2011 IL App (1st) 100102-U

FOURTH DIVISION
October 6, 2011

No. 1-10-0102

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CIG HOWARD COMMERCIAL, LLC, and JAY D. JOHNSON	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	
HISPANIC HOUSING DEVELOPMENT CORPORATION,	)	No. 04 L 9880
Defendant-Appellant,	)	
v.	)	The Honorable Henry Simmons, Jr. Judge Presiding.
Rudy Mulder,	)	
Third-Party Defendant-Appellee.	)	

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

Held: Defendant, Hispanic Housing Development Corporation remains liable under the guaranty agreement it entered into with Howard Theater Limited Partnership on behalf of Howard Square, LLC. The trial court properly granted the motions *in limine* which denied defendant the opportunity to present evidence of an oral agreement and properly entered judgment in favor of plaintiff and in favor of third-party defendant. Defendant is unable to prove that the circumstances of this case present a recognizable exception to the statute of frauds.

¶ 1 BACKGROUND

¶ 2 Here we deal with the legal flotsam and jetsam from a real estate deal gone awry, stemming from the conversion of Howard Theater into a mixed-use building. Various entities entered into a series of labyrinthine corporate transactions and oral agreements that will be deciphered *infra* as accurately as possible. The project was developed by Jay Johnson, a principal of Howard Theater Limited Partnership (the partnership). The partnership then transferred its interest to CIG Howard Commercial, LLC, another Johnson venture. For convenience and consistency, these entities will collectively be referred to as "Johnson." Johnson entered into an agreement with Howard Square, LLC, a company whose sole member and manager was Hispanic Housing Development Corporation (Hispanic Housing), to develop the first floor of Howard Theater into commercial units. Hispanic Housing also served as guarantor for the work to be done by Howard Square, LLC. Another entity, Urban Investment Trust, Inc. (Urban), by and through its principal Rudy Mulder (Mulder) was brought in to market the project for quality tenants. Urban and Mulder are also legally associated for many purposes on this appeal, and where appropriate will be referred to collectively as "Mulder."

¶ 3 In terms of the actual construction to be done on the site, Johnson was responsible for developing the second and third floor into residential units. Over time, Hispanic Housing became dissatisfied with the project, largely because of dissatisfaction with the work being done by Johnson which allegedly caused damage to the first floor units. Hispanic Housing contends that it then came to an oral agreement with Mulder where by Urban became the sole member and manager of Howard Square, LLC. The gravamen of Hispanic Housing's position on appeal is

that this oral agreement relieved Hispanic Housing of its role as guarantor of Howard Square, LLC. Soon after the alleged oral agreement, Urban, through Howard Square, LLC, hired Frederickson KRJ (Frederickson), to build out the first floor of the project.

¶ 4 Shortly thereafter, Johnson soured on the project and entered into a written agreement with Urban, which allowed Urban to take over Johnson's role as overall developer. In return, Johnson allegedly replaced Urban as the sole member and manager of Howard Square. After Urban and Johnson exchanged roles in this project, Frederickson filed an action in the Circuit Court of Cook County seeking to enforce its mechanic's lien against Howard Theater. Urban entered into a settlement with Frederickson, but failed to honor the terms of the agreement, prompting a refiling of the claim. Johnson then entered into a settlement agreement with Frederickson for $425,000 and later filed a lawsuit against Hispanic Housing, claiming that its guaranty agreement left it responsible for satisfaction of the mechanic's lien. At trial and on appeal, Hispanic Housing contends that the guaranty was extinguished when it allegedly transferred its interest to Urban.

¶ 5 At bottom, this case comes down to which of the three entities named in this suit, Johnson, Hispanic Housing Development Corporation or Mulder, is ultimately responsible for the satisfaction of the aforementioned mechanic's lien. At the second trial of this matter, the trial court entered judgment in favor of Johnson and Mulder. We affirm.

