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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ROSALIE GARDELLA, etc.,
Plaintiff and Respondent,

v.

COLM CAMPBELL COMPANY, INC.,
Defendant and Respondent.

H037661
(Santa Clara County
Super. Ct. No. CV145659)

Rosalie Gardella, Trustee of the Rosalie P. Montalbano Living Trust dated September 18, 1990 (hereinafter "Gardella"), brought an action for damages against SAE Power, Inc. (hereinafter "SAE") for breach of a commercial lease, dated February 20, 2001, between Gardella and SAE (hereinafter "Lease" or "SAE Lease"). Gardella also sued Colm Campbell Company, Inc. (hereinafter "CC Co.") as the guarantor under a written Guaranty of Lease (sometimes hereinafter "Guaranty"). Following a jury trial, the jury returned a special verdict in favor of Gardella against both defendants. CC Co. appeals from the judgment.

Appellant CC Co. raises multiple issues on appeal, most of which concern the interpretation of the Guaranty. We affirm the judgment.

I

Procedural History

Respondent filed a complaint alleging breach of contract against SAE and CC Co. on June 24, 2009. On December 14, 2009, respondent filed a second amended complaint which alleged a breach of written contract, namely the February 20, 2001 Lease between Gardella and SAE as extended by agreement. It alleged that Gardella and CC Co. entered into a Guaranty of Lease with respect to that lease, which was attached to that complaint and incorporated by reference.

Appellant CC Co. and SAE brought a motion in limine to exclude any evidence of appellant CC Co.'s liability on the grounds that the Guaranty did not guarantee the SAE Lease. Appellant argued that the Guaranty was defective because it referred to a lease with CC Co. that did not exist, it failed to identify the guarantor, and it was undated. Appellant asserted that, since Gardella had not "put the imperfection in the claimed guaranty agreement into issue by her pleadings, [Gardella could not] now resort to extrinsic evidence to rewrite the terms of the claimed agreement. [Fn. omitted.]" The company maintained that evidence of its liability was irrelevant and inadmissible and unduly prejudicial. (See Evid. Code, §§ 210, 350, 352.)

Appellant CC Co. and SAE brought a separate motion in limine to exclude evidence of the Guaranty and to preclude all evidence and argument related to the Guaranty based on the same reasons presented in its related pretrial motion.

At the hearing on the motions, appellant essentially argued that the Guaranty was unambiguous and it was irrelevant because it was a personal guarantee by Colm Campbell, guaranteeing "a lease that doesn't exist." Although the trial court's tentative decision indicated that it would rule in favor of appellant, the trial court ultimately determined that evidence of the Guaranty would be admitted. It indicated that it believed

that the agreement was ambiguous on its face since the name of the guarantor was missing and ruled that extrinsic evidence regarding the parties' intent would be admitted.

During trial, appellant's counsel asked the trial court to reconsider the motions in limine because evidence had been adduced that the Guaranty had misidentified CC Co. as the lessee, the mistake was a drafting error, and reformation of the Guaranty was barred by the statute of limitations.¹ The court denied the request, stating: "I think I'm permitted to look at the entire transaction as a whole. You have got the lease bearing the date February 20, identifying the lessee as SAE Power, identifying the guarantor as Colm Campbell Company, Inc. And then you have got an associated document that is a guarantee, and it was an error, no question about it, by putting the name of the guarantor where the lessee ought to be. But I think because that guarantee makes reference to the other lease, the February 20th lease, that in order to properly interpret the guarantee, you have to look at the contract."

Following trial, the jury made findings by special verdict. With respect to the breach of contract action against SAE, the jury found that SAE had breached the Lease, Gardella had been damaged by the breach, and none of the damages could have been reasonably avoided by Gardella. With respect to CC Co.'s liability, the jury found that CC Co. had entered into a guaranty agreement that guaranteed the SAE Lease, CC Co. breached the Guaranty, Gardella was damaged by the breach, and none of the damages

¹ Civil Code 3399 provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." An action for relief on the ground of mistake must be brought within three years. (Code Civ. Proc., § 338, subd. (d).) "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the . . . mistake." (*Ibid.*)

could have been reasonably avoided by Gardella. The jury found that Gardella had suffered property damage totaling \$23,599 and late rent fees of \$21,151, as the result of the breaches.²

The trial court entered judgment in favor of Gardella. It awarded \$23,599 in property damages and \$2,130 in late charges against SAE pursuant to the parties' stipulation that the recovery of late charges incurred prior to June 25, 2005 from SAE was barred by the statute of limitations. It awarded \$44,750, the full amount of damages, against CC Co.

