Jason B. Lattimore
The Law Office Of
JASON B. LATTIMORE, ESQ. LLC
55 Madison Avenue, Suite 400
Morristown, NJ 07960
Telephone: (973) 998-7477
Facsimile: (973) 264-1159
Attorneys for Plaintiff

SHOREWOOD PACKAGING, LLC, Plaintiff, v. OPTOS CAPITAL PARTNERS, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO.: BER L-7469-13 CIVIL ACTION **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER having come before the Court on the motion of Plaintiff, Shorewood Packaging, LLC, for an order granting summary judgment (a) that Defendant is liable for breach of contract under Count I of Plaintiff's Amended Complaint; and (b) dismissing Defendant's affirmative defenses; and the Court having considered the written submissions of the parties and having heard oral argument on the motion,

IT IS on this 14th day of Oct., 2014:

ORDERED that:

1. Plaintiff's motion for summary judgment is hereby GRANTED;
2. Defendant is hereby ordered, adjudged and decreed liable for breach of contract under Count I of Plaintiff's Amended Complaint;

3. Defendant's affirmative defenses (1 through 14) are hereby dismissed with prejudice; and

4. The parties shall have thirty (30) days from the date of service of this Order upon Defendant to conduct fact discovery on the remaining issues in the case.

IT IS FURTHER ORDERED that Plaintiff shall serve a copy of this Order upon Defendant within seven (7) days of the date hereof.

Opposed [✓] Unopposed [ ]

~~HON. KENNETH J. SLOMIENSKI, J.S.C.~~

CHARLES E. POWERS, JR., J.S.C.

SEE RIDER ATTACHED

SHOREWOOD PACKAGING, LLC v. OPTOS CAPITAL PARTNERS, LLC

Docket No. BER-L-7469-13

RIDER TO ORDER DATED OCTOBER 14, 2014

I. Factual Background and Travel

The facts giving rise to the instant motion for summary judgment stem from an alleged breach of a sublease agreement between Plaintiff Shorewood Packaging, LLC ("Plaintiff" or "Shorewood")—the sublessor—and Focus Wireless—the sublessee. The sublease was secured by a guaranty agreement executed by Defendant Optos Capital Partners ("Defendant" or "Optos"), Focus Wireless's parent company. Plaintiff now seeks to recover under the guaranty. The relevant facts are as follows.

In early 2013, Shorewood entered into a commercial sublease (the "Sublease") with Focus Wireless, LLC for premises located Carlstadt, New Jersey. The Sublease contemplated a three year tenancy commencing March 2013 and ending February 2016. Rent was to be paid monthly, along with payments for utilities, taxes and any applicable late fees. Richard Berliner, who was a Focus Wireless consultant at the time, signed on Focus's behalf.

To secure performance, Focus Wireless's parent company, Optos, executed a guaranty (the "Guaranty") with Plaintiff. Paragraph 1 of the Guaranty states:

> "1. Guaranty. Guarantor hereby unconditionally and irrevocably guarantees to Holder, the full and punctual payment, when due, whether by acceleration, maturity, or for any other reason, of the unpaid amount of: Rent; Additional Rent; Utilities, replenishment of the Security Deposit; Tenant's liability for Indemnity obligations; Tenant's liability for damages and loss suffered by Landlord and Owner; and interest owed, to Landlord pursuant to the Sub-Lease, and all future extensions of credit, if any, by Holder to the Tenant." Pltf.'s Ex. 2, ¶ 1 (Guaranty).

The Guaranty further provides:

"2.2 The obligations of the Guarantor hereunder are independent of any of the obligations of the Tenant under the Sub-Lease, and a separate action or actions may be brought and prosecuted against Guarantor, whether or not action is brought against the Tenant and whether or not the Tenant is joined in any such action or actions. Further, Guarantor waives, to the fullest extent permitted by law, the benefit of any statute of limitations affecting its liability hereunder or the enforcement thereof.

. . . .

2.3 . . . . All rights and remedies of the Holder under this Guaranty and the Sub-Lease shall be cumulative . . . .

. . . .

3.1 Upon a default by the Tenant, Holder in its sole discretion may elect (subject to the provisions of Section 2 regarding notice and opportunity to cure) to: (i) compromise or adjust the Obligations or any part of them or make any other accommodation with the Tenant or Guarantor, or (ii) exercise any other remedy against the Tenant. No such action by Holder shall release or limit the liability of Guarantor, who shall remain liable under this Guaranty after the action, even if the effect of the action is to deprive Guarantor of any subrogation rights, rights of indemnity, or other rights to collect reimbursement from the Tenant for any sums paid to Holder, whether contractual or arising by operation of law or otherwise.