¶ 6 Turning back to the contractual peregrinations in this muddled matter, in Apri1 1998, the partnership entered into a series of agreements with defendant Hispanic Housing. The first agreement called for Howard Square, LLC, a corporation whose sole member and manager was

defendant, to oversee the build-out of the first-floor rental units and become the master tenant for the first-floor space for a period of 25 years. The responsibilities of the master tenant were to involve working with and collecting rent from retail tenants at Howard Theater. According to the terms of this agreement, Johnson would develop the second and third floors into residential units. Johnson would later assign his rights as landlord under the master lease to another corporation he controlled, CIG Howard Commercial, LLC, the named plaintiff in this case.

¶ 7 Along with the master lease, a guaranty was entered into by defendant, which provided that defendant would guarantee the obligations of Howard Square, LLC as master tenant under the master lease. The terms of the guaranty included the full payment of all rent as well as full performance and observance of all other provided terms, covenants, conditions and agreements.

¶ 8 After defendant became dissatisfied with the performance of Mulder and Johnson, it began seeking an exit strategy from the failing project. Defendant claims that in April of 2000, an oral agreement with Mulder was reached that separated defendant entirely from the Howard Theater project. Defendant maintains that the agreement transferred its entire interest in Howard Square, LLC to Mulder, thereby making Mulder the sole member of the corporation. Defendant also claims that the agreement relieved it from the guaranty. Finally, defendant alleges that Johnson acquiesced to this oral agreement between defendant and Mulder, substantiating its claim by providing two letters sent from Mulder, one of which was signed by both Johnson and Mulder, which provide some context and framework of an oral discussion that occurred between the two parties.

¶ 9 Defendant avers that the oral agreement was not reduced to writing due to Johnson's request that the signing of the legal documents be deferred in order to help preserve financing for the residential floors. Regardless of whether a valid enforceable oral agreement was reached, it is undisputed that defendant took substantial steps to separate itself from the Howard Theater project. These steps included turning over the existing leases for the subtenants of the first floor to Urban's Vice President, Mike Beckerman, in March of 2000; turning over rights under the master lease for the entire retail space for the remaining 23 years of the contract to Urban; and turning over the architects' plans, pro formas and construction estimates for the retail build-out to Urban.

¶ 10 On March 22, 2001, a construction contract was entered into between Howard Square, LLC, and Frederickson, involving the construction and build-out of the Howard Theater first floor space. The contract was signed for Howard Square, LLC by Mulder in his capacity as sole member and manager. On October 26, 2002, Johnson entered into a separation agreement with Mulder which included a number of projects, including Howard Theater. The agreement, as it pertained to Howard Theater, stated that Johnson would separate himself as the developer of the second and third floor residential units while becoming the sole managing member of Howard Square, LLC (the master tenant). This agreement went on to state that any construction bills or costs that were incurred relating to the Howard Theater or master tenant prior to October 1, 2001 would be the responsibility of Urban, and any bills or costs after that date would be Johnson's responsibility. It was shortly after the separation agreement was completed that Mulder became delinquent on payments to the contractors working on Howard Theater, which prompted the

filing of four mechanic's liens, including Frederickson's.

¶ 11 Defendant filed an affirmative defense pleading that the oral agreement it had reached with Mulder which was agreed to by Johnson absolved it from any liability under the guaranty. Defendant also counterclaimed against Johnson for breach of his obligations under the oral agreement, and filed a third-party complaint against Urban seeking indemnification in the event that it was held liable to Johnson under the guaranty. Johnson denied that he agreed to release defendant from the guaranty, and asserted that any oral agreement would be unenforceable under section 2 of the Frauds Act (statute of frauds) (740 ILCS 80/2 (West 2006)). Mulder likewise denied that an oral agreement had been reached which would have relieved defendant from its guaranty and argues that even if any such agreement existed it is unenforceable under the statute of frauds.

¶ 12 For the first five years this case was assigned to Judge McGrath. During that time period Johnson and Mulder unsuccessfully sought to dismiss defendant's claims on the grounds that the oral agreement was unenforceable as a matter of law under the statute of frauds. In November of 2009, the case was assigned for trial to Judge Solganick. After jury selection was complete but before opening statements had been made, Johnson made a motion for judgment on his complaint and a combined motion for judgment on the pleadings for summary judgment and/or to dismiss Count I of defendant's counterclaim pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619) (West 2006)). Judge Solganick refused to hear these motions as untimely.

