NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0567

ESPLANADE, L.L.C.

VERSUS

KMR ENTERTAINMENT COMPANY, KENNETH STEPHEN STUBBS, JR., MARILYN DAVIS STUBBS, AND GLEN D. BYNUM

Judgment Rendered: March 30, 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 511,633, Division "D"

Honorable Janice Clark, Judge Presiding

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BEFORE: PARRO, PETTIGREW, AND HUGHES, JJ.

HUGHES, J.

This appeal contests the district court's granting of a new trial and vacating of a judgment that had been rendered in favor of the plaintiff/landlord and against the guarantors of a lease. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In September of 1996, the plaintiff, Esplanade, L.L.C. ("Esplanade"), entered into a lease with Southern Bombay Enterprises, Inc. ("Bombay"),[1] for the rental of over 5,000 square feet for the operation of a business known as Glen's Bombay Club, located in Esplanade Mall. The term of the lease began on September 1, 1996 and ended August 31, 2001. The lease contained a "Rider" providing in "Section 16.17" for a right to renew the lease for an additional five-year term "in favor of only the Original Tenant ... and shall cease to exist if the Original Tenant makes an Assignment or Sublease."[2] A "Guarantee of Lease" was executed by Glen D. Bynum, individually and as administrator of the J. David Trust by Glen D. Bynum, in which the guarantors agreed to assignment of the lease "if there be such a privilege granted." Assignment and sublease of the premises was allowed under the terms of the lease only with the prior consent of Esplanade.

In October of 1999, Bombay assigned the lease to KMR Entertainment Company ("KMR"), with the consent of Esplanade. The assignment agreement expressly provided that neither Bombay nor its guarantors under the original lease were released from liability, but rather all agreed these parties would remain liable "per the terms of that Guaranty ...

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[1] Glen D. Bynum signed on behalf of Bombay.

[2] The rider further stated, "The rights set forth herein shall not inure to the benefit of any successor or assignee Tenant or any other Tenant."

for the term of the Lease and any extensions terms [sic] provided for in the Lease." Esplanade, Bombay, Mr. Bynum, individually and as administrator of the J. David Trust, and KMR all signed the "Assignment and Assumption of Lease" document. An additional "Guaranty of Lease" was executed on October 26, 1999 by guarantors Glen D. Bynum, Kenneth Stephen Stubbs, Jr., and Marilyn Davis Stubbs.

No new lease agreement was signed. However, on July 2, 2001 a one-page "Addendum to Lease" was signed by Esplanade and Marilyn Stubbs, as president of KMR, enlarging the leased premises from 5,369 square feet to 6,142 square feet. The addendum further provided:

> Section 1.01 of the Lease, setting forth the "Primary Term", is supplemented to provide for an additional term, (previously referred to as the "option period"), whereby Esplanade, L.L.C. shall lease to KMR Entertainment Company the property described and referred to in paragraph "1." of this Addendum for a term beginning September 1, 2001 through August 31, 2006. Section 16.17 in the Rider is deleted in its entirety.

Neither Bombay nor the guarantors signed this addendum.

In 2003 KMR defaulted on the lease. Esplanade filed the instant lawsuit on September 10, 2003 against KMR,[3] Kenneth Stephen Stubbs, Jr., Marilyn Davis Stubbs, and Glen D. Bynum, seeking to recover sums due under the lease.[4]

At the conclusion of the trial held May 3, 2004, the court asked the parties to submit memoranda, proposed findings of fact, and proposed judgments. Proposed findings of fact and conclusions of law, along with a proposed judgment, were submitted and filed into the record by counsel for Glen D. Bynum on May 7, 2004. A proposed judgment was also submitted

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[3] A notice of bankruptcy was filed into the record on September 26, 2003 as to KMR.

[4] The petition did not assert a claim against the J. David Trust.

and filed into the record by counsel for Esplanade on May 26, 2004; this judgment was signed by the district court judge on the day it was filed, and named as judgment debtors KMR, Kenneth Stephen Stubbs, Jr., Marilyn Davis Stubbs, and Glen D. Bynum, "jointly, severally, and in solido" for the sum of $164,227.97, along with interest at the rate of 18% per annum commencing on May 1, 2004, plus attorney's fees in the amount of $24,230.10, and all costs.

Kenneth Stephen Stubbs, Jr. and Marilyn Davis Stubbs then filed a motion for new trial on June 3, 2004, and Glen D. Bynum filed a motion for new trial on June 7, 2004. On July 19, 2004, the district court granted a new trial, stating:

> The following oral reasons assigned this date in this matter: "This is No. 511-633, Esplanade v. KMR Entertainment Company. This matter comes before the Court on a motion for new trial, having previously been heard and submitted, having been previously reassigned. The Court has reviewed this matter and is firmly convinced that the motion should be granted inasmuch as the judgment is contrary to the law and evidence and was improvidently signed. Judgment to be signed accordingly. Notify counsel."

