

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

JAMES B. CUMMING and CLEAR
DEVELOPMENT, INC.,

Plaintiffs,

vs.

CORE LAVISTA, LLC and
STEVEN W. DELONGA,

Defendants.

CIVIL ACTION
FILE NO. 09-EV-006520-E

JUDGMENT

The above-styled action comes before this court on Plaintiffs' Motion for Summary Judgment and the Defendants' Motion to Strike or in the Alternative not to Consider for Summary Judgment Purposes the Affidavits Filed by Plaintiff James B. Cumming and Kenneth G. Sauer. Plaintiffs seek to recover amounts owed on an August 31, 2007, Promissory Note and Guaranty and on the September 25, 2008, modification of said Promissory Note. At issue before this court is whether Plaintiffs have satisfied their summary judgment burden by demonstrating the Defendants' indebtedness, by proving with *prima facie* evidence that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.

The relevant facts of the above-styled case are as follows: On August 31, 2007, Defendant Core Lavista, LLC executed a Promissory Note in favor of James B. Cumming in the principal amount of \$650,000.00. *See* Steven W. Delonga Aff., ¶3; Ex. A. Contemporaneously, Defendant Steven W. Delonga, managing member of Core Lavista, LLC, executed a personal Unconditional Guaranty of Payment and Performance (hereinafter "Unconditional Guaranty") in which Mr. Delonga states

“for the purpose of seeking to induce James B. Cumming to extend credit and make a loan to Core Lavista, LLC, a Georgia limited liability Company, which extension of credit will be to the direct interest and financial advantage of [Guarantor Steven W. Delonga], Guarantor does hereby unconditionally guarantee to [James B. Cumming] and its successors, successor-in-title and assigns: (a) the full and prompt payment when due, whether by acceleration or otherwise, with such interest as may accrue thereon, either before or after maturity thereof, of the indebtedness payable under that certain Promissory Note dated on or about even date herewith made by [Core Lavista, LLC] to the order [James B. Cumming] in the original principal amount of [\$650,000.00] together with any renewals, modifications, consolidations and extensions thereof.”

See id. at ¶4; Ex. B. The Unconditional Guaranty further provided that in the event that the Promissory Note is not paid to James B. Cumming in accordance with its terms, Guarantor will immediately make such required payments or perform any such required obligations, including the payment of all expenses paid or incurred by James B.

Cumming in endeavoring to collect the indebtedness evidenced in the Promissory Note.

See id. Plaintiff Clear Development, Inc. was assigned forty percent (40%) interest in the Promissory Note on September 6, 2008. *See id.* at Ex. C, Assignment of Promissory Note.

On September 25, 2008, and pursuant to the renewal, modification and extension rights granted by the Promissory Note and Unconditional Guaranty, James B. Cumming and Core Lavista, LLC executed a Modification to Promissory Note increasing the value of the Promissory Note to \$812,500.00 and extending the maturity date from August 31, 2008 to February 28, 2009. *See id.* at Ex. D. A modification of the Unconditional Guaranty was not executed by the parties as the Unconditional Guaranty provides that its provisions shall extend and be applicable to all renewals, amendments, extensions, consolidations or modifications of the Promissory Note and shall be deemed to include

any such renewals, amendments, extensions, consolidations or modifications thereof. *See id.* at Ex. B.

The Plaintiffs filed the above-styled action on January 26, 2009, against Defendants Core Lavista, LLC and Steven W. Delonga for their default on the Promissory Note and Unconditional Guaranty. *See* Pls.' Compl.; Ex. E They seek compensatory damages, pre-judgment interest and attorney's fees and expenses of litigation, pursuant to O.C.G.A. § 13-1-11. *See id.* The Plaintiffs' Motion for Summary Judgment now comes before this Court.

In a Motion for Summary Judgment, a moving party bears the burden of furnishing the court with affirmative evidence such as affidavits, depositions, orders, and other documents to support their claim and has the burden of piercing the nonmovant's affirmative defenses. *See Coastal Plans Trucking Co. v. Thomas County Fed. S&L Ass'n*, 224 Ga. App. 885 (1997). When ruling on a motion for summary judgment, a court must give the opposing party the benefit of all reasonable doubt, and the evidence and all inferences and conclusions therefrom must be construed most favorably toward the party opposing the motion. *Davis v. Discover Bank*, 277 Ga. App. 864 (2006).

Where the terms of a contract, such as a promissory note, are before the Court, the construction of that contract is a question of law decided by the court. O.C.G.A. § 13-2-1. Where the language of the agreement is clear and unambiguous, then it is controlling, and the court need look no further. *Smith v. Seaboard C. L. R. Co.*, 639 F.2d 1235, 1239 (1981). In order to recover on a promissory note, the Plaintiff has the burden of establishing with *prima facie* evidence the existence of a note duly signed, dated and executed by the promisor. *Collins v. Regional Bank*, 282 Ga. App. 725, 726 (2006). On

presentation of the evidence, a presumption arises that the signature on the note is authentic and authorized and that the note is enforceable. *See* OCGA § 11-3-308(a). When signatures are admitted or established, in a promissory note, the production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. *See* OCGA § 11-3-308(b); *Jay Gleason Advertising Service, Inc. v. Gleason*, 193 Ga. App. 445 (1989).

After review and consideration of the pleadings filed in the above-styled case, the Court finds that the Promissory Note, Unconditional Guaranty and Modification to Promissory Note are unambiguous and therefore, this Court shall strictly construe the clear and obvious provisions of the documents and leave nothing to parol. The Court finds that Defendant Steven W. Delonga admits by affidavit and the exhibits thereafter, that Defendant Core Lavista, LLC executed the promissory note for the benefit of Plaintiff James B. Cumming payable in full to James B. Cumming on or before August 31, 2008. *See* Steven W. Delonga Aff., ¶3; Ex. A., ¶1(c). Furthermore, the Court finds that the Promissory Note was modified on September 25, 2008, pursuant to the renewal, modification and extension rights set forth in the Promissory Note, increasing the value of the Promissory Note and extending the maturity date from August 31, 2008 to February 28, 2009. *See id.* at ¶8; Ex. D, Modification to Promissory Note. The terms of the Modification to Promissory Note remain payable to Plaintiff Cummings and do not modify, preempt or alter any other terms and conditions of the Promissory Note, except the provisions stated herein. *See id.* Plaintiff Clear Development, Inc. retained 40% interest in the Promissory Note under the September 6, 2007, Assignment of Promissory Note executed by James B. Cumming and Clear Development, Inc. *See id.* at ¶6; Ex. C.

The Defendants contend that the Modification to Promissory Note was a novation releasing Defendant Steven W. Delonga from his obligations under the Unconditional Guaranty. A contract of guaranty is primarily one to pay the debt of another, which may be due and payable by the principal debtor to the creditor, upon the default of the principal debtor. *Hartsfield Co. v. Shoaf*, 184 Ga. 378 (1937). A guarantor may assert all defenses to a contract which would be available to his principal, with the exception of personal defenses, such as infancy, bankruptcy and incapacity but the terms of promise to assume debt of another cannot be settled by parol. *See Jones v. Dixie O'Brien Div., O'Brien Corp.*, 174 Ga. App. 67 (1985); *Johnson v. Rycroft*, 4 Ga. App. 547, (1908). Here, the Court finds that the Unconditional Guaranty unambiguously sets forth that Defendant Steven B. Delonga unconditionally guarantees the full and prompt payment of Core Lavista, LLC's indebtedness payable under the provisions of the Promissory Note in the original principal amount of \$650,000.00. Furthermore, the Court finds that the absence of the Unconditional Guaranty or Mr. Delonga's name in the Modification to Promissory does not extinguish his liability, but invokes the provisions of the Unconditional Guaranty that state that the guaranty applies to any "renewals, modifications, consolidations and extensions of the [Promissory Note] thereof" thereby not releasing Defendant Delonga's obligations under the Unconditional Guaranty, but imputing Core Lavista, LLC's obligation under the Modification to the Promissory Note upon Defendant Delonga. *See Steven W. Delonga Aff.; Ex. B.*

Under O.C.G.A. § 13-1-11, obligations to pay attorney's fees upon any note shall be valid and enforceable and collectible as a part of such debt if such note is collected by or through an attorney after maturity where such note provides for attorney's fees in some

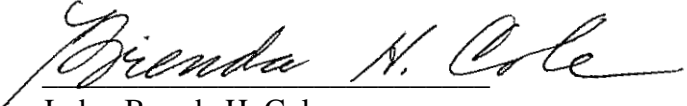
specific percent of the principal and shall be valid and enforceable up to but not in excess of 15 percent of the principal. O.C.G.A. § 13-1-11. The holder of the note or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced.

O.C.G.A. § 13-1-11. Here, the Court finds that the Promissory Note and Unconditional Guaranty provide Plaintiffs with the right to seek attorney's fees and that the Plaintiffs have presented the Defendants with timely notice of their intent to exercise this right. *See* Steven W. Delonga Aff.; Ex. A, ¶5; Ex. B. Therefore, the Court finds that the Plaintiffs have satisfied their summary judgment burden, there remain no genuine issues of material fact and that the Plaintiffs are entitled to judgment as a matter of law.

Accordingly, it is

ORDERED AND ADJUDGED that the Plaintiffs' Motion for Summary Judgment is hereby GRANTED and that the Plaintiffs shall recover from the Defendants \$891,338.45 principal, \$228,721.50 in pre-judgment interest, attorney's fees in the amount of \$5,803.00, along with post-judgment interest at the legal rate per annum and court costs. Defendants' Motion to Strike or in the Alternative not to Consider for Summary Judgment Purposes the Affidavits Filed by Plaintiff James B. Cumming and Kenneth G. Sauer is MOOT.

SO ORDERED this 8th day of March, 2010.



Judge Brenda H. Cole
State Court of Fulton County, Georgia