ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

PALMER DISTRIBUTING, INC.,

Plaintiff,

-vs-

Index No. 55952

RONALD KRUEGER,

Defendant.

APPEARANCES: A. SHELDON GOULD, ESQ.
Attorney for the Plaintiff

ANTHONY J. VILLANI, P.C.
(ANTHONY J. VILLANI, ESQ., of counsel)
Attorneys for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

Plaintiff, Palmer Distributing Inc. ("Palmer"), brought this action for a money judgment against defendant based upon breach of guaranty contract[1]. The basic facts established at trial are uncomplicated and largely undisputed. The plaintiff is in the business of selling goods and supplies to restaurants, primarily consumables The defendant was engaged in operating a restaurant known as Divot's Restaurant and Grill Room ("Divot's") located at the former Newark Country Club on Murray Street in the Village of Newark, Wayne County. The restaurant was the property of a

---

[1] This species of contract is described as follows:
§2. "Guaranty" defined
A contract of guaranty is the promise to answer for the payment of some debt or the performance of some obligation, on default of such payment or performance, by a third person who is liable in the first instance, and imports the existence of two different obligations. It is an obligation to answer for the debt of another. Thus, one who agrees to satisfy every debt or a corporation and, in the event of the failure of the corporation to satisfy such debts, to personally assume and satisfy such debts, is a guarantor of payment of the corporation's debts.

63 NY Jur2d, Guaranty and Suretyship §2 (1987 as supplemented).

corporation named Kimaron Enterprises, Inc., which operated under the assumed name of Divot's. The defendant was an officer of the corporation, more specifically, its president. The corporation was established for the purpose of operating Divot's, and to limit the individual liability of the defendant with respect to debts and obligations that could derive therefrom except as expressly assumed or imposed by operation of law. To achieve this purpose, defendant testified that his corporate attorney instructed him to always sign documents associated with the business by appending his corporate office after his signature to make clear that he was signing as an agent of the corporation and not in his individual capacity.

In April of 2003, shortly after the restaurant had commenced operation, Jason Palmer, one of plaintiff's sales representatives, stopped by the restaurant to solicit its business and establish a credit account for Palmer's products purchased. The result of that meeting was a document signed by the defendant, which is the central focus of this litigation. That document is a single sheet, eight by eleven inch page, two sided pre-printed form. The first side is headed with the name, address, and telephone and fax numbers of the plaintiff, Palmer Distributing. The balance of the first side call for certain information about the customer, including the name and type of business, its form of organization, and the owners thereof. The space provided to insert this information was filled in by hand, clearly showing that the business was a corporation doing business under an assumed name, and that its officers were the defendant as president and another as vice-president.

The second side consists primarily of a statement in bold capitalization reading in pertinent part as follows:

GUARANTEE

I/WE HEREBY GUARANTEE THE PAYMENT OF ANY OBLIGATIONS DUE TO PALMER DISTRIBUTING, INC. FOR MERCHANDISE SUPPLIED BY PALMER DISTRIBUTING, INC. TO _____ AFTER THE DATE HEREOF. I/WE ALSO GIVE AUTHORIZATION TO PALMER DISTRIBUTING, INC. TO CHARGE MY VISA OR MASTERCARD ACCOUNT WITH OUTSTANDING BALANCE DUE.
THIS GUARANTEE SHALL REMAIN IN FORCE AND EFFECT UNTIL REVOKED IN WRITING BY ME AND SHALL APPLY TO ANY MERCHANDISE SUPPLIED TO _____ PRIOR TO THE REVOCATION OF THIS GUARANTEE. I/WE ALSO AGREE TO PAY ANY LATE CHARGES, WHICH ACCRUE ON THIS ACCOUNT AND ANY COLLECTION AND ATTORNEY'S FEES, WHICH MAY BE INCURRED BY PALMER DISTRIBUTING, INC. TO COLLECT THIS ACCOUNT.
* * * *

UNDERSTOOD AND AGREED BY THOSE INVOLVED THAT IN CASE OF A CORPORATION, INDIVIDUAL, OR PARTNERSHIP, THE CREDIT BACKGROUND OF ALL OFFICERS, OWNERS, AND PARTNERS WILL BE CHECKED AND APPROVAL OF THIS APPLICATION IS SUBJECT TO THE RESULTS OF SUCH CREDIT CHECKS.

NAME OF APPLICANT _____ TITLE _____

AUTHORIZED SIGNATURE _____ DATE _____

The two spaces in the body of this typed form to indicate the entity whose obligations were being guaranteed were left blank. The spaces at the bottom of the form were, however, completed in handwriting to identify "Divots's Restaurant - Ronald Kruger" as the applicant, "President" as his title, and "4/17/03" as the date. On the line to indicate the authorized signature, there appears the signature of Ronald P. Krueger, without further addition to indicate either individual or corporate capacity. At trial, the genuineness of the document and authenticity of the defendant's signature was undisputed, nor did the defendant disavow any of its contents. Both parties to this litigation agree that the document is what it is. Further, the parol evidence introduced concerning its execution does not enhance or diminish either parties' position on the issue whether the document creates a binding contract of guarantee with the defendant as individual guarantor of his corporation's debts to the plaintiff.

Following the execution of this document, the plaintiff began selling its goods to Divot's, and in the course of a few months the accumulating unpaid invoices eclipsed the payments on account. Deliveries ceased in the Fall of 2003 based either upon nonpayment or the restaurant going out of business. The plaintiff established at trial that the balance due the plaintiff as of November, 7, 2003 was $9,159.62. No dispute exists that any debt owed to plaintiff is a corporate obligation, which, unfortunately, is insolvent and without assets. The parties sharply dispute whether the defendant personally guaranteed payment of this corporate debt.

Long among the canons of contract law is "the rule that where there is a disclosed principal-agent relationship, and the contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (*Mencher v Weiss*, 306 NY 1, 5 (1953). Said otherwise, "the courts should refrain from foisting such an obligation [of guarantor] upon a party,

be he individual or corporation, who simply signs as agent, absent the requisite clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability" (*Savoy Record Company v Cardinal Export*, 15 NY2d 1, 4 (1964). While the contract language relied upon in the instant case as a basis of personal liability of the defendant may fall short of syntactical perfection in places, no specific language is needed to create a contract of guaranty (*see General Phoenix Corp. v Cabot*, 300 NY 87 [1949]). It is sufficient if the language used clearly evidences that such was intended.

The Court finds that the language used in the document with the word "guarantee" appearing three times evidences such intent. To be sure, the leaving of blanks in the guarantee was sloppy business practice, but not fatal when it is clear what entity is intended to be referenced. So too, it is better practice to have the individual sign twice, once in his corporate capacity and the second in his personal capacity as a guarantor. But the totality of the language used in thus case clearly indicates that the word "guaranty" was used in its ordinary commercial and legal meaning, and not simply as a substitute for a corporate promise to pay (*Crown Tire Company, Inc. v Tire Associates of Fairport, Inc.*, 177 AD2d 974 [4th Dept 1991]; *Sullivan County Wholesalers, Inc. V Cornwall Construction Co., Inc.*, 90 AD2d 914 [3d Dept 1982]).

Accordingly, judgment is granted to the plaintiff in the amount of $9,159.62 with interest, costs and disbursements, together with reasonable attorney fees as contractually provided, the latter to be approved by the Court upon submission of an affidavit of services, subject to the defendant's right to object and request a hearing thereon.

Dated: May 5, 2006
Lyons, New York

John B. Nesbitt
Acting Supreme Court Justice