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IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Case No. 3D23-1160

L.T. Case No. 2018-031604-CA-01

BERNARDO DE LA PEÑA,

Appellant,

v.

SC MOTA ASSOCIATES LIMITED PARTNERSHIP,

Appellee.

ON APPEAL FROM A FINAL ORDER OF THE
CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Preservation of Error

Through its Answer Brief, Appellee SC Mota Associates Limited Partnership ("Landlord") suggests that Appellant Bernardo de la Peña ("Peña") "waived any argument about the sufficiency of the evidence when he failed to file a motion for rehearing." [AB.28]. Landlord cites Rule 1.530, which states: "To preserve for appeal a challenge to the failure of the trial court to make required findings of fact in the final judgment, a party must raise that issue in a motion for rehearing." Fla. R. Civ. P. 1.530(a). However, Rule 1.530 also provides: "In a non-jury action, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." Fla. R. Civ. P. 1.530(e). The Final Judgment was entered after a non-jury trial. [A.1264]. Thus, Rule 1.530 "allows review of the sufficiency of the evidence despite [the] absence of post-trial motions." *Lacombe v. Deutsche Bank Nat. Tr. Co.*, 149 So. 3d 152, 153 (Fla. 1st DCA 2014). Hence, the claim "Peña waived any argument against the sufficiency of the evidence" is without merit. [AB.32].

II. Standard of Review

Landlord claims that "to the contrary of Peña's misstatement in his Standard of Review, the *de novo* review regarding the statute of frauds is applicable only to the enforceability of an oral agreement, and not to a written agreement." [AB.30]. Admittedly, the cases cited dealt with oral, not written, agreements. However, Landlord presents no support for its contention that *de novo* review is not applicable to whether a written—but unsigned—contract is enforceable under the statute of frauds. "Statute of limitations and statute of frauds . . . pose questions of law." *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So. 2d 762, 769 (Fla. 4th DCA 1972). "Pure questions of law are reviewed de novo." *Republic of Ecuador v. Dassum*, 255 So. 3d 390, 394 (Fla. 3d DCA 2017).

III. The Statute of Frauds

a. The statute of frauds applies to the Guaranty.

In its Answer Brief, Landlord contends that, "contrary to Peña's assertions, the Guaranty is not an unwritten special promise to pay another's debt . . ., but a written contract." [AB.33]. Yet, as noted by the lower court, "[t]here is no dispute that the Guaranty is in writing." [A.1264]. Indeed, Peña has never disputed the Guaranty is in writing,

which makes Landlord's argument befuddling. Peña's position is that the Guaranty, being a "special promise to answer for the debt, default or miscarriage of another person," is required by the statute of frauds to "be in writing ***and signed*** by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized." § 725.01, Fla. Stat. (emphasis added). A "written contract" is simply not sufficient to satisfy the statute of frauds; a signature is required. *See First Guar. Corp. v. Palmer Bank & Tr. Co. of Fort Myers, N.A.*, 405 So. 2d 186, 188 (Fla. 2d DCA 1981) ("The statute of frauds requires a written contract guaranteeing the debt of another to be signed by the person to be charged."). At trial, Landlord never disputed that the Guaranty fell within the scope of the statute as a "special promise to answer for the debt, default or miscarriage of another person." Now, Landlord contends "the Guaranty is a contract that could have been performed within a year ..., and therefore the statute of frauds cannot apply." [AB.34]. However, Landlord's new argument is without merit, as explained below.

In construing statutes, the Court's "first (and often only) step is to ask what the Legislature actually said in the statute." *Tsuji v. Fleet*, 366 So. 3d 1020, 1025 (Fla. 2023). The statute of frauds applies to

"any special promise to answer for the debt, default or miscarriage of another person . . ., ***or*** . . . any agreement that is not to be performed within the space of 1 year from the making thereof." § 725.01, Fla. Stat. (emphasis added).[1] The word "or" is "generally construed in the disjunctive when used in a statute." *Fettig's Constr., Inc. v. Paradise Properties & Interiors LLC*, 305 So. 3d 555, 560 (Fla. 4th DCA 2020). The use of "or" in a statute "normally indicates that alternatives were intended." *Id.* Thus, a contract will fall under the statute of frauds if it either: (a) guarantees another's debt; ***or*** (b) cannot be completed in a year; it need not satisfy both conditions for the statute of frauds to apply. Since the Guaranty is a written contract guaranteeing the debt of another, it is immaterial whether it could be performed in a year; the statute of frauds still applies.

