RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000372-MR

JOHN DEERE LANDSCAPES — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 03-CI-00276

TERRY GAGEL, JR, INDIVIDUALLY AND D/B/A GAGEL CONTRACTING A/K/A ENVIROWISE, INC. D/B/A GAGEL CONTRACTING, DEFENDANT — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: McANULTY[1] AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.[2]

ROSENBLUM, SENIOR JUDGE: John Deere Landscapes[3] (John Deere), appeals from a judgment of the Shelby Circuit Court entered upon

[1] Judge William E. McAnulty, Jr., concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[3] John Deere Landscapes is also referred to in the record as John Deere Landscapes, Inc.

an involuntary dismissal pursuant to Kentucky Rules of Civil Procedure (CR) 41.02(2)[4] determining that charges made to the John Deere credit account of Envirowise, Inc. d/b/a Gagel Contracting (Gagel Contracting), a company owned by Terry Gagel, Jr. (Terry), are not subject to a personal guaranty executed by Terry guaranteeing the Gagel Contracting account. The charges to the account were made by a company owned by Terry's son, Casey Gagel (Casey). For the reasons stated below, we vacate the judgment in favor of the appellees and remand.

On April 6, 2001, Terry, on behalf of himself and his company, Gagel Contracting, entered into a business relationship with McGinnis Farms, Inc. (McGinnis Farms), to purchase landscaping materials.[5] Incident to this, Terry executed an Application for Credit in the name of Gagel Contracting. This credit account was assigned the Account Number 19503012593. In conjunction with establishing the credit account, Terry also executed a Personal Guaranty in which he guaranteed payment of the account in the event of default by Gagel Contracting. Among other things, the Personal Guaranty required Terry to provide written notice if he desired to terminate his obligation under

[4] This dismissal has been referred to in the record as a "directed verdict." However, this term is a misnomer. In a bench trial "directed verdicts" are not rendered midtrial as they are pursuant to CR 50.01 in a jury trial; rather, the case is involuntarily dismissed pursuant to CR 41.02(2).

[5] The Appellees did not file a brief in this appeal. By way of sanction, where necessary and appropriate, we have accepted the Appellant's statement of the facts as correct. CR 76.12(8)(c)(i).

the guaranty. Representing McGinnis Farms in the transaction was store manager Bret Dormire.

On January 1, 2002, McGinnis Farms merged with John Deere. Pursuant to the terms of the merger, John Deere was the surviving corporation of the merger and McGinnis Farms was the nonsurviving corporation. Dormire remained on as manager of the John Deere store. Based upon the conduct of the parties, as further discussed below, it appears that it was presumed that the previously established Gagel Contracting credit account and Terry's supporting personal guaranty remained in effect.

Subsequent to this, Terry's son, Casey, sought to begin his own landscaping business, and organized a company called Gagel Lawn & Landscaping, Inc. (Gagel Lawn & Landscaping). According to John Deere, to facilitate the endeavor, Terry and John Deere orally agreed that Casey would be permitted to charge materials to his father's John Deere credit account, and the parties understood that Terry's personal guarantee would extend to any charges to the account incurred by Gagel Lawn & Landscaping.

On March 8, 2002, Casey's company, Gagel Lawn & Landscaping, entered into a contract with Wadsworth Golf Construction Company to provide landscaping work on a golf course construction project. In apparent reliance upon the aforementioned agreement between McGinnis Farms and Terry

executed prior to the merger, Gagel Lawn & Landscaping sought to charge purchases to Gagel Contracting's credit account with John Deere, which John Deere had carried forward following the merger. John Deere established a job line account for the golf course project on the Gagel Contracting credit account, and Gagel Lawn & Landscaping commenced obtaining landscaping materials (primarily tree plantings) for the project. Despite a $10,000.00 per month credit limitation on the Gagel Contracting account, Gagel Lawn & Landscape eventually charged in excess of $140,000.00 to the account. The invoices to those charges were sent to Gagel Contracting or, on some occasions, picked up at the John Deere facility. It appears that Terry did not express objection to the billings. Wadsworth Golf Course made four payments to Gagel Lawn & Landscaping totaling in excess of $126,000.00; however, those funds were never applied to pay the Gagel Contracting account.

