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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1153

Grace Capital, LLC,
Plaintiff,

Barry Benowitz,
Respondent,

Locksley Shae Trust, et al.,
Respondents,

vs.

Wayne W. Mills, et al.,
Defendants,

Henry Fong,
Appellant.

Filed May 13, 2013
Affirmed
Cleary, Judge
Concurring in part, dissenting in part, Hooten, Judge

Hennepin County District Court
File No. 27-CV-08-4767

Jack Y. Perry, Paul J. Hemming, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondent Barry Benowitz)

Marc A. Al, Stoel Rives, LLP, Minneapolis, Minnesota (for respondents Locksley Shae Trust and Gretchen and Robert Strandell)

Carl E. Christensen, Daniel M. Eaton, Kevin Lampone, Christensen Law Office PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Chutich, Judge.

U N P U B L I S H E D   O P I N I O N

CLEARY, Judge

Appellant Henry Fong challenges the district court's order entering judgments against him, arguing that the judgments exceeded the amount that he was responsible for under a personal guaranty; that the district court erred by holding that the judgment entered under a settlement agreement did not apply toward the limit under the guaranty; that the district court erred by failing to hold that the settlement agreement resolved all claims under the guaranty; that the district court erred by enforcing the settlement agreement and holding that the settlement agreement had no effect on respondent Barry Benowitz's claims; and that the court erred by failing to submit a dispute over the terms and effect of the settlement agreement to mediation. We affirm.

FACTS

In March 2007, Fong personally guaranteed several promissory notes made by FastFunds Financial Corporation (FFFC) to various parties totaling $1.825 million. Fong's guaranty expressly limited his liability to an aggregate sum of $1 million. In 2007, FFFC defaulted on the promissory notes, and the aggrieved parties filed a complaint, attempting to collect on the personal guaranty issued by Fong.

The district court granted summary judgment in favor of the plaintiffs, determining that Fong's affirmative defense of fraudulent inducement failed as a matter of law, and Fong appealed to this court. *See Grace Capital, LLC v. Mills*, No. A09-1857,

2010 WL 3396817, at *1–2 (Minn. App. Aug. 31, 2010), *review denied* (Minn. Nov. 16, 2010). This court affirmed in part, reversed the district court's exclusion of certain affidavits, and remanded for further proceedings. *Id.* at *6.

Respondents Locksley Shae Trust, Gretchen Strandell, and Robert Strandell (settling respondents) settled their claims in September 2011 following mediation. Under the terms of the settlement agreement, Fong agreed to pay the settling respondents $162,000 according to a payment schedule and to transfer to them 350,000 common shares of stock. If Fong breached the settlement agreement in any way, the agreement stated that "judgment shall be entered in favor of [the settling respondents] . . . as follows: $562,500 in favor of Locksley Shea Trust and $437,500 in favor of Gretchen and Robert Strandell." The parties also agreed to release "any and all claims, causes of action, suits and/or other liabilities between and among them of any nature whatsoever."

After the settling respondents and Fong reached the settlement agreement, Fong informally sought to dismiss all of the non-settling parties' claims due to failure to prosecute. The court denied Fong's informal request. The non-settling parties, with the exception of Benowitz, declined to pursue their claims. Benowitz informed the court that he intended to proceed with his claim. In October 2011, Fong's counsel withdrew, and Fong obtained new counsel. As scheduling for trial proceeded, questions about the validity, enforceability, and scope of the settlement agreement were raised by Fong's new counsel.

In December 2011, Fong filed a motion to enforce the settlement agreement or, in the alternative, to vacate the settlement agreement. In January 2012, the settling

respondents filed a motion to enforce the settlement agreement and for entry of judgment. Benowitz filed a response to Fong's motion. In February 2012, the court issued an order denying Fong's motion, granting in part and denying in part the settling respondents' motion, ordering Fong to become current on all payment obligations under the settlement agreement, and stating that, if Fong failed to become current on all payment obligations, judgment would be entered in favor of the settling respondents. The court held that the settlement agreement was valid and enforceable and that Benowitz's claims were not affected by the settlement agreement. The court also stated that, because it never issued a direct order compelling Benowitz to participate in the mediation, it refused to hold that Benowitz had "forfeited his claims by failing to appear at the mediation."