¶ 13 During the course of opening statements, all three parties committed errors which led

Judge Solganick to declare a mistrial. The case was then immediately reassigned to Judge Simmons. On November 25, 2009, Johnson renewed his dispositive motions for judgment on his complaint and a combined motion for judgment on the pleading and a motion for summary judgment and/or to dismiss Count I of defendant's counterclaim, the same motions that Judge Solganick had earlier refused to hear on the grounds that they were untimely. Then, on November 30, 2009, Mulder likewise filed a dispositive motion for a judgment on the pleading, asserting that the statute of frauds made the purported oral agreement unenforceable under the statute of frauds.

¶ 14 The next day, over defendant's objection, Judge Simmons heard these motions and ruled in favor of Johnson and Mulder, holding that the oral agreement was unenforceable under the statute of frauds. Judge Simmons entered summary judgment finding liability in favor of Johnson on its complaint against defendant, entered a judgment against defendant on its counter claim against Johnson, and entered judgment against defendant on its third-party claim against Mulder. Thereafter, Judge Simmons awarded costs to Mulder and costs and attorneys fees to Johnson. Defendant filed this timely appeal.

¶ 15 ANALYSIS

¶ 16 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact. *Home Insurance Co. v. Cincinnati Insurance. Co.*, 213 Ill. 2d 307, 315 (2004). Summary judgment may be affirmed on any basis appearing in the record, regardless of whether the lower court relied upon that ground. *Id*. The standard of

review for the entry of summary judgment is *de novo*. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003).

¶ 17 Defendant first argues that the filing of the summary judgment motions was improper under Cook County Circuit Court Rule 2.1(f), which states: "All motions for summary judgment shall be filed and duly noticed for hearing such that the motion comes before the court for initial presentation and entry of a briefing schedule not later than 45 days before the trial date, except by prior leave and for good cause shown." Cook Co. Cir. Ct. R. 2.1(f) (Jul. 1, 1976). Defendant argues that Johnson and Mulder were in violation of Rule 2.1(f) when they brought their motion within seven days of the start of the trial because neither party had received prior leave of court and provided a showing of good cause for the presentation of summary judgment motions.

¶ 18 Illinois Supreme Court Rule 21(a) (eff. Dec. 1, 2008) vests circuit courts the ability to adopt rules governing civil cases so long as those rules are consistent with the rule and statutes of the State. Local circuit court rules may not abrogate, limit, or modify existing law. *Tolve v. Ogden Chrysler Plymouth*, Inc., 324 Ill. App. 3d 485, 493 (2001). Section 2-1005 of the code states that summary judgment for the plaintiff can be granted at any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits. 735 ILCS 5/2-1005 (West 2006). Similarly, Illinois Supreme Court Rule 191 (eff. July 1, 2002) states that motions for summary judgment under section 2-1005 must be filed before the last date, if any, is set by the trial court for the filing of dispositive motions.

¶ 19 On November 25, just six days prior to the start of the trial in front of Judge Simmons,

Johnson orally renewed his motion for summary judgment and motion to dismiss defendant's counterclaim. Similarly, on November 30, just one day prior to the start of trial, Mulder filed a motion for summary judgment on counts II and III of defendant's third-party complaint. These were the same motions that were filed before Judge Solganick, who believed them to be untimely filed. Judge Simmons, however, heard and granted these motions. Despite the fact that Circuit Court Rule 2.1(f) (Jul. 1, 1976). places a 45 day restriction on filing a motion for summary judgment, neither the Illinois Supreme Court rules nor the Illinois Code of Civil Procedure place such a restriction, thus the circuit court rule modifies the state statute and rule, therefore the supreme court rule and Illinois code of civil procedure must control. "To rule otherwise would improperly elevate a local circuit court rule over statutory and supreme court rules." *Valio v. Board of Fire and Police Commissioners of Village of Itasca,* 311 Ill. App. 3d 321, 328. Thus, Johnson and Mulder's motions for summary judgment were timely filed.

