NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1929

THE SHERWIN-WILLIAMS COMPANY

VERSUS

FRANK J. CULOTTA AND FRANK CULOTTA CONTRACTOR, INC.

DATE OF JUDGMENT: MAY - 2 2012

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 93,304, DIVISION E, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE ALVIN TURNER, JR., JUDGE

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: AFFIRMED.

Guidry, J. concurs.

KUHN, J.

The defendant-appellant, Frank. J. Culotta, Jr. (Culotta), appeals a summary judgment holding him liable to plaintiff-appellee, The Sherwin-Williams Company (Sherwin-Williams), under a written guaranty for goods and services supplied by Sherwin-Williams to Frank Culotta Contractor, Inc. (FCC). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In June 2004, Culotta executed and signed a commercial credit application with Sherwin-Williams on behalf of FCC, of which he was a shareholder. The document signed by Culotta included a guaranty that he would individually pay for all goods, wares and merchandise supplied to him or FCC by Sherwin-Williams. Subsequently, in 2005, Culotta retired and transferred his entire interest in FCC to his son through the sale of his shares therein. He contends that he has had no affiliation with FCC since that time.

In November 2007, FCC and Sherwin-Williams executed two "Purchase Order/Subcontract" agreements, pursuant to which FCC supplied floor covering and carpet to FCC for a construction project on which it was the general contractor. The purchase agreements contained clauses providing that all disputes arising out of or related to the contracts were to be decided by arbitration, if the contractor [FCC] so agreed. Culotta was not a party or signatory to these purchase orders.

FCC failed to fully pay Sherwin-Williams for the goods and services supplied pursuant to the purchase orders; in July 2009, Sherwin-Williams filed suit against FCC and Culotta, as a personal guarantor of FCC's debt, for the amounts due. FCC did not answer the suit, and a default judgment was entered against it in favor of Sherwin-Williams. In his answer to the suit, Culotta made no

reference to arbitration. However, after Sherwin-Williams filed a motion for summary judgment, Culotta filed a motion in June 2010 to stay the proceedings pending arbitration, relying on the arbitration clauses in the purchase orders as the basis for the requested stay. Following a hearing, the trial court denied the motion to stay, and Culotta filed a writ application seeking review of that ruling. This Court denied the application. See ***The Sherwin-Williams Company v. Frank J. Culotta and Frank Culotta Contractor, Inc.***, 10-2285 (La. App. 1st Cir. 1/31/11) (unpublished).

Thereafter, the trial court granted summary judgment in favor of Sherwin-Williams ordering Culotta to pay the principal amount of $50,375.73, plus attorney fees of $3,500.00, interest, and court costs. The summary judgment specified that the award against Culotta was *in solido* with the award previously rendered against FCC. Culotta now appeals the summary judgment, arguing in two assignments of error that the trial court erred in failing to stay the proceedings pending arbitration and in granting summary judgment for Sherwin-Williams when its employees knew that Culotta no longer had an ownership interest in, or was affiliated with, FCC.

MOTION TO STAY

On appeal, Culotta contends the trial court erred in refusing to grant his motion to stay based on the court's erroneous conclusion that arbitration was not required in this matter. Culotta argues that a stay was required because Sherwin-Williams did not submit this matter to arbitration prior to filing suit, as required by the unambiguous terms of the purchase orders. In so arguing, Culotta relies, in part, on La. R.S. 9:4202, which provides that:

> If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in

> the suit or proceedings is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement,** providing the applicant for the stay is not in default in proceeding with the arbitration. [Emphasis added.]

Culotta acknowledges that he was not a signatory to the purchase orders containing the arbitration clauses. Nevertheless, he asserts that he had the same right as FCC, with whom he was held solidarily liable, to stay this matter pending arbitration under the terms of the contracts, since La. C.C. art. 3046[1] provides that a surety can assert all defenses available to the principal obligor. Accordingly, he contends that, since this dispute arises out of written contracts requiring arbitration, the trial court should have stayed the proceedings once he filed his motion to stay pending arbitration, particularly considering the strong public policy favoring arbitration.

