

2015

**Pc Riverview, LLC,, Respondent/Plaintiff v. Hong Gaung Lin, D/B/a
Golden Isle Restaurant and Xiao-Yan Cao, Petitioner/Defendants**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

PC RIVERVIEW, LLC,,

Respondent/Plaintiff

v.

HONG GAUNG LIN, d/b/a GOLDEN
ISLE RESTAURANT and XIAO-YAN
CAO,

Petitioner/Defendants.

Supreme Court No. 20150479

Court of Appeals No. 20150479-CA

Dist. Ct. No. 149902947

BRIEF OF RESPONDENT ON CERTIORARI

Appeal from the Third Judicial District Court
Salt Lake County, Salt Lake Department, State of Utah
Honorable Katie Bernards-Goodman

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JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. §78A-3-102(3)(a).

ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Whether the Court of appeals erred in concluding any modification of the lease agreement only extended the time for making payments.

Standard of Review: On a writ of Certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Richards v. Brown*, 274 P.3d 911.

ISSUE NO. 2: Whether the Court of Appeals erred in concluding an extension of time to make payment did not constitute a material modification of the lease that relieved the Petitioner of any obligation as guarantor.

Standard of Review: On a writ of Certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Richards v. Brown*, 274 P.3d 911.

ISSUE NO. 3: Whether the Court of Appeals erred in declining to address Petitioner's arguments for an alternate ground for affirmance and in remanding with a directive to enter judgment in favor of Respondent.

Standard of Review: On a writ of Certiorari, this Court reviews the decision of the Court of Appeals for correctness. *Richards v. Brown*, 274 P.3d 911.

DETERMINATIVE LAW

The Respondent believes the following authorities are determinative of this appeal or are of central importance to the appeal:

Central Florida Invs. V. Parkwest Assocs., 2002 UT 3, 40 P.3d 599.

Restatement (Third) of Suretyship and Guaranty, §50, (1996).

38 Am. Jur. 2d *Guaranty* §53, (2016).

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition below.

PC Riverview, LLC (Riverview) acquired the subject property in June 2006. The property is a shopping mall located at approximately 625-700 West 5300 South, Murray, Utah, consisting of approximately 18 business rental units. The property purchased included an Assignment and Assumption of Leases, transferring to Riverview the landlord's interest in each of the leases of the tenants occupying rental units on the property, including the lease of Hong G. Lin and Xiao-Yan Cao (Cao). Mr. Lin acquired his interest in the subject lease from the previous tenant, L and C Unlimited in March 2006, prior to Riverview's purchase of the property. Ms. Cao was the president of L and C Unlimited, the assignor, and she personally guaranteed full performance of all of the tenant's obligations under the lease, including the payment of rent. By May 1, 2010, Mr. Lin, the owner of Golden Isle Restaurant, was delinquent in rent owed under the lease and Riverview filed an action against Mr. Lin and Ms. Cao for the amount past due. While the action was pending, Mr. Lin cured the delinquency pursuant to a written agreement between

Riverview and Mr. Lin and Riverview attempted to voluntarily dismiss the 2010 lawsuit. After the lawsuit was filed, Ms. Cao moved the court to require Riverview to evict Mr. Lin from the property and objected to the voluntary dismissal. Because of the agreement allowing Mr. Lin time to cure the delinquency, Riverview refused to evict Mr. Lin. Mr. Lin paid the delinquency in full pursuant to the agreement. Subsequently, the court dismissed the action for lack of prosecution.

When the lease terminated at the end of September 2013, Mr. Lin vacated the property but he did not pay the last months' rent owed under the lease. Riverview filed the current action, seeking to recover the rent owed.

Riverview was successful in obtaining summary judgment against Mr Lin and the action proceeded to a bench trial against Ms. Cao on April 29, 2015. The trial court entered judgment against Riverview, in favor of Ms. Cao, ruling that the agreement between Mr. Lin and Riverview that allowed Mr. Lin time to cure the rent delinquency materially modified the terms of the subject lease and consequently voided Ms. Cao's personal liability and made her guaranty unenforceable. The Order and Judgment was entered on May 26, 2015. Riverview timely filed its Notice of Appeal on June 11, 2015. The Court of Appeals reversed the trial court and ordered that the trial court enter judgment in favor of Plaintiff.