CC Co. filed a notice of appeal.

II

Evidence Related to Guaranty

On appeal, there is no challenge to the damage amounts determined by the jury. The principal issues are whether the Guaranty of Lease was a guaranty of the SAE lease and enforceable against CC Co. Accordingly, our evidentiary recitation is limited to the evidence pertaining to those questions.

The Lease and Guaranty were admitted into evidence. The Lease was a preprinted form, denominated "Standard Industrial/Commercial Single-Tenant Lease--Net." The Lease, dated February 20, 2001, was between Gardella and SAE (the lessor and lessee, respectively) for premises, consisting of the real property and freestanding industrial building, excluding the four residential units at the rear of the property, commonly known as 820 Comstock Street, Santa Clara, California. Section 1.11 provided: "Guarantor. The obligations of the Lessee are to be guaranteed by Colm Campbell Company, Inc. ('Guarantor')." Section 37.2 stated in part: "It shall constitute a Default of the Lessee if

² The damages consisted of the following: \$13,682 for exterior metal panels, \$6,000 for irrigation, \$2,304 for roll-up door, \$1,063 for door locking hardware, \$550 for window, and \$21,151 for late rent charges.

any Guarantor fails or refuses, upon request to provide: (a) evidence of the execution of the guaranty, including the authority of the party signing on Guarantor's behalf to obligate Guarantor, . . . [or] (b) current financial statements"

The Lease provided regarding late charges that "if any Rent shall not be received by Lessor within five (5) days after such amount shall be due, then, without any requirement for notice to Lessee, Lessee shall pay to Lessor a one-time late charge equal to ten percent (10%) of each such overdue amount." It required lessee SAE to surrender the premises by the expiration date "with all of the improvements, parts and surfaces thereof broom clean and free of debris, and in good operating order, condition and state of repair, ordinary wear and tear excepted."

The Lease appears on its face to have been signed by Bruce Fitzpatrick in his representative capacity as SAE's Chief Financial Officer (CFO) on February 26, 2001. The lease appears on its face to have been signed by Rosalie Gardella in her trustee capacity on February 28, 2001.

The preprinted Guaranty of Lease, as completed, stated in part: "WHEREAS, [Gardella], hereinafter 'Lessor', and Colm Campbell Company, Inc., hereinafter 'Lessee', are about to execute a document entitled 'Lease' dated February 20, 2001 concerning the premises commonly known as 820 Comstock Street, Santa Clara wherein Lessor will lease the premises to Lessee, and [¶] WHEREAS, _____, hereinafter 'Guarantors' have a financial interest in Lessee, and [¶] WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to the Lessor this Guarantee of Lease, [¶] NOW THEREFORE, in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease, Guarantors hereby . . . unconditionally and irrevocably guarantee the prompt payment by Lessee of all rents and other sums payable by Lessee under said Lease" The space in which to identify the

guarantor was left blank in the recital and the guarantor was not expressly named elsewhere.

The Guaranty provided that the Lease could be modified by agreement between the Lessor and Lessee and the Guaranty shall guarantee the performance of the Lease as modified. It stated that the "Guarantors hereby waive . . . all right to assert or plead any statute of limitation relating to this Guaranty or the Lease"

The Guaranty is undated and appears to bear Colm Campbell's signature, without any corporate title, on a line above the preprinted word "Guarantors."

Colm Campbell testified that he was the president of SAE and he had been its president since 1990. SAE manufactures and sells filters. The filters are manufactured in China and distributed in the U.S. Campbell testified that he bought SAE in 1994.