Arbitration is a matter of contract and a court cannot compel a party to submit to arbitration any disputes that the party has not agreed to submit. ***Snyder v. Belmont Homes, Inc.***, 04-0445 (La. App. 1st Cir. 2/16/05), 899 So.2d 57, 63, writ denied, 05-1075 (La. 6/17/05), 904 So.2d 699; ***Ciaccio v. Cazayoux***, 519

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[1] Louisiana Civil Code article 3046 provides that:

> The surety may assert against the creditor any defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor.

It is well established that "guarantor" and "surety" may be used interchangeably, since a contract of guaranty is equivalent to a contract of suretyship. See ***Regions Bank v. Louisiana Pipe & Steel Fabricators, LLC***, 11-0839 (La. App. 1st Cir. 12/21/11), ____ So.3d ____; see also La. R.S. 10:1-201(b)(39).

Additionally, La. C.C. art. 1801 provides that:

> A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. He may not raise a defense that is personal to another solidary obligor.

So.2d 799, 804 (La. App. 1st Cir. 1987). The authority of an arbitrator to resolve disputes is derived from the parties' advance agreement to submit such grievances to arbitration. ***AT & T Technologies, Inc. v. Communications Workers of America***, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate a particular dispute is an issue for judicial determination. ***International River Center v. Johns-Manville Sales Corporation***, 02-3060 (La. 12/3/03) 861 So.2d 139, 143, quoting ***Howsam v. Dean Witter Reynolds***, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). Thus, the determination as to whether to stay or to compel arbitration is a question of law for the trial court. On appeal, the standard of review is simply to decide whether the trial court's determination was legally correct. ***Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C.***, 06-1950 (La. App. 1st Cir. 7/25/07), 965 So.2d 455, 459.

In the instant case, the obligation for which Culotta was held liable under the guaranty agreement was based on purchase orders signed by representatives of Sherwin-Williams and FCC. Those contracts include the following provision:

> Subcontractor /supplier [Sherwin-Williams] agrees that any and all disputes arising out of or relating to this contract shall be decided by arbitration with the hearing location to be Baton Rouge, Louisiana. **If the Contractor [FCC] agrees to arbitrate** then the Contractor will decide the forum under which the arbitration will be held. **However, if the Contractor elects not to arbitrate the disputes, then subcontractor/supplier specifically agrees that all litigation** will take place in Baton Rouge, Louisiana.[2] [Emphasis added.]

Based on our review, we conclude the trial court correctly denied the motion to stay. Given the circumstances, the contracts between the parties do not

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[2] The instant suit was filed in the Twenty-third Judicial District, Parish of Ascension, rather than in Baton Rouge, Louisiana. However, since neither defendant filed a declinatory exception raising the objection of venue, that objection has been waived. La. C.C.P. art. 925(C).

require arbitration in this case. Under the clear provisions of the contracts, Sherwin-Williams had the contractual right to institute litigation if FCC elected not to arbitrate their dispute. Although FCC had the option to invoke arbitration herein, it elected not to do so. Accordingly, since a written contract constitutes the law between the parties, Sherwin-Williams had the right to proceed with this lawsuit under the specific terms of the purchase orders. See La. C.C. art. 1983; ***Corbello v. Iowa Production***, 02-0826 (La. 2/25/03), 850 So.2d 686, 693.

Culotta contends that FCC never made an election with respect to arbitration, but simply failed to take any action, which cannot be equated to an election on its part. We disagree, finding that FCC's silence and failure to take any action to invoke its right to arbitration, even after it was sued, constituted a *de facto* election not to arbitrate this matter.