. . . .

5. Enforceability. This Guaranty of the Obligations is a continuing, absolute, and unconditional guaranty without regard to the validity, regularity, or enforceability of the Sub-Lease or any security document or other guaranty therefor and without regard to any counterclaim which may at any time be available to or be asserted by the Tenant against the Holder, and which constitutes, or might be construed to constitute, an equitable or legal discharge of the Tenant or any other party, or of Guarantor under this Guaranty . . . ." Id. at ¶¶ 2.2, 2.3, 3.1, and 5.

Paragraph 21 of the Sublease specifies the events that constitute default, including failure to pay rent and other charges when due, and abandonment of the subleased premises. With respect to such defaults, the Guaranty states:

> "2.1. . . . . [B]efore Holder may take any action or exercise any rights with respect to this Guaranty if any default under the Obligations occurs, Holder shall first give Guarantor written notice of such default, and Guarantor shall have fifteen (15) calendar days from the date of such notice in which to cure the default.
>
> . . . .
>
> 19. Notices. All notices, requests, demands, and other communications under this guarantee must be in writing and will be considered to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed to the party to whom notice is to be given, by first class mail, registered or certified, postage prepaid, and properly addressed to the party at the addresses set forth below:
>
> . . . .
>
> To Guarantor: Chris Ferguson
> 969 Postal Road
> Suite 100
> Allentown, PA 18109" Id. at ¶¶ 2.1, 19.

On May 24, 2013, Shorewood's attorney Daniel Fishkin ("Fishkin") emailed Christopher Ferguson ("Ferguson") written notice of Focus Wireless's default under the Sublease. Ferguson acknowledged receipt of the email. On July 1, 2013, Fishkin also emailed notice to Phillip McFillin ("McFillin"), a staff attorney at Optos. This commenced an exchange of emails regarding Focus Wireless's default and Optos's obligations under the Guaranty. To date, Optos has failed to make payment under the Guaranty, prompting Shorewood to file this action.

Shorewood filed a Complaint with this Court on September 30, 2014. Optos, in turn, filed an Answer on April 15, 2014—only after Shorewood moved for default judgment. Shorewood subsequently filed an Amended Complaint on June 25, 2014. On July 11, 2014, the Court issued separate orders (1) striking Optos's pleadings and defenses for failure to provide discovery; and (2) directing Optos to file an answer to Shorewood's Amended Complaint. Optos filed its Answer to the Amended Complaint on July 23, 2014. While the deadline for completing discovery in this

case was August 1, 2014, Optos has moved to reinstate its pleadings pursuant to R. 4:23-5 and reopen discovery.[1]

Shorewood now moves for summary judgment on Count I of its Complaint as to Optos's liability for breach of the Guaranty and for dismissal of Optos's affirmative defenses 1-14. In its motion, Plaintiff asserts Optos is liable under the absolute and unconditional language of the Guaranty. Optos, on the other hand, takes the position that Richard Berliner, as an independent contractor for Focus Wireless, was never authorized to enter into the Sublease. Accordingly, the Sublease is invalid and the Guaranty unenforceable. Additionally, Optos asserts even if the Guaranty was enforceable, Plaintiff had a duty to mitigate damages.

II. Legal Analysis

a. Summary Judgment

New Jersey's standard for Summary Judgment as set forth in Brill v. Guardian Life Ins. Co. Am., 142 N.J. 520, 540 (1995) entitles a movant to Summary Judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a dispute whose resolution in its favor will entitle him to judgment. Summary Judgment must 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 challenged. R. 4:46-2(c); Brill, 142 N.J. at 528-29. "Clearly, bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment." Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

Brill brought New Jersey summary judgment practice in line with the federal summary judgment standards enunciated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), Celotex

[1] These motions are also returnable on October 10, 2014, but are not addressed here.