Fong failed to become current on the payment obligations under the settlement agreement. In March 2012, Fong submitted a request for leave to bring a motion to reconsider. The district court denied the request and ordered entry of judgment in favor of the settling respondents. The court also noted "for purpose of clarification" that "under the [the February 2012] Order any amounts paid by Fong to the [settling respondents] under the Settlement Agreement shall not serve to reduce his potential liability to Benowitz under the Guaranty."

In April 2012, the court held a hearing during which Fong waived his remaining defense to Benowitz's claims. In May 2012, the court issued an order directing entry of final judgment on all claims and held that "Benowitz has alleged and proven entitlement to recover on Fong's guarantee of a promissory note with a principal outstanding sum due

of $1,000,000 plus interest and legal fees. However, Fong's liability to Benowitz is specifically limited to $1,000,000." This appeal follows.

D E C I S I O N

I

Fong first challenges the validity of the settlement agreement. He argues that, because the settlement agreement did not affect his obligations to Benowitz or the settling respondents under the guaranty, then it must be invalid due to either mutual mistake or unilateral mistake. He also argues that, if the settlement agreement is valid but does not affect his obligations to Benowitz under the guaranty, then it yields an absurd result and should be reversed.

"Settlement agreements are contractual in nature and are as binding on the parties as any contract they could make." *Chalmers v. Kanawyer*, 544 N.W.2d 795, 797 (Minn. App. 1996). "Settling suits without trial is greatly favored, and such agreements will not lightly be set aside by Minnesota courts." *Beach v. Anderson*, 417 N.W.2d 709, 711–12 (Minn. App. 1988), *review denied* (Minn. Mar. 23, 1988). The validity of a settlement agreement is evaluated using basic principles of contract law. *Id.* at 711. "[T]he construction and effect of a contract are questions of law for the court." *A.A. Metcalf Moving & Storage Co. v. N. St. Paul-Maplewood-Oakdale Sch.*, 587 N.W.2d 311, 317 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Mar. 16, 1999).

"Rescission of a contract for mistake . . . is ordinarily founded upon either mutual mistake of the parties or a mistake by one induced or contributed to by the other." *Gethsemane Lutheran Church v. Zacho*, 258 Minn. 438, 443–44, 104 N.W.2d 645, 649

(1960). "Mutual mistake consists of a clear showing of a misunderstanding, reciprocal and common to both parties, with respect to the terms and subject matter of the contract, or some substantial part thereof." *Carpenter v. Vreeman*, 409 N.W.2d 258, 261 (Minn. App. 1987) (quotation marks omitted). Unilateral mistake is defined as "[a] mistake by only one party to a contract." *Black's Law Dictionary* 1093 (9th ed. 2009). "A unilateral mistake in entering a contract is not a basis for rescission unless there is ambiguity, fraud, [or] misrepresentation . . . ." *Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. App. 1985).

Mutual Mistake

Fong first argues that, if the settlement agreement had no effect on the settling respondents' claims under the guaranty, then it must be a product of mutual mistake because it does not actually achieve the intent of the parties. This argument is unpersuasive because the settlement agreement did affect the settling respondents' claims. The settlement agreement states that the parties will release "any and all claims, causes of action, suits and/or other liabilities between and among them of any nature whatsoever." The settling respondents negotiated payments of cash and stock shares in exchange for the release of their rights under the guaranty. The settling respondents agreed that they intended the settlement agreement to be binding and that their disputes with Fong had been settled by the agreement. There was no mistake on the part of the settling respondents as to the terms and subject matter of the settlement agreement.

Fong also appears to argue that the contract was not supported by consideration. "Determining whether sufficient consideration exists for an agreement is a question of

law." *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999). "Minnesota follows the long-standing contract principle that a court will not examine the adequacy of consideration as long as something of value has passed between the parties." *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). In exchange for the promised payments of cash and stock shares, the settling respondents released their rights to make any claims against Fong, so both parties to the settlement agreement gave something of value, and the contract was supported by consideration.