B. Statement of Facts.

1. In June 1993, Riverview's predecessor in interest, Riverview Properties, a general partnership, owned the property at issue in this case and

entered into the written lease agreement as landlord, with Cheuk Yue, Guo Q. Peng and Sam Yue, doing business as Royal China Restaurant, as tenants. (Plaintiff's Trial Ex. 2).

2. In July 1996, Cheuk Yue, Guo Q. Peng and Sam Yue assigned their interests in the lease to Li Ling Huang. (Plaintiff's Trial Ex. 3).

3. In January 1997, Li Ling Huang assigned his interest in the lease to Chia Teng Tsao and Hong Min Zhang, doing business as Golden Isle Restaurant. (Plaintiff's Trial Ex. 4).

4. In October 2003, Chia Teng Tsao and Hong Min Zhang assigned their interest in the lease to L and C Unlimited Corp. Xiao Yao Cao, the defendant and appellant in this action, signed the Assignment as president of L and C Unlimited Corp. and she also signed as personal guarantor of the lease, guaranteeing "performance of all covenants, conditions and obligations and duties required of Tenant under said Lease from and after October 1, 2003". (Plaintiff's Trial Ex. 6).

5. In March 2006, L and C Unlimited Corp. assigned its interest in the lease to Hong G. Lin, the co-defendant in this action. Ms. Cao executed the Assignment on behalf of L and C Unlimited Corp. and she also signed as Guarantor, individually agreeing to "remain obligated to Landlord for the full performance of all covenants, conditions and obligations and duties required of Tenant under the Lease. . ." The Assignment signed by Ms. Cao

and Mr. Lin also extended the lease term to September 30, 2013. (Plaintiff's Trial Ex. 7).

6. On June 19, 2006, Riverview acquired the property and received an Assignment and Assumption of Leases, including the lease of Mr. Lin, doing business as Golden Isle Restaurant. (Plaintiff's Trial Ex. 1).

7. By May 2010, Mr. Lin was delinquent in rent owed under the lease in an amount exceeding \$22,000.00 due and Riverview filed suit against Mr. Lin and Ms. Cao to recover the delinquent rent. (R. 242, p. 18, lines 14-19). While the suit was pending, Riverview agreed to allow Mr. Lin time to pay the delinquent rent. (Defendant's Trial Ex. 2).

8. Mr. Lin paid the delinquent rent required by the agreement and Riverview requested that the parties stipulate to a dismissal of the action. Ms. Cao, through her attorney, had filed a motion to require Riverview to terminate Mr. Lin's tenancy and refused to stipulate to a dismissal. As the delinquent rent was paid in full, Riverview declined to further prosecute the action and it was ultimately dismissed without prejudice by the court for lack of prosecution. (R. 242, pp 18, 19, Defendant's Ex. 3; *PC Riverview v. Lin*, Salt Lake District Court, Civil No. 100908746).

9. Mr. Lin vacated the premises at the end of the lease term (September 30, 2013), but he did not pay the last month's rent plus a small balance owed for the previous month. (R. 242, p.17; R. 3, 4).

10. Riverview commenced this present action against Mr. Lin and Ms. Cao to recover the balance owed under the lease. . (R. 3,4).

11. Riverview obtained summary judgment against Defendant Lin on Dec. 9, 2014. (CR 200-201).

12. The case against Defendant Cao proceeded to trial on April 29, 2015. (See trial transcript).

13. The trial court ruled that the agreement between Riverview and Defendant Lin was a material modification of the lease agreement, thus relieving Defendant Cao of her guaranty. (TT 51).

14. Riverview filed its Notice of Appeal on June 11, 2015.

15. The Court of Appeals reversed the ruling of the trial court and ordered that the trial court enter judgment in favor of Riverview, against Defendant Cao. (Court of Appeals decision).