¶ 20 Defendant next contends that the circuit court erred when it ruled on a "hybrid motion." Johnson filed a combined motion for "Judgment on the Pleadings, Motion For Summary Judgment and Motion to Dismiss Count I of Counterplaintiffs/ Third-Party Plaintiffs Second Amended Counterclaim and Third-Party Complaint Pursuant to 735 ILCS 5/2-619." (collectively referred to throughout as " dispositive motions.") Defendant claims that these type of "hybrid motions" are frowned upon by the court and therefore Judge Simmons had no power to hear them.

¶ 21 In support of its argument, defendant cites to *Smith v. Chemical Personnel Search, Inc.*, 215 Ill. App. 3d 1078, 1081 (1991). There the court held that procedures which combine

separate motions for joint analysis and determination are expressly disapproved and discouraged. The court went on to state however, that in the interest of judicial economy, if the respondent is not prejudiced by the improper combination of motions, reversal is not automatically required and the matter would be considered on its merits. *Id*.

¶ 22 As the court held in *Smith*, these motions are merely discouraged, and as is the case here, where no prejudice is shown a reversal is neither required nor needed. Therefore, despite the fact that these "hybrid motions" are discouraged we will not automatically reverse and instead examine the motion on the merits which will be done in some detail below.

¶ 23 Defendant next contends that in hearing the summary judgment motions brought by Johnson and Mulder, Judge Simmons was overruling the decision of his immediate predecessor, Judge Solganick. Defendant, citing *McClain v. Illinois Central Gulf R.R. Co.*, 121 Ill. 2d 278, 287 (1988), argues that where a predecessor judge's ruling involved the exercise of discretion, a successor judge may overrule his or her predecessor only where new matter is brought to light and there is no evidence of judge shopping. Defendant maintains that neither Johnson nor Mulder claimed or even could claim that there was a "new matter" that would justify Judge Simmons hearing the motions.

¶ 24 While prior rulings should be vacated or amended only after careful consideration, especially if there is evidence of "judge shopping" on behalf of one who has obtained an adverse ruling, a court is not bound by an order of a previous judge and has the power to correct orders which it considers erroneous. *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 121 (1978). A demonstration of changed circumstances is necessary only when the efficient administration of

justice would be frustrated or uncertainty in litigation promoted. *People Gas Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 32 (1986).

¶ 25 In the case at hand, Judge Solganick dismissed Johnson and Mulder's dispositive motions as untimely. Johnson and Mulder raised these same dispositive motions in front of Judge Simmons. As explained in some detail above, Judge Solganick erred when he ruled that these motions were untimely based solely on the circuit court rule that is obviously intended to streamline pretrial procedures in Cook County. That rule, however, does not prohibit a trial judge from hearing dispositive motions that otherwise comply with the rules of the Supreme Court or the Code of Civil Procedure. Therefore, Judge Simmons was acting within those rules and within his considerable discretion when he heard Johnson and Mulder's timely filed dispositive motions.

¶ 26 Next, we turn to the motions *in limine* which were granted by Judge Simmons which precluded defendant from submitting evidence of any oral agreement as well as providing any evidence regarding Johnson's control or ownership of Howard Square, LLC. Defendant claims that Judge Simmons granted these two motions in error. It continues on to argue that even assuming *arguendo* that the motions were granted correctly, that the two letters of intent that Judge Simmons refused to preclude, when looked at in combination, contained enough evidence to support the "series of writings" exception to the statute of frauds, thereby defeating summary judgment.

¶ 27 Whether a motion *in limine* should be granted is subject to the trial court's discretion. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 646 (2010). A trial court's broad discretion in ruling upon

a motion *in limine,* and a decision on a motion *in limine* will not be disturbed except for when there has been an abuse of that discretion. *Colella v. JMS Trucking Co. of Illinois, Inc*., 403 Ill. App. 3d 82, 92-93 (2010). This court will only find that a trial court has abused its discretion when it acts indiscriminately without the use of conscientious judgment, exceeded the limits of reason and ignored fundamental principles of law or where no reasonable person would take the position held by the court. *Schmitz v . Binette,* 368 Ill. App.3d 447, 452 (2006). "In determining whether there has been an abuse of discretion, this court does not substitute its judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely." *Alm v. Loyola University Medical Center,* 373 Ill. App. 3d 1, 4 (2007).