Further, we are unpersuaded by Culotta's argument that he is entitled, due to his position as a guarantor or surety, to stay the proceedings and compel arbitration, since La. C.C. arts. 1801 and 3046 allow a surety to raise all defenses available to the principal obligor. The initial issue raised by Culotta's motion to stay is not a question of available defenses, but rather the scope of FCC and Sherwin-Williams' contractual agreement to arbitrate. Because arbitration is a matter of contract, a party cannot be compelled to arbitrate a dispute under circumstances to which he did not agree. See ***Snyder***, 899 So.2d at 61; ***Ciaccio***, 519 So.2d at 804. The contracts at issue grant Sherwin-Williams the right to litigate this matter if FCC elected not to arbitrate, which is exactly what occurred. Hence, the present suit was filed in accordance with the arbitration clauses contained in the contracts between Sherwin-Williams and FCC. Culotta, who was not a party to the contracts, had no right to compel arbitration contrary to the terms of these provisions.

We likewise find no merit in Culotta's contention that this Court previously has recognized a surety's right to stay a proceeding pending arbitration even though he is not a signatory to the contract containing the arbitration clauses. In making this assertion, Culotta cites ***Mapp Construction, LLC v. Southgate Penthouses, LLC***, 09-0850 (La. App. 1st Cir. 10/23/09), 29 So.3d 548, 554 n.4, writ denied, 09-2743 (La. 2/26/10), 28 So.3d 275, and ***LaCour's Drapery Company, Inc. v. Brunt Construction, Inc.***, 05-1352 (La. App. 1st Cir. 6/28/06), 939 So.2d 424, 427, writ denied, 06-2324 (La. 12/8/06), 943 So.2d 1091. However, our review indicates that neither of these cases supports Culotta's position.

In ***Mapp***, this Court merely noted in a footnote that the trial court had granted a stay of proceedings against the principal, its surety, and other parties pending resolution of arbitration proceedings. This Court did not consider the issue of whether the surety had a right to compel arbitration of the dispute. See ***Mapp***, 29 So.3d at 554 n.4.

In ***LaCour's***, this Court dealt with a surety's complaint that it should not be held liable on its surety bond when it was not a party to the lawsuit when arbitration proceedings were held, since it had no notice or opportunity to participate in those proceedings. In response, this Court held that it was not necessary for the surety to be a party to the arbitration in order to be held liable on its surety bond, and that the surety could have raised any defenses it had to liability at the hearing held in the trial court to confirm the arbitration award. ***LaCour's***, 939 So.2d at 427. In reaching this decision, this Court observed that the surety knew about the arbitration proceedings and could have requested that it be allowed to participate therein, but failed to do so. In our view, the ***LaCour's***

decision in no way implies that the surety had a right to compel arbitration. In fact, in stating that it was not necessary for the surety to be a party to the arbitration in order for it to be liable on the surety bond, the case seems to support the contrary conclusion that the surety has no right to compel arbitration.

Finally, Culotta also cites several cases from other jurisdictions in support of his argument that the trial court was required to stay the instant proceedings under the doctrine of equitable estoppel. See ***Gunderson v. F.A. Richard & Associates, Inc.***, 05-917 (La. App. 3d Cir. 8/23/06), 937 So.2d 916, 921; ***Saavedra v. Dealmaker Developments, LLC***, 08-1239 (La. App. 4th Cir. 3/18/09), 8 So.3d 758, 764 n.5, writ denied, 09-0875 (La. 6/5/09), 9 So.3d 871; ***Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc.***, 03-1662 (La. App. 4th Cir. 3/17/04), 871 So.2d 380, 393, writs denied, 04-0969, 04-0972 (La. 6/25/04), 876 So.2d 834. Under this doctrine, a non-signatory to a contract containing an arbitration clause may sometimes compel arbitration against a signatory to a contract, when the signatory's claim against the non-signatory is based upon or closely intertwined with the contract containing the arbitration clause. See ***Grigson v. Creative Artists Agency, L.L.C.***, 210 F.3d 524, 526-28 (5th Cir. 2000), cert. denied, 531 U.S. 1013, 121 S.Ct. 570, 148 L.Ed.2d 488 (2000).

