariz. 420, 56 P.2d 188, 189 (1936)); *Lindus v. N. Ins. Co. of New York*, 103 Ariz. 160, 438 P.2d 311 (1968) (absent a showing of prejudice, an insured's failure to give timely notice does not discharge the insurer's duty to provide insurance coverage). Given that less than three months after the March 31, 2001 date, Otto received a second payment of $300,000, what he bargained for pursuant to the Guaranty, we cannot conclude that Otto was prejudiced.

¶20 Otto also argues the Letter Agreement was an escrow agreement and when its provisions were not met, the underlying document, the Guaranty, was never delivered out of escrow and became unenforceable. We disagree.

¶21 We need not decide whether the Letter Agreement created a valid escrow. The Guaranty was effective when signed. As discussed above, *supra* ¶ 15, the trial court found the second payment of $300,000 was "a condition of delivery," and was in satisfaction of the agreement to pay Otto Trucking $600,000 out of the proceeds of Alleco V. Consequently, the essential condition for making the Guaranty effective, the second payment of $300,000 to Otto, was met.

¶22 Even assuming the Letter Agreement was an escrow, Otto's remedy would be against Fry, not Footbridge. *See Maganas v. Northroup*, 135 Ariz. 573, 576, 663 P.2d 565, 568 (1983)

(noting that deviation from escrow terms without the consent of the parties subjects the escrow agent to liability for damages resulting from the deviation). Accordingly, the Letter Agreement does not contain conditions precedent to the effectiveness of the Guaranty and does not satisfy the statute of frauds.

UCC-1 Subordination

¶23 Otto further contends that (1) the UCC-1 deal was an entirely separate agreement from the Guaranty and (2) the June 11, 2001 subordination of Otto Trucking's UCC-1 was not in satisfaction of the second payment of $300,000 because the March 31, 2001 deadline had passed. Otto further argues that because the UCC-1 was in favor of Otto Trucking and not Otto individually, "[a]ny obligation of Otto individually to subordinate any liens would not have been binding on Otto Trucking."

¶24 As noted above, payment on or before March 31, 2001 was not a condition precedent to Otto's obligations under the Guaranty. *See supra* ¶ 21. Furthermore, the UCC-1 deal is not a distinct and separate agreement from the Guaranty as Otto argues. Otto could not bargain to do what he already agreed to do under the Guaranty. The Guaranty provides that Otto agrees that until Alleco V is repaid and Otto has performed all of his obligations pursuant to the Guaranty, he "shall not receive or collect, directly or indirectly, from [Alleco] or any other

party any amount upon" his own claims. The Guaranty also provides that Otto's liens upon Alleco's assets are subordinate to those of Footbridge's.

¶25 Otto was the president and majority shareholder of Otto Trucking. Although Otto signed the Guaranty in his individual capacity, he could expect to indirectly benefit from any transaction involving Otto Trucking, including the $600,000 paid for trucking services. Moreover, the trial court concluded that the June 11, 2001 payment of $300,000 to Otto was in satisfaction of the Guaranty and not subordination of Otto's obligation under the Guaranty to subordinate superior liens. We agree.

Prejudgment interest

¶26 The trial court awarded Footbridge prejudgment interest totaling $1,273,972.60 for the period of March 27, 2007[4] to October 16, 2009, the day the final judgment was entered. **[ROA 119 at 2:10-13]** Otto argues that if the Guaranty was enforceable against him, he was improperly assessed prejudgment interest because: (1) the Guaranty specifically limited his liability on Alleco's debt to "an explicit cap" of $5,000,000;

[4] The parties agreed the date to begin accrual of prejudgment interest was the date of filing for Footbridge's fourth amended complaint. Although the trial court ordered the interest to accrue from March 27, 2007, we note that Footbridge's fourth amended complaint was filed March 5, 2007. Neither party argues this point on appeal.

and (2) although Footbridge requested prejudgment interest pursuant to A.R.S. § 44-1201 (2003), the statute "is not absolute," and it does not necessarily require prejudgment interest on every liquidated debt.

¶27 We review de novo whether a party is entitled to prejudgment interest. *Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 288, ¶ 32, 205 P.3d 1128, 1135 (App. 2009). "A party is entitled to prejudgment interest on a liquidated claim as a matter of right." *Id.* "A claim is liquidated if the plaintiff provides a basis for precisely calculating the amounts owed." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 544, ¶ 39, 96 P.3d 530, 542 (App. 2004). If the amount of damages can be calculated exactly without relying on the opinion or discretion of a judge or jury, the claim is liquidated. *Id.* at ¶ 39.

¶28 In the joint pretrial statement, the parties stipulated that Footbridge's damages exceeded $5,000,000. Pursuant to the Guaranty, Otto guaranteed Alleco V for a "maximum aggregate amount up to $5,000,000." Footbridge's claim is liquidated because it can calculate precisely what is owed, $5,000,000, without relying on the opinion of a judge or a jury. *See id.* Because Footbridge's claims were liquidated, it is entitled to prejudgment interest as a matter of right. The trial court did not err in awarding Footbridge prejudgment interest.

Attorneys' fees on appeal

¶29 Both Otto and Footbridge request attorneys' fees on appeal. In an exercise of our discretion, we award Footbridge its attorneys' fees and costs on appeal upon its timely compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

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

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge