NO. COA13-291
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

WRI/RALEIGH LP,
Plaintiff,

v. Wake County
No. 10 CVS 13451

TIMOTHY L. RICHARDSON d/b/a Nu Dimensions Fitness Center, Inc.,
Defendant.

Appeal by defendant and cross-appeal by plaintiff from judgment entered 17 August 2012 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 August 2013.

Williams Mullen, by Elizabeth Sims Hedrick and Gilbert C. Laite III, for plaintiff-appellee/cross-appellant.

Ewing Law Center, P.C., by Carey L. Ewing, for defendant-appellant.

MARTIN, Chief Judge.

Defendant, Timothy L. Richardson, appeals from a 17 August 2012 judgment following a bench trial finding him liable under the terms of a personal guaranty, but not personally liable on

the underlying lease contract. Plaintiff, WRI/Raleigh LP, cross-appeals from the same judgment. We affirm in part, and reverse in part.

On or about 5 February 2004, plaintiff WRI/Raleigh LP leased commercial space in the Capital Square Shopping Center in Wake County, North Carolina, for a term of seven years to "Nu Dimensions Fitness Center, Inc." Defendant Timothy L. Richardson signed the lease as "President" of "Nu Dimensions Fitness Center, Inc." However, Nu Dimensions Fitness Center, Inc. was not——and is not——a legal entity.

Richardson also signed a personal guaranty contemporaneously with the lease. Richardson negotiated to change the proposed terms of the personal guaranty from "all of the rents, additional charges, and any improvement allowance that's due at the end of the lease for the entire term of the lease" to a more limited amount that was roughly equal to twelve months' rent plus the unamortized portion of the improvement allowance.

Once the lease term began, defendant soon fell behind on the monthly lease payments. Beginning in March 2005 and continuing throughout the lease term, plaintiff sent numerous notices of default to defendant granting defendant the opportunity to cure those defaults. Defendant made payments

after each notice until a notice was given on 30 September 2009, indicating defendant was in default for partial rent due in July 2009, and for full rents due in August 2009 and September 2009. Following the 30 September 2009 notice, defendant made no additional payments. In a letter dated 8 October 2009, plaintiff terminated defendant's right to possession of the premises and soon thereafter defendant vacated the premises.

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On appeal, defendant argues that the trial court erred in interpreting the provision of the personal guaranty that limited defendant's liability and argues that the trial court's findings of fact and conclusions of law do not support the trial court's verdict. "When the trial court sits without a jury, . . . the standard of review on appeal is 'whether there was competent evidence to support [the trial court's] findings of fact and whether its conclusions of law were proper in light of such facts.'" *Chem. Realty Corp. v. Home Fed. Sav. & Loan Ass'n of Hollywood*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1988) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984)). "[F]indings of fact made by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them." *Hunt v. Hunt*,

85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987) (citing *Henderson Cnty. v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979)). "However, conclusions of law reached by the trial court are reviewable de novo." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001) (citing *Mann Contr'rs Inc. v. Flair with Goldsmith Consultants—II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999)).

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973) (citing *Bowles v. Bowles*, 237 N.C. 462, 465, 75 S.E.2d 413, 415 (1953)). "If the language of a contract 'is clear and only one reasonable interpretation exists, the courts must enforce the contract as written' and cannot, under the guise of interpretation, 'rewrite the contract or impose [terms] on the parties not bargained for and found' within the contract." *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266, 554 S.E.2d 863, 866 (2001) (alteration in original) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)), *cert. denied*, 356 N.C. 161, 568 S.E.2d 192 (2002). If the agreement is ambiguous, however, interpretation of the contract is a matter for the finder of fact. *Dockery v. Quality Plastic*

Custom Molding, Inc., 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001). Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties. *Glover v. First Union Nat'l Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993).

In this case, the language of the personal guaranty reads, in pertinent part:

> [T]he maximum liability of Guarantor hereunder shall be limited to a sum equal to (i) the total monetary obligations due under the Lease measured from the date of Tenant's default which has remained uncured, and for which demand has been made upon Guarantor, through and including the next succeeding twelve (12) calendar months plus (ii) any unamortized portion of the [construction allowance] paid to Tenant pursuant to . . . the Construction Rider . . . .

Defendant contends that his liability was strictly limited by the terms of this personal guaranty to payment of rent for the twelve months following the first notice of default in 2005, which defendant claims to have satisfied by the business's continued occupancy and rent payments through 2009. Defendant arrives at this interpretation by referencing a provision of the lease contract that provides that the landlord will not be deemed to have waived its right to remedies under the contract absent a written waiver of such remedies. Defendant surmises, without citation to authority, that this provision requires that

before a default can be considered "cured," the landlord must have notified the tenant in writing that the default was considered cured. Defendant also reads into the language of the guaranty the word "first" preceding the word "default," such that the landlord may only collect from the guarantor a sum equal to twelve months rent following the *first* uncured default, rather than twelve months of rent following *any* uncured default or the last uncured default. Defendant's interpretation would also require applying the rent payments made by defendant during its continued occupancy, instead, as credit for money due by defendant personally through his guaranty of the breached lease.

These interpretations defy both common sense and the plain language of the contract. The contract in question is not reasonably susceptible to defendant's proffered interpretation and this Court will not "'rewrite the contract or impose [terms] on the parties not bargained for and found' within the contract." *See Crider*, 147 N.C. App. at 266, 554 S.E.2d at 866 (quoting *Woods*, 295 N.C. at 506, 246 S.E.2d at 777).

Even assuming *arguendo* that the provision is ambiguous, defendant's interpretation advances a reading that the trial court, sitting as the finder of fact, did not believe was the intention of the parties. The trial court's findings of fact concerning the personal guaranty are supported by competent

evidence from plaintiff's employees about the intention of the agreement. *See Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). The trial court's conclusions of law are, in turn, supported by those findings of fact. *See id.* Therefore, defendant's arguments are overruled.

Next, we consider plaintiff/cross-appellant's contention that defendant is personally liable for the breach of the lease agreement by Nu Dimensions because it is not a legally recognized entity. Based on the trial court's findings of fact, and the following reasoning, we agree with plaintiff that defendant is personally liable for the breach of the lease agreement.

In North Carolina, an officer or director of a corporation is personally liable for contracts entered into, due to their affirmative actions or acquiescence, when they are aware that the corporation on whose behalf they claim to act is not a legally recognized corporation at the time of contracting. *Charles A. Torrence Co. v. Clary*, 121 N.C. App. 211, 213, 464 S.E.2d 502, 504 (1995) (holding that an officer of a corporation was not personally liable for a corporation's debt because he was unaware that the corporation's charter was suspended at the time the debt was incurred); *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 414, 335 S.E.2d 30, 31-

32 (1985) (noting that corporate officers have a "duty *not* to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended").

The trial court found that Nu Dimensions Fitness Center, Inc. is not a legal entity, and that defendant signed the lease as President of Nu Dimensions Fitness Center, Inc. Furthermore, defendant's trial testimony demonstrates that he knew he was signing the lease as the president of a corporation that did not exist.

> Q. Why did you sign the lease if it had an incorrect name on it?
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> A. Well, number one, because I had told them, and I figured since they had got it wrong on the letter of intent and they corrected it, that was just a minor thing they'd correct it.

As a result, defendant is personally liable for the breach of the lease because he signed the lease as the president of a corporation that he knew did not legally exist.

Affirmed in part, reversed in part.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).