Subsequently a status conference was held on the record, during which the following colloquy occurred between counsel and the district court judge:

> **[COUNSEL FOR KMR, KENNETH STUBBS, AND MARILYN STUBBS]:** I think there may still be some confusion of what the court's ruling was on the motion for new trial. My appreciation is that there was a minute entry issued --
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> **THE COURT:** That's correct.
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> **[COUNSEL FOR KMR, KENNETH STUBBS, AND MARILYN STUBBS]:** That the court ruled vacating the prior judgment.
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> **THE COURT:** That's right. The court inadvertently signed a judgment and looked for the minute entry to compare it and there was none at the time. So the court had a -- could easily have heard the motion contradictorily, have each of you come down here and present argument. But in the interest of judicial

economy, I thought that the better procedure would be to issue the minute entry, as normally is the procedure.

The reason we didn't do it that time, somewhere along the line a sub was involved, one of our employees was not here during that period. In any event, there was an error, so I wanted to correct it as expeditiously as possible.

So I will grant the motion for new trial, or indicate to you that I will let the record, if you prefer, let anybody submit anything in addition that they would like to. But that was not the judgment I intended to sign.

* * *

THE COURT: Thank you very much. Let me reiterate for counsel because apparently I did not make myself clear, and please excuse me for being inartful in this instance. But let me suggest to you that this court made an error and reversed itself.

* * *

THE COURT: I made an error because the judgment that I signed was not the one I intended to sign. And when I went to compare it to the minute entry, the minute entry wasn't there. Instead of whiting my signature out, it went out before it got back to my attention and [was] sent out to counsel.

And immediately upon receiving the motion for a new trial I went back to look and see what occurred and there was an error. Now in granting a new trial, it gives this court an opportunity to correct its error without anyone having to appeal or take writs and that's what this court intended to do. We are now at the point where we were initially. All right?

* * *

...If you all want to enter into some additional stipulations, the court will allow you to do that. But in any event, as soon as this court fully recognized what occurred, it took great pains to correct its own error. And that's what I wanted to do because I didn't want additional expense and time delay to the parties.

Additional discussion between the court and counsel was had at a December 12, 2005 hearing, as follows:

[COUNSEL FOR GLEN BYNUM]: ...The original lease contained a rider which said that the only way and the only party that can extend or renew the lease, the only party that has that right, is the original tenant Southern Bombay. The lease was assigned in 1999; ergo, the right to extend the lease was terminated at that point.

Therefore, when the lease terminated, ran its course to August 31st of '01, that lease ended. That was a principle [sic] obligation. That was the obligation to which Glen Bynum's

accessory obligation as a guarantor was attached and his obligation at that point ceased and he has, basically, no ties to this case after that point.

Therefore, the plaintiff's claims against Mr. Bynum in his capacity as a guarantor after that date are without merit. Thank you.

THE COURT: That was the judgment the court intended to sign and will sign a judgment accordingly. Thank you very much.

[COUNSEL FOR ESPLANADE]: Your Honor, I just have a question. With respect to the original obligor, which was KMR, they did not appeal that judgment with respect to them.

THE COURT: I vacated that judgment. The court inadvertently signed a judgment and expressed that to all counsel, both by minute entry and by telephone. ... It was an error that the court made.

[COUNSEL FOR ESPLANADE]: So is your ruling today that there's not going to be a judgment against the original obligor as well as the guarantors?

THE COURT: That's correct.

[COUNSEL FOR ESPLANADE]: Because the original obligor did not request a motion for new trial.

THE COURT: That's my judgment.

The district court signed a judgment on December 20, 2005, dismissing Esplanade's demands against KMR, Kenneth Stephen Stubbs, Jr., Marilyn Davis Stubbs, and Glen D. Bynum. Esplanade subsequently filed a notice of appeal, appealing the "Final Judgment entered in this matter in which the Court dismissed its petition." In brief to this court, Esplanade asserts the district court erred: in vacating a judgment in favor of a party who did not file a motion for new trial or otherwise seek to modify the judgment; in granting a new trial under LSA-C.C.P. art. 1972(1) when the judgment was supported by a fair interpretation of the evidence; in vacating the May 26, 2004 judgment and in entering the December 20, 2005

judgment; and in granting a motion for new trial when the judgment was "improvidently signed."

LAW AND ANALYSIS

Motion for New Trial

A new trial may be granted, upon contradictory motion of any party *or by the court on its own motion*, to all or any of the parties and on all or part of the issues, or for reargument only. LSA-C.C.P. art. 1971. A new trial *shall* be granted, upon contradictory motion of any party, in the following cases: (1) when the verdict or judgment appears clearly contrary to the law and the evidence; (2) when the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial; (3) when the jury was bribed or has behaved improperly so that impartial justice has not been done. LSA-C.C.P. art. 1972. A new trial *may* be granted in any case if there is good ground therefor, except as otherwise provided by law. LSA-C.C.P. art. 1973. The trial court's discretion in ruling on a motion for new trial is great and its decision will not be disturbed on appeal absent an abuse of that discretion. **Jackson v. Home Depot, Inc.**, 2004-1653, p. 12 (La. App. 1 Cir. 6/10/05), 906 So.2d 721, 728; **Evangelista v. U.S. Welding Service, Inc.**, 2003-2824, pp. 5-6 (La. App. 1 Cir. 12/30/04), 898 So.2d 438, 440-41; **Guidry v. Millers Casualty Insurance Company**, 2001-0001, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 675, 680.

The record in this case presents an ample basis for the district court's exercise of discretion in granting a new trial from the May 2004 judgment. The district court judge clearly stated on the record that she signed the wrong judgment and had intended to rule in favor of Mr. Bynum, rather than

the plaintiff. Under the circumstances, we can find no abuse of discretion in the district court's grant of a new trial in this case.

Review of Merits of Final Judgment

Esplanade contends on appeal that the substance of the vacated judgment was supported by the law and evidence, rather than the final judgment, which dismissed its claims as to all defendants.

The basis for the alleged liability of Kenneth Stephen Stubbs, Jr., Marilyn Davis Stubbs, and Glen D. Bynum to Esplanade was the guaranty each of these defendants executed on October 26, 1999 to ensure the performance of the assumption of the lease undertaken by KMR. This guaranty provided, in pertinent part:

> [Guarantors] ... do hereby guaranty the prompt, full and faithful performance by [KMR] of all agreements, covenants, obligations and acts to be performed by [KMR] under the provisions of said Assignment and/or said Lease during the initial term and any extensions granted thereto, and Guarantors covenant and agree that in the event of [KMR's] default or defaults, upon [Esplanade's] demand, promptly to fulfill and perform any and all agreements, covenants and obligations of [KMR] contained in said Assignment and/or Lease which may accrue, become due and payable, or performable during or for such initial term or any extension of the Assignment and/or Lease. Guarantors and [Esplanade] may deal with [KMR] as they may elect without diminishing or discharging the liability of Guarantors, assumed hereunder. Guarantors agree that [Esplanade], and [KMR] ***may alter, modify or otherwise amend*** said Assignment and/or Lease without necessity of any notice to or joinder by Guarantors, and [Esplanade] may deal with [KMR] as it may elect without notice to Guarantors of any default by [KMR] under the said Assignment and/or Lease or other notice to which [KMR] or Guarantors might otherwise be entitled by law or contract. ... [Emphasis added.]

On the merits, the guarantors essentially assert that by the terms of the "Rider" to the original lease agreement, only the "Original Tenant" (Bombay) was authorized to renew the lease for an additional term, and the subsequent assignee (KMR) could not extend the original lease under the express terms of the rider. The guarantors argue their guaranty of the

original lease terminated on the date the original lease was to terminate, August 31, 2001. Thus the guarantors argue they cannot be legally responsible to Esplanade for any default of KMR that occurred in 2003, which is the subject of this lawsuit. In contrast, Esplanade essentially asserts that in the guaranty, the guarantors authorized Esplanade to contract directly with KMR, without notice to them, even to the extent of extending the original lease term and expanding the premises leased. Thus, Esplanade asserts that the July 2001 addendum, signed only by KMR, contractually deleted the restriction contained in the "Rider," and allowed the original lease to be extended through 2006.

The district court, in ruling in favor of the guarantors, rejected Esplanade's argument. We find no error in that ruling.

Suretyship must be express and in writing. LSA-C.C. art. 3038. Suretyship cannot be presumed, but rather an agreement to become a surety must be expressed and must be construed within the limits intended by the parties to the agreement. **Placid Refining Co. v. Privette**, 523 So.2d 865, 867 (La. App. 1 Cir.), writ denied, 524 So.2d 748 (La. 1988). Contracts of guaranty or suretyship are subject to the same rules of interpretation as contracts in general. **Ferrell v. South Central Bell Telephone Co.**, 403 So.2d 698, 700 (La. 1981); **Eclipse Telecommunications Inc. v. Telnet Intern. Corp.**, 2001-0271, p. 4 (La. App. 5 Cir. 10/17/01), 800 So.2d 1009, 1011.

Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2046. A doubtful provision must be interpreted in light of the nature of the contract,

equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties. LSA-C.C. art. 2053. When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose. LSA-C.C. art. 2054. Equity is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. LSA-C.C. art. 2055. See **Naquin v. Louisiana Power & Light Co.**, 2005-2104, p. 5 (La. App. 1 Cir. 11/17/06), ___ So.2d ___, ___. Any ambiguity in a contract is to be construed against the party who furnished the text. LSA-C.C. arts. 2056 and 2057; **Seals v. Sumrall**, 2003-0873, p. 6 (La. App. 1 Cir. 9/17/04), 887 So.2d 91, 95.

The seemingly incongruous language of the various pertinent documents in this case has created ambiguity as to the extent of the obligations undertaken by the guarantors. The 1996 lease agreement stated that only the "Original Tenant" (Bombay) could renew the lease for an additional five-year term beyond August 31, 2001, and the 1999 KMR "Assignment and Assumption of Lease" allowed an extension of the original lease term only as "provided for in the Lease." However, the 2001 "Addendum to Lease" attempted to delete the renewal restriction to allow the assignee of the lease, KMR, to renew the lease through August 31, 2006. It is unclear whether the guaranty, which authorized Esplanade and KMR to "alter, modify or otherwise amend" the assignment and/or lease without notice to or joinder of the guarantors, contemplated that the original lease would be renewed or extended in time.

Our review of the principles of contractual construction and the language of the documents at issue in this case, compel our conclusion that KMR never acquired the right, *under the original lease agreement*, to extend that particular contract beyond August 31, 2001. All ambiguities must be construed against the drafting party, Esplanade.[5] Thus, the renewal rider operated, on the date the lease was assigned to KMR, to invalidate the right of renewal under the lease, since the rider expressly declared that the right to renew shall "cease to exist" if the lease was assigned. Accordingly, the guarantors could not guarantee performance of a condition that ceased to exist under the lease, i.e., a lease term beyond August 31, 2001.

Consequently, we find no error in the district court's decision to rule in favor of the guarantors. Under what contractual terms Esplanade and KMR nevertheless continued thereafter in their relationship as landlord and tenant is not an issue reached in this appeal.

Liability of KMR

With respect to KMR, Esplanade additionally asserts that the original May 2004 judgment should not have been vacated as to KMR, because KMR failed to file a motion for new trial. Notwithstanding this fact, the district court had the authority to grant the new trial on its own motion, which the record clearly indicates was the court's intention.[6]

The evidence presented would tend to establish that some type of contractual agreement existed between Esplanade and KMR after the August 31, 2001 lease agreement, and thus, KMR remained primarily liable for

[5] The testimony in the instant case revealed that Esplanade's attorney drafted all of the relevant documents. And, all of the guarantors testified that it was their understanding that their guaranty expired with the original term of the lease.

[6] The district court noted that pursuant to the motions for new trial before the court, it could have ordered a contradictory hearing; however, the court realized it had made a mistake in signing the wrong judgment from the two alternatives presented to the court. Therefore, the court granted the motion ex parte, ostensibly on its own motion.

unpaid rentals and other damages due; however, the record contains a "Notice of Bankruptcy" as to KMR. The filing of a petition in bankruptcy acts as an automatic stay of other judicial proceedings against the debtor, absent action of the bankruptcy court terminating, annuling, or modifying the stay. See 11 U.S.C.A. § 362; **Miller v. French**, 530 U.S. 327, 359, 120 S.Ct. 2246, 2265, 147 L.Ed.2d 326 (2000). Consequently, we note that nothing appears in the record presented on appeal to indicate that the bankruptcy stay was terminated, annuled, or modified with respect to KMR; therefore, we cannot say that the district court erred in refusing to maintain the judgment against KMR.

Nevertheless, we conclude the district court erred in *dismissing* Esplanade's suit as to KMR. Since the record does not reveal the final disposition of the bankruptcy court as to KMR, we are unable to determine whether Esplanade's action against KMR remains viable. Therefore, we vacate that portion of the district court's December 20, 2005 judgment dismissing Esplanade's claims against KMR and remand the matter to the district court for further proceedings consistent with this opinion and the rulings in KMR's bankruptcy action.

CONCLUSION

For the reasons assigned herein, the judgment of the district court is affirmed in part, as to defendants Kenneth Stephen Stubbs, Jr., Marilyn Davis Stubbs, and Glen D. Bynum. The district court judgment is vacated in part as to defendant, KMR Entertainment Company, and the matter is remanded for further proceedings as to this defendant. All costs of this appeal are to be borne by appellant, Esplanade, L.L.C.

AFFIRMED IN PART; VACATED IN PART; REMANDED.