2013 IL App (1st) 121271-U

FIRST DIVISION
March 29, 2013

Nos. 1-12-1271 and 1-12-1512 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PHYLLIS FISCHEL and DIAMONDS PLUS, INC., an Illinois Corporation, Plaintiffs-Appellees, v. MICHAEL SOURI and GARABED SAZIAN, Individually and as Officers of International Art Jewelers, Inc., an Illinois Corporation, and Diamonds Plus, Inc., an Illinois Corporation, Defendants-Appellants (International Art Jewelers, Inc., an Illinois Corporation, Defendant).	)	Appeal from the Circuit Court of Cook County. No. 08 CH 21171 Honorable Lee Preston, Judge Presiding.

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

¶ 1 ***Held***: In these consolidated appeals, we find: (1) appellants' initial appeal must be dismissed for lack of jurisdiction; and (2) the circuit court properly interpreted the parties' settlement agreement; and, therefore, properly entered a judgment against appellants after they failed to comply with the terms of that agreement.

¶ 2 Defendants-appellants, Michael Souri and Garabed Sazian, individually and as officers of both International Art Jewelers, Inc., an Illinois corporation, and Diamonds Plus, Inc., an Illinois Corporation (appellants), have filed these two consolidated appeals from orders of the circuit court entering judgment against them for their failure to comply with the terms of a settlement agreement. For the following reasons, we conclude: (1) appellants' initial appeal must be dismissed for a lack of appellate jurisdiction; and (2) the circuit court properly entered a judgment against appellants.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs-appellees, Phyllis Fischel and Diamonds Plus, Inc., an Illinois corporation (DPI), filed an initial complaint on June 12, 2008, naming only the two appellants as defendants. Plaintiffs generally alleged that starting in 2001, they entered into a series of business agreements which established DPI, a corporation "in the general business of importing and distributing diamonds." These agreements were between Ms. Fischel, the two appellants, and another party, Maria Lasday. In general, Ms. Fischel and Ms. Lasday were to be the officers, financiers, and the sole shareholders of DPI, while appellants would run DPI's day-to-day operations of DPI. Appellants would be using their experience as the owners and operators of defendant, International Art Jewelers, Inc., an Illinois corporation (IAJ),[1] which was in the business of selling jewelry and would be a customer of DPI. All four parties to the agreements would equally share in any profits generated by DPI.

¶ 5 The complaint further alleged that, pursuant to these agreements, Ms. Fischel made loans to DPI in the amount of $2.5 million for the purposes of purchasing inventory. While Ms. Lasday

[1] While the captions of the notices of appeal and the briefs filed in this matter appear to indicate that IAJ is also an appellant, the body of the notices of appeal and the body of the briefs all indicate that only Mr. Souri and Mr. Sazian have appealed. Thus, we refer to IAJ solely as a defendant, as opposed to a defendant-appellant.

was also intended to assist in funding DPI, she never provided any loans or other capital. Ms. Fischel ultimately purchased Ms. Lasday's shares in the company and became the sole shareholder of DPI. Ms. Fischel's loans were in fact used to purchase inventory, and DPI ultimately entered into another agreement whereby that inventory was consigned to IAJ for the purpose of sale, with any profits to benefit plaintiffs.

¶ 6 While Ms. Fischel did receive partial repayment for her loans, she was not repaid fully as required under the terms of the various agreements. Further, the complaint alleged appellants did not in fact hold out the inventory for the benefit of DPI, but had obtained and maintained that inventory for themselves and IAJ. The initial complaint alleged appellants, as agents for IAJ, had refused demands to return the inventory to DPI or to Ms. Fischel, and that the amount still due to Ms. Fischel on her loans to DPI exceeded $2.3 million. The complaint, therefore, sought injunctive relief and monetary damages in separate counts against appellants for detinue, conversion, breach of contract, and an accounting. In an order entered on July 15, 2008, the circuit court granted a preliminary injunction requiring appellants to place the inventory claimed by plaintiffs in escrow with a third party.