CC Co. was started in 1994. Campbell was also the president of CC Co. and had been since 1994. CC Co. was merely a holding company that was started for reasons of consolidation and U.S. taxes. CC Co. held SAE as well as another company, Colm Campbell, Inc. ("CCI"). It had no other subsidiaries. Campbell had been the president of CCI since 1997.

Campbell testified that Bruce Fitzpatrick had served as the CFO of CC Co. and SAE. Fitzpatrick left the company around June 2001 and someone else then filled the CFO position.

Campbell acknowledged that the SAE Lease was for the lease of property located at 820 Comstock Street in Santa Clara. He recognized the signature on the Lease as belonging to Fitzpatrick, SAE's CFO. Campbell, as SAE's president, first became aware that SAE was attempting to negotiate the lease in early February. Fitzpatrick had the authority to negotiate and execute the lease on behalf of SAE. Campbell believed that the Lease Agreement was completed on February 26 or 27, when he was out of the country.

Campbell had agreed to sign the Guaranty before the SAE lease was completed. He subsequently learned that a lease agreement had been executed.

At the time the SAE Lease was executed, SAE was represented by the real estate brokerage firm of Renault & Handley. Campbell did not review the Lease because he knew its terms and was comfortable with Fitzpatrick handling it. Campbell acknowledged that paragraph 1.11 of the lease requires SAE's obligations as lessee to be guaranteed by CC Co.

Campbell acknowledged that Gardella's agent contacted him to provide a guaranty. He recalled that an earlier draft of the guaranty, dated February 16, which he had received from Gardella's real estate agent, identified the lessee as "Colm Campbell Industries." Campbell asked Fitzpatrick to have the name corrected because it was "obviously wrong." Campbell testified that he recalled telling Fitzpatrick that he "would sign a personal guarantee for Colm Campbell Company, Inc. if [he] had to."

Campbell admitted that the signature on the Guaranty of Lease was his. Campbell agreed that the Guaranty refers to a lease dated February 20, 2001 for property at 820 Comstock Street in Santa Clara between Gardella as lessor and CC Co. as the lessee. In 2001, SAE's offices were on Comstock Avenue.

Campbell stated that the guaranty was sent to him and he signed it as an individual, believing that he was signing a personal guaranty on behalf of CC Co. He believed that the guaranteed lease was a CC Co. lease. He claimed that when he signed the Guaranty Agreement, "it was not related in any way to an SAE lease." At one point Campbell testified that he thought the property on Comstock was going to be leased to CC Co. Campbell indicated that, in his capacity as president of CC Co., he never provided Gardella with a guaranty of the SAE Lease because he was never asked to do so.

Although Campbell could not recall the date he signed the Guaranty, he believed that the earliest that he could have signed it was "probably around March 3" because he was traveling. The SAE lease was already signed. Plaintiff's counsel recited Campbell's deposition testimony in which he conceded that he was aware when he signed the Guaranty that the guaranteed lease was "[i]n a sense" a lease to SAE because "SAE was basically responsible for paying and did pay the lease." Counsel then inquired at trial, "So you knew, Mr. Campbell, when you signed this guarantee that it was a guarantee for the SAE Power lease, didn't you?" Campbell responded, "That's not correct." Campbell said that, when he saw that the Guaranty identified the lessee as CC Co., he believed that SAE could operate under the described lease.

Campbell acknowledged that he signed, on behalf of SAE, three options to extend the SAE Lease. The first option, dated May 15, 2002, extended the Lease from October 1, 2002 through March 30, 2004. The second option, dated February 16, 2004, extended the Lease from April 1, 2004 through September 30, 2005. The third option, dated June 1, 2005, extended the Lease from October 1, 2005 through September 30, 2006.

Campbell indicated that he had never looked at the SAE Lease or its provision requiring CC Co. to be the guarantor before signing the Guaranty or the extensions of the SAE lease. He thought the first time he actually saw the SAE Lease might have been during a deposition.