Corp. v. Catrett, 477 U.S. 317 (1986) and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The standard requires a "kind of weighing that involves a type of evaluation, analysis, and sifting of evidential materials," Brill, 142 N.J. at 536, which is the same type of evaluation, analysis, and sifting of evidential matters that is required when deciding a motion for directed verdict following the close of plaintiff's case. Id. at 540.

b. Enforceability of the Guaranty

Plaintiff's motion requires the Court to address a novel issue of law, namely, whether the validity of the underlying obligation affects the enforceability of a guaranty securing that obligation. While the New Jersey Supreme Court has not broached this topic, numerous jurisdictions have recognized "[t]he basic rule . . . that 'the surety [or guarantor] is not liable to the creditor unless his principal is liable'[;] thus he may plead the defenses which are available to his principal." In re Modern Textile, Inc., 900 F.2d 1184, 1188 (8th Cir. 1990) (quoting Rhode Island Hosp. Trust Nat'l Bank v. Ohio Casualty Ins. Co., 789 F.2d 74, 78 (1st Cir. 1986)). In such jurisdictions, it follows that if the guarantee has no cause of action against the principal, then there can be no cause of action against the guarantor. Id. See also Provident Trust co. v. Metropolitan Casualty Ins. Co., 152 F.2d 875 (3rd 1945), cert. denied, 327 U.S. 789 (1946) (noting that a primary obligor builder was not in default because he had an excuse for non-performance, and therefore, defendant, as the builder's surety, could not be in default of any obligation to plaintiff); Stephens v. First Bank & Trust, 540 S.W.2d 572, 574 (Tex. Ct. App. 1976) ("[a] surety or guarantor can assert any defense to a suit on a note available to the principal").

This principle is echoed in the Restatement (Third) of Suretyship & Guaranty, which provides, in relevant part:

> "(1) Except as provided in subsection (3), the secondary obligor may raise as a defense to the secondary obligation any defense of

> the principal obligor to the underlying obligation [.]" Restatement (Third) of Suretyship & Guaranty § 34 (1995).

Notwithstanding this general principle, however, comment (a) to Restatement (Third) § 34 tells us "the secondary obligor is free to contract to be liable on the secondary obligation even when the principal obligor has a defense to the underlying obligation." Id. at cmt. (a). This exception arises from Restatement (Third) § 6, which states that "each rule in this restatement stating the effect of suretyship status may be varied by contract between the parties subject to it." Id. at § 6. The Restatement (Third) exception is also supported by the policy in this jurisdiction that courts are not to lightly interfere with parties' freedom of contract. See generally, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, (1960). Particularly, where—as here—the contract "is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality [.]" Id. at 389.

In this matter, Shorewood and Optos varied the traditional relationship between an obligee and a secondary obligor by including a provision that made Optos liable regardless of the validity of the underlying obligation. See Guaranty at ¶ 5. Both Shorewood and Optos are sophisticated corporate entities, and there is no evidence that Shorewood was in a stronger bargaining position. Indeed, if Optos did not like the terms of the Guaranty, it could have refused to sign, or informed its subsidiary to find another suitable commercial space. It did neither. This Court sees no reason to set aside a fairly-bargained for agreement simply because one side later cries foul after failing to uphold its end of the bargain.

Optos also attempts to side-step the plain language of the Guaranty; arguing the parties entered into the guarantee through a mutual mistake, i.e., the validity of the Sublease. "The doctrine of mutual mistake applies when a 'mistake was mutual in that both parties were laboring under the same misapprehension as to [a] particular, essential fact.'" Bonnco Petrol, Inc. v.

Epstein, 115 N.J. 599, 608 (1989) (emphasis omitted) (quoting Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446 (App. Div. 1979)). Thus,

> "'[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.'" Id. (quoting Restatement (Second) of Contracts § 152(1).

Restatement § 154(a) further states that "a party bears the risk of a mistake when (a) the risk is allocated to [it] by agreement of the parties [.]"

In this case, Optos agreed to liability "without regard to the validity, regularity, or enforceability of the Sub-Lease [.]" Guaranty at ¶ 5. Thus, Optos bore the risk that the Sublease would not be enforceable. Accordingly, the Guaranty is not voidable on grounds of mutual mistake.

c. Notice Requirement

Having determined the Guaranty is enforceable notwithstanding the potential invalidity of the Sublease, this Court must now consider whether it was proper for Plaintiff to provide Defendant with notice of Focus's breach through email, rather than by mail to the address listed in paragraph 19.

Guaranty agreements are to be strictly interpreted, with any ambiguities being construed in favor of the guarantor. Housatonic Bank v. Fleming, 234 N.J. Super. 79, 82 (App. Div. 1989). The terms of the agreement should be read "in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved." Ctr. 48 Ltd. P'ship v. May Dep't Stores Co., 355 N.J. Super. 390, 406 (App. Div. 2002) (citing Mt. Holly State Bank v. Mt. Holly Washington Hotel, Inc., 220 N.J. Super. 506, 511 (App. Div. 1987).