¶ 7 Thereafter, the parties engaged in nearly two years of litigation. Over the course of that litigation, the plaintiffs filed an amended complaint which added IAJ and George Souri as defendants. George Souri was Michael Souri's son, and an officer of IAJ. George Souri was subsequently dismissed from this case in an order entered on September 29, 2009.

¶ 8 Throughout this time, the parties also engaged in a number of settlement conferences, some

involving Judge Daniel Riley, the circuit court judge presiding over this matter at the time.[2] These discussions resulted in a "CONFIDENTIAL SETTLEMENT AND GENERAL RELEASE AGREEMENT" (agreement) executed by the parties on March 12, 2012. That agreement was "made by and between" both plaintiffs and all three remaining defendants, Mr. Souri, Mr. Saizan, and IAJ. The agreement generally indicated that it was made to finally settle the instant litigation, and provided that compliance with its provisions would cause all parties to release and relinquish any claims that they might otherwise have against each other.

¶ 9 The terms most relevant here are contained in paragraph 2 of the agreement, which generally provided that the parties agreed that "Fischel and DPI have agreed to accept $1,050,000.00 as repayment of Fischel's capital equity principal if and only if Souri, Sazian, and IAJ abide by the payment schedule and terms outlined below." A number of subparagraphs then outlined that: (1) "Defendants" would pay Ms. Fischel $14,166.67 per month "until payment in full is made;" (2) "Defendants" would turn over the disputed inventory to Ms. Fischel immediately; (3) the disputed inventory would be valued at $370,000; and (4) "Defendants" would receive an immediate credit of $200,000 on their $1,050,000 obligation upon tender of the inventory, while the remaining $170,000 would be available as a future credit should "Defendants" fail to timely make any monthly payment. Paragraph 2 also stated that the circuit court would retain jurisdiction to enforce the agreement, specifically providing that if "Defendants fail to make monthly payments and have used all the available credit balance, Defendants will then be in default on this settlement agreement and the court will enter judgment against Defendants immediately." Finally, subparagraph 2(e) provided

[2] Judge Riley subsequently retired, and the orders at issues here were entered by Judge Lee Preston.

that "[b]y entering into this settlement agreement, all parties acknowledge that no personal guaranties are created by either Souri or Sazian[.]"

¶ 10 On March 12, 2012, the circuit court entered an order dismissing this suit pursuant to the terms of the agreement, which was tendered in open court. Thereafter, plaintiffs filed a motion for the entry of a judgment against the three remaining defendants on April 25, 2011. In that motion, plaintiffs alleged that defendants had failed to make *any* monthly payments under the terms of the agreement, had exhausted their credit balance, and were, therefore, subject to a judgment against them for the entire balance of the amount owed under the agreement.

¶ 11 After plaintiffs filed an amended motion, and that motion was briefed and argued, the circuit court entered an order on October 28, 2011. That order granted plaintiffs' motion, in part, and entered a judgment against defendants. The circuit court's order concluded that while the agreement entitled plaintiffs to a judgment for defendants' default, and while such a judgment should be entered jointly against all three remaining defendants, the agreement did not contain an acceleration clause. Therefore, defendants were only in default as to the payments they had failed to make after exhausting their credit balance. The circuit court, therefore, entered judgment against the defendants in the amount of $99,199.73.

¶ 12 Defendants filed a motion to reconsider, which argued that the circuit court's judgment order improperly failed to account for the language of subparagraph 2(e), which they argued released appellants from any personal liability for the payment of the amounts owing under the agreement. The circuit court granted that motion in an order entered on January 17, 2012, concluding that the terms of the agreement were ambiguous and an evidentiary hearing would be required to "clarify the parties' intention concerning section 2(e) of the document."

¶ 13 That evidentiary hearing was held on March 19 and 21, 2012, and at the hearing the circuit court heard testimony from both appellants, George Souri, Ms. Fischel, and Judge Riley. In general, the appellants and George Souri each testified that there was no intention for appellants to be personally liable under the agreement. Indeed, George Souri and Mr. Sazian testified that any personal liability on their part could cause them to be in default of the terms of other, unrelated loans. Judge Riley also testified that, as he recalled, appellants were unwilling to accept personal liability during the course of the settlement negotiations.

¶ 14 However, George Souri–the person primarily responsible for negotiating the settlement on behalf of defendants–also testified that he did not object to the language in the agreement requiring Mr. Souri, Mr. Sazian, and IAJ to abide by the payment schedule. Nor did he object to the language indicating that a judgment could be entered against "Defendants" if those payments were not made. Moreover, while Mr. Souri and Mr. Sazian did testify that they did not intend to be personally liable under the agreement, they also testified at times that paragraph 2(e) of the agreement indicated that they were not guarantying any payments by IAJ. Furthermore, Judge Riley also testified that he did not review the agreement before it was executed, and did not know why paragraph 2(e) was included in the parties' final agreement.

¶ 15 In addition, Ms. Fischel testified that appellants were indeed intended to be personally liable for any default under the agreement, and that she would not have agreed to settle this matter it they were not personally liable for any judgment to be entered in the case of a default. She testified that, as far as she understood, subparagraph 2(e) was intended to reflect that appellants would not guaranty any payment by IAJ. Ms. Fischel further testified that she was not concerned with such a provision, because she "did not care who I received payments from pursuant to the agreement

because the way the agreement was drafted, if the payments weren't made, the Court retained jurisdiction and a judgment would be entered against IAJ, Souri and Sazian."

¶ 16 On April 24, 2012, the circuit court entered one of the orders challenged on appeal. In that order, the circuit court recounted the history of this matter, the language of subparagraph 2(e) of the agreement, and the testimony presented at the evidentiary hearing. While the circuit court concluded that the agreement was "somewhat ambiguous," it also concluded that the other language of the agreement and the testimony presented–including the testimony of Ms. Fischel, which the court found to be "more credible" than the testimony of Mr. Souri and Mr. Sazian–established that "the parties did expect Sazian and Souri to incur individual liability for the terms of the Agreement." The circuit court also based its decision upon the fact that a "guaranty" is typically viewed as a secondary, collateral liability for the primary liability of another. The court, thus, entered judgment in favor of plaintiffs and against all three remaining defendants, jointly and severally.

¶ 17 That order did not enter judgment in a specific amount, however. Instead, another order was entered on the same date indicating that this case was set for a subsequent hearing "to determine the amount of judgment to be entered against defendants personally." Nevertheless, appellants filed an appeal from the order entering the unspecified judgment against them on April 26, 2012 (appeal no. 1-12-1271). The circuit court, thereafter, entered a May 9, 2012, order, in which the court entered a final judgment against all three remaining defendants, jointly and severally, in the amount of $198,333.38. Appellants filed a notice of appeal from this order on May 22, 2012 (appeal no. 1-12-1512). The two appeals were subsequently consolidated by an order of this court.

¶ 18 II. ANALYSIS

¶ 19 We first address the matter of this court's jurisdiction–as well as the jurisdiction of the circuit

court–before considering appellants' arguments on the merits.

¶ 20 A. Jurisdiction

¶ 21 While none of the parties have questioned this court's appellate jurisdiction over these consolidated appeals, we have a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006).

¶ 22 Except as specifically provided by provisions of the Illinois Supreme Court Rules not relevant here, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), *et seq*.; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). "A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChrysler Corp*., 356 Ill. App. 3d 760, 765 (2005). Thus, a "[j]udgment is not final, nor immediately appealable, where the court reserves an issue for further consideration or otherwise manifests an intention to retain jurisdiction for the entry of a further order." *Djikas v. Grafft*, 344 Ill. App. 3d 1, 8 (2003).

¶ 23 Here, appellants filed their initial notice of appeal (appeal no. 1-12-1271) on April 26, 2012, purporting to challenge the circuit court's April 24, 2012, order entering judgment against defendants. However, that order did not enter judgment in a specific amount. In addition, the record contains another order entered on the same date indicating that this case was set for a subsequent hearing "to determine the amount of judgment to be entered against defendants personally."