¶ 28 Johnson presented four motions *in limine* to Judge Simmons. As mentioned, the first was to exclude evidence of any oral agreements which purportedly terminated the guaranty. The second asked to bar any evidence which would show his control or ownership of the master tenant, Howard Square, LLC. The third, Johnson asked the court to bar argument that defendant was released from its obligations under the guaranty and the final motion sought to bar evidence of the two letters of intent sent by Mulder to defendant. Judge Simmons granted the first two motions *in limine* but denied the last two.

¶ 29 Defendant claims that the first two motions *in limine* were granted under an erroneous view of the law by Judge Simmons. Defendant bases its argument on its speculation that Judge Simmons most likely believed that the evidence was barred under the statute of frauds despite any explicit statement by the trial judge on that specific matter. Defendant maintains that if its assumption is correct, then Judge Simmons' decision to grant the first two motions was

manifestly inconsistent with his decision to allow evidence of the two letters which defendant contends would have allowed it to establish a viable exception to the statute of frauds. Here, defendant leans on a rather slender reed.

¶ 30 Evidence of an oral agreement will be allowed in so long as defendant can show that the alleged oral agreement falls within one of the recognized exceptions to the statute of frauds. *Cravens v. Bishop*, 44 Ill. App. 3d 850, 853 (1977). This is independent of and unrelated to the potential enforceability of any such agreement. *Id*. First, we will examine whether the two letters of April 4, 2000 are sufficient to constitute a series of writings, which would take this case out of the statute of frauds analysis.

> "A 'writing' sufficient to satisfy the statute of frauds may be made up of several documents which may consist of various forms such as notes, papers, letters and telegrams, so long as, taken together, they contain on their face, or by reference to other writings, the names of the parties, an identification of the subject matter of the contract, and the terms and conditions of the contract." *American College of Surgeons v. Lumbermens Mutual Casualty Co.*,142 Ill. App. 3d 680, 698-99 (1986).

These writings must be so definite that there is no need of parol evidence for any of the terms or conditions of the sale or the intentions of the parties. *Mid-Town Petroleum, Inc. v. Dine*, 72 Ill. App. 3d, 296, 303 (1979). When various writings are involved, it is necessary that they be connected in some definite manner, the signed writing or writings must refer expressly to the other writing, or the several writings must be so connected, either physically or otherwise, as to

show by internal evidence that they relate to the same contract. *Id*. at 303-04.

¶ 31 In this case, defendant presented two letters dated April 4, 2000. The first letter written on Urban letterhead and signed by Mulder was sent to Paul Roldan who is the president of defendant corporation. The letter began by stating "Please accept this letter as our agreement with regard to Howard Square L.L.C.," the letter went on to state that defendant will assign its membership interest in Howard Square, LLC to Urban; that Urban will reimburse defendant for all its reasonable expenses incurred with relationship to Howard Square, LLC; and finally that Urban will have the paperwork for both the assignment and the reimbursement schedule prepared by its attorneys and forwarded to defendant no later than April 15, 2000. The second letter, also written on Urban letterhead was again signed by Mulder, but this time signed under the phrase "Acceptance By," by Johnson, in his capacity as president of Howard Theater Limited Partnership. This letter also addressed to Paul Roldan stated: "This letter will act as confirmation that pursuant to the Guaranty Agreements and Indemnity Agreements, Urban Investment Trust, Inc. and Rudy J Mulder personally shall be responsible for said agreements." Based on these two writings, we must determine if the letters sufficiently name all parties of the agreement, identify the subject matter of the contract, as well as the terms and conditions of the contract.