Initially, we note that we disagree generally with this doctrine. However, we need not address this issue or its application to the facts herein, because the present case is distinguishable from those cited by Culotta. Unlike the present case, ***Saavedra*** and ***Grigson*** involved mandatory arbitration clauses whereby each of the signatories intended at the time that they signed the contracts that all

disputes arising from or based upon those contracts would be subject to compulsory arbitration.[3] By contrast, arbitration was not mandatory herein in the event that FCC elected not to arbitrate. In that case, the parties contemplated that Sherwin-Williams would have the right to file suit. Therefore, unlike the parties against whom arbitration was compelled in ***Saavedra*** and ***Grigson***, Sherwin-Williams did not seek to avoid the terms of the arbitration clauses contained in the purchase orders. Instead, it was acting in accordance therewith when it filed the present suit.

Additionally, ***Saavedra*** involved a situation where a signatory to the contract requiring arbitration sued another signatory and several non-signatories, all of whom sought to compel arbitration. Thus, it was not a situation like the present one where the only party seeking arbitration was a non-signatory to the contract. Furthermore, the plaintiff acknowledged that the signatory defendant and the non-signatory defendants who were seeking arbitration together formed a single business enterprise. See ***Saavedra***, 8 So.3d at 764 n.5.

Gunderson also differs from the instant case in that, while the plaintiff who was compelled to arbitrate therein did not personally sign the contacts containing the arbitration clauses, his authorized representative did so. Thus, the Third Circuit concluded that the plaintiff was bound to the arbitration clauses under accepted theories of agency and contract law, even though he did not himself sign the contracts. See ***Gunderson***, 937 So.2d at 921-22. Finally, we note that, although ***Lakeland*** may have contained some discussion of equitable estoppel, the

[3] The arbitration agreement in ***Grigson*** was somewhat ambiguous on this point, since it provided that the dispute was to be decided by the Presiding Judge of the Los Angeles Superior Court, if the parties could not mutually agree upon an arbitrator. However, the opinion states that the parties agreed that the procedure provided was the equivalent of arbitration subject to the Federal Arbitration Act. ***Grigson***, 210 F.3d at 525-26.

Fourth Circuit actually refused to compel arbitration therein. See ***Lakeland***, 871 So.2d at 395.

Accordingly, since the trial court was legally correct in determining that Culotta was not entitled to compel arbitration, we find no error in the denial of Culotta's motion to stay pending arbitration.[4]

SUMMARY JUDGMENT

Culotta contends the trial court erred in granting Sherwin-Williams' motion for summary judgment, because Culotta was not a signatory to the purchase orders and employees of Sherwin-Williams were aware at the time that the purchase orders were executed that Culotta had sold his interest in FCC and had not been affiliated with that business for several years. He argues that, since La. C.C. art. 3061 allows termination of a suretyship by notice to a creditor, the actual knowledge possessed by Sherwin-Williams' employees was sufficient to terminate the guaranty he signed, even though the agreement specifically required written notice of termination. Culotta asserts that, at the very least, there are genuine issues of material fact regarding the actual knowledge possessed by Sherwin-Williams employees that precluded summary judgment.

