[Cite as *Cheap Escape Co., Inc. v. Crystal Windows & Doors Corp.*, 2010-Ohio-5002.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93739

THE CHEAP ESCAPE COMPANY, INC.

PLAINTIFF-APPELLEE

vs.

CRYSTAL WINDOWS & DOORS CORP., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Parma Municipal Court
Case No. 08 CVF 02535

BEFORE: Blackmon, J., Gallagher, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: October 14, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Crystal Windows & Doors ("Crystal Windows") and Lydia Wu appeal the trial court's judgment that failed to find the guaranty clause of an advertising contract was unconscionable. They assign the following two errors for our review:

> **"I. The trial court erred as a matter of law in finding liability against an uncompensated surety on a contract that was unconscionable under the circumstances."**

"II. The trial court erred as a matter of law in upholding an unconscionable provision in the contract of surety requiring an uncompensated surety to pay interest on the balance due under a contract with her employer at the rate of 24% per month."

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court's decision. The apposite facts follow.

Facts

{¶ 3} Appellee, The Cheap Escape Company, Inc., d.b.a. JB Dollar Stretcher ("JB"), is an Ohio Corporation that provides a regional magazine containing the advertisements of small local businesses. Crystal Windows is an Ohio Corporation located in Parma, Ohio. Its shareholders are David Sun and Crystal Windows Systems, a New York Corporation. David Sun is the husband of appellant Lydia Wu, a.k.a. Zhen Chu Wu. Crystal Windows failed to pay for its advertising contract with JB. After collection efforts failed, JB sought payment from the guarantor of the contract, Lydia Wu. A bench trial was conducted.

{¶ 4} JB has sales representatives who solicit business from advertisers for the magazine. Barry Beck has been the JB sales representative for Crystal Windows for the past eight years. For most of that time, he dealt with David Sun when negotiating the contract. However, in 2006, David Sun told him that he was operating a new company called Sunshine Windows and that he was turning over the operation of Crystal

Windows to his wife, Lydia Wu. Although Sun was present at the contract negotiations, he instructed Beck that Wu was responsible for signing the Crystal Windows' advertising contract. According to Beck, "I spent most of my time talking with David [Sun] because David did a lot of the negotiation along with Lydia." He also stated that over the years he normally dealt with David Sun. However, "this year, and the year prior to that, both David and Lydia would be there. Lydia was there at the same time for this one."

{¶ 5} Wu admitted that she had signed the contract, but maintained she had no ownership interest in the company and was just an office clerk. She claimed that she was acting on behalf of Crystal Windows when she signed the agreement. She admitted she could read English, but stated she did not read the contract because her husband told her to sign the contract. The contract contained the following bold and underscored clause:

> **"Undersigned and Purchaser hereby states that he is authorized to sign and obligate on behalf of the company and further agrees to be held personally liable. Signing with a corporate title does not release the purchaser of the personal liability."**

{¶ 6} Pursuant to the contract, JB ran the approved advertisement in three regions for three separate magazines for a total of nine magazines. Although Crystal Windows had paid for the advertising for some of the issues,

it failed to pay for three issues and was unresponsive to collection calls. The balance due was $9,270, plus interest and late fees for a total of $15,505.90.

{¶ 7} The trial court found the guaranty was valid, enforceable, and awarded JB $15,505.90, plus interest at the rate of 24% per annum from March 13, 2009, and issued findings of fact and conclusions of law in support thereof.

Unconscionable Guaranty Clause

{¶ 8} In her first assigned error, Wu argues the guaranty clause was substantively and procedurally unconscionable; therefore, the court erred in concluding she was personally liable for Crystal Windows' debt.

{¶ 9} A determination of whether a written contract is unconscionable is an issue of law. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12; *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.* (1981), 67 Ohio St.2d 91, 98, 423 N.E.2d 151. Therefore, our review of the trial court's decision is de novo. *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.* (1980), 67 Ohio St.2d 91, 98, 423 N.E.2d 151.

{¶ 10} "Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. "Unconscionability thus embodies two separate concepts: 1)

unfair and unreasonable contract terms, i.e., 'substantive unconscionability,' and 2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., 'procedural unconscionability' * * *". Id., quoting White & Summers, Uniform Commercial Code (1988) 219, Section 4-7. The party asserting unconscionability has the burden of proving that the agreement is both substantively and procedurally unconscionable. *Taylor Bldg. Corp. of Am. v. Benfield,* 117 Ohio St.3d 353, 2008-Ohio-938, 884 N.E.2d 12, at ¶14.

{¶ 11} Substantive unconscionability concerns the actual terms of the agreement and whether the terms are unfair and unreasonable. *Collins,* supra, at 834. Contract clauses are substantively unconscionable where the "clauses involved are so one-sided as to oppress or unfairly surprise [a] party." *Neubrander v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311-312, 610 N.E.2d 1089.

{¶ 12} We conclude the clause was not substantively unconscionable. The contract was similar to other contracts entered into over the years between Crystal Windows and JB; therefore, the terms were familiar and not surprising. The evidence indicated that Wu's husband, the majority owner of Crystal Windows, had negotiated the terms of the contract, then indicated to Beck that his wife Lydia, the new person in charge of Crystal Windows, was the appropriate person to sign the contract. Wu was present during the

negotiations. According to Beck, over the years, he usually dealt only with David Sun. However, "this year, and the year prior to that, both David and Lydia would be there. Lydia was there at the same time for this one."