¶ 32 Even though the two letters directly reference the subject matter of the agreement Howard Square, LLC and identify the three parties to this agreement, they never directly reference each other. In fact there is no evidence at all that these two letters are discussing the same contract. Furthermore, the two letters do not establish the terms and conditions of the

which is fatal to meeting the series of writings exception. Even with the broadest reading of these letters, it is impossible to say what the terms of this contract are. The second letter appears to relieve defendant from the guaranty and indemnity agreements, but there are literally no terms listed at all. The first letter again somewhat clearly lays out the purpose of the agreement, as well as a somewhat detailed reimbursement schedule, but again makes no reference to the guaranty and indemnity agreements which are at issue in the case *sub judice*.

¶ 33 Next, defendant claims that the record contains evidence to support the full performance exception to the statute of frauds. Defendant argues that the significant steps that it took to separate itself from Howard Square, LLC after the oral agreement constituted full performance. The doctrine of full performance "provides that where one party completely performs a contract, the contract is enforceable and the statute of frauds may not be used as a defense." *Anderson v. Kohler*, 397 Ill. App. 3d 773, 786 (2009).

¶ 34 Defendant contends that there is significant undisputed evidence which would have enabled the jury to find that defendant fully performed all of its obligations under the oral agreement. These factors included defendant turning over the existing leases for the first floor sub-tenants, turning over rights under the master lease, turning over the architects' plans, pro formas and construction estimates for the retail build-out, giving up the right to hire the contractors to do the build-out, and giving up 23 years of tax advantages that accompanied the rental of the retail space. Despite all of these factors, which does suggest substantial performance, defendant readily admits in its brief that even after April 2000, its vice president Erica Pascal continued to pay the fees to the Illinois Secretary of State on behalf of Howard

Square, LLC. Despite this troubling fact, defendant maintains that Howard Square, LLC was an inactive corporation for its purpose and it did not conduct any business with it. In essence, this is sufficient proof that defendant had not fully performed all of its obligations under the oral agreement and supports the trial court's decisions below.

¶ 35 Ultimately, because defendant is unable to prove that there is an exception to the statute of frauds, the evidence of the alleged oral agreement was properly precluded. Judge Simmons correctly granted Johnson and Mulder's motions *in limine*, and his decision in no way can be considered erroneous.

¶ 36 Lastly, defendant contends that fundamental changes in business relations between the parties released the guaranty by operation of law. Defendant argues that a fundamental principle of the law of suretyship is that a material change in business dealings between the guarantor and the person to whom the guaranty runs can effectuate a release of the guaranty by operation of law.

¶ 37 "In Illinois, the general principle applies that a guarantor is not released unless the essentials of the original contract have been changed and the performance required of the principal is materially different from that first contemplated." *Chicago Exhibitors Corp. v. Jeepers! of Illinois, Inc.*, 376 Ill. App. 3d 599, 607 (2007). A guaranty occurs when a guarantor takes on a risk in exchange for a certain benefit. When events occur that are beyond the guarantor's control which dramatically increase the risk, the assumptions upon which the contract were formed are undercut. *Roels v. Drew Industries, Inc.*, 240 Ill. App. 3d 578, 582 (1992). A guaranty rests on the basic assumption that a guarantor would not ordinarily allow a

substituted increase in risk without receiving something in return, based on this simple fact, it is a commonly held principle that a substantial increase in risk along with some material change discharges the guaranty. *Id.* A key element in determining whether a guarantor has been exposed to an increased risk is to evaluate whether there has been a material change in the guaranty agreement. *Id.*

¶ 38 Defendant maintains that a reasonable jury could have found that the guaranty was extinguished by operation of law. Defendant contends that there is extensive evidence of enormous change in the business relationship between defendant and Johnson, which led to an exponential increase of defendant's risk. Defendant maintains that when it became the guarantor of the master tenant's obligations, it was strictly because it was the sole member and owner of Howard Square, LLC. Defendant argues when it transferred its entire ownership interest in Howard Square, LLC to Mulder, it constituted a significant change in business relationship because it was no longer guaranteeing the performance of an entity it controlled. Defendant contends that the alleged changes in ownership interest in Howard Square, LLC shows that there was a substantial increase in risk plus a change of business relationship because defendant no longer controlled the entity whose performance it was guaranteeing. Furthermore, defendant maintains that there is substantial evidence that the nonpayment of the mechanic's lien that prompted the present litigation occurred after October 2001, the time period when Mulder allegedly transferred his interest in Howard Square, LLC to Johnson, and, more importantly, well after April 2000, when defendant allegedly gave up its control of Howard Square, LLC. Finally, defendant makes much of the fact that it was not even made a party to the two lawsuits