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The

[4] Culotta also cites this Court's decision in ***Shroyer v. Foster***, 01-0385 (La. App. 1st Cir. 3/28/02), 814 So.2d 83, 89, as further support for his position. However, we also find ***Shroyer*** to be distinguishable. It is true that arbitration was compelled in ***Shroyer*** against a plaintiff who did not personally sign the inspection agreement containing the arbitration clause. However, the plaintiff's husband had signed the agreement on behalf of and for the benefit of the matrimonial community, thereby also binding his wife to the agreement. See ***Shroyer***, 814 So.2d at 89.

summary judgment procedure is favored and shall be construed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

The initial burden of proof remains with the movant for summary judgment, but once the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. The nonmoving party may not rest on mere allegations or denials, but must set forth specific facts that show that a genuine issue of material fact remains. If the nonmoving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. See La. C.C.P. art. 966(C)(2); ***Davis v. Peoples Benefit Life Insurance Company***, 10-0194 (La. App. 1st Cir. 9/10/10), 47 So.3d 1033, 1035, writ denied, 10-2440 (La. 12/17/10), 51 So.3d 11. A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. ***Davis***, 47 So.3d at 1036.

The motion for summary judgment at issue herein arose in the context of a suit on a continuing guaranty. A contract of guaranty is equivalent to a contract of suretyship; the terms are interchangeable. ***First National Bank of Crowley v. Green Garden Processing Company, Inc.***, 387 So.2d 1070, 1073 (La. 1980). The law is well-settled that a continuing suretyship remains in force until revoked. Moreover, it is the responsibility of the surety to cancel the suretyship agreement, and further, to prove the cancellation. ***Wooley v. Lucksinger***, 06-1140 (La. App. 1st Cir. 12/30/08), 7 So.3d 660, 667. A continuing guaranty is **not** revoked merely

by notice to the creditor that a guarantor has sold his interest in a business entity on whose behalf he executed the guaranty. See ***Wooley***, 7 So.3d at 667; ***Custom-Bilt Cabinet & Supply, Inc. v. Quality Built Cabinets, Inc.***, 32,441 (La. App. 2d Cir. 12/8/99), 748 So.2d 594, 601; ***W.H. Ward Lumber Company, Inc. v. Merit Homes, Inc.***, 522 So.2d 648, 651 (La. App. 5th Cir. 1988). It is necessary that the creditor be given notice that the suretyship is being terminated. La. C.C. art. 3061; ***Custom-Bilt Cabinet & Supply, Inc.***, 748 So.2d at 600.

In the instant case, the continuing guaranty signed by Culotta provides that:

> In consideration of Sherwin-Williams extending credit to the above business [FCC], **I**/We **do hereby agree** jointly and **individually, to pay for all goods, wares and merchandise supplied to** me or to any of us or **the above business**. In the event that the account is placed with a third party for collection, I/We agree to pay all costs including reasonable attorney fees, court costs and finance charges.
>
> ... I/We agree to: (i) immediately notify Sherwin-Williams in writing, delivered in person or by certified mail return receipt requested, of any change in ownership, form of business, or address, or the termination of a person's authority to incur charges under the account on behalf of the applicant [FCC], and (ii) indemnify Sherwin-Williams for any loss incurred thereby as a result of our failure to provide said written notice. **This agreement shall remain in full force and effect until written notice of revocation is received by Sherwin-Williams**. [Emphasis added.]

Culotta alleges that this guaranty was implicitly revoked when Sherwin-Williams employees learned that he had retired, had sold his interest in FCC, and was no longer affiliated with that company. In opposition to the motion for summary judgment, he presented the affidavits of two individuals who declared that they knew of their own personal knowledge that certain Sherwin-Williams employees were aware since 2007 that Culotta had sold his interest in FCC to his son and was no longer affiliated with that company. They further declared that

these facts had been well known in the Baton Rouge construction business community since 2005.

Regardless, for the following reasons, these affidavits do not raise any genuine issues of disputed fact. First, Sherwin-Williams does not dispute, for purposes of the motion for summary judgment, that Sherwin-Williams employees knew that Culotta had sold FCC to his son. Second, whether or not Sherwin-Williams knew that Culotta had sold his interest in FCC and was no longer affiliated with that business is immaterial to the issue of Culotta's liability under the guaranty agreement. As previously noted, a continuing guaranty is **not** revoked merely by notice to the creditor that a guarantor has sold his interest in a business; the pertinent inquiry is whether the creditor was given notice that the guaranty is being terminated. See ***Wooley***, 7 So.3d at 667; ***Custom-Bilt Cabinet & Supply, Inc.,*** 748 So.2d at 600-01; ***W.H. Ward Lumber Company, Inc.***, 522 So.2d at 651.