Michael Thompson testified that he was a licensed realtor and a real estate broker with Cushman & Wakefield. He was hired by Gardella as the listing broker to find a tenant for the property located at 820 Comstock Street in Santa Clara. Broker Geordie McKee of Renault & Handley procured the tenant, SAE. After about two weeks of negotiations, the parties signed the Lease. Thompson had filled in the blanks of the

Lease. McKee had informed Thompson that CC Co. would guarantee the lease. McKee had never informed Thompson that the lease was supposed to be with CC Co. or CCI.

Thompson, who was acting on behalf of Gardella, prepared and provided the Guaranty. He filled in the blanks. Thompson indicated that he made a mistake in identifying the lessee as CC Co., and the Guaranty of Lease should have identified SAE as the lessee.

Thompson never directly spoke to or communicated with Campbell and he was not present when the Guaranty was signed. After it was signed, it was delivered to Thompson. Thompson was satisfied that it was a guaranty from CC Co. He was never informed by anyone from SAE or CC Co., Campbell, or McKee that it was not a guaranty from CC Co.

Thompson informed Gardella that he had the guaranty required by the Lease. Thompson did not notice that the Guaranty was undated, it named CC Co. instead of SAE as the lessee, and the name of the guarantor was missing in its recital.

At the time of trial, McKee was a licensed real estate broker with Renault & Handley. McKee testified that, in 2001, he was a real estate agent with that company. McKee represented SAE in one or two lease transactions, including the lease for the property located at 820 Comstock Street in Santa Clara. McKee had met Campbell a couple of times but not with regard to the SAE lease. With respect to the SAE Lease, McKee had dealt primarily with Campbell's son. Campbell had not told McKee that he intended to provide a guaranty of the Lease in his personal capacity.

McKee could not recall seeing a guaranty satisfying the lease's condition requiring a guaranty from CC Co. The file on the Comstock property maintained by Renault & Handley did not contain the Guaranty. The file did contain a credit report provided by CC Co.

Rosalie Gardella testified that she was the trustee for the Rosalie Montalbano Trust, which benefitted her mother. The Trust had owned the property located at 820 Comstock Street in Santa Clara since 1990. A commercial building, which was constructed in 1998, occupied about three-quarters of the site and four very small residential studio units were located at the back of the property.

Gardella hired "Cushman & Wakefield, Michael Thompson" to list the Comstock property after the original commercial tenant, which was there for about three years, left. When Gardella signed the Lease on February 28, 2001, Bruce Fitzpatrick had already signed it. Gardella had not spoken with Fitzpatrick or his realtor. Three extensions of the Lease were signed by Campbell, SAE's president, but, at the time of their execution, Campbell had not informed Gardella that the Guaranty was not signed by him on behalf of CC Co. No one from SAE had ever informed her that she did not have a Guaranty of Lease from CC Co.

It was very important to Gardella to have the Guaranty from CC Co. because she had received information from Fitzpatrick, through his realtor, that SAE's parent company was CC Co. It was her understanding at the time she entered the lease that Fitzpatrick was the CFO of both SAE and CC Co. Gardella had requested a guaranty from CC Co. as a condition of her acceptance of the Lease. A credit report on CC Co., not SAE, was provided and she received the information from Cushman & Wakefield. She relied on that credit report, which disclosed CC Co.'s assets, in entering into the SAE Lease. She had no information on Campbell's assets at the time she entered into the Lease. She had no reason to believe that the Guaranty of Lease that she received was not from CC Co. Fitzpatrick did not inform her that the Guaranty was not from CC Co. and Campbell never contacted her to let her know that he had signed a personal guaranty as an individual.

When Gardella looked at the Guaranty, which she received sometime prior to SAE taking occupancy, she noted the signature but Gardella did not notice the lease was misdescribed. To her, it looked like the guaranty that she was promised by SAE when their contract was signed.

Campbell testified that, on February 16, 2001, the day before he left for Hong Kong, he had signed another guaranty, guaranteeing a lease between a different lessor and SAE, on behalf of CC Co. which was the guarantor. In that instance, he had not indicated he was signing in his representative capacity. Campbell had also signed that lease but he had not identified himself as SAE's president.