Eventually, Casey walked off the golf course project without completing the job. When Dormire learned that Casey had walked off the job, he called a meeting with Terry and Casey to discuss the outstanding debt. Terry and Casey, however, refused to pay the bill. Shortly thereafter, Terry sent a letter to John Deere on Gagel Contracting letterhead. The letter stated, in relevant part, as follows:

> RE: Account # 49619 – Gagel Contracting.
>
> As of this date, August 26, 2002, I am placing a charge stop on this account. Since I am signatory to this account I feel I must take this drastic action to not incur any further debt.
>
> If you want to insure that you will receive payment this year then I suggest you place a lien on the Wadsworth Golf Court, Brady Built homes, Ball Homes, and Trademark Homes. I apologize for this inconvenience and the additional work, but this has to be done to insure your payment.

The debt relating to the golf course work was never paid. On January 17, 2003, John Deere filed a Complaint against Terry Gagel and Gagel Contracting in Jefferson Circuit Court seeking a judgment in the amount of $143,043.99 plus interest and attorney fees. The action was later transferred to Shelby Circuit Court. Eventually, trial on the matter was scheduled for July 1, 2004. However, neither Terry nor counsel appeared on the scheduled trial date. The trial court permitted John Deere to go forward with its case, and the plaintiff presented the direct testimony of Bret Dormire. At the conclusion of Dormire's direct testimony, the trial court held in favor of John Deere, and judgment was subsequently entered in accordance therewith.

The defendants subsequently moved to vacate the judgment on the basis that they had not been properly noticed of the trial date. The trial court set aside the judgment and

scheduled a trial date for August 10, 2004. At the second trial, the direct testimony of Dormire given at the July 1, 2004, trial was judicially noticed, and the August 10, 2004, proceedings commenced with the cross-examination of Dormire. At the conclusion of the cross-examination John Deere announced closed. Thereupon the trial court involuntarily dismissed the lawsuit pursuant to CR 41.02(2), thereby holding in favor of the defendants.

On October 21, 2004, the trial court entered its Findings of Fact, Conclusions of Law, and Final Judgment as follows:

FINDINGS OF FACT

> The Complaint arises out of the Plaintiff's claim against the Defendant for the recovery of an unpaid account balance for landscape materials. The Defendant denies he was obligated on this account and denied the indebtedness.
>
> The evidence does not support the Plaintiff's contention that the Defendant is indebted to them because of a personal guaranty the Defendant executed with McGinnis Farms, Inc., in April 2001. The Court finds that the Defendant owed no money to McGinnis Farms, Inc., when it merged with John Deere Landscapes on January 1, 2002.
>
> The Plaintiff established by testimony that John Deere Landscapes did business with the Defendant's son, Casey Gagel and his son's company, Gagel Lawn & Landscape, LLC, and the Court finds it was this indebtedness upon which this action was predicated. The debt claimed is subsequent to the

> Defendants' obligation to McGinnis Farms and relates to a different account between John Deere Landscapes and Casey Gagel and Gagel Lawn & Landscape, LLC. The Defendants guaranty did not extend to this account.
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> The amounts claimed are for monies owed to John Deere Landscapes for goods and services provided to the defendant's son's company, primarily for a golf course job in Ohio. The Defendant is not liable for this account or any debt to the Plaintiff.
>
> CONCLUSIONS OF LAW
>
> At the close of the Plaintiff's case in chief the Defendant moved for a directed verdict based on the insufficiency of the evidence as a matter of law. The Court having made its findings herein and as recorded on the videotape of the proceedings does hereby direct a verdict for the Defendant and enters that attached Final Judgment dismissing with prejudice the Complaint of the Plaintiff against the Defendant.

The trial court denied John Deere's motion to alter, amend or vacate the judgment. This appeal followed.