¶ 24 As such, it is evident that the circuit court's April 24, 2012, order entering an unspecified

judgment against defendants was not a final order, as it did not finally dispose of the rights of the parties. *Brentine*, 356 Ill. App. 3d at 765. Indeed, when the two orders entered on April 24, 2012, are considered together, it is clear that the circuit court manifested "an intention to retain jurisdiction for the entry of a further order." *Djikas*, 344 Ill. App. 3d at 8. Because appellants' initial appeal was taken from an order that was not final and appealable, this court lacks jurisdiction over that appeal and it must, therefore, be dismissed.

¶ 25 We must next consider what jurisdictional significance the filing of appellants' initial notice of appeal may have had on the circuit court's jurisdiction over this matter. See *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002) (reviewing court has an "obligation to take notice of matters which go to the jurisdiction of the circuit court"). After reviewing the record, we find appellants' initial notice of appeal had no jurisdictional significance whatsoever. As we have previously recognized:

> "It is generally understood that '[t]he jurisdiction of the appellate court attaches upon the proper filing of a notice of appeal. When the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause is beyond the jurisdiction of the trial court.' [Citation.] However, 'if the order appealed from is not final and appealable, the notice of appeal neither deprives the trial court of jurisdiction to proceed with the case nor vests the appellate court with jurisdiction to review.' [Citation.]" *State ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860, 863-64 (2006).

¶ 26 Thus, the circuit court retained jurisdiction over this matter, despite the filing of appellants' initial notice of appeal. The circuit court, therefore, had jurisdiction to enter its May 9, 2012, order in which the court entered judgment against defendants, jointly and severally, in the amount of

$198,333.38. Moreover, because this subsequent order *did* dispose of the rights of the parties, it was final and appealable. *Brentine*, 356 Ill. App. 3d at 765. Appellants filed a timely notice of appeal from the May 9, 2012, order on May 22, 2012 (appeal no. 1-12-1512).

¶ 27 Finally, we note that appellants did not include a challenge to the circuit court's prior April 24, 2012, order in its second notice of appeal. Nevertheless, appellants' second notice of appeal conferred jurisdiction upon this court to review the circuit court's prior order, as "an appeal from a subsequent final judgment will draw into question all prior nonfinal rulings and final but nonappealable orders that produced the judgment." *In re Marriage of King*, 336 Ill. App. 3d 83, 86 (2002). We, therefore, have jurisdiction, within the context of appeal no. 1-12-1512, to consider the orders entered by the circuit court on April 24, 2012, and May 9, 2012.

¶ 28 B. The Circuit Court's Interpretation of the Agreement and Its Judgment

¶ 29 We now turn to a consideration of the propriety of the circuit court's interpretation of the parties' agreement, as well as the resulting judgment the circuit court entered against appellants for their violation of the terms of that agreement.

¶ 30 It is well recognized that "a settlement agreement is a contract, and construction and enforcement of settlement agreements are governed by principles of contract law." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). If there is no ambiguity in the language of a settlement agreement, a determination of the intent of the parties is governed solely by the language of that agreement. *First Star Financial Corp.*, 2011 IL App (1st) 101849,

¶ 18. Where the language of a contract is clear and unambiguous, the construction of that contract is a matter of law subject to *de novo* review. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 684 (2009).

¶ 31 Where a dispute exists between the parties as to the meaning of a contract provision, however, the threshold issue is whether the contract is ambiguous. *Hillenbrand v. Meyer Medical Group, S.C.*, 288 Ill. App. 3d 871, 875-76 (1997). "In determining whether an ambiguity exists, the court applies the 'four corners rule' and looks to the language of the agreement alone." *DFO Partnership*, 392 Ill. App. 3d at 685. The determination of whether a contract is ambiguous is a question of law, which this court reviews *de novo*. *Id*. at 684.

¶ 32 Once it is determined that a contract is ambiguous, however, a court may consider extrinsic evidence to ascertain the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). The interpretation of the contract language then becomes a question of fact, and the circuit court's determination of the intent of the parties will not be overturned unless it is contrary to the manifest weight of the evidence. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (2002) (citing *Bradley Real Estate Trust v. Dolan Associates Ltd.*, 266 Ill. App. 3d 709, 712 (1994); see also *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991) ("Where a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended."). A finding is against the manifest weight of the evidence only when an opposite conclusion is apparent from the record, or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010).