III

Discussion

A. Admission of the Guaranty of Lease and Extrinsic Evidence to Interpret It

Appellant CC Co. argues that, in ruling on its motions in limine, the trial court committed reversible error by failing to exclude the Guaranty of Lease and evidence of liability. It maintains that "[c]ontract interpretation is a matter of law to be independently reviewed by this Court." It argues that, "[g]iven its clear and explicit terms, the Guaranty could only be admitted into evidence if the trial court found its terms to be ambiguous or in need of reformation due to a unilateral mistake of the drafter." It asserts that this court must independently construe the Guaranty because "no competent parol evidence" was introduced or there was "no conflict in the competent parol evidence submitted" It further contends that "[s]ince Gardella refused to seek reformation of the Guaranty, as a matter of law, its terms must be interpreted without regard to extrinsic evidence."

1. General Legal Principles

"The parol evidence rule is codified in Civil Code section 1625 and Code of Civil Procedure section 1856. (See *Marani v. Jackson* (1986) 183 Cal.App.3d 695, 701 . . . (*Marani*)). It 'generally prohibits the introduction of any extrinsic evidence, whether

oral or written, to vary, alter or add to the terms of an integrated written instrument.'

(Alling v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 1433 . . . (Alling).)

The rule does not, however, prohibit the introduction of extrinsic evidence 'to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.' (*BMW of North America, Inc. v. New Motor Vehicle Bd. (1984) 162 Cal.App.3d 980, 990, fn. 4 . . . (BMW).*)" (*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 343.*) Subdivision (g) of the Code of Civil Procedure section 1856 states: "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement"

"[The parol evidence rule] provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing. (*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 343*) 'An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.' (Rest.2d Contracts, § 209, subd. (1); see *Alling v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 1433*)" (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n (2013) 55 Cal.4th 1169, 1174.*)

Accordingly, "[w]hen the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms. [Citations.] When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing. [Citations.]" (*Masterson v. Sine (1968) 68 Cal.2d 222, 225.*)

"Unlike traditional rules of evidence, the parol evidence rule 'does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is

simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the "integration"), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.' (*Estate of Gaines, supra*, 15 Cal.2d at pp. 264-265) Thus, '[u]nder [the] rule[,] the act of executing a written contract . . . *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' (*BMW, supra*, 162 Cal.App.3d at p. 990 . . . , italics added.) And '[e]xtrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. [Citation.]' (*Ibid.*) 'Such evidence is legally irrelevant and cannot support a judgment.' (*Marani, supra*, 183 Cal.App.3d at p. 701)" (*Casa Herrera, Inc. v. Beydoun, supra*, 32 Cal.4th at p. 344.)

"In this state, . . . the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used." (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38 ("*Pacific Gas*"), fn. omitted.) "Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose." (*Id.* at p. 39.)

In 1968, the *Pacific Gas* case made clear that the traditional rule that parol evidence is inadmissible to contradict the "plain meaning" of an integrated agreement does not apply in California. "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] [¶] A rule

that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (*Pacific Gas, supra*, 69 Cal.2d at p. 37.)

Thus, "[a]n ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40 . . . ; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 . . .)" (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360.) "In order to determine initially whether the terms of *any written instrument* are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous." (*Estate of Russell* (1968) 69 Cal.2d 200, 208-209.)

"As California courts previously have observed, the 'meaning of language is to be found in its applications. An indeterminacy in the application of language signals its vagueness or ambiguity. An ambiguity arises when language is reasonably susceptible of more than one application to material facts. There cannot be an ambiguity per se, i.e., an ambiguity unrelated to an application.' [Citations.]" (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391; see Rest.2d Contracts, § 212, com. b. ["It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. . . . Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties"].)

"[R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. [Citations.] Such evidence includes testimony as to the 'circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . .' so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.' [Citations.] If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is 'fairly susceptible of either one of the two interpretations contended for . . .[.]' [citations], extrinsic evidence relevant to prove either of such meanings is admissible." (*Pacific Gas, supra*, 69 Cal.2d at pp. 39-40, fns. omitted.)