Louisiana Civil Code article 3058 states that: "The obligations of a surety are extinguished by the different manners in which conventional obligations are extinguished ..." Pursuant to La. C.C. art. 1983, "[c]ontracts have the effect of law for the parties and can be dissolved only through the consent of the parties or on grounds provided by law." The guaranty agreement between Culotta and Sherwin-Williams does not permit revocation of the contract by any means other than written notice. It specifically provides that the continuing guaranty will remain in full force and effect until written notice of its revocation is received by Sherwin-Williams. Therefore, the fact that Sherwin-Williams may have had actual notice of the sale of Culotta's interest in FCC cannot constitute a revocation of the guaranty agreement, as such would not comply with the terms of the contract

requiring written notice of revocation. See ***W.H. Ward Lumber Company, Inc.***, 522 So.2d at 651.[5]

Finally, Culotta argues that Sherwin-Williams' failure to file a lien pursuant to La. R.S. 9:4802 asserting a privilege against the owner of the property where the floor coverings that it sold to FCC were installed released him from liability. He maintains that Sherwin-Williams' failure to do so impaired a security interest available to pay the debt, thereby extinguishing his suretyship obligation under La. C.C. art. 3062.[6] However, we note that Culotta did not raise this defense in his answer to this suit. In fact, it appears that he may be raising this defense for the first time on appeal. In any event, as the defense urged, if sustained, would constitute an extinguishment of the obligation to the extent of any prejudice suffered by Culotta, it constitutes an affirmative defense. See La. C.C.P. art. 1005; ***Pioneer Bank & Trust Company v. Foggin***, 177 So.2d 131, 134 (La. App. 2d Cir.), writ denied, 248 La. 423, 179 So.2d 18 (1965). A defendant is required to

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[5] The cases offered by Culotta in support of his argument that he cannot be held liable for FCC's debts because Sherwin-Williams knew at the time that the purchase orders were executed that he had sold his interest in FCC and was no longer affiliated with it are all cases involving the liability of former partners for partnership debts. These cases have no application to the instant case involving a guaranty agreement. Under La. C.C. art. 2817, the liability of a partner for his virile share of the partnership debts stems directly from his status as a member of the partnership. Thus, it necessarily follows that notice of a partner's withdrawal from the partnership constitutes notice that he will no longer be liable on that basis alone for partnership debts. The same is not true with respect to notice that an individual who has given a continuing guaranty is no longer affiliated with a business. Particularly where written notice of revocation is required, it does not necessarily follow that the guaranty is revoked by the guarantor's disassociation from the business.

[6] Louisiana Civil Code article 3062 provides, in pertinent part, as follows:

> The modification or amendment of the principal obligation, or the impairment of real security held for it, by the creditor, in any material manner and without the consent of the surety, has the following effects.
>
> An ordinary suretyship is extinguished.
>
> A commercial suretyship is extinguished to the extent the surety is prejudiced by the action of the creditor ....

affirmatively set forth in his answer any matter constituting an affirmative defense on which he will rely. ***Hanks v. Wilson***, 93-0554 (La. App. 1st Cir. 3/11/94), 633 So.2d 1345, 1348. Thus, since Culotta did not specially plead or raise this affirmative defense in the trial court, he cannot do so for the first time on appeal.

CONCLUSION

For the reasons assigned, the judgment of the trial court granting summary judgment in favor of The Sherwin-Williams Company and against Frank J. Culotta, Jr., in the principal amount of $50,375.73, plus $3,500.00 attorney fees, interest, and court costs is hereby affirmed. Culotta is to pay all costs of this appeal.

AFFIRMED.