John Deere contends that the trial court erred in directing a verdict in favor of the appellees. The appellant argues that the credit account that Gagel Contracting executed with McGinnis Farms, and the corresponding guaranty of Terry Gagel, Jr., survived the merger of John Deere and McGinnis Farms, and that Terry is accordingly personally liable for the default upon the Gagel Contracting account.

We begin with a general statement of our standard of review. Under CR 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). In the usual case, "[a] factual finding is not clearly erroneous if it is supported by substantial evidence." Id. However, this case involves a dismissal of the lawsuit midtrial following the presentation of the plaintiff's evidence pursuant to CR 41.02(2), the bench trial equivalent of a directed verdict under CR 50.01. CR 43.01 placed the burden and risk of non-persuasion on John Deere as to the issues upon which the trial court made findings. In a bench trial, "[w]hen the trial court makes a finding of fact adverse to the party having the burden of proof and his is the only evidence presented, the test of whether its finding is clearly erroneous is not one of support by 'substantial evidence,' but rather, one of whether the evidence adduced is so conclusive as to compel a finding in his favor as a matter of law." Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 824 (Ky. 1975).[6]

[6] We also note that "the considerations of the trial court on a motion to dismiss in a bench trial are quite different from those on a motion for a directed verdict in a jury trial. . . . The trial court does not, as in the

However, as always, an appellate court reviews legal issues de novo. Hunter v. Hunter, 127 S.W.3d 656 (Ky. App. 2003).

We first consider whether the credit account which Gagel Contracting established with McGinnis Farms survived the merger. It unquestionably did. Kentucky Revised Statutes (KRS) 273.291 provides, in relevant part, as follows:

> When a merger or consolidation has been effected:
>
> . . . .
>
> (1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.
>
> . . . .
>
> (3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under KRS 273.161 to 273.390.[7]
>
> (4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all

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case of a motion for a directed verdict [in a jury trial], indulge every inference in the plaintiff's favor." Morrison at 824.

[7] KRS 273.161 to 273.390 addresses general matters concerning corporations, none of which are directly relevant in this proceeding.

> debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.
>
> (5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation. (Emphasis added).

"[O]bviously, the facility of corporate mergers . . . provided by applicable statutes would be completely thwarted if the benefit of a merging corporation's . . . contracts were denied to the surviving corporation." All Brand Importers, Inc. v. Department of Liquor Control, 213 Conn. 184, 210-211, 567 A.2d 1156, 1170 (Conn. 1989). Based upon the foregoing, we conclude that the credit contract that Gagel Contracting executed with McGinnis Farms survived the corporate merger.[8]

[8] While not pled by John Deere, by way of dicta we note a troubling aspect to this case. Following the merger, Gagel Lawn & Landscaping commenced purchases from John Deere in connection with the golf course project. These

For substantially the same reasons as just discussed, we also conclude that Terry's Personal Guaranty survived the merger. We further note that a corporate merger does not affect the validity of a guarantee held in favor of the merging corporation. See Metro Corrugated Containers v. Owens-Illinois Glass Co., 185 F.Supp 359 (D.C.N.Y. 1960). Further, the rights of a company under a guarantee agreement survive the merger of that company with another, even though the originally-guaranteed company is not the survivor corporation of the merger. McKesson Corp. v. Farooqi, 207 A.D.2d 873 (N.Y.A.D. 1994). Based upon this, Terry Gagel, Jr.'s Personal Guaranty survived the merger and continued to back the Gagel Contracting account just as it did prior to the merger.[9]

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purchases were billed to the Gagel Contracting account and sent to the company, placing Terry on notice of the charges. The invoices identify Gagel Contracting as the debtor. According to Dormire's unrefuted testimony, except for those picked up at the John Deere facility, the invoices were sent to Gagel Contracting. For example, the billings for April 2002 were $25,134.33 and the billings for May 2002 were $25,542.16. Terry and Gagel Contracting did not object to the billings.