In any case, even under Landlord's theory, the statute of frauds would bar the Guaranty since it was ***not*** intended to be completed in a year. "Intent of the parties is generally the determining factor as to whether all the terms of a contract are to be performed within a year." *Cent. Nat. Bank of Miami v. Cent. Bancorp., Inc.*, 411 So. 2d 358, 362 (Fla. 3d DCA 1982). The statute of frauds will make unenforceable an

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[1] The statute also applies to other types of contracts not at issue here.

agreement whenever it is "apparent that it was the understanding of the parties that the agreement was not to be performed within a year from the time it was made." *LynkUs Communications, Inc. v. WebMD Corp.*, 965 So. 2d 1161, 1165 (Fla. 2d DCA 2007). Here, the Guaranty provides: "Guarantor irrevocably guarantees to Landlord the prompt and full payment of all Rent payable under the Lease and the prompt and full performance of all other obligations of Tenant . . . under the Lease, whether before, during or after the Term." [A.457]. The "Term" was defined as "the period between the Commencement Date and the Expiration Date." [A.417]. The "Expiration Date," in turn, was defined as "five (5) years after" the first rent payment. [A.414]. Landlord and Mota Pizza Rustica Corp. ("Tenant") clearly intended the Lease, and thus the Guaranty, to last for at least five years. Landlord argues the Guaranty could have been completed in a year "had Tenant defaulted within one year." [AB.34]. However, the statute of frauds will bar the enforcement of any agreement "intended by the parties to last longer than a year," even if it "could have been terminated for cause within a year." *Hosp. Corp. of Am. v. Assocs. in Adolescent Psychiatry, S.C.*, 605 So. 2d 556, 557 (Fla. 4th DCA 1992). Accordingly, the statute of frauds applies to the Guaranty.

b. Landlord had the burden to prove by clear and convincing evidence that the statute of frauds did not apply.

In its Answer Brief, Landlord argues that "[t]he standard of proof for a trial court to determine whether a party signed a contract or not is by a preponderance of the evidence." [AB.34]. However, none of the cases cited by Landlord dealt with the statute of frauds and are thus inapplicable. Landlord also argues that "[t]he burden of proving each element of an affirmative defense rests on the party that asserts the defense." [AB.35]. Yet, it is well-settled the party seeking enforcement of an agreement "has the burden of establishing the existence of an enforceable agreement." *Mattamy Florida LLC v. Reserve at Loch Lake Homeowners Ass'n, Inc.*, 341 So. 3d 372, 374 (Fla. 5th DCA 2022). Indeed, the Florida Supreme Court held long ago that:

> In order that a plaintiff may be permitted to give evidence of a contract not in writing, and which is in the very teeth of the statute and a nullity at law, it is essential that he establish, by clear and positive proof, acts, and things done in pursuance and on account thereof, . . . which take it out of the operation of the statute.

Maloy v. Boyett, 43 So. 243, 246-47 (Fla. 1907). Although the opinion refers to contracts "not in writing," the holding is not limited to oral contracts. The Fifth District Court of Appeal, citing *Maloy*, concluded "[b]efore a plaintiff may be allowed to give evidence of a contract . . .

not in writing ***or executed*** as required by the statute, it is essential he establish, by clear and positive proof, acts which take the contract out of the statute." *Unatin v. Hudon*, 383 So. 2d 1131, 1133 (Fla. 5th DCA 1980) (emphasis added); *cf. Meneses v. City Furniture*, 34 So. 3d 71, 74 (Fla. 1st DCA 2010) (holding "[t]he party seeking to obtain the benefit of an exception to a statute bears the burden of persuasion.").

The statute of frauds provides that "[n]o action shall be brought" unless the contract is in writing and signed by the party to be charged or his agent. § 725.01, Fla. Stat. In this sense, the statute is akin to a condition precedent affecting standing. Hence, the party seeking to enforce an agreement has the burden to prove that: (a) the agreement satisfies the statute of frauds; or (b) the statute is inapplicable. Once Peña established the Guaranty implicated the statute of frauds, being a "special promise to answer for the debt, default or miscarriage of another person," the burden was shifted to Landlord to prove either compliance with or non-applicability of the statute of frauds "by clear and positive proof." *Unatin*, 383 So. 2d at 1133.

c. The Court may review the trial court's findings of fact.

