Circuit Court for Montgomery County
Case No. 402204V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2648

September Term, 2015

USA REAL ESTATE-2, LLC

v.

STEVEN CARTER, et al.

Berger,
*Krauser,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: January 12, 2018

*Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

The principal issue before us is the enforceability of a personal guaranty of payments due, under a lease agreement, after the term of that lease was extended, by the landlord and tenant, without the knowledge and approval of the lease's guarantors.

This issue arose when USA Real Estate-2, LLC, appellant, brought an action alleging breach of lease and of the personal guaranty supporting that lease, in the Circuit Court for Montgomery County, against its tenant, Faithful and True Christian Center, Inc. ("F&T") and the guarantors of the lease. The lease was signed, on behalf of F&T, by its president and pastor, Anthony T. Harrison. And the guaranty of the lease was signed by the pastor and his wife, Monica Harrison, and by six members of the church: Steven J. Carter and Cindy Carter, Jeffrey S. Walker and Jacquelyn V. Walker, Joey N. Jones and Kinta Jones.

The suit sought, from F&T and its lease guarantors, payment of rent, fees, costs, and expenses due under an amendment to the lease, extending the term of the lease an additional three years, which was entered into by the pastor and USA Real Estate, without either notice to or the consent of the six members of the church, who together with the pastor and his wife had signed the lease guaranty. Shortly after this action was filed, the pastor and his wife sought and obtained a discharge in bankruptcy, leaving their six congregants on the hook for those debts. A bench trial then ensued against the remaining guarantors (hereinafter "the appellee guarantors"), at the conclusion of which, the Montgomery County circuit court held that, because the appellee guarantors had not received any prior notice of the lease extension nor had ever consented to it and because neither the lease nor

the guaranty provides such notice or their consent, they were not responsible for any payments due under that extension.

Appealing that decision, USA Real Estate contends that the circuit erred in so ruling because: first, the guaranty provided that "modifications" to the lease could be made "without releasing Guarantor from its obligations hereunder or limiting or impairing its liability" and that a lease extension was a "modification"; second, the guaranty was a "continuing guaranty"; and, third, "the lease expressly contemplated a lease term extending beyond the original five [] years . . . by the tenant holding over beyond the term as a month-to-month tenant . . ."

Because we find none of these contentions persuasive, we affirm the judgment of the circuit court in favor of the appellee guarantors.

Background

Faithful and True Christian Center, Inc., ("F&T") entered into a lease agreement with USA Real Estate, in which it leased space in one of USA's commercial buildings for church activities. The lease was for a period of five years, beginning on September 1, 2007, and ending on August 31, 2012. At the time the lease was executed, a personal guaranty of that lease, which was drafted by USA Real Estate, was signed by the church's pastor and president, Anthony T. Harrison, and his wife, as well as the appellee guarantors, each of whom was a member of, and had a "leadership" role in, the church: Steven J. Carter and Cindy Carter and Jeffrey S. Walker and Jacquelyn V. Walker were deacons of the church; Joey N. Jones and Kinta Jones were members of the F&T's "Board," and Mr. Jones was

also the church's acting treasurer. The guaranty was accepted by USA Real Estate only after it had requested and reviewed the federal and state tax returns of the appellee guarantors.

None of the appellee guarantors had any "financial interest" in F&T other than a "charitable contribution of ten percent of income" that they made.[1] That is to say, none of the appellees had, in the words of the circuit court, "stock, employment, or ownership interest of any kind" in the church, "nor were any [of them] officers or employers of the corporation." Nor were any of them, observed the circuit court, "commercially sophisticated."

In any event, four years later, in 2011, the pastor, seeking "a reduction in future rental amounts" as a result of F&T's "financial problems and issues," entered into, without the prior knowledge and consent of the appellee guarantors, a lease extension amendment with USA Real Estate, lowering the monthly rental payment due and extending the term of the lease an additional three years. As, on that occasion, unlike what had occurred when the guaranty was executed, no financial information was requested by USA Real Estate from the appellee guarantors, they had not even a hint, let alone notice, of what was transpiring. And, if they had been informed, "none," the circuit court found, "would have executed an extension of the Personal Guaranty or entered into a new Personal Guaranty Agreement had such been presented . . . ."