{¶ 13} Wu also argues that requiring her to be personally liable for the company debt was substantively unconscionable because she possessed no ownership interest in the company; therefore, she did not personally receive any consideration for agreeing to assume personal liability for the debt. As the court in *FPC Financial d.b.a. Farm Plan Corp. v. Wood*, 12th Dist. No. 2006-02-005, 2007-Ohio-1098, held:

> **"As with other contracts, a guaranty is not enforceable unless supported by sufficient consideration. *Solomon Sturges & Co. v. Bank of Circleville* (1860), 11 Ohio St.153, 168-169. In the case of a guaranty though, the benefit of the consideration need not accrue to the promisor. Restatement of Law 2d, Contracts (1981), Section 71(4). 'The performance or return promise may be given to the promisor or to some other person. * * * It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' Id."**

{¶ 14} Thus, it is not necessary that the guarantor derive any benefit from the undertaking in order to create a binding contract. The court in *FPC* went on to conclude that there was not sufficient consideration to enforce the guaranty clause in that case because evidence was produced that the contract could have been entered into even without the guaranty clause. The instant case is distinguishable. Here, the CEO of JB stated that the guaranty was

necessary because JB was extending credit to small businesses, which may not be able to pay for the contract when it becomes due. Moreover, the contract makes it impossible to accept the contract without the guaranty language because it provides one single signatory line for both. Thus, the consideration for extension of credit applied to the guaranty clause. We, therefore, conclude the clause was not substantively unconscionable.

{¶ 15} Procedural unconscionability involves the circumstances surrounding the execution of the contract between the two parties and occurs where no voluntary meeting of the minds was possible. *Collins,* at 834. In determining procedural unconscionability, a court should consider factors bearing on the relative bargaining position of the contracting parties — including age, education, intelligence, business acumen, and experience in similar transactions. *Taylor,* at ¶14.

{¶ 16} Wu contends that Beck did not explain the terms of personal liability to her and had more business experience than she. Additionally, she argues that the contract was not written in her native language.

{¶ 17} There is no evidence that Beck explained the personal guaranty contained in the contract. However, the guaranty was set out in bold print, underlined, and in capital letters. Therefore, it was easily visible in the contract. Wu contends that she failed to read the contract and merely signed the contract at her husband's behest; however, this does not alleviate her

obligation to perform under the contract. A party entering a contract has a responsibility to learn the terms of the contract prior to agreeing to its terms. The law does not require that each aspect of a contract be explained orally to a party prior to signing. *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 503, 1998-Ohio-612, 692 N.E.2d 574. "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written." *ABM Farms*, citing *Upton v. Tribilcock* (1875), 91 U.S. 45, 50, 23 L.Ed. 203. "Parties to a contract are presumed to have read and understood them and * * * a signatory is bound by a contract that he or she willingly signed." *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, at ¶10, citing *Haller v. Borror Corp.* (1990), 50 Ohio St.3d 10, 14, 552 N.E.2d 207. The contract was written in English; however, Wu testified that she was able to read English. She did not testify that she did not read the contract because she could not read or understand the language. Additionally, as the court noted, Wu was able to create a document in which she made a settlement offer to JB, regarding the debt, showing her understanding of the English language.

{¶ 18} Although Beck did have more business experience than Wu, this was not her first contract that she had signed. She had signed other

contracts for the company. Moreover, her husband negotiated the contract in her presence and according to Beck, she had been present with her husband for the negotiation of prior advertising contracts during the past year. The husband also told Beck that his wife was now in charge of Crystal Windows, which would mean she had more business experience than what she claimed she had as an office clerk.

{¶ 19} We conclude the contract was not procedurally unconscionable. Although it is concerning that Sun would allow his office manager, who is also his wife, to assume the debt for his company, because the clause was not unconscionable, the law binds Wu to the guaranty agreement. Wu's first assigned error is overruled.

Unconscionability of the 24% Contract Interest Rate

{¶ 20} In her second assigned error, Wu, without citing to any case law, argues the 24% interest rate set forth in the contract was unconscionable because of the amount and because it was in small print in the contract, making it difficult to read.

{¶ 21} Under R.C. 1343.03(A), "when money becomes due and payable upon any bond, bill, note, or other instrument of writing, * * * the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in

which case the creditor is entitled to interest at the rate provided in that contract." Thus, in order to be entitled to a rate different from the statutory rate of interest, two prerequisites must be satisfied: (1) there must be a written contract between the parties; and (2) the contract must provide a rate of interest with respect to money that becomes due and payable. *P. & W.F., Inc. v.C.S.U. Pizza, Inc.* (1993), 91 Ohio App.3d 724, 729, 633 N.E.2d 606; *Yager Materials, Inc. v. Marietta Indus. Ent., Inc.* (1996), 116 Ohio App.3d 233, 235-236, 687 N.E.2d 505; *Hobart Bros. Co. v. Welding Supply Serv., Inc.* (1985), 21 Ohio App.3d 142, 144, 486 N.E.2d 1229.

{¶ 22} In the instant case, the contract specifically provided for an interest rate of 24% per annum to be applied to past due amounts. Accordingly, the trial court did not err by applying the contract rate to the judgment. Wu also argues the interest provision was in small type making it difficult to read. Wu has maintained that she did not read the contract; therefore, the readability of the stated interest rate played no part in Wu's decision to sign the contract. Wu's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR