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LIVINGSTON MALL VENTURE

Plaintiff,

v.

LIVINGSTON MALL DENTAL, P.A.
and STOMATCARE DSO, LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION, CIVIL PART

DOCKET NO.: ESX-L-1830-22

Civil Action

LIVINGSTON MALL DENTAL, PA

Plaintiff,

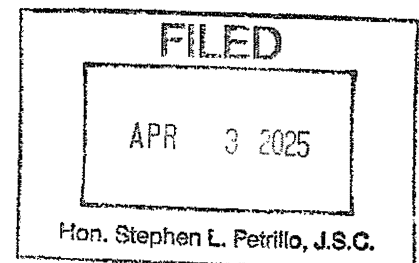
v.

LIVINGSTON MALL VENTURE et al,

Defendants.

DOCKET NO.: ESX-L-2070-22

Civil Action



Decided: April 3, 2025

Lawerence M Berkely, for plaintiffs Livingston Mall Venture (Weiner Law Group
LLP, attorneys)

Steven J. Sico, for defendants Livingston Mall Dental, P.A. and Stomatcare DSO,
LLC (Law Office of Steven J. Sico, LLC, attorneys)

PETRILLO, J.S.C.

This is a fee application by plaintiff, Livingston Mall Venture ("LMV") and
by defendants Livingston Mall Dental, PA ("LMD") and Stomatcare DSO, LLC

(“SDL”) following a bench trial. LMV was LMD’s landlord for a span of years for space leased and occupied by LMD in the Livingston Mall, owned by LMV, in which space LMD operated a dental practice. SDL is a guarantor of the LMD obligation.

At trial, the court found that LMD breached its lease with LMV and awarded LMV unpaid rent and related charges. The court denied and dismissed LMD’s defenses and affirmative claims in their entirety. The court reserved entry of judgment on attorneys’ fees and the extent of SDL’s liability under the guaranty pending post-trial submissions.

LMV and LMD both claim to be entitled to fees as prevailing parties or otherwise and both oppose, in all respects, the other’s application. SDL argues that its obligation to guarantee LMD’s obligation is capped as to all exposure of any kind as per a formula set forth in the agreement. SDL also seeks fees.

Oral argument was heard on the fee application on March 17, 2025, after which the court reserved decision.

For the reasons explained, the court finds that LMV is the sole party entitled to attorneys’ fees and costs; that LMV is entitled to one hundred percent of its attorneys’ fees and costs from LMD; and that SDL’s guarantee of LMD’s obligation to LMV is limited and capped as per the plain language of the guaranty agreement negotiated by and between LMV and SDL.

BACKGROUND

LMV was the owner of Livingston Mall until June 2022. LMV entered into a lease dated September 11, 2018 with LMD for commercial premises identified in the lease as “Room 1071A”. As part of the lease, SDL executed a guaranty guaranteeing certain financial obligations of LMD under the lease. LMD defaulted under the lease by failing to make required rental payments beginning in April 2020. Following litigation under the LT docket, the outcome of which is not entirely clear, LMD vacated these premises in January 2022 at which time it owed LMV some amount of unpaid rent.

LMV subsequently initiated litigation to recover the unpaid rent, attorneys’ fees, and costs. LMD then filed a separate action, asserting affirmative claims based on LMV’s alleged breach of the lease. Both actions were then consolidated.

This court conducted the bench trial. After the parties rested, the court found that LMD breached its contract with LMV and awarded LMV \$64,119.94 in unpaid rent, covering the period through March 8, 2022, when LMD finally surrendered the keys to the premises. In an oral ruling, the court found LMD’s claims against LMV to be without merit and denied and dismissed these claims in their entirety. The court’s decision was memorialized in an order dated January 9, 2025.

QUESTIONS PRESENTED

The issues before the Court are straightforward:

- 1) Under the terms of the lease, is LMV entitled to reimbursement of its attorneys' fees and costs for having successfully prosecuted this case to collect unpaid rent from LMV's former commercial tenant, i.e. LMD?
- 2) Is there any scenario where LMD (or SDL) could conceivably defeat LMV's fee application including but not limited to the argument that it is itself a prevailing party or otherwise entitled to fees?
- 3) Finally, to what degree must SDL guarantee any such obligation imposed upon LMD?

All three of these questions require the court to interpret the two written agreements at issue, both of which are contracts: the lease between LMV and LMD and the guaranty between LMV and SDL.

Interpretation of a contract is a question of law. It is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. Tessmar v. Grosner, 23 N.J. 193, 201 (1957). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991). The court has no right to "remake a better contract for the parties than they themselves have seen fit to enter

into, or to alter it for the benefit of one party and to the detriment of the other." Id. at 493.

The starting point for contract construction is always the language of the contract. Commc'ns Workers of Am., Local 1087 v. Monmouth County Bd. of Soc. Servs., 96 N.J. 442, 452 (1984). Generally, contract terms are to be given their "plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). "If the terms of a contract are clear, they are to be enforced as written." Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) (citing County of Morris v. Fauver, 153 N.J. 80, 103 (1998)).

The freedom to contract is a bedrock principle of New Jersey law. Marcinczyk v. State of N.J. Police Training Comm'n, 203 N.J. 586, 592 (2010). In the absence of fraud, duress, illegality or mistake, a contract is fully binding, and the parties are "conclusively presumed" to understand and assent to its legal effect. Id. at 593 (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992)). Absent these findings, a court will not interfere with parties' freedom to enter into binding agreements. See Gross v. Lasko, 338 N.J. Super. 476, 485-86 (App Div. 2001) ("It is not the function of any court to make a better contract for the parties by supplying terms that have not been agreed upon.") (citing Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999)).

In Hardy ex. rel. Dowdell v. Abdu-Matin, 198 N.J. 95, 103 (2009), the Supreme Court held that "a basic principle of contract interpretation is to read the

document as a whole in a fair and common sense manner.” The court is not to interject its own opinion as to what terms should be included. “We do not supply terms to contracts that are clear and unambiguous, nor do we make a better contract for the parties than the one which the parties themselves have created,” Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007); and Graziano, 326 N.J. Super. at 342. The court must enforce those terms as written, Watson v. City of East Orange, 175 N.J. 442, 447 (2003), and give them their “plain, ordinary meaning.” Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 270 (2008). See also Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001).

It is against this well-known backdrop of precedent defining the court’s function and focus that the court undertakes to answer the three questions presented by the fee application at bar.

LMV IS ENTITLED TO ATTORNEYS’ FEES & COSTS

The lease between LMV & LMD

Under the terms of the lease, between LMV and LMD, Art. 18.2, in the event of a breach or default of the Lease:

[Landlord] may recover from Tenant all damages incurred by reason of such breach or default, including if Landlord is the prevailing party, the cost of recovering the Premises, brokerage fees and reasonable and actual expenses of placing the Premises in rentable condition, attorneys’ fees, and including the total monthly rent and charges reserved in this Lease for each month of the remainder of the Lease Term (as if this Lease had not been terminated) as each such payment becomes due.

The obligation is made clearer by the following additional language:

Each party's obligation to reimburse the other for attorneys' fees as referred to in this Lease shall include all legal costs, fees and expenses arising out of (i) the defaulting party's default in the performance or observance of any of the terms, covenants, conditions or obligations contained in this Lease and the non-defaulting party places the enforcement of all or any part of this Lease, the collection of any rent due or to become due or the recovery of possession of the Premises in the hands of an attorney or (ii) either party's incurring any fees or out of pocket costs in any litigation, negotiation or transaction in which one party causes the other to be involved or concerned, in either event regardless of whether or not suit is actually filed.

Id.