[1] It is unclear whether these charitable contributions of the appellee guarantors were annual contributions.

Unfortunately, three years after the execution of the lease extension amendment at issue, F&T was unable to pay the reduced rent and other sums due under that extension amendment because of its worsening financial problems. Consequently, F&T and USA Real Estate agreed that F&T would vacate the property on December 31, 2014, more than two years into the term of the lease extension and only eight months before it was due to expire.

Proceeding Below

As noted earlier, after F&T vacated the leased space, USA Real Estate brought an action for breach of the lease and of the personal guaranty supporting that lease, in the Circuit Court for Montgomery County, against F&T, as well as Pastor Harrison and his wife, and the appellee guarantors. In that complaint, USA Real Estate sought "an amount to exceed $75,000," from F&T, for breach of the lease, and $65,489.43 "plus costs and expenses . . . as allowed under the Guaranty," from the guarantors, for breach of the guaranty.[2]

Upon being served with that complaint, the appellee guarantors first learned of the lease extension amendment. Then, following service of those complaints, USA Real Estate's claims against Pastor Harrison and his wife were dismissed as they were

[2] The discrepancy in the amount of damages sought from F&T and those sought from the guarantors appears to have been a reflection of the fact that the guaranty only bound the guarantors to pay "Rent due for the twelve (12) month period immediately following any Event of Default . . . ."

"discharged in bankruptcy," leaving only the appellee guarantors as defendants in the suit below.

At the conclusion of a bench trial of this matter, the circuit court held that neither the lease nor the guaranty "expressly or implicitly" provide appellees' "consent to a Lease extension or Amendment without prior notice or consent," nor was such prior notice or consent "sought [or] obtained." Accordingly, the court held that appellees were not responsible for rent or for any other monetary obligation due under the lease extension amendment.

Standard of Review

Because the trial below was a bench trial, our review of the trial court's decision is governed by Maryland Rule 8-131, which provides that this Court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." In determining whether the findings of the circuit court were "clearly erroneous," we "must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *Ryan v. Thurston*, 276 Md. 390, 392 (1975) (citations omitted). But, the "clearly erroneous standard does not apply to the circuit court's legal conclusions . . . which we accord no deference and which we review to determine whether they are legally correct*." Cattail Assocs. v. Sass*, 170 Md. App. 474, 486 (2006).

And, because USA Real Estate challenges only the legal conclusions reached by the court below in construing the lease and guaranty, and not its factual findings, our review is confined to whether those conclusions were legally correct.

I.

To begin with, "[a] contract of guarantee is a form of commercial obligation, in which the guarantor promises to perform if the principal does not." *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atl., Inc.*, 149 Md. App. 336, 361 (2003) (citations and quotations omitted). As a contract, a guaranty is subject to the general tenets of contract interpretation adopted by our Maryland courts.

Those tenets require us to engage in what is known as an "objective approach" to contract interpretation. That approach demands that "unless a contract's language is ambiguous, we give effect to the language of a contract as written, without concern for the subjective intent of the parties at the time of formation." *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010) (citation omitted). But, when there are ambiguities in the language of a contract, those "ambiguities are [to be] resolved against the draftsman of the instrument." *John L. Mattingly Const. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327 (2010) (quotation omitted). Moreover, and of particular relevance here, as "[t]he liability of a guarantor is created entirely by his contract, it is strictly confined and limited to his contract. No change can be made in [it] without his consent." *Id.* at 361-62 (citations, quotations, brackets and ellipses omitted).

Here, there is no dispute that the appellee guarantors were not informed of the lease extension, by USA Real Estate or F&T, either before or even after it was executed. In fact, they did not learn of the extension until they were served with the complaint in this matter, which was almost four years after the lease extension amendment was executed. Given the failure to notify appellees and gain their consent, the issue before us is whether the language in either the lease or the guaranty rendered notice to and consent of appellees unnecessary, as USA Real Estate claims. We therefore turn to the terms of that guaranty and the lease.

