IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

KAPLAN COMPANY,	:	MARCH TERM, 2004
	:	
Plaintiff,	:	NO. 02783
	:	
v.	:	COMMERCE PROGRAM
	:	
WILLIAM MILLER, and BETTER NATIONAL BUMPERS, INC.,	:	Control Nos. 041365, 051574
	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 12th day of August, 2005, upon consideration of plaintiff's Motion for Summary Judgment, defendant William Miller's Motion for Summary Judgment, the respective responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion issued contemporaneously herewith, it is hereby **ORDERED** as follows:

1. Defendant's Motion is **DENIED**;

2. Plaintiff's Motion is **GRANTED** in part and **DENIED** in part;

3. Judgment is entered for plaintiff in the amount of $18, 072.69 on its claim against Better National Bumpers, Inc. for breach of contract as set forth in Count III of the Amended Complaint.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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OPINION

Plaintiff, Kaplan Company, ("Kaplan") is the owner of three warehouse buildings (individually known as "Buildings A, B, and C" and collectively known as the "Premises") in which a considerable quantity of automobile bumpers (the "Bumpers") were stored. Prior to November, 2000, the Bumpers were owned by a non-party, International Bumper Manufacturing, Inc. ("IBC"), who leased the Premises from Kaplan. IBC apparently defaulted on its lease and went out of business, and its creditor, Stuart Financial ("Stuart"), came to own the Bumpers.

Defendant, Better National Bumpers, Inc. ("BNB"), purchased the Bumpers contained in Buildings A and B from Stuart, but did not purchase the Bumpers contained in Building C. After it purchased the Bumpers, BNB, through its principal, defendant William Miller ("Miller") attempted to negotiate a lease for Buildings A and B with Kaplan for a lesser rent than IBC had paid. However, Kaplan proposed that BNB rent the entire Premises for the same rental amount that IBC had been paying. Kaplan apparently obtained a judgment against IBC for unpaid rent and attempted to execute on it, with the aid of the Sheriff, in or about January 31, 2001. Rather

than have its Bumpers in Buildings A and B seized, BNB executed a lease for the entire Premises for the same rental amount that IBC had been paying (the "Lease").

In addition, Kaplan required Miller to execute a Guaranty of Lease (the "Guaranty") whereby Miller agreed that the Bumpers would be removed from the Premises upon termination of the Lease. The Guaranty further provided that

> If there is a default and/or the Lease has been terminated for any reason, [Miller] absolutely and unconditionally guarantees that all of the contents in the property being leased under the aforementioned Lease will be removed from the property within 30 days of the termination date.
> [Miller] further agrees to pay to [Kaplan] all damages that may arise in connection with its failure to remove the aforementioned property, including, without limitation, all reasonable attorneys' fees and disbursements incurred by [Kaplan] or caused by any such default and/or by the enforcement of this Guaranty.

Amended Complaint, Ex. B.

In or about, October, 2003, BNB ceased to pay rent and other charges due under the Lease. Kaplan served BNB with a notice of termination effective November 9, 2003, but BNB apparently did not immediately remove the Bumpers from the premises. Instead, BNB claims that, on February 27, 2004, it sold its assets, which apparently included the Bumpers in Buildings A and B, to a non-party, Supreme Auto Parts ("SAP"). On March 1, 2004, SAP entered into a lease with Kaplan for a portion, but apparently not all, of the Premises.

In the present action, Kaplan has asserted claims against BNB for breach of the Lease and against Miller for breach of the Guaranty, and Kaplan has moved for summary

judgment on both claims.[1] Miller has cross moved for summary judgment on the claim for breach of the Guaranty. These motions are presently before the court.[2]

I. The Lease and Guaranty Are Enforceable Against Miller and BNB.

Miller claims that Kaplan forced BNB and Miller to execute the Lease and Guaranty through economic duress by "represent[ing] that [Kaplan] would have the Sheriff remove and liquidate the [Bumpers] (located in the Premises) that BNB had just purchased." Defendants' Response to Plaintiff's motion for Summary Judgment ("Response"), Ex. 13. ¶ 19. Kaplan counters that it was simply exercising a valid judgment for unpaid rent that it had obtained against IBC, its former tenant and the prior owner of the Bumpers. *See* Plaintiff's Reply in Support of Motion for Summary Judgment, Ex. B., ¶¶ 1-3.

> The important elements in the applicability of the doctrine of economic duress or business necessity are that (1) there exists such pressure of circumstances which compels the injured party to involuntarily or against his will execute an agreement which results in economic loss, and (2) the injured party does not have an immediate legal remedy.

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[1] Kaplan has also asserted a claim sounding in negligence against Miller and BNB for the damages they allegedly caused to the Premises by their removal of the Bumpers. Kaplan has not moved for summary judgment on its negligence claim.

[2] Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999). When confronted with a motion for summary judgment,

> [t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response . . . identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R. Civ. P. 1035.3.

Nat'l Auto Brokers Corp. v. Aleeda Dev. Corp., 243 Pa. Super. 101, 110, 364 A.2d 470, 474 (1976). "Of course, another essential element is that the party against whom the defense of duress is asserted must have placed the contracting party in the position which eliminated the party's exercise of free will." Academy Electrical Contractors, Inc. v. Nason & Cullen Group, Inc., 2004 Phila. Ct. Com Pl. LEXIS 77 *7 (Jan. 14, 2004).