"Accordingly, '[e]ven if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.' (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 . . .)" (*Dore v. Arnold Worldwide, Inc., supra*, 39 Cal.4th at p. 391.) "Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

2. Trial Court's Refusal to Exclude Guaranty and Extrinsic Evidence

Appellant CC Co. misunderstands the parole evidence rule and role of courts in California.

"It is . . . solely a judicial function to interpret a written instrument *unless the interpretation turns upon the credibility of extrinsic evidence.*" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, italics added.) When conflicting inferences arise from conflicting evidence, the interpretation of a written instrument is no longer a pure question of law to be resolved by the reviewing court. (See *id.* at p. 866, fn. 2.)

In this case, the Guaranty indicated that the guaranteed lease was between Gardella and CC Co., dated February 20, 2001, concerning the premises known as 820 Comstock Street in Santa Clara. No actual lease matched the Guaranty's description. But there was a lease, so dated, for those premises between Gardella and CC Co.'s subsidiary, SAE. In addition, the Guaranty's recital left out the name of the guarantor and the Guaranty did not disclose the capacity in which Campbell had signed the document.

The fact that the Guaranty contains a partially correct description of an existing lease and no lease exactly corresponds to the lease described is similar to a circumstance that sometimes arises with respect to a will where no person or thing exactly answers the will's description of a subject or object of a gift and extrinsic evidence is admissible to both establish and resolve the latent ambiguity. (See *In re Estate of Russell* (1968) 69 Cal.2d 200, 206-207; *Estate of Donnellan* (1912) 164 Cal. 14, 20; see also Code Civ. Proc., § 1856, subd. (h).) In any event, extrinsic evidence was admissible to establish and resolve the two, related latent ambiguities in this case, namely (1) whether the lease guaranteed was the SAE lease (cf. *Royal Banks of Missouri v. Fridkin* (1991) 819 S.W.2d 359, 362 [latent ambiguity existed where no promissory note exactly matched description in guaranty of note but there was evidence of a promissory note that fit guaranty's description "in all respects except for principal amount"]) and (2) whether Campbell signed the Guaranty in his personal or representative capacity (cf. *Coughlin v. Blair* (1953) 41 Cal.2d 587, 595 [extrinsic evidence admissible to resolve whether individual who signed real estate contract was personally liable or had signed only as agent of owner]; *Koenig v. Steinbach* (1931) 119 Cal.App. 425, 427-428 [parol evidence admissible to resolve whether individual signed guaranty of note in personal or trustee capacity].)

At trial, there was conflicting evidence from which conflicting inferences might be drawn concerning the meaning of the Guaranty. Campbell indicated that his intent in

signing the Guaranty of Lease was circumscribed by its explicit terms, which specifies that the lessee was CC Co. rather than SAE, and he believed he was personally guaranteeing a lease between Gardella and CC Co. Respondent presented evidence of the surrounding circumstances, including but not limited to the execution of the SAE Lease, which required a guaranty of lease to be executed by CC Co. guaranteeing SAE's obligations under the Lease.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.) "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret." (Code Civ. Proc., § 1860.) The "literal language of a contract does not control if it leads to absurdity (Civ. Code, § 1638) or if it is wholly inconsistent with the main intention of the parties (Civ. Code, § 1653)." (*SDC/Pullman Partners v. Tolo Inc.* (1997) 60 Cal.App.4th 37, 46.)

"When a guaranty agreement incorporates another contract, the two documents are read together and "[c]onstrued fairly and reasonably as a whole according to the intention of the parties." [Citations.]' (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 39-40) In other words, when a party undertakes to guarantee the faithful performance of another contract, the guarantor is contracting in reference to the other contract; 'otherwise it would not know what obligation it was assuming.' (*Boys Club of San Fernando Valley, Inc. v. Fidelity Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1272)" (*Central Bldg., LLC v. Cooper* (2005) 127 Cal.App.4th 1053, 1058-1059; *First Nat. Bank of Redondo v. Spalding* (1918) 177 Cal. 217, 221-222 ["The

guaranty should not be construed separately from the notes but the instruments should be read together in the light of surrounding circumstances so that the true intention of the parties may be ascertained"].)