In its Answer Brief, Landlord also claims that discussion of the statute of frauds "is actually a transparent ruse to ask this Court to

re-weigh and reconsider the evidence and credibility determinations adduced by the trial court, which is improper." [AB.37]. Putting aside Landlord's insinuations, there is no dispute the Court may review the findings of fact of the lower court. "When there are issues of fact, the appellant necessarily asks the reviewing court to draw conclusions about the evidence." *Shojaie v. Gables Court Prof'l Ctr., Inc.*, 974 So. 2d 1140, 1142 (Fla. 3d DCA 2008). It is well-settled that if "findings of fact are not supported by substantial competent evidence, it is an appellate court's duty to reverse." *Stewart v. Stewart*, 581 So. 2d 246, 248 (Fla. 3d DCA 1991). And if the trial court's decision is "manifestly against the weight of the evidence or is contrary to the legal effect of the evidence," likewise, "it becomes the duty of the appellate court to reverse such a decision." *Hull v. Miami Shores Vill.*, 435 So. 2d 868, 871 (Fla. 3d DCA 1983).

IV. The trial court erred when it concluded Peña had signed the Guaranty.

a. The trial court's ruling was not supported by competent substantial evidence.

The statute of frauds is "strictly construed to prevent the fraud it was designed to correct, and . . . courts should be reluctant to take cases from its protection." *All Seasons Condo. Ass'n, Inc. v. Patrician*

Hotel, LLC, 274 So. 3d 438, 451 (Fla. 3d DCA 2019). For the Guaranty to be enforceable, the statute requires that it be signed either: "[1] by the party to be charged therewith or [2] by some other person by her or him . . . lawfully authorized." § 725.01, Fla. Stat. Because "Florida adheres to strict application of the statute of frauds," if it was signed neither by Peña nor an agent lawfully authorized, the Guaranty is not enforceable under the statute of frauds. *Ostman v. Lawn*, 305 So. 2d 871, 872 (Fla. 3d DCA 1974).

In its Answer Brief, Landlord states its corporate representative, Ms. Terri Teply-Smith, "testified that she personally saw Peña signing the Lease and Guaranty." [AB.39]. Landlord argues that "[t]his alone qualifies as competent substantial evidence." [*Id.*] As noted in Peña's Initial Brief, however, Teply-Smith's testimony was contradictory and she could not recall any details about the execution of the Guaranty. [IB.4-5, 16]. Moreover, the fact Teply-Smith is employed by Landlord "bear[s] heavily on the weight" her testimony should have been given. *In re Reid's Estate*, 138 So. 2d 342, 350 (Fla. 3d DCA 1962). Finally, the lower court's conclusion that Peña signed the Guaranty based on nothing more than Teply-Smith's testimony goes against the purpose of the statute. *See LaRue v. Kalex Const. & Dev., Inc.*, 97 So. 3d 251,

253 (Fla. 3d DCA 2012) (statute was enacted to prevent "enforcement of claims based on loose verbal statements made faulty by the lapse of time"); *DK Arena, Inc. v. EB Acquisitions I, LLC*, 31 So. 3d 313, 322 (Fla. 4th DCA 2010) (statute's object is to prevent setting up of bogus contracts and then "supporting them by perjury in swearing contests where one person's word is pitted against that of another").

Landlord then mentions the trial court "adduced evidence" that "Peña initially admitted executing 'some agreement' with Landlord." [AB.39]. As explained in the Initial Brief, the lower court's admission into evidence of Peña's initial Answer constituted clear error. [IB.23]. It is well-settled pleadings are "inadmissible into evidence to prove or disprove a fact in issue." *Fallon v. City Furniture, Inc.*, 959 So. 2d 306, 307 (Fla. 3d DCA 2007). When the lower court admitted Peña's initial Answer despite the clear case law on its inadmissibility, it abused her discretion.[2] Notably, even in this initial Answer, Peña does not admit signing the Guaranty, only "some agreement." [A.79]. Landlord then

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[2] Usually, the "standard of review on a trial court's evidentiary rulings is abuse of discretion." *Mesa v. Citizens Prop. Ins. Corp.*, 358 So. 3d 452, 455 n.1 (Fla. 3d DCA 2023). However, the trial court's discretion is "limited by the evidence code and applicable case law." *Dayes v. Werner Enterprises, Inc.*, 314 So. 3d 718, 722 (Fla. 3d DCA 2021). "A trial court's erroneous interpretation of these authorities is subject to de novo review." *Id.*

argues "Peña manifested his belief in the truth of that admission" by "failing to raise at any time any argument that he never signed or was not bound to the Guaranty." [AB.41]. There is simply no basis to infer that Peña signed the Guaranty based on raising his statute of frauds defense when Landlord decided to pursue its case against Peña years later. In any case, Peña filed an amended answer. [A.285]. Thus, "long before trial, [Landlord] was aware of [Peña's] unequivocal denial" and his original answer "should not have been admitted into evidence as a judicial admission." *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 392 So. 2d 4, 5 (Fla. 4th DCA 1980).