Unilateral Mistake

Fong next argues that, if the settling respondents were aware that Fong was laboring under the mistaken belief that the settlement agreement would resolve all claims under the guaranty, then the agreement was the product of unilateral mistake. The settling respondents argue that they made no "misrepresentation or omitted any relevant fact" concerning the subject matter and terms of the settlement agreement.

The record demonstrates that the settling respondents and Fong were the only parties that participated in the mediation that produced the settlement agreement. The settlement agreement itself sets out the parties as Gretchen Strandell, Robert Strandell, Locksley Shae Trust, and Fong. All of the parties were represented by counsel during the settlement process. The settlement agreement states that, upon "full and final payment of the Settlement Payments," Gretchen Strandell, Robert Strandell, and Locksley Shea Trust will assign their FFFC promissory notes to Fong and/or his assigns. There is no mention of any other parties in the settlement agreement. The record further demonstrates that,

following the execution of the settlement agreement, Fong's attorney communicated with the court that Fong wanted to pursue dismissal of the "remaining plaintiffs," including Benowitz. There was not a unilateral mistake induced by any fraud, ambiguity, or misrepresentation that would merit rescission of the settlement agreement.

Absurd Result

Finally, Fong argues the district court reached an absurd result by holding that the settlement agreement did not affect his obligations to Benowitz under the guaranty because such a holding contravenes the whole purpose of the settlement, which was to resolve the dispute. As mentioned above, Fong hoped to dismiss the remaining plaintiffs' claims after he executed the settlement agreement with the settling respondents. All but one of the remaining plaintiffs declined to pursue their claims. If he had been successful in dismissing Benowitz's claim, Fong would have satisfied all of his liability under the guaranty for only what he negotiated in the settlement agreement. Because Fong's counsel contacted the court to request dismissal of the remaining plaintiffs *after* the settlement agreement was reached, Fong, or at least his attorney, was aware that the settlement agreement did not satisfy all of the claims under the guaranty.[1]

The settlement agreement is valid, and the district court did not err by refusing to rescind the contract based on mutual or unilateral mistake or lack of consideration.

[1] If Benowitz had chosen not to pursue his claim, or if the district court had dismissed Benowitz's claim, Fong would have discharged his obligations for less than what he had guaranteed. Whether it was an advisable strategy for Fong to proceed as he did is not an issue before this court.

Further, the court did not reach an absurd result by holding that the settlement agreement was valid.

II

Fong next asserts that the district court erred in interpreting the settlement agreement. "Absent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). "A settlement agreement is a contract, and we review the language of the contract to determine the intent of the parties. When the language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581–82 (Minn. 2010) (citations omitted). "When the material facts are not in dispute, we review the lower court's application of the law de novo." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

Fong's Argument that Benowitz's Claims Were Extinguished by the Settlement Agreement

Fong argues that Benowitz's claims under the guaranty were extinguished by the settlement agreement reached between the settling respondents and Fong for three reasons. He argues that the terms of the settlement agreement demonstrate the intent of Fong and the settling respondents to resolve all claims under the guaranty. He next contends that the settling respondents had the authority to settle Benowitz's claims because the guaranty placed all of the beneficiaries of the guaranty in the position of co-principals. Finally, he argues that, because the court entered a $1 million judgment

against him and reached the limit of the guaranty, Fong's liability under the guaranty was extinguished.

A. The Intent of the Parties to the Settlement Agreement

Fong argues that the terms of the settlement agreement demonstrate the intent of the settling parties to settle all claims under the guaranty. "[N]onparties to a contract acquire no rights or obligations under it." *In re Welfare of M.R.H.*, 716 N.W.2d 349, 352 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Aug. 15, 2006). No matter what the intent of the parties to the settlement agreement, Benowitz was not bound by the release that the settling respondents signed, and he was not entitled to any compensation from the settlement payments. The terms of the settlement agreement included only the settling respondents and Fong as the parties. One of the provisions of the settlement agreement provided that the settling respondents would assign their promissory notes to Fong upon "full and final timely payment." No mention was made of the other seven noteholders, nor was there any reference to the guaranty. If the parties intended to settle all of the claims, there should have been at least some mention of the other noteholders or of the guaranty. The parties to the settlement agreement only intended to settle their disputes with one another.