It is wholly inconsistent for the appellees to now deny the assignment of the McGinnis Farm account to John Deere after sitting idly by while these sums were billed to the McGinnis Contracting account without objection. "It is the general rule that a party may not keep silent when he ought to speak and allow other parties to be misled to their prejudice by his silence." Furst & Thomas v. Smith, 280 Ky. 601, 133 S.W.2d 941, 942 (Ky. 1939). As such, upon a proper pleading by the Appellant, the Appellees would have been estopped from denying that the McGinnis Farm/Gagel Contracting credit account was effectively assigned to John Deere and survived the merger. (We also note than in his August 26, 2002, letter to John Deere Terry expressed that it was his state of mind that the account had carried forward and was backed by his personal guaranty, and in response to an interrogatory propounded by the Appellant the Appellees unequivocally identified the debt as the responsibility of Gagel Contracting).

[9] We note that the personal guaranty executed by Terry would not be valid under Kentucky law because it does not contain a maximum aggregate liability

We next consider the trial court's findings of fact that "[t]he debt claimed is subsequent to the Defendant's obligation to McGinnis Farms and relates to a different account between John Deere Landscapes and Casey Gagel and Gagel Lawn & Landscape, LLC. The Defendants guaranty did not extend to this account." These findings are clearly erroneous.

The only witness to testify at trial prior to the involuntary dismissal was John Deere Store Manager Bret Dormire. Dormire steadfastly maintained that all charges for the golf course job were charged to the Gagel Contracting account. Moreover, the invoices are captioned Gagel Contracting, and the invoices were sent to Gagel Contracting's business address. And, as previously discussed, Terry Gagel's personal guarantee continued to back the Gagel Contracting account. Further, no invoices were billed to Gagel Lawn & Landscaping and no bills were sent to that entity. Contrary to the trial court's finding, Dormire testified that Casey's company, Gagel Lawn & Landscaping, did not have a "separate account" with John Deere,

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of the guarantor or a date on which the guaranty terminates. See KRS 371.065. However, the credit agreement of the parties specifies that Georgia law will apply to the parties' credit agreement. Georgia law requires only that a personal guaranty must identify the debt, the promisee, and the promisor. See Roach v. C.L. Wigington Enterprises, Inc, 539 S.E.2d 543 (Ga.App. 2000). Georgia law should be applied under these circumstances. See Wallace Hardware Co., Inc. v. Abrams 223 F.3d 382 (6th.Circ 2000) (Guaranty's choice-of-law provision, stating that it was to be "governed by and construed in accordance with" Tennessee law, was enforceable, even though debtor-retailer and guarantors were located in Kentucky and guaranty did not comply with Kentucky statute governing necessary formalities of enforceable guaranties).

and that the charges were made to Gagel Contracting's account.[10] The only evidence in the record is that John Deere charged Casey's purchases to the Gagel Contracting account as orally authorized by his father, Terry Gagel.

Based upon the foregoing, the trial court's October 21, 2004, Findings of Fact, Conclusions of Law, and Final Judgment is fatally unsound and is accordingly vacated.

Upon retrial, the trial court should apply the law as outlined herein. However, in addition, the trial court should resolve the terms of the oral agreement between the parties concerning Casey's authority to charge purchases to the Gagel Contracting account, and make specific findings concerning that issue pursuant to CR 52.01. If it is found that the parties had a valid oral agreement permitting the charges, the trial court should find Gagel Contracting and Terry Gagel liable for the debt associated with charges made by Casey to the account, except, however, any charges subsequent to Terry Gagel's August 26, 2002, letter to John Deere placing a stop on the account, would, of course not be subject to the personal guarantee. If it is determined that there was not a valid oral agreement, the

[10] Dormire did testify that as a bookkeeping matter a separate "job line" was established within the Gagel Contracting account to track charges made by Casey on the golf course project. However, this would appear to be merely in accordance with sensible accounting practices and not, as concluded by the trial court, the establishment of a "separate account."

appellees should be held not liable upon the charges to the account.

For the foregoing reasons the judgment of the Shelby Circuit Court is vacated, and the cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Elizabeth H. Turner Richard Alphin Louisville, Kentucky	No brief filed by Appellee.