Finally, Landlord points out that the lower court found Peña's "argument that he did not sign the Guaranty . . . was not credible." [AB.40]. This too was error, as clarified in the Initial Brief. [IB.19-25]. The trial court's "[d]isbelief of the denials by one party, of facts which must be proved and corroborated, is not the equivalent of affirmative evidence of those facts." *Dworkis v. Dworkis*, 111 So. 2d 70, 74 (Fla. 3d DCA 1959). In short, there is no "competent substantial evidence" to support the lower court's finding that Peña signed the Guaranty. Instead, it should have held the Guaranty unenforceable as to Peña. *Cf. Vargas v. Deutsche Bank Nat. Tr. Co.*, 104 So. 3d 1156, 1168-69

(Fla. 3d DCA 2012); *Walsh v. Abate*, 336 So. 3d 50, 53 (Fla. 4th DCA 2022); *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268, 1271 (Fla. 5th DCA 2009); *First Guar. Corp.*, 405 So. 2d at 189.

b. The trial court erred when it rejected Peña's unrebutted expert evidence.

As noted in Peña's Initial Brief, the only "evidence" presented by Landlord as to Peña's alleged signature—Teply-Smith's testimony—was undermined by the expert testimony of Mr. Thomas W. Vastrick. [IB.6-7, 16-19]. Landlord asserts "Mr. Vastrick did not actually opine on the prime issue of whether Peña signed the Guaranty." [AB.43]. It is unclear what Landlord means by this; Mr. Vastrick clearly testified that the signature in the Guaranty was not Peña's to a "high degree of probability." [A.1199]. While Landlord tries to highlight that it "was not at a level of unqualified identification," it is only much ado about nothing. [AB.42]. A "high degree of probability" means it is a "virtual certainty." *Miller v. State*, 127 So. 3d 580, 583 (Fla. 4th DCA 2012).

A trial court can only reject unrebutted expert testimony when it "concerns technical evidence and is so palpably incredible, illogical, and unreasonable as to be unworthy of belief or otherwise open to doubt, or when it concerns non-expert matters and is disputed by lay testimony." *Freeman v. State*, 325 So. 3d 120, 121 (Fla. 5th DCA

2020). In its Answer Brief, Landlord now argues for the first time that the issue of the signature is a "non-expert matter." [AB.44]. However, courts have said "handwriting is an art concerning which correctness of opinion is susceptible of demonstration." *Clark v. State*, 114 So. 2d 197, 202 (Fla. 1st DCA 1959). Consequently, "a witness testifying as to his opinion of the genuineness of a writing must either be an expert or sufficiently acquainted with the handwriting of the defendant to testify as a skilled witness." *Id.* at 203. The testimony of handwriting experts "alone is sufficient to establish a forgery." *Mauldin v. Reel*, 56 So. 2d 918, 920 (Fla. 1951).

Landlord also attacks Mr. Vastrick's unrebutted expert opinion, declaring "his methods were suspect and unconvincing as the only signatures he used to compare were from a provided photocopy of eighteen signatures of which he did not know if they had been signed at one time or over a period of time." [AB.45]. However, this allegation is demonstrably false. Landlord knows that Mr. Vastrick reached his opinion after analyzing the signatures in four documents: two sworn declarations from Peña, his driver's license, and eighteen specimens, which were all admitted into evidence. [A.1194-96]. In fact, when he was asked whether Peña could make his signature to look different

on two different days, Mr. Vastrick stated: "I did a cross-comparison with other documents to include a driver's license that was issued in 2016, and I did not find any discrepancy in there." [A.1204]. Landlord did not present any rebuttal experts. Despite this, the trial court just ignored Mr. Vastrick's testimony. This was error.

V. The trial court erred when it concluded that Peña would be bound by the Guaranty, even if he did not sign it.

a. The trial court's finding that Peña was bound "by having provided his authority to Tenant" was not supported by competent substantial evidence.