B. Whether the Settling Respondents Could Represent Benowitz as Co-Principals

Fong next argues that "Benowitz's failure to appear at the mediation allowed those co-principals to the Fong Guaranty who *were* present to represent his interests." The cases that Fong relies on for this argument are inapposite. It is unclear how any of these

cases support Fong's contention. *See Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482 (Minn. App. 1990) (holding that a "settlement agreement evidenced by correspondence between parties' attorneys is binding and enforceable against such parties through summary judgment, where there is no material factual dispute as to whether the attorneys possessed authority to enter into such a settlement on their clients' behalf"); *Austin Farm Ctr., Inc. v. Austin Grain Co.*, 418 N.W.2d 181 (Minn. App. 1988) (holding that a party is bound to an oral settlement made by its attorney, even if the attorney was not expressly authorized to settle the case, when the settlement agreement was impliedly accepted); *Rosenberg v. Townsend, Rosenberg & Young, Inc.*, 376 N.W.2d 434 (Minn. App. 1985) (holding that the record supported the determination that the client's attorney had authority to enter into a settlement agreement on his behalf). Benowitz was not represented by an attorney during the mediation and was not included as a party to the settlement agreement, and no one claimed to have accepted the settlement agreement on his behalf. The settling respondents were not representing his interests.

C. Whether the Judgment Entered Under the Settlement Agreement Applied Toward the Limit Under the Guaranty, Reaching the Limit and Extinguishing Benowitz's Claim

Finally, Fong argues that the $1 million judgment entered for the settling respondents pursuant to the settlement agreement applies toward the $1 million aggregate limit under the guaranty. Fong claims that Benowitz's claim is extinguished because the limit was reached by the judgment for the settling respondents.

"A settlement agreement is a contract, and we review the language of the contract to determine the intent of the parties. When the language is clear and unambiguous, we

enforce the agreement of the parties as expressed in the language of the contract." *Dykes*, 781 N.W.2d at 581–82 (citations omitted). "[N]onparties to a contract acquire no rights or obligations under it." *In re Welfare of M.R.H.*, 716 N.W.2d at 352 (quotation omitted).

The language of the settlement agreement does not demonstrate that Fong intended to pay the settling respondents under the terms of the guaranty. The settlement agreement does not mention the guaranty anywhere in its terms. The settlement agreement stated that the parties would release "any and all claims, causes of action, suits and/or other liabilities between and among them." Because the judgment entered arose from the settlement agreement, rather than from the guaranty, the judgment does not apply toward the $1 million limit under the guaranty.

Fong's Argument That His Obligations Under the Settlement Agreement Reduced His Liability Under the Guaranty

Fong also argues that his payments to the settling respondents should apply toward the $1 million limit set out in the guaranty because the parties' intent when executing the settlement agreement was that Fong's "payments on any of [the] guaranteed obligations would reduce the remaining amount of Fong's total liability under the guaranty."[2] He also argues that the parties' intent when executing the settlement agreement was to

[2] Appellant references the concept of "*in pari passu*" in this context, claiming that the settling respondents could collect on the guaranty "even to the extent that doing so would reach the guaranty's aggregate limit and leave Benowitz unable to collect on it, without violating the terms of the guaranty." The dissent relies on this concept even though none of the respondents briefed it, and it was only mentioned in passing during oral arguments. Further, it appears that appellant's interpretation of the concept, that respondents could collect on the guaranty even to the extent that they would reach the aggregate limit leaving Benowitz unable to collect, is at odds with the dissent's position that Benowitz would be entitled "to his proportionate share."

resolve the settling respondents' claims under the guaranty. The settling respondents relinquished their rights under the guaranty by the terms of the settlement agreement, which stated that they would release "any and all claims, causes of action, suits and/or other liabilities between and among them of any nature whatsoever." Benowitz did not give up his rights under the guaranty and did not acquire any rights or obligations from the settlement agreement. He was not entitled to any of the judgment that resulted from the settlement agreement.