With regard to notice, the Guaranty provides:

> "2.1. . . . . [B]efore Holder may take any action or exercise any rights with respect to this Guaranty if any default under the Obligations occurs, Holder shall first give Guarantor written notice of such default, and Guarantor shall have fifteen (15) calendar days from the date of such notice in which to cure the default.
>
> . . . .
>
> 19. Notices. All notices, requests, demands, and other communications under this guarantee must be in writing and will be considered to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed to the party to whom notice is to be given, by first class mail, registered or certified, postage prepaid, and properly addressed to the party at the addresses set forth below:
>
> . . . .
>
> To Guarantor: Chris Ferguson
> 969 Postal Road
> Suite 100
> Allentown, PA 18109" Id. at ¶¶ 2.1, 19.

In this case, the only requirement regarding notice requirement is that it "must be in writing [.]" Id. at ¶ 19. Proper addressing and mailing of the notice to Ferguson at the listed-address only raises the presumption that the mailed notice was given "on the third day after mailing [.]" Id. Accordingly, by the plain language of the Guaranty, Plaintiff was not required to mail notice to Ferguson's given address.

To the extent Plaintiff's notice of Focus Wireless's default under the Sublease was defective, and therefore relieves Defendant of liability, this argument also fails. There is no basis that Defendant's obligations were dependent on Focus Wireless's receiving proper notice of default under the Sublease.

On a more elementary level, this Court points out that there is sufficient evidence in the record that Ferguson and McFillin actually received notice. "A bell cannot be unrung, knowledge

cannot be erased, and actual notice is—or ought to be—the best notice unless either the English language or the law of common sense be repealed." I.S. Smick Lumber v. Hubschmidt, 177 N.J. Super. 131, 136 (Law Div. 1980). Accordingly, this Court finds Plaintiff complied with the Guaranty's notice requirement.

d. Duty to Mitigate

This Court's inquiry, however, does not end here. Rather, it must determine whether Plaintiff had a duty to mitigate damages and, if so, whether Plaintiff did so. In support of its position that Plaintiff had a duty to mitigate, Defendant cites the well-established principle that a landlord must mitigate damages arising from the breach of a lease by making reasonable attempts to re-let the premises. Sommer v. Kridel, 74 N.J. 446 (1977). Plaintiff, on the other hand, claims that no duty exists, citing First Bank & Trust co. v. Siegel, 36 N.J. Super. 207, 211 (Law Div. 1995) for the proposition that the beneficiary of a guarantee is not obligated "to pursue other remedies when the obligation is an absolute guaranty and a primary obligation [.]" For the following reasons, this Court finds the general rule regarding mitigation of damages is inapplicable to Plaintiff and, thus no such duty to mitigate exists here.

Mitigation of damages is concerned with the compensatory aspect of tort and contract law; the purpose of which is to place the Plaintiff in the position he or she would have been in had the contract been performed. Viewed more generally, "'Mitigation of damages' is defined as '[a] reduction of the amount of damages . . . [based on] facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify . . . ." White v. North Bergen, 77 N.J. 538, 546 (1978) (quoting Black's Law Dictionary 1153 (rev. 4th ed. 1968)). Interestingly enough, the duty to mitigate damages is not a duty that arises solely in the context of a landlord tenant relationship. It is well settled that a party

claiming damages for a breach of contract has a duty to mitigate his loss. See Frank Stamato & Co. v. Borough of Lodi, 4 N.J. 14 (1950); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 455 (App. Div. 1976). Notwithstanding these general principles, it is logically inconsistent to force a party who has contracted for an absolute and unconditional guaranty to mitigate its damages. If that were the case then the plain language of the agreement would be eviscerated, and it would be absolute and unconditional no more—an interpretation this Court is unwilling to endorse. Moreover, Defendant has cited no public policy that would support its position that a plaintiff with an absolute and unconditional right to relief has a duty to mitigate and, indeed, this Court finds none. Accordingly, Plaintiff had no duty to mitigate its damages.

e. Defendant's Affirmative Defenses

The final consideration presented by Plaintiffs summary judgment motion is which, if any, of Defendant's affirmative defenses remain viable.

i. First Affirmative Defense

Defendant's first affirmative defense is that the Complaint fails to state a claim upon which relief can be granted. Under New Jersey's Rules of Practice, Rule 4:6-2(e) allows a party to move to dismiss a complaint if the complaint fails to plead a claim upon which relief can be granted. In reviewing a motion to dismiss, courts are constrained to an examination of the legal sufficiency of the facts alleged on the face of the complaint. R. 4:6-2(e). "To establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007).