¶ 33 Pursuant to the above authority, we must first determine if the agreement at issue here is

ambiguous, with that determination guided solely by the language of the agreement itself. *DFO Partnership*, 392 Ill. App. 3d at 685. "A settlement agreement is ambiguous if it is susceptible to more than one interpretation or if its terms are obscure in meaning through indefiniteness of expression. [Citation.] Contract language is not ambiguous solely because parties disagree as to its meaning. [Citation.]" *First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. A court should consider only reasonable interpretations of the contract language and will not strain to find an ambiguity where none exists. *DFO Partnership*, 392 Ill. App. 3d at 686.

¶ 34 The agreement at issue here is ambiguous, if at all, primarily on the basis of the language contained in paragraph 2. As noted above, paragraph 2 generally provided that plaintiffs agreed to accept $1,050,000 to settle this dispute "if and only if Souri, Sazian, and IAJ abide by the payment schedule and terms" contained in the various subparagraphs of that paragraph. Those subparagraphs provided that "Defendants" would pay Ms. Fischel $14,166,67 per month, less a $370,000 credit balance established upon the transfer of the disputed inventory, until the entire $1,050,000 was paid. The circuit court was to retain jurisdiction to enter judgment against "Defendants" if they defaulted on the agreement by failing to make any monthly payment after the credit balance was exhausted. Finally, subparagraph 2(e) indicated that "[b]y entering into this settlement agreement, all parties acknowledge that no personal guaranties are created by either Souri or Sazian."

¶ 35 As an initial matter, we reject appellants' argument that the agreement is ambiguous because it does not clearly define the term "Defendants" to include appellants and, therefore, cannot possibly be construed to impose personal liability upon them. Here, the agreement's introductory paragraphs identify the document as a settlement agreement between the two plaintiffs and all three remaining defendants, Mr. Souri, Mr. Sazian, and IAJ. Those introductory paragraphs further explicitly

indicate that the agreement was intended to settle the instant litigation, and clearly identified Mr. Souri, Mr. Sazian, and IAJ as defendants in this litigation. Paragraph 2 of the agreement specifically provides that plaintiffs agreed to settle this litigation "if and only if Souri, Sazian, and IAJ abide by the payment schedule and terms" contained in its various subparagraphs, and those subparagraphs contain the specific obligations of "Defendants."

¶ 36 Again, "[t]he primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce*, 382 Ill. App. 3d at 636-37. Moreover, this court will construe a contract reasonably to avoid absurd results. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009). Finally, "[t]he parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract." *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011). Construing the agreement reasonably and as a whole–as we must–it is unambiguously apparent that the term "Defendants" is intended to refer jointly to all the three remaining defendants, Mr. Souri, Mr. Sazian, and IAJ. Indeed, any other interpretation of the term "Defendants" could only be accomplished by improperly viewing that term in isolation, and would improperly yield an absurd result.

¶ 37 We similarly reject any contention that the agreement is ambiguous because it does not specify exactly what type of judgment would be entered in the case of a default, or against whom such a judgment would be entered. As explained above, paragraph 2 requires that plaintiffs be paid a total of $1,050,000 by "Defendants" in settlement of this litigation, provides for a specific payment schedule and other obligations, and specifically provides that "Defendants" must comply with that payment schedule and those other obligations. Paragraph 2 further provides that if "Defendants fail

to make monthly payments and have used all of the available credit balance, Defendants will then be in default on this settlement agreement and the court will enter judgment against Defendants immediately."