Fong relies on *Quintana v. Allstate Ins. Co.*, 378 N.W.2d 40, 44–45 (Minn. App. 1985), to argue that payment to one joint obligee is payment to all, and therefore Fong will satisfy his obligations to all parties under the guaranty when he pays the judgments to the settling respondents. This reliance is misplaced because Fong has not paid any of his obligations under the guaranty. The guaranty states, "No act or thing need occur to establish the liability of Guarantor hereunder, and no act or thing, except full payment and discharge of all of the Guaranteed Obligations, shall in any way exonerate Guarantor hereunder or modify, reduce, limit or release Guarantor's liability hereunder." Under the express terms of the guaranty, the only way for Fong to reduce his obligations under the guaranty is by "full payment and discharge of all of the Guaranteed Obligations." Fong did not compromise with the settling respondents by "full payment and discharge," so his obligations under the guaranty are not discharged. Furthermore, under the settlement agreement, Fong agreed to pay less than the $1 million judgment that was entered against him. It was his failure to pay the settling respondents that triggered the increased judgment. The district court did not err by entering $2 million in judgments against him.

III

In the alternative to his arguments above, Fong argues that the district court erred by resolving issues regarding the terms and effect of the settlement agreement. Under the settlement agreement, the parties agreed that

> should any matter not set out here be the subject of irreconcilable dispute *in respect to any formal documentation*, the mediator will decide the issue based on his determination of what is consistent with intent and spirit of our negotiations, or his determination of what is fair and equitable under the circumstances.

(Emphasis added.) No irreconcilable dispute exists concerning any formal documentation in the settlement agreement. None of the parties argue that the settlement-agreement documents are not what the parties agreed to during the settlement negotiations. The district court did not err in resolving the issues here.

Affirmed.

HOOTEN, Judge (concurring in part, dissenting in part)

For the reasons set forth by the majority, I agree that the district court correctly denied appellant Henry Fong's motion to set aside the mediated settlement agreement that he reached with respondents Locksley Shae Trust, Gretchen Strandell, and Robert Strandell; and properly entered judgment in the amount of $1,000,000 on behalf of the settling respondents against appellant. However, I respectfully dissent relative to the $1,000,000 judgment entered against appellant on behalf of the non-settling respondent Barry Benowitz, and would instead affirm, but modify, the judgment.

Paragraph 1 of the guaranty contract specifically limited appellant's liability as the guarantor to $1,000,000 "in the aggregate" and required that appellant guarantee to respondent Grace Capital, LLC, the loans made by the respondent noteholders "*in pari passu*." According to *Black's Law Dictionary* 1225 (9th ed. 2009), "*pari passu*," which is Latin for "by equal step" means "[p]roportionally; at an equal pace; without preference." Thus, respondent Grace Capital, as the agent that was to receive the payments for the underlying loans, was required to distribute the payments on a proportional basis to the noteholders so that no one creditor received more than his or her proportionate share to the detriment of the other creditors.

A guaranty is "[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." *Black's Law Dictionary* 773 (9th ed. 2009). "[A] guaranty is construed the same as any other contract, the intent of the parties being derived from the commonly accepted meaning of the words and clauses used, taken as a whole." *Am. Tobacco Co. v.*