The trial court properly admitted the Guaranty and conflicting extrinsic evidence relevant to resolving its latent ambiguities and submitted the issue of interpretation to the jury. (See *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291.) "Juries are not prohibited from interpreting contracts. . . . [W]hen, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 289 . . . ['since the interpretation of the crucial provisions turned on the credibility of expert testimony, the court did not err in submitting the construction of the contract to the jury'])." (*City of Hope Nat. Medical Center v. Genentech, Inc.*, *supra*, 43 Cal.4th at p. 395, fn. omitted.) "This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. [Citations.] California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314; Com. to BAJI No. 10.75 (9th ed.2002) p. 407), as do authoritative secondary sources (11 Williston on Contracts (4th ed.2006) § 30:7, pp. 87–91; Rest.2d Contracts, § 212, subd. (2), p. 125)." (*Ibid.*)

"[T]he established rule [is] that if the construction of a document turns on the resolution of conflicting extrinsic evidence, the [trier of fact's] interpretation will be followed if supported by substantial evidence. [Citation.] In light of this rule, defendants, in order to overturn the [trier of fact's] interpretation, must demonstrate either that the extrinsic evidence on which the [trier of fact] relied conflicts with any

interpretation to which the instrument is reasonably susceptible (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d 33, 40) or that such evidence does not provide substantial support for the [trier of fact's] interpretation." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 340; see *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847.) Appellant has shown neither.

To the extent that appellant may be arguing that the trial court erred in concluding before trial that the Guaranty had a patent ambiguity or otherwise erred in ruling on the limine motions concerning exclusion of the Guaranty and extrinsic evidence, we find no cause for reversal. "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below. [Citations.]" (*People v. Brown* (2004) 33 Cal.4th 892, 901.) "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

3. *Gardella's Failure to Seek Reformation of Guaranty*

Appellant CC Co. maintains that, since Gardella did not seek reformation of the Guaranty, the law requires its terms to be interpreted without regard to extrinsic evidence. This is not a correct statement of the law.

Reformation was not the remedy sought by plaintiff Gardella. The pleading's failure to put at issue a mistake or imperfection in the Guaranty (see Code Civ. Proc., § 1856, subd. (e)) did not prevent it from being construed. (Cf. *Decter v. Stevenson Properties* (1952) 39 Cal.2d 407, 418, see *id.* at p. 415 [in action for declaratory relief, court rejected argument that plaintiffs, "having failed to plead ambiguity as the basis for reformation of the contracts, are bound by the language of the lease"].) Insofar as

appellant may be arguing that the Guaranty of Lease could not be reformed under the guise of resolving an ambiguity, we agree. But that is not what occurred.

"No petition for reformation is necessary when the writing, as interpreted in the light of surrounding circumstances, preliminary negotiations, and course of dealing, is found by the court to express exactly what the plaintiff asserts the two parties in fact agreed upon. Obvious mistakes of grammar, punctuation, terminology, description, or specification that can be corrected by the usual processes of interpretation require no reformation. The document as a whole expresses what was in fact intended and agreed upon by the parties, even though that intended meaning cannot be understood by the court or other third persons from an examination of the writing alone without the aid of extrinsic evidence." (7 Corbin on Contracts (2002 ed.) § 28.45, p. 316; see 11A Cal.Jur.3d (2007 ed.) Cancellation and Reformation, § 106, p. 157 ["in many situations, reformation is not necessary because the true intention can be ascertained and enforced under established rules of construction or interpretation"].) As Restatement Second of Contracts has recognized: "In some instances where it might appear that both parties are mistaken with respect to the reduction to writing of a prior agreement, interpretation of the writing will show that the mistake is only apparent and not real. . . . In a borderline case a court may avoid the necessity of reforming the writing by viewing the issue as one of interpretation." (Rest.2d Contracts, § 155, com. b.)

In this case, we have concluded that the jury could properly construe the Guaranty after resolving the conflicts in the extrinsic evidence.

B. Consideration

Appellant argues that the Guaranty is unenforceable because respondent offered no evidence of additional consideration and no proof of the date on which the Guaranty was signed. We find no basis for reversal.