In this case, it is evident that Plaintiff has plead sufficient facts that, if proven at trial, would entitle Plaintiff to relief. Specifically, Plaintiff asserts the existence of a contract, that Defendant

breached the contract, and that Plaintiff has sustained damages as a result thereof. Accordingly, Defendant's first affirmative defense is denied.

ii. Second, Ninth, Thirteenth and Fourteenth Affirmative Defenses.

Defendant's separately numbered affirmative defenses also claim that Defendant breached no duty owing to plaintiff (second), that Defendant did not breach any duties which it may have owed to Plaintiff (ninth), that the Guaranty is void because the sublease was not negotiated with an authorized representative (thirteenth), and that Plaintiff did not provide the notice required under the sublease and/or guaranty (fourteenth).

In view of this Court's earlier discussion regarding the enforceability of the Guaranty, and the sufficiency of notice, and Defendants second, ninth, thirteenth and fourteenth affirmative defenses are dismissed.

iii. Third Affirmative Defense

Defendant's third affirmative defense is that Plaintiff's claim is barred by the statute of frauds. The statute of frauds requires that, to be effective, certain types of agreements must be "in writing, and signed by the party to be charged therewith. N.J.S.A. 25:1-5, et seq. Here there is no dispute that the Guaranty on which Shorewood has sued Optos was in writing and signed by the party against whom enforcement is sought. Further, the Guaranty obligations at issue here do not fall within the statute of frauds. Accordingly, Defendant's third affirmative defense is dismissed.

iv. Fourth and Seventh Affirmative Defenses

Defendant's fourth—unclean hands—and seventh—failure to mitigate—affirmative defenses are founded on the contention that Shorewood failed to mitigate damages. For the reasons expressed above, Plaintiff had no duty to mitigate its damages. Accordingly, Plaintiff's motion for summary judgment on Defendant's fourth and seventh affirmative defenses is granted.

v. Fifth Affirmative Defense

Defendant's fifth affirmative defense—material breach of contract—is founded on the contention that Shorewood did not provide proper notice under the Guaranty. For the reasons expressed above, more specifically that Plaintiff's notice was sufficient, Defendant's fifth affirmative defense is dismissed.

vi. Sixth and Eleventh Affirmative Defense

As its sixth and eleventh affirmative defenses, Defendant asserts estoppel and waiver, respectively. There is, however, no competent evidence upon which a jury could conclude Plaintiff is either estopped from bringing this suit, or has waived its right to do so. Given the absence of such evidence, Defendant's sixth and eleventh affirmative defenses are dismissed.

vii. Eighth Affirmative Defense

Defendant's eighth affirmative defense for setoff/recoupment, is premised upon its belief that it is entitled to setoff and/or recoupment of all monies that were already paid to Shorewood. "Recoupment is distinguishable from setoff in that the latter involves an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff's claim is based. While recoupment may be utilized only to reduce or extinguish the plaintiff's recovery, setoff may be awarded for any amount to which the defendant is entitled." Beneficial Finance Co. v. Swaggerty, 86 N.J. 602, 609 (1981).

Both Defendant's setoff and recoupment claims fail as a matter of law because Optos has no claim for affirmative relief against Shorewood, and further, Shorewood has only sued for amounts that have not been paid. Accordingly, Shorewood is entitled to summary judgment on Defendant's eighth affirmative defense.

viii. Tenth Affirmative Defense

In its tenth affirmative defense, Defendant asserts Plaintiff's claim is barred by the statute of limitations. The statute of limitations for a breach of contract in New Jersey is six years. See N.J.S.A. 2A:14-1. The statute of limitations begins to run when "the party seeking to bring the action has an enforceable right."

In this case, Plaintiff filed suit a mere months after Defendant refused to abide by its Guaranty obligations. Accordingly, Defendant's statute of limitations defense fails as a matter of law.

ix. Twelfth Affirmative Defense

In its twelfth affirmative defense, Defendant asserts that Plaintiff is barred from bringing suit by the doctrine of laches. Laches, however, is inapplicable to an action at law governed by a statute of limitations. See Fox v. Millman, 210 N.J. 401, 424-25 (2012). Accordingly, Defendant's twelfth affirmative defense is dismissed.

III. Conclusion

For the aforementioned reasons, Plaintiff's motion for summary judgment is GRANTED as to Count I of its complaint. Summary Judgment is also GRANTED with respect to Defendant's first through fourteenth affirmative defenses.