As noted above, in order to be enforceable, the statute of frauds requires the Guaranty be signed either: "[1] by the party to be charged therewith or [2] by some other person by her or him . . . authorized." § 725.01, Fla. Stat. Since the statute of frauds is "strictly construed," if Peña did not sign the Guaranty—as was the case—the only way he could be bound therewith is by the signature of a lawfully authorized agent on his behalf. *See id.* Yet, as mentioned in the Initial Brief, the Final Judgment contains no finding that any other person authorized by Peña signed the Guaranty on his behalf. [IB.26]. This is, perhaps, not surprising since Landlord rested its entire case on the theory that Peña, not someone else, signed the Guaranty. It does mean, however, that the Final Judgment is clearly erroneous on this point.

Landlord contends that Peña is "bound by the Guaranty having provided his apparent authority to Tenant." [AB.47]. As mentioned in the Initial Brief, there is no legal support for a finding that Tenant, a corporation, acted as an agent for Peña as "it is well established that a corporation can only act through its officers and agents." *Morgan Intern. Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 617 So. 2d 455, 459 (Fla. 3d DCA 1993). Corporations "necessarily must act and contract through individuals." *Mease v. Warm Mineral Springs, Inc.*, 128 So. 2d 174, 179 (Fla. 2d DCA 1961). Again, there is no finding of fact in the Final Judgment that any individual (i.e., a human being) signed the Guaranty on behalf of Peña, nor did Landlord present any evidence of this at trial.[3] Moreover, even if Tenant could act as Peña's agent, Tenant did ***not*** sign the Guaranty! The only signatures on the Guaranty are the alleged signature of Peña and that of "ULISES RUIZ, an individual." [A.459]. "Under general agency principles, as applied in the corporate context, an officer's actions are not imputed to the corporation where the officer is acting in his own behalf, and not in

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[3] Needless to say, Landlord's "evidence" that "Peña admitted he gave Ruiz permission to use his credit to set up Tenant's business" and that "Peña's own expert was forced to admit that the signature on Peña's Credit Application resembled Peña's signature" are not proof that the Guaranty was signed by an agent of Peña. [AB.48].

any official or representative capacity." *In re EZ Pay Services, Inc.*, 390 B.R. 445, 463 (Bankr. M.D. Fla. 2008).

b. The trial court's finding that Peña was otherwise bound was not supported by competent substantial evidence.

Despite the lack of "competent substantial evidence" that Peña signed the Guaranty or that he authorized another individual to sign it on his behalf, the trial court found that he was nonetheless bound "as he demonstrated his assent and the parties acted at all times as if the provisions were in force." [AB.50]. As Landlord puts it, the trial court "found the evidence demonstrated Peña's conduct irrefutably manifested his consent to be bound by the Guaranty." [AB.51]. "The question of intent to be bound is, however, distinct from the question of sufficiency under the Statute of Frauds." *Craig R. Weiner Assocs., Inc. v. Sherden*, 444 So. 2d 431, 432 (Fla. 4th DCA 1983). Put another way, proof of "intent to be bound" is not evidence of compliance with the statute of frauds.

Landlord also protests it "performed on its part of the agreement to [l]ease the Premises to Tenant, and Tenant (and through Tenant, Peña) obtained the benefit of the agreement." [AB.52]. As clarified in the Initial Brief, however, "partial performance does not remove the bar of the statute of frauds for actions seeking damages." *LaRue*, 97

So. 3d at 253; *LynkUs*, 965 So. 2d at 1166 (partial performance does not apply to actions for breach of contract within operation of statute of frauds); *Guest v. Claycomb*, 932 So. 2d 567, 570 n.1 (Fla. 5th DCA 2006) ("the doctrine of part performance to excuse a failure to comply with the statute of frauds is not available in Florida to actions solely for money damages"); *Wharfside at Boca Pointe, Inc. v. Superior Bank*, 741 So. 2d 542, 545 (Fla. 4th DCA 1999) (same). Thus, the trial court committed clear error when it chose to enforce the Guaranty, despite the bar of the statute of frauds, based on partial performance.

CONCLUSION

For the reasons stated above, the Court should reverse the Final Judgment and remand for a new trial.

Dated: October 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements in Florida Rule of Appellate Procedure 9.045(b) and the word count limit in Florida Rule of Appellate Procedure 9.210(a)(2)(B). This reply brief contains 3,860 words, excluding the parts exempt by Florida Rule of Appellate Procedure 9.210(a)(2)(E).

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