II.

Pointing out that section (b) of the guaranty provided that "modifications" to the lease could be made "without releasing Guarantor from its obligations hereunder or limiting or impairing its liability," USA Real Estate contends that a lease term extension was such a "modification," and, hence, it was not necessary that the guarantors be given notice of or consent to such a "modification." Therefore, according to USA Real Estate, neither it nor F&T was required to notify the appellee guarantors of the proposed extension and obtain their consent to it in order for the appellee guarantors to be bound to its terms. We disagree.

First of all, no provision of the lease or guaranty mentions or even appears to contemplate a future consensual[3] extension of the term of the lease, and that is why USA Real Estate relies on section (b) of the guaranty to support its position. That section states:

[3] We employ the term "consensual" to distinguish it from a nonconsensual extension such as holding over, which we address in a later section of this opinion.

> That Landlord may exercise or forbear from exercising any rights against the Tenant under said Lease Agreement or otherwise act or forbear from acting and may settle or compromise any rent which may become due under said Lease Agreement without notice to or consent of Guarantor or *grant or make any accommodations, alterations, modifications, indulgence, to Tenant all without releasing Guarantor from its obligations hereunder or limiting or impairing its liability*.

(Emphasis added.) We are then asked, by USA Real Estate, to read, into the foregoing section, a term that is not present in either the lease or guaranty but purportedly falls within section (b)'s reference to "modifications." In short, USA requests that we interpret this ambiguity in its favor, a request that is in conflict with a basic principle of contractual interpretation, namely, that all "ambiguities are [to be] resolved against the draftsman of the instrument," *John L. Mattingly Const. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327 (2010) (quotation omitted), which, in this instance, was USA Real Estate. We decline to do so, and find that neither the lease nor the guaranty addressed the issue of a lease term extension.

Moreover, the cases, upon which USA Real Estate relies, for the proposition that the guaranty at issue gave "USA Real Estate a free hand" to bind appellee guarantors to the lease extension amendment, are all quite distinguishable. In fact, those three cases, *Mercy Medical Center, Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md. App. 336 (2003), *Grand Investment Corp. v. Connaughton, Boyd & Kenter, P.C.*, 119 S.W.3d 101 (Mo. Ct. App. 2003), and *Southeastern Hose, Inc. v. Prudential Insurance Company of America*, 306 S.E.2d 308 (Ga. Ct. App. 1983), provide support, not for USA's claim, but for our rejection of that claim.

In each of the three cases, the underlying contract that was guaranteed expressly anticipated the change which occurred. Therefore, the guarantors had agreed, in the guaranty, to be bound when that change did occur. *See Mercy*, 149 Md. App. at 362 ("[A] change in a guarantor's obligation does not discharge him from it where the change is made in accordance with an express or implied provision contained in the principal contract or in the contract of guaranty.") (quotations and citations omitted).

In *Mercy*, for instance, this Court found that the underlying contract and the guaranty "reflect[ed] the fluid nature" of the obligation guaranteed in the underlying contract, and, therefore, the guarantors were on the hook when that guaranteed obligation was increased.[4] Moreover, in *Grand Investment*, the Missouri Court of Appeals reversed judgment in guarantors' favor, regarding the landlord's action filed against them seeking payments due under a lease extension, as such extensions were expressly provided for in the lease which they guaranteed. And, finally, in *Southeastern Hose*, the Court of Appeals

[4] Moreover, in *Mercy*, we took notice of the fact that certain board members of Mercy, the guarantor, "were members of MPPI's Board and the more active . . . Committee of MPPI, which dealt with regular and routine business decisions." *Id.* at 365. In fact, "agents of Mercy sat on MPPI's Board of Directors and . . . Committee during a time when that board and committee were considering the . . . Amendments to the [underlying medical services contract] as well as the additional Medicare members." *Id.* Consequently, "knowledge of that transaction" was, we said, "imputable to Mercy," through its agents. *Id.* at 367.

In contrast, here, none of the appellee guarantors, as we have previously observed, had any knowledge of the lease extension amendment, before it was executed, nor did USA Real Estate, or Pastor Harrison, make any effort to inform them of the amendment, or to determine their willingness to guaranty the payments due under the contemplated lease extension. In fact, appellees first learned of the amendment, the circuit court found, in the spring of 2015, about four years after it was signed, which is not disputed by USA Real Estate on appeal.

of Georgia observed that the guaranteed lease agreement "contained [a] provision for a renewal of the lease for an additional term at the option of lessee," and, therefore, even though the exact "terms and conditions" of that renewal were not specified in either the lease or guaranty, "there [was] no release of the guarantor."

Here, in contrast, and, as previously noted, neither the guaranteed lease nor the guaranty itself contained language to suggest that the term of the lease could be or would be consensually extended, unlike the "fluid nature" of the guarantor's obligation in *Mercy*, or the lease extension option in *Grand Investment*, or the lease renewal clause in *Southeastern Hose*. In fact, it was clear that the lease at issue was for a fixed term of five years, and would expire on August 31, 2012.

In sum, as no lease extension provision appears in either the lease or the guaranty, we do not believe the term "modifications" entails a lease extension. And, even if there was ambiguity in the use of the term "modification," that ambiguity would, under *John L. Mattingly Const. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327 (2010), be construed against the drafter, here, USA Real Estate, leaving us with the same conclusion: That the term modifications, in this guaranty, does not contemplate a lease extension and, therefore, the consent of the appellee guarantors was necessary to concurrently extend the guaranty.

Moreover, even if we were to conclude that the term "modifications," as it appears in the guaranty, encompassed the three-year extension amendment, the structure of the guaranty showed that any waiver of prior notice to and consent of the guarantors, in the guaranty, did not apply to "modifications" of the lease.

First of all, in section (a) of the guaranty, the guarantors agreed that the "Landlord may . . . extend the time or manner of payment of all or any part of the rent under said Lease Agreement without notice to or consent of the Guarantor," but that waiver is confined to rental payments due under the lease. No mention was made, there, of any payments due under an extension of that lease. Thus, the negative implication of that language was that such a waiver of notice and consent would not extend beyond the term of the original unamended lease itself.

Furthermore, while section (b) of the guaranty stated that the landlord "may exercise or forbear from exercising" its rights, under the lease, such as settling or compromising any rent which may become due under the lease, "without notice to or consent of Guarantor," it suggests that that is not so as to "modifications," because, as the circuit court put it, the sentence was written in the disjunctive. That is, after it granted the landlord the right to exercise or forbear from exercising a right without notice to or consent of the guarantors, it then addressed, in the disjunctive, the right to make modifications without any reference to doing so in the absence of either the notice to or consent of the guarantors.

Hence, it is clear that the guaranty did not provide that modifications could be made without prior notice to and the consent of appellee guarantors. Therefore, even assuming that the extension was a "modification" under section (b) (which we previously concluded it was not), the appellee guarantors are not responsible for the payments due under the lease extension. See *Mercy*, 149 Md. App. at 362 ("No change can be made in [a guarantor's liability] without [the guarantor's] consent.") (quoting *Plunkett v. Davis Sewing-Mach. Co.*, 84 Md. 529, 533 (1897)).

III.

Next, USA Real Estate claims that the guaranty had "the attributes of a continuing guaranty" and therefore encompasses the lease extension at issue, leaving the appellee guarantors responsible for any monetary obligations that accrued thereunder. We disagree.

"A continuing guaranty covers all the transactions, including those arising in the future, which are within the description or contemplation of the agreement, until the expiration or termination of the guaranty." 38A C.J.S. Guaranty § 60 (footnotes omitted). Indeed, it "contemplates a future course of dealing encompassing a series of transactions . . . ." *Id.*

In support of its claim that the guaranty at issue was "continuing," USA Real Estate asserts that the guaranty had "no sunset provision or date on which the guaranty would expire"; rather, its terms provided an "absolutely guaranty to [USA Real Estate of] the full and complete payment of rent and other charges to [USA Real Estate] to be paid by [F&T] under said Lease agreement, and the full and complete performance by [F&T] of all other terms, conditions, covenants and agreements of said Lease agreement." However, USA Real Estate conveniently ignores that the lease in question had a fixed "five year" term, and would expire on August 31, 2012. And, since the appellee guarantors merely guaranteed the "full and complete payment of rent and other charges to [USA Real Estate] to be paid by [F&T] under said Lease agreement," and those lease terms did not

contemplate a future course of dealing, but only a set term-of-years, appellees' obligations ended when the lease's term did on August 31, 2012.[5]

Nor does USA Real Estate's suggestion that *Cent. Bldg., LLC v. Cooper*, 26 Cal. Rptr. 3d 212 (Ct. App. 2005), supports its claim that the guaranty at issue was "continuing" survive scrutiny. In *Central Building*, the landlord and tenant, following the termination of their initial lease agreement, signed a new lease agreement, and the principal shareholders of the tenant corporation agreed to guaranty the payments due under that lease. Then, before the expiration of that lease, the landlord and tenant agreed to an amendment of the lease that extended its term. After that lease term extension expired, however, the tenant remained in possession of the property "pursuant to the holdover provision in the lease." *Id.* at 215. Shortly thereafter, the "parties executed a second amendment to the lease" which again extended the term of the lease. Then, when the tenant failed to pay any rent during the lease's second extension, the landlord filed an action against the guarantors, seeking the unpaid rent.

The California Court of Appeal for the First District, after noting that "the guaranty agreement . . . applied to present and future obligations under the lease," found that it "was a continuing guaranty, *as specifically stated in paragraph 5 of the agreement*," *id.* at 217 (emphasis added), and therefore it applied to the extended term of the lease. Here, however, there is no language in the guaranty indicating that it would be "continuing." Indeed, there is nothing in the guaranty that indicated that the guaranty could be extended beyond the

[5] Whether appellee guarantors would have been liable for payments due if F&T had held over, which it did not, is not before us and thus is left unaddressed.

lease's fixed five-year term. Consequently, *Central Building* is of no relevance to the issue before us.

IV.

Finally, USA maintains that the lease's holdover provision amounted to the express or implied consent of the appellee guarantors to the lease extension.

Under the holdover provision[6] in the lease, F&T's rent doubled if they remained a holdover tenant following the completion of the five-year term of the lease. However, that is not what occurred here, nor, if it did, would it amount to a lease extension amendment. As the circuit court put it, the holdover provision "addresses a situation where, without permission," F&T "stay[ed] beyond its lease term," and the increase in rent that F&T would be subject to was "punitive." That punitive provision for non-consensual unilateral refusal to vacate has nothing in common with a lease extension amendment negotiated and agreed to by the landlord and tenant, as we have here.

In support of their dubious contention, USA cites *Hood v. Peck*, 269 Ga. App. 249 (2004). In *Hood*, the lessee had, after the lease term expired, held over, as expressly provided in the lease, and, during that period, the lessee failed to fully pay rent due to the lessor. The lessor sought, from the lessee and the guarantor, the unpaid rent accrued during the holdover term. The Court of Appeals of Georgia agreed with the lessor and held that

[6] The holdover provision provided that if F&T held over at the expiration of the five-year term, F&T would "be deemed to be occupying the Premises as a tenant from month to month," and would pay "200% of the rent payable on the last day of the term."

the guarantor was responsible for the holdover rent, as it "was specifically reserved in the lease." But, here, the issue is not whether the lease guarantors, appellees, would be responsible for any rent that accrued if F&T held over, as that is not what occurred. Consequently, *Hood* is readily distinguishable from the instant case.

Accordingly, we conclude that the guaranty did not render appellees responsible for the payments owed under the lease extension amendment. We therefore affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.