¶ 38 We note that a judgment has been traditionally defined as a "court's final determination of the rights and obligations of the parties in a case." *Black's Law Dictionary, Abridged* 678 (7th ed. 2000); *McDonald v. Health Care Service Corp.*, 2012 IL App (2d) 110779, ¶ 21 (same); *Sundance Homes, Inc. v. County of DuPage*, 195 Ill. 2d 257, 274 (2001) (same). Furthermore, we have already concluded that "Defendants" is a term that unambiguously refers jointly to Mr. Souri, Mr. Sazian, and IAJ. Thus, the agreement unambiguously creates a joint, primary obligation on the part of all three remaining defendants to timely pay the full $1,050,000 in settlement of this litigation, and unambiguously provides that the court will enter a final determination of the obligations of all three defendants in the event of a default on that joint obligation. Indeed, we conclude that the agreement unambiguously provides for the entry of a judgment of joint and several liability against all three defendants. See 765 ILCS 1005/3 (West 2010) ("all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants"); *Pritchett v. Asbestos Claims Management Corp.*, 332 Ill. App. 3d 890, 898 (2002) (" 'If two or more parties to a contract owe a joint and several duty of performance to another party to the contract and the duty is not performed, each may be liable for the entire damages resulting from the failure to perform.' ") (quoting *Brokerage Resources, Inc. v. Jordan*, 80 Ill. App. 3d 605, 608 (1980)). We fail to see any *reasonable* ambiguity in the language of the agreement with respect to these provisions, and we refuse to strain to find any ambiguity where none exists. *DFO Partnership*, 392 Ill. App. 3d at 686.

¶ 39 We next address whether the language of paragraph 2(e), which states that "[b]y entering into

this settlement agreement, all parties acknowledge that no personal guaranties are created by either Souri or Sazian," renders the agreement ambiguous.

¶ 40 While acknowledging that a "guaranty" typically indicates secondary liability for the debt of another, appellants assert that this term can also be used to indicate primary liability. Appellants, thus, contend that–in the context of the agreement–the language of paragraph 2(e) unambiguously reflects an intent that they "would not be individually liable for payments to [plaintiffs], and that only the corporate entity, IAJ, would be so liable." Indeed, appellants contend that any other construction of paragraph 2(e) would lead to absurd results in light of the other language of paragraph 2, or would improperly render the language of this subparagraph superfluous. In response, plaintiffs contend that–based in part upon the ordinary and usual definition of a guaranty–paragraph 2(e) should be construed to unambiguously "mean that Souri and Saizan will not act as guarantors, namely they will not assume responsibility of another party if that party fails to meet his or its obligation."

¶ 41 In its April 24, 2012, order, the circuit court concluded that the language of paragraph 2(e) was "unclear." As the circuit court explained:

> "Its plain meaning is that Sazian and Souri do not intend to act as guarantors for IAJ. However, that conclusion is puzzling considering that the document does not indicate for what they might have been guarantors. It is possible that the language could mean Sazian and Souri intended to show that they would not accept individual liability for the debts of IAJ. The court finds that the Agreement is somewhat ambiguous and requires the Court to determine the intent of the parties though parole evidence."

¶ 42 It is not immediately apparent that the circuit court correctly determined that the language

of paragraph 2(e) renders the agreement ambiguous. As the circuit court and the parties all acknowledge, a "guaranty" has long been defined as a promise to be secondarily liable for the debt of another. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 465 (2010) (a guaranty has been defined as " 'a collateral undertaking to pay the debt of another' ") (Emphasis omitted.) (quoting W. Shumaker & G. Longsdorf, *The Cyclopedic Dictionary of Law Comprising the Terms and Phrases of American Jurisprudence* 423 (1901)); *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 482 (2006) (guaranty defined as " 'a promise to answer for the payment of some debt or the performance of some obligation, on default of such payment or performance, by a third person who is liable or expected to become liable therefor in the first instance' ") (quoting *Commonwealth Trust & Savings Bank v. Hart*, 268 Ill. App. 322, 327 (1932)); *Clark v. Morgan*, 13 Ill. App. 597, 598 (1883) ("A guaranty is defined as a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who in the first instance is liable.").

¶ 43 Thus, it appears possible to construe paragraph 2 as generally creating joint, primary obligations among Mr. Souri, Mr. Sazian, and IAJ, with paragraph 2(e) merely indicating that neither Mr. Souri or Mr. Sazian personally guaranteed the payment or performance of the other defendants with respect to those obligations. Such a construction of the agreement would simply apply the plain and ordinary meaning of the words used therein, would not be inherently absurd, would not render paragraph 2(e) superfluous, and would support the circuit court's ultimate entry of a judgment of joint and several liability against all three remaining defendants.