Miller and BNB have failed to satisfy all of the requirements for a showing of economic duress. In particular, they have failed to show that Kaplan placed them in the position that prevented their exercise of free will. Instead, the evidence shows that Miller caused his and BNB's own difficulties when he purchased the Bumpers before entering into the Lease for the Premises, and/or failed to remove the Bumpers promptly from the Premises after their purchase. In addition, Miller and BNB had an adequate legal remedy in that they could have asked a court to determine their rights vis-à-vis Kaplan to the Bumpers.

Furthermore, even if the Lease and Guaranty had been procured by economic duress, Miller and BNB ratified them by occupying the Premises, under the terms of the Lese and Guaranty, for over two years. *See* Academy Electrical Contractors, 2004 Phila. Ct. Com. Pl. LEXIS 77, *12, n6 ("Ratification results if a party who executed a contract under duress accepts the benefits flowing from it, or remains silent, or acquiesces in the contract for any considerable length of time after the party has the opportunity to annul or avoid the contract.") Therefore, the Lease is enforceable against BNB, and the Guaranty is enforceable against Miller.

II. Kaplan Is Entitled to Damages From BNB For Breach of the Lease.

Kaplan claims it is entitled to damages in the amount of $18, 072.69 from BNB due to BNB's breach of the Lease. The amount claimed includes rent, taxes and other charges due under the Lease for the months of October and November, 2003. BNB does not dispute the

amounts due except to say that they are not recoverable because the Lease is void due to economic duress. *See* Response, ¶ 19. Since the Lease is not void, such amounts are recoverable from BNB.

III. The Guaranty Provides for the Award of Rent As Damages.

Kaplan claims that it is entitled to damages from Miller under the Guaranty because BNB did not remove the Bumpers from the Premises for six months after the Lease was terminated. Kaplan further claims that the damages are equal to the rental amounts that would have been due under the Lease from December, 2003 until May, 2004, when Kaplan alleges the Bumpers were finally removed.[3] Miller objects that the Guaranty does not provide for the payment of rent, and instead permits Kaplan to recover only the costs of removing the Bumpers, which Kaplan never incurred.

The Guaranty requires Miller to pay to Kaplan "all damages that may arise in connection with" the failure to remove the Bumpers from the Premises after the termination of the Lease. *See* Amended Complaint, Ex. B. The Guaranty does not contain language limiting such damages to the costs of removal, nor does it contain language precluding the payment of storage charges. The loss of use of the Premises is clearly "damage" that Kaplan could suffer as a result of Miller's failure to remove the Bumpers from the Premises. Therefore, if Kaplan proves that it did suffer such damage, it may recover from Miller the fair rental value for the Premises on which the Bumpers remained after the termination of the Lease.

[3]Kaplan claims that the Bumpers owned by BNB were not removed from the Premises until May, 2004, but BNB claims to have sold all of the Bumpers to SAP in February, 2004. Clearly, there is a disputed issue of fact as to whose property was stored on the Premises from February through May, 2004. In addition, there is a disputed issue of fact as to when the Bumpers in Building C, which apparently were owned by Stuart Financial, were removed.

IV. There Exist Disputed Issues Of Material Fact Regarding Whether Kaplan Is Estopped From Collecting Damages From Miller Under The Guaranty.

Miller claims that, after the Lease was terminated, and in anticipation of Supreme Auto's purchase of the Bumpers and execution of a lease for the Premises,

> Kaplan informed [Miller] that BNB could leave the [Bumpers] on the Premises [and] Kaplan further promised [Miller] that if [SAP] entered into a lease with Kaplan, then Kaplan would pay [Miller] a commission in the amount that Kaplan believed it was owed under the Guaranty, i.e. the cost of removing the [Bumpers].[4]

Response, Ex. 13, ¶ 42. Miller claims that this oral representation by Kaplan precludes Kaplan from asserting a claim for damages under the Guaranty.

Normally, under the statute of frauds, a guaranty, or "promise to answer for the debt or default of another," must be in writing and signed by the party to be charged. 33 P.S. § 3 (2002).[5] Where the statute of frauds requires that a certain type of contract be in writing, it also requires that any modification to that contract be in writing. *See* Brown v. Aiken, 329 Pa. 566, 198 A. 441 (1938). However, "under the estoppel concept, a contract may be modified if either words or actions of one party to the contract induce another party to the contract to act in derogation of the contract, and the other party justifiably relies upon the words or deeds of the first party." Kreutzer v. Montgomery County Herald Co., 560 Pa. 600, 607, 747 A.2d 358, 362 (2000).

In this case, there is a disputed issue of fact as to whether Kaplan represented that it would not enforce its right to collect damages from Miller under the Guaranty. If the evidence

[4] This alleged promise does not make sense in that, if Supreme Auto purchased the Bumpers and entered into a lease for the Premises, there would be no need to remove the Bumpers and therefore no need to incur costs for removing them. However, the alleged promise makes more sense if the parties contemplated that the costs for which Miller could be held liable under the Guaranty included the costs of storage during the period between the termination of the BNB Lease and the commencement of the Supreme Auto lease.

[5] Miller clearly agreed, in the Guaranty, to answer for BNB's default under the Lease in failing to remove the Bumpers. Therefore, Miller's claim that the Guaranty is not a contract subject to the statute of frauds is without merit.

shows that Kaplan did make such a representation, it is then for the court to determine whether it was reasonable for Miller to rely on that representation and to leave the Bumpers at the Premises. Because the court cannot make this determination at the present time, neither party is entitled to summary judgment with respect to Kaplan's claim against Miller for breach of the Guaranty.

CONCLUSION

For all the foregoing reasons, plaintiff's Motion for Summary Judgment is granted in part and denied in part, and defendant's Motion for Summary Judgment is denied.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.