Chalfen, 260 Minn. 79, 81, 108 N.W.2d 702, 704 (1961). Contract interpretation is a question of law. *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). "The plain and ordinary meaning of the contract language controls, unless the language is ambiguous." *Id.* "Ambiguity exists if" the document "is susceptible to more than one construction." *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979). "Intent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract as a whole." *Id.* (quotation omitted). "[O]nce the intent of the parties has been ascertained, the guarantor has the right to insist upon strict compliance with the terms of his obligation." *Chalfen*, 206 Minn. at 81, 108 N.W.2d at 704. A "guaranty is not to be unduly restricted by technical interpretation nor enlarged beyond the fair and natural import of its terms." *Id.* Since the creditor's rights are founded on the guarantor's contract, it follows that the creditor's rights are restricted by the terms of the contract, including any express or implied conditions. 23 Richard A. Lord, *Williston on Contracts* § 61:2 (4th ed. 2002) ("A surety may impose any condition in the promise made to the creditor that the parties agree upon, or that the law implies. . . ."). "Where the liability of the guarantor is expressly limited, he or she is only liable up to that amount." 38A C.J.S. *Guaranty* § 66 (2008); *see also Chalfen*, 260 Minn. at 81, 108 N.W.2d at 704.

In this case, once there was a default on the promissory notes, respondent Grace Capital, as agent for the respondent noteholders, brought a claim against appellant under his guaranty with respondents, which, according to paragraph 25 of the complaint,

alleged that appellant had "guaranteed FastFund's obligation under the Guaranteed Promissory Notes up to an aggregate liability of $1,000,000." The only relief requested is the "exhaustion of [appellant's] maximum liability," which was "$1,000,000." The mediation giving rise to the settlement agreement between appellant and the settling respondents was held to dispose of that single claim against appellant and within the context of the pending litigation.

The effect of the mediated settlement agreement between appellant and the settling respondents had upon Benowitz as a non-settling party must be construed within the context of the pending litigation and the terms of appellant's guaranty contract. *See Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 180 (Minn. App. 2012) ("A contract must be interpreted in a way that gives all of its provisions meaning." (quotation omitted)), *review denied* (Minn. Apr. 25, 2012). In applying the "*in pari passu*" clause of the guaranty, respondents who participated in the mediated settlement could only settle their proportionate share of appellant's guaranty of $1,000,000.[3] Because there is no dispute that appellant must pay the guaranty, I would affirm the judgment in favor of Benowitz, but limit the judgment to his proportionate share of the guaranty.

By modifying the judgment in this manner, we would be enforcing the terms of the guaranty and supporting the mediated settlement agreement. Rather than considering

[3]According to counsel for Benowitz at oral argument, the settling respondents' share is 23.9% of the $1,000,000 guaranty. This roughly 23.9% was calculated by dividing the loan amount outstanding by the amount owed to the settling respondents. Assuming a $1,000,000 liability cap on appellant's guaranty and that the non-settling respondents' proportionate share was $238,805.90, Benowitz would be entitled to only his proportionate share of the guaranty of $761,194.10.

the mediation outside the claims in the complaint and the terms of the guaranty, we would resolve the issue of how such mediated settlement affected the rights of Benowitz by enforcing the "*in pari passu*" provision of the guaranty. By doing so, we would give effect to Benowitz's rights and relationship to appellant and the settling respondents as defined under the unambiguous wording of the guaranty. Also, by enforcing the "*in pari passu*" provision, we recognize the legitimacy of the mediated settlement agreement even though such agreement was reached by Benowitz's former attorney. That is, if his former attorney could only settle the settling parties' proportionate share of the guaranty, he would not have a conflict that would adversely affect Benowitz. Moreover, by restricting the Benowitz judgment to the amount he was actually entitled to under the guaranty, we would not reward Benowitz with an undeserved windfall for his failure to participate in the mediation. Also, by analyzing the case in this manner, we would provide support to respondents' competing interests in the collection of their judgments against appellant by emphasizing, and enforcing, the "*in pari passu*" clause of the guaranty that not only governs their relationship to appellant, but governs their relationship to each other.

Finally, by enforcing the cap on appellant's liability under the guaranty, we also address his arguments that the district court violated the terms of the guaranty by entering two separate $1,000,000 judgments against him. Rather, it is clear that appellant knew or should have known that under the clear and unambiguous "*in pari passu*" terms of the guaranty, that the settling respondents could only settle their proportionate share of the $1,000,000 guaranty. Accordingly, to the extent appellant agreed to pay more than the settling respondents' share in the event of a default on the mediated settlement

agreement, he was acting outside the terms and obligations set forth in the guaranty contract in accepting this additional liability.