The Lease also defines situations which constitute a "default" and "breach" of the Lease:

The following shall be considered for all purposes to be defaults under and breaches of this Lease: (a) any failure of Tenant to pay any rent or other amount ten (10) days after same is due and a past-due notice received by Tenant; (b) any failure by Tenant to perform or observe any other of the terms, provisions, conditions and covenants of this Lease for more than thirty (30) days after written notice of such failure (or such additional time as is reasonably required to correct any such default); (c) a determination by Landlord that Tenant has submitted any false report required to be furnished hereunder; (d) anything done by Tenant upon or in connection with the Premises or the construction of any part thereof which directly or indirectly interferes in any way with, or results in a work stoppage in connection with, construction of any part of the Center or any other tenant's space; (e) the bankruptcy or insolvency of Tenant or the filing by or against Tenant of a petition in bankruptcy or for reorganization or arrangement or for the appointment of a receiver or trustee of all or a portion of Tenant's property, or Tenant's assignment for the benefit of creditors; (f) if Tenant abandons or vacates or does not do business in the Premises; (g) this Lease or Tenant's interest herein or in the Premises or any improvements thereon or any property of Tenant are executed upon or attached; (h) the Premises come into the hands of any person other than expressly permitted under this Lease; or (i) any claim or lien is asserted or recorded against the interest of Landlord in the Premises or Center, or any portion thereof, on the account of, or extending from any improvement or work done by or at the instance, or for the benefit of Tenant, or any person claiming by, through or under Tenant or from any improvement or work the cost of which is the responsibility of Tenant.

Id. at Art. 18.1.

This language is unambiguous. The court agrees that these provisions clearly establish an enforceable obligation requiring LMD to pay attorneys' fees and costs incurred as a result of LMD's default. The court has already determined that LMD breached the lease and denied LMD's affirmative claims. As such, LMV is entitled to recover its legal expenses. The lease between the parties says so.

New Jersey courts interpret leases and guaranties in accordance with the general principles of contract law. Marini v. Ireland, 56 N.J. 130, 141-43 (1970); Ctr. 48 Ltd. P'ship v. May Dep't Stores Co., 355 N.J. Super. 390, 405 (App. Div. 2002). Courts respect and enforce freely negotiated contractual terms unless they violate public policy. Fargo Realty, Inc. v. Harris, 173 N.J. Super. 262, 265-66 (App. Div. 1980). New Jersey courts have consistently enforced contractual provisions requiring the payment of attorneys' fees and costs. See State Dep't of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 504 (1983) (holding that attorneys' fees provisions are enforceable where expressly authorized by contract, statute, or court rule) (citations omitted); Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 448-449 (1965) (upholding an attorneys' fee provision in a promissory note); Kellam Assocs., Inc. v. Angel Projects, LLC, 357 N.J. Super. 132, 138 (App. Div. 2003) ("While a contractually-based claim, such as that asserted here, does not fall within any of the designated exceptions, the rule does not preclude a party from agreeing by contract to pay attorneys' fees"); Ryan v. Biederman Indus., 223 N.J.

Super. 492, 502-503 (App. Div. 1988) (enforcing attorney fee provision contained in lease agreement). The lease at issue here expressly provides for the recovery of attorneys' fees and costs in the event of tenant's default, and nothing in New Jersey law precludes the enforcement of this negotiated contractual term.

As recapped above, the lease here explicitly includes the recovery of attorney's fees and costs in, among other sections, Art. 18.2. This section provides for attorneys' fees and costs recovery including but not limited to if LMV is a "prevailing party" as well as when it incurs same because of LMD's default. Both bases are triggered here.

The court found at trial the LMD had defaulted and awarded damages in light thereof. As such LMV can also easily be characterized as a prevailing party. A prevailing party is one who has "won substantially the relief originally sought." Empower our Neighborhoods v. Gudagno, 453 N.J. Super. 565, 579-580 (App. Div. 2018). Plaintiff easily satisfies this standard having achieved its essential goal of recovering unpaid rent due and owing to it. Under both, or either, fee shift triggers, the court is satisfied that LMV is entitled the attorneys' fees and costs incurred.

To the extent defendants point to LMV's reduced recovery as indicative of some basis to reject LMV's fee award, they are incorrect. That the amount recovered fell below the amount sought is inconsequential. Kellam Associates, Inc., 357 N.J. Super. at 138-39 provides guidance in this context. There, the plaintiff landlord sought fees and costs as provided in the lease between the parties. Ibid. The

defendant tenant argued that the landlord was not a prevailing party because the court reduced the damages sought. Id. at 140, a proposition with which the trial court agreed. The appellate division reversed the trial court order holding that “the strength of [defendant]’s position in resisting [plaintiff]’s claim does not detract from the enforceability of [plaintiff]’s contractual right to attorneys’ fees and costs.” Id. at 142. Similar to the landlord/plaintiff in Kellam, LMV in this case received “substantially” all the relief it sought and a judgment on the merits.

An additional provision of the lease, Art. 4.7, lends even more support to the argument advanced by LMV. This provision mandates that the “breaching party” shall pay “all court costs and all reasonable attorneys’ fees and disbursements of the other party arising from such breach, whether pre-judgment, appellate, post-judgment, or otherwise.” The breaching party in this case has been found to be LMD.

If the contract is clear, there is no need for the court to look any further than the agreement itself, the so called “four corners” of the contract. See Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133, 140 (Ch. Div. 2018) and the court sees no need to do so here. The court agrees with LMV that the operative lease provisions are “unambiguous and enforceable” thus obliging LMD to reimburse LMV’s attorneys’ fees and costs. Following trial, the court found that LMD defaulted on its obligations under its lease with LMV. The requirement that it bear

the fees and costs that it agreed to in its lease with LMV is a bargained for and unavoidable consequence flowing from that finding.

Rule of Professional Conduct 1.5(a)

In determining what amount the court will award, a touchstone of that analysis is, of course, reasonableness. The Rule governing the court's consideration of this fee application provides that "all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by [Rule of Professional Conduct (RPC)] 1.5(a)."¹ RPC 1.5(a) mandates, "A lawyer's fee shall be reasonable" and provides the following factors for the court to consider in determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

¹ A comprehensive affidavit with attachments was submitted by LMV's counsel. Counsel for the defendants did not provide any such affidavit or certification, a potentially fatal flaw in its application that need not be addressed in light of the defendants' applications substantive shortcomings addressed infra.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

This litigation has been ongoing in some form or fashion since at least 2022 and has involved multiple stages, including an underlying action to evict LMD, discovery, substantial motion practice, a contested trial, and post-trial briefing. The surprising complexity of the case (exacerbated in part by a patent animus between the principals of LMV, LMD, and SDL), the underlying eviction action, the duration of the litigation, the necessity of responding to LMD's defenses and affirmative claims, and the volume of court filings are all offered as support for the reasonableness of the requested fees.

"The list [in RPC 1.5(a)] is not exhaustive and all factors will not be relevant in every case." Twp. Of W. Orange v 769 Associates, LLC, 198 N.J. 529, 542 (2009). "[T]he reasonableness of the hourly rate sought 'is to be calculated according to the prevailing market rates in the relevant community.'" R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 10 (2007) (citation omitted). The certification of LMV's counsel addresses the required factors, and establishes the reasonableness of the fees and costs requested.²

² The court's specific findings in this regard were placed on the record on April 3, 2025 as part of its ruling on this application and are hereby incorporated into this opinion by reference.

For the foregoing reasons and authority, addressed herein and on the record as recounted in footnote two, LMV is entitled to recover \$178,063.10 in attorneys' fees and costs, which includes all amounts accruing through and including argument on this application as per a supplemental certification submitted following oral argument.

NEITHER LMD NOR SDL IS ENTITLED TO FEES & COSTS

Under the lease, LMD would only be entitled to recover attorneys' fees and costs arising out of LMV's breach or default of the lease. There was no such breach or default here. The court denied and dismissed all LMD's affirmative claims and defenses premised on LMV's alleged breach of the lease. As such, LMD is not entitled to fees and costs. Even under the cited "prevailing party" standard, LMD would still not be entitled to fees and costs because it was not a prevailing party regardless of whether one considers the legal definition or the plain English language meaning of the words. It literally lost at trial.

LMD does not meet the requirements for an award of attorneys' fees or costs under the lease. There are only two situations in which LMD may recover fees and costs per the explicit terms of the lease.

First, LMD would only be entitled to recover attorneys' fees and costs if LMV breached or defaulted under the lease. See, Art. 18.2(i) and Art. 4.7. LMV did not breach the lease. Second, LMD would only be entitled to fees and costs if LMV caused it to be involved in litigation. See, Art. 18.2(ii).

Section 18.2 of the Lease provides in pertinent part:

Each party's obligation to reimburse the other for attorneys' fees as referred to in this Lease shall include all legal costs, fees and expenses arising out of (i) the defaulting party's default in the performance or observance of any of the terms, covenants, conditions or obligations contained in this Lease and the non-defaulting party places the enforcement of all or any part of this Lease, the collection of any rent due or to become due or the recovery of possession of the Premises in the hands of an attorney or (ii) either party's incurring any fees or out of pocket costs in any litigation, negotiation or transaction in which one party causes the other to be involved or concerned, in either event regardless of whether or not suit is actually filed.

Id. at Sec. 18.2.

Section 4.7 of the Lease provides in pertinent part:

If any of the parties shall breach this Lease, and if as a result thereof litigation shall arise, then the party who is found to have breached the Lease shall pay all the Court costs and reasonable attorney's fees and disbursements of the other party arising from such breach, whether pre-judgment, appellate, post-judgment or otherwise.

Id. at Sec. 4.7

This simply did not occur. LMV did not breach or default under the Lease. Instead, the court agrees, as it found at trial, that LMD breached and defaulted. LMV's conduct did not cause LMD to be involved in litigation. LMV caused the litigation by failing to pay its rent. LMD is not entitled to fees and costs.

The court agrees with LMV that SDL lacks standing to seek any fees and costs under the lease as it is not a party to the lease, and the lease does not provide for fees and costs to a guarantor. Likewise, the guaranty SDL executed provides only for the recovery of fees and costs by the landlord, not the guarantor.

SDL'S GUARANTY OBLIGATION TO LMV IS CAPPED

The plain language of the guaranty between SDL and LMV caps SDL's obligation. To the extent to which the language might be perceived as ambiguous, the testimony at trial regarding this provision and its negotiation satisfies the court that it cannot fairly be read in any other way.

Under New Jersey law, an unconditional guarantor's liability generally extends as far as that of the principal obligor, except where expressly limited. Nat'l Westminster Bank N.J. v. Lomker, 277 N.J. Super. 491, 498 (App. Div. 1994) (citing Gen. Elec. Credit Corp. v. Castiglione, 142 N.J. Super. 90, 100-01 (Law Div. 1976)) (emphasis added).

Attorneys' fees recoverable under a breach of contract are considered an element of damages and are therefore included in the scope of damages imputable to a guarantor. Belfer v. Merling, 322 N.J. Super. 124, 141 (App. Div. 1999). Courts have also found that attorneys' fees may be recoverable under a guaranty, even where they are unrelated to its direct enforcement, provided the guaranty is unconditional. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 254 (App. Div. 1997) (emphasis added).

The court is satisfied that the guaranty is, in fact, expressly limited and that it is not unconditional.

The guaranty begins by specifically stating that liabilities include:

The full and prompt payment when due of all rents, charges and additional sums coming due under said Lease, together with the performance of all covenants and agreements of the Tenant therein contained and together with the full and prompt payment of all damages that may arise or be incurred by Landlord in consequence of Tenant's failure to perform such covenants and agreements (all such obligations hereinafter collectively referred to as "Liabilities").

Para. 1.

Immediately following this provision, the Guaranty makes clear that in addition to these liabilities, the Guarantor "further" agrees to pay "all" expenses including attorney's fees and legal expenses:

Guarantor further agrees to pay all expenses, including attorneys' fees and legal expenses, paid or incurred by Landlord in endeavoring to collect or enforce the Liabilities or any part thereof and in enforcing this guaranty, such payment and performance to be made or performed by Guarantor forthwith upon a default by Tenant.

Id.

Following all of this, and appearing in *italicized* text, the guaranty goes on to limit SDL's liability under the guaranty:

Notwithstanding anything contained in this Guaranty to the contrary, Guarantor's liability hereunder shall not exceed an amount equal to the Minimum Annual Rent, Percentage Rent and additional rent charges payable under the Lease for a period of one (1) year following the date of Tenant's default.

Para. 4 (emphasis added).

LMV argues that any limitation of liability pertains to the rental charges due under the lease only as there is no specific reference to a limitation on the recovery of attorney's fees. SDL argues that the language is expansive and is clearly intended

to limit "Guarantor's liability" as to all line items and elements of any obligation. SDL further argues that the reference to one year's worth of rent was an agreed upon formula to cap its exposure. One of the defense witnesses at trial testified that the italicized language indicated that it was a defense insertion into the guaranty made during the negotiations. This was undisputed.

"A guaranty is a contract and must be interpreted according to its clear terms so as to effect the objective expectations of the parties," Housatonic Bank & Tr. Co. v. Fleming, 234 N.J. Super. 79, 82 (App. Div. 1989) as well as in accordance with general principles of contract law. "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." M.J. Paquet, Inc. v. New Jersey Dept. of Transp., 171 N.J. 378, 396 (2002) (citation omitted).

It is of course not uncommon for even unambiguous contract terms to be the subject of debate between adversaries, even when the words and meaning are plain and obvious. Here the parties each argue that the cited language cannot possibly mean what the other party says. So, who is right?

The essence of contract construction is to decipher "the intention of the parties . . . as revealed by the language used, taken as an entirety. . . ." Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301 (1953). See also Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 582 (1986). "[I]n the quest for the intention, the situation of the parties,

the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." Atl. N. Airlines, supra, 12 N.J. at 301.

To discover the intention of the parties, and to determine whether a contract is ambiguous, courts may consider extrinsic evidence offered in support of conflicting interpretations. Conway v. 287 Corporate Ctr. Assoc., 187 N.J. 259, 268-69 (2006). See also In re Teamsters Indus. Emp. Welfare Fund, supra, 989 F.2d at 132, 135 (3d Cir. 1993). "Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement, even where the contract is free from ambiguity, not for the purpose of changing the writing, but to secure light by which its actual significance may be measured." Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 427 (1956); Atl. N. Airlines, supra, 12 N.J. at 301-02. "There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown[.]" Restatement (Second) of Contracts 223 comment b (1981).

"Extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning." In re Teamsters Indus. Emp. Welfare Fund, supra, 989 F.2d at 135. See also Restatement (Second) of Contracts, supra, 214(c) ("[N]egotiations prior to . . . adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated"); Id., 214, reporter's note, comment b (noting jurisdictions that have adopted "the proposition that there need

not be a finding of ambiguity before parol evidence is admitted to interpret an integrated agreement").

Disproportionate emphasis upon a word or clause or a single provision does not serve the purpose of interpretation. Words and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose. . . .

Newark Publishers' Ass'n, supra, 22 N.J. at 426.

Resolution of ambiguity, if found, is a fact issue. Michaels v. Brookchester, Inc., 26 N.J. 379, 388 (1958); Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 152-53 (App. Div. 1960), certif. denied, 34 N.J. 66 (1961). A contract is ambiguous if it is susceptible to two reasonable alternative interpretations. Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008); M.J. Paquet v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). However, a plenary hearing is required to resolve an ambiguous contract only if, after considering all relevant materials, a genuine issue of fact remains. In re Teamsters Indus. Emp. Welfare Fund, supra, 989 F.2d at 135 n.2.

Although this court discerns plausible ambiguity, the relevant extrinsic evidence supports SDL's interpretation of the guaranty, specifically the testimony of the defense witness regarding the modification of the proposed guaranty originally circulated by LMV. The extrinsic evidence is of particular potency as the testimony was elicited at trial and the witness was subject to vigorous cross

examination. Thus, the proofs adduced are precisely what would be adduced in the event the question had been presented on a motion and an ambiguity found.³

The defense witness's testimony regarding the defense inclusion of italicized contract language limiting the SDL's obligation, a fact that was not disputed, its placement following the essential promise of SDL as to what it would guarantee, and the language of paragraph four stating "[n]otwithstanding anything contained in this Guaranty to the contrary, Guarantor's liability hereunder shall not exceed ..." is powerful evidence in support of SDL's interpretation of the limitation of liability.

LMV's primary argument in opposition to this evidence and SDL's reading of it is summarized in footnote seven of its brief in support of its request for fees and costs filed on January 31, 2025. LMV's argument is not illogical, it is, however, not nearly as supported by record evidence. In interpreting a contract, the court must also consider it as whole and avoid interpreting one provision in isolation from others pertaining to the same subject. In this guaranty the parties first agreed as to what SDL was promising to LMV it would guarantee in paragraph one. Three paragraphs later, in broad, plain English, the parties limited SDL's financial

³ While this court might have decided the question on papers alone with a less robust record to rely upon, and perhaps found no ambiguity, that is not what happened. The fact that the case went the distance to verdict and that the proofs presented focused meaningfully on this issue allows the court to buttress its conclusions with exactly the sort of record it would have needed to resolve an ambiguity. In other words, even though the court detects only a plausible ambiguity, the ultimate question it is answering is based upon a record perfectly suited for resolution of an indisputable ambiguity, i.e. the trial proofs and testimony.

exposure to be fixed and capped not by a dollar amount, but by a mutually agreed upon formula which uses the annual rent (a figure that likely changed from year to year) as the cap.

The cap states that it applies regardless of what other promises SDL might have made in the agreement ("Notwithstanding anything contained in this Guaranty to the contrary...") and that SDL is not required to pay anything more than one year's worth of rent for its exposure to the categories of costs described in paragraph one of the guaranty ("Guarantor's liability hereunder shall not exceed an amount equal to the Minimum Annual Rent, Percentage Rent and additional rent charges payable under the Lease...").

At issue here, and always, is the parties' objective manifestations of intent. See Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956) ("It is not the real intent but the intent expressed or apparent in the writing that controls."); George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 17 N.J. 20, 32 (1954) ("[T]he quest is for the reasonably certain meaning of the language used, taken as an entirety, considering the situation of the parties, the attendant circumstances, the operative usages and practices, and the objects the parties were striving to achieve."); Nestor v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) ("To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their plain and ordinary meaning.") (internal quotation marks and citations omitted). "[A] contracting party is bound by the

apparent intention he outwardly manifests to the other contracting party. To the extent that his real, secret intention differs therefrom, it is entirely immaterial." Cohn v. Fisher, 118 N.J. Super. 286, 291 (Law Div. 1972).

The court is fully satisfied that this limitation was part of the bargained for guaranty and thus all that SDL may be made to guarantee is the amount defined by that agreement. In this case, that means that SDL must guarantee one hundred percent of the judgment. SDL must also bear the cost of LMV's attorneys' fees and costs, but only up to a dollar amount equal to the difference between the calculated cap and the deduction for the judgment.

In its ruling the court found that the monthly rent amount was \$10,422.43. Multiplying that figure by twelve months yields a maximum guaranty obligation of \$125,068.08. Once the judgment amount of \$64,119.94 is subtracted, the balance of the SDL obligation which it may be made to pay towards the attorneys' fees and costs award is \$60,948.14.

A memorializing order will be entered simultaneous with the filing of this opinion.