¶ 44 Nevertheless, we acknowledge that a "guaranty" is not always defined as or interpreted to mean a secondary liability. *JPMorgan Chase Bank, N.A.*, 238 Ill. 2d at 476 (a guaranty " 'is a word

which is frequently employed in business transactions which do not provide for securing the promise or debt of another, to express an original primary obligation' ") (quoting *Vermont Marble Co. v. Bayne*, 356 Ill. 127, 133 (1934)); *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 449 (2009) ("Labeling a document or a promise a 'guaranty' does not automatically make it a guaranty under the law and does not conclusively establish the obligations of the parties involved. [Citation.] Rather, the obligations of the parties must be determined from the terms of the contract and the circumstances under which the contract was made. [Citation.]"). We also acknowledge that the circuit court was correct to at least question the proper import of paragraph 2(e), as a purported waiver of any possible secondary liability on the part of appellants, when the remainder of paragraph 2 appears to provide for joint, several, and primary liability on the part of all three remaining defendants. If defendants are all indeed jointly and severally obligated and liable under the agreement, what did the parties intend by including a provision indicating appellants are not also secondarily liable for any default by the other defendants?

¶ 45 As such, we ultimately conclude that the circuit court correctly found that the agreement was at least "somewhat ambiguous," and that parole evidence would have to be considered to determine the intent of the parties. We also conclude that the circuit court's ultimate finding that the agreement called for a judgment to be entered against appellants personally–after considering such extrinsic evidence–was not against the manifest weight of the evidence.

¶ 46 At the evidentiary hearing, the circuit court heard testimony from both appellants, George Souri, Ms. Fischel, and Judge Riley. While the two appellants and George Souri testified that there was no intention that appellants would be personally and primarily liable under the agreement, there were some inconsistencies with respect to their understanding of the language of paragraph 2(e).

Moreover, Ms. Fischel testified that appellants were intended to be personally liable for any default judgment entered, and that paragraph 2(e) merely indicated appellants would not guaranty any payment by IAJ. The circuit court explicitly found Ms. Fischel to be the more credible witness. That finding of fact is entitled to great deference by this court, because the circuit court was "in a superior position to observe the witnesses while testifying, to judge their credibility, and determine the weight of their testimony." *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 891 (2010). Indeed, "resolving conflicts relating to the credibility of witnesses and the weight to be afforded their testimony is the province of the trial court." *Id*. Moreover, while Judge Riley testified appellants were unwilling to submit to personal liability during the settlement negotiations, he also testified that he did not review the agreement before it was executed, and did not know why paragraph 2(e) was included therein.

¶ 47 In light of the evidence presented at the hearing, the common understanding that a guaranty agreement generally indicates secondary liability, and the agreement at issue here otherwise indicated that all three remaining defendants were jointly liable for any default, the trial court ultimately concluded that "the parties did expect Sazian and Souri to incur individual liability" for a judgment entered pursuant to paragraph 2 of the agreement. The circuit court, thus, entered a judgment against all three remaining defendants, jointly and severally.

¶ 48 Upon review, we cannot say that an opposite conclusion is apparent from the record, or that the circuit court's findings and its ultimate judgment were unreasonable, arbitrary, or not based on the evidence. *Poulokefalos*, 401 Ill. App. 3d at 890. Indeed, " '[w]hen a term is susceptible to two different interpretations, the court must follow the interpretation that establishes a rational and probable agreement.' " *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014,

¶ 26 (quoting *In re Marriage of Hahn*, 324 Ill. App. 3d 44, 47 (2001)). Interpreting the guaranty language in paragraph 2(e) to absolve appellants of any primary, personal liability would not establish a rational or probable agreement, where the other language of paragraph 2 clearly reflects an intent that all three remaining defendants would share a joint obligation to plaintiffs. We, therefore, affirm the judgment of the circuit court.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, we dismiss appeal no. 1-12-1271 for a lack of appellate jurisdiction. With respect to appeal no. 1-12-1512, the judgment of the circuit court is affirmed.

¶ 51 Appeal No. 1-12-1271, appeal dismissed.

¶ 52 Appeal No. 1-12-1512, affirmed.