Proof of the date of execution is not an essential element of a contract. (See Civ. Code, § 1550.) Consideration is a requisite element. (*Ibid.*)

Although ordinarily "a suretyship obligation must be in writing, and signed by the surety," "the writing need not express a consideration." (Civ. Code, § 2793; see Civ. Code, § 2787 [distinction between sureties and guarantors abolished].) Further, "[a] written instrument is presumptive evidence of a consideration." (Civ. Code, § 1614.) "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." (Civ. Code, § 1615.) An alleged guarantor, "as the party seeking to avoid enforcement of the guaranty, has the burden of proving his affirmative defense of want of consideration. [Citations.]" (*Niederer v. Ferreira* (1983) 150 Cal.App.3d 219, 224, but see *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 ["presumption of consideration under [Civil Code] section 1614 affects the burden of producing evidence and not the burden of proof"].)³

"[I]f the contract of guaranty was executed *as a part of the lease transaction* the consideration for the lease furnished consideration for the contract of guaranty. [Citations.]" (*Miller v. Smith* (1960) 179 Cal.App.2d 114, 116; see Civ. Code, §§ 2792 ["Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that

³ " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) " 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (Evid. Code, § 604.)

obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation"]; 2787.) Where a guarantee agreement "was requested and given orally, contemporaneously with the agreement to lease, the proviso although unenforceable as the promise to answer for the debt of another, until reduced to writing, was given for a consideration which in turn supports the subsequently executed written agreement. [Citations.]" (*Challenge-Cook Bros., Inc. v. Lantz* (1967) 256 Cal.App.2d 536, 540.) On the other hand, a "contract of guaranty, not having been entered into concurrently with the original obligation, requires a consideration to support it." (*Estate of Thomson* (1913) 165 Cal. 290, 296; see Civ. Code, §§ 2787, 2792; see *Rusk v. Johnston* (1937) 18 Cal.App.2d 408, 409 [judgment affirmed where substantial evidence showed that "guaranty was not requested nor given until after the note was executed and the consideration for the note passed"].)

In this case, Campbell, SAE's president, was aware in early February that SAE was attempting to negotiate a lease for the premises located at 820 Comstock Street in Santa Clara. Fitzpatrick had the authority to negotiate and execute a lease on behalf of SAE. Campbell knew the terms of the lease. Campbell had agreed to sign the Guaranty before the SAE lease was completed. Fitzpatrick, who was the CFO of both CC Co. and SAE, signed the SAE Lease, which required a guaranty of the lease from CC Co. Even if the written Guaranty was signed subsequent to the execution of the Lease, there is evidence indicating that CC Co. had agreed to the Guaranty as part of the lease transaction and the consideration for the Lease furnished consideration for the Guaranty.

Furthermore, a defendant must assert the affirmative defense of lack of consideration in the answer to a complaint for breach of a contract, otherwise the defense is not available. (See *Elster's Sales v. Longo* (1970) 4 Cal.App.3d 216, 221-222; *California Standard Finance Corp. v. J.D. Millar Realty Co.* (1931) 118 Cal.App. 185,

190-191; *Kruce v. Parlier Winery* (1930) 208 Cal. 723, 725.) The record on appeal does not establish that appellant pleaded that affirmative defense.

C. Jury Instruction

Appellant requested a special jury instruction regarding the reformation of the Guaranty based on Gardella's unilateral mistake and its claim that the lawsuit was untimely filed. The proposed instruction stated in part: "The Trust seeks to reform terms of the guaranty agreement" Appellant argues that the trial court improperly refused to instruct the jury on mistake.

This action was not a proceeding for reformation of the Guaranty to remedy a mistake.⁴ The three-year statute of limitations for reformation based on mistake had no application here. (See fn. 1, *ante*.) The trial court properly refused to give appellant's proposed special jury instruction.

DISPOSITION

The judgment is affirmed.

⁴ There is no right to a jury trial on an action for reformation of a contract. (*Loftus v. Fischer* (1896) 113 Cal. 286, 288; see *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9 [parties are not entitled to a jury trial if the action is equitable in nature].)

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.