arising out of the Howard Theater mechanic's lien because it was not a party to the contract that formed the basis for those lawsuits, freeing it from any obligation to satisfy those liens.

¶ 39 Defendant cites in its brief primarily to *Chicago Exhibitors Corp. v. Jeepers! of Illinois, Inc*., 376 Ill. App. 3d 599 (2007) and *Roels v. Drew Industries*, Inc. 240 Ill. App. 3d 578 (1992). Although both of these cases do an excellent job of extrapolating the principle that a fundamental change in business relations between parties can result in a release of a guaranty by operation of law, neither case comes to a result that is favorable to defendant in this case. In fact, while neither case is quite analogous to the facts present before us, they only weaken defendant's position that a material change, as well as an increased risk, occurred in the business relationship between defendant and Johnson.

¶ 40 To begin with, as stated earlier, defendant can not prove through a "series of writings" or by "full performance" that an actual transfer of its interest in Howard Square, LLC was consummated. Assuming *arguendo*, that a transfer of interest did in fact occur between defendant and Mulder, we will analyze whether that transfer could constitute a fundamental change in business relations. Defendant first contends that the business relationship was changed when it as guarantor, with Johnson's full knowledge and assent, was replaced by Urban as the party controlling Howard Square, LLC, the master tenant. In *Chicago Exhibitors Corp.*, 376 Ill. App. 3d at 608, the guarantor argued that their guaranty should be extinguished because the guarantor was no longer guarantying the performance of an entity in which he exercised direct control over. The court held that where the language of the personal guaranty specifically provided that the guaranty would remain intact regardless of changes and modifications to the

lease. *Id*. at 609. This is precisely the case here: defendant signed and agreed to a guaranty which explicitly states that the guaranty shall be "absolute and unconditional" and shall be in effect "notwithstanding any amendment, addition, assignment, sublease, transfer, renewal, extension of other modification of the lease". Thus, the transfer of interest from defendant to Mulder, does not, in and of itself, serve to extinguish the guaranty.

¶ 41 Next, as was the case in *Chicago Exhibitors Corp.*, 376 Ill. App. 3d at 608, nothing occurred that altered the performance required by the tenant, such as the amount of rent owed under the lease, the terms of the lease, or the basic relationship between the tenant and landlord. Furthermore, despite defendant's contentions, there was never an increase in its potential liability. In fact there was no change in the contract at all. The original agreement was always for the master tenant to develop the residential units of the building while the master landlord develops the remainder of the building. The mechanic's lien that arose was an obligation in which the guarantor was bound by due to the fact that it was work that was specifically outlined in the contract in which the guaranty was for. There was never an increase of risk, it merely went from a potential liability to an actual liability, which is precisely the purpose of the guaranty. Finally, we are unpersuaded by the fact that defendant was never made a party to the initial lawsuit with Frederickson, due to the fact that there was absolute zero language in the guaranty that afforded it that right.

¶ 42 Lastly, defendant maintains, that on remand this court should deliver instructions regarding jury selection and *Batson* challenges. Due to the fact that we are affirming the trial court, those issues are irrelevant.

¶ 43 CONCLUSION

¶ 44 In conclusion, we decline to find that the circuit court erred in finding summary judgment against the defendant, and affirm its judgment. Despite defendant's contention there is no issue of material fact in this case. Plaintiff has failed to demonstrate that an exception to the statute of frauds is applicable in this case, therefore the evidence of an oral agreement was correctly barred leaving no issue of material fact. Therefore the lower court properly granted Johnson and Mulder's motions for summary judgment.

¶ 45 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 46 Affirmed.