SUMMARY OF ARGUMENT

Riverview is the landlord and Mr. Lin, doing business as Golden Isle Restaurant, was the tenant of the premises located at 671 West 5300 South, Murray, Utah. Mr. Lin became the tenant through an Assignment and Extension of Lease Agreement, signed by Ms. Cao, in which she not only signed as Guarantor, but she also agreed to “remain obligated to Landlord for the full performance of all covenants, conditions and obligations and duties required of Tenant under the Lease. . .” Mr. Lin vacated the premises at the end of the lease term, but failed to

pay the charges that accrued during the last month of his tenancy. Although the trial court earlier had granted summary judgment in favor of Riverview against Mr. Lin in the amount of \$10,148.43, the court erroneously ruled after a bench trial that since Riverview allowed Mr. Lin time in 2010 to pay rent that was delinquent, Ms. Cao's personal liability, including her guarantee which was absolute and unconditional, was void and unenforceable.

The Court of Appeals reversed the ruling of the trial court, declaring that the agreement allowing the Defendants time to pay the delinquent rent was not a material modification of the lease agreement. The Court of Appeals ruled that Defendant Cao's personal guaranty was enforceable and ordered the trial court to enter judgment in favor of Riverview and against Cao.

ARGUMENT

I. THE LEASE AGREEMENT WAS NOT MATERIALLY MODIFIED

Ms. Cao argues that the Court of Appeals' ruling that the agreement extending time to pay the past due rent was not a material modification of the lease, "was incorrect on two levels." She argues that before the agreement was signed, "Plaintiff and Defendant Lin engaged in a series of actions that ran contrary to their obligations under the lease agreement." Other than arguing that Lin fell behind in his rent and continued to incur past due rent and late fees, Cao identifies no other actions that run contrary to the lease obligations. Obviously, an extension to pay

need only be granted if the obligor does fall behind in payments. If there were not a default in payment, there would be no need for an extension. The late fees that Cao argues modified the agreement, most of which Riverview waived, were consistent with the lease agreement, not a modification of its terms.

Ms. Cao also argues that "the Workout Agreement modified more than the timing of the Tenant's rent payments." Cao argues that "Plaintiff and Lin agreed that Defendant Lin should make partial rent payments over several month[s]." That is not true. Riverview never "agreed" that Lin should make partial rent payments. The record, specifically the previous lawsuit and the "Workout Agreement", evidences just the opposite. Although Riverview did in fact agree to extend the time to pay the past due rent, Riverview insisted that Defendant Lin make the payments required by the lease agreement. Ms. Cao characterizes the makeup payments as "balloon payments", arguing that as such, that is further modification of the lease agreement. However, those payments were not tacked on to the end of the lease as balloon payments. Whether the payments are called balloon payments or something else, they were simply payments made that Riverview required Lin to make to catch up on the past due rent. Again, it seems obvious that any time an extension of time to make payments is given, it will require payments to be made in addition to the regular payments called for in the lease. That does not make them balloon payments. If the payments were all made on time, there would be no need for an extension. If not made on time, additional payments will be required.

As the Court of Appeals correctly ruled, "[T]he Workout was the sole modification of the original lease, and the Workout only modified the timing of the Tenant's payments by extending the time in which past due rent could be paid." Court of Appeals Decision page 4.

II. AN EXTENSION OF TIME DOES NOT MATERIALLY MODIFY A LEASE

Although counsel for Riverview found no decision of this Court where the precise issue of whether an extension of time for payment constitutes a material modification of a contract such that a guarantor would be released from his guaranty, the Court of Appeals correctly followed precedent and ruled that it does not. This Court in *First SEC. Bank of Utah v. Creech*, 858 P.2d 958 (Utah 1993), avoided the specific issue¹, but did rule that the guarantors were not relived from their guaranty, even though the principle obligors entered into a stipulation extending the time for payments. In *Creech*, the elder Creeches obtained a loan, which was guaranteed by the younger Creeches. The elder Creeches filed for bankruptcy protection, but after several months, the bankruptcy petition was dismissed. While the bankruptcy petition was pending, no payments were made on the loan, although the bank and the elder Creeches did enter into a stipulation which provided among other things, for reduced payments on the loan. After the elder

¹"The younger Creeches also argue that the stipulation between their parents and the bank materially modified the terms of the commercial debts they had accepted as guarantors and that this modification constitutes a discharge of their obligation to perform. [citation omitted] We decline to address this contention." (*Creech*, p. 967).

Creeches defaulted on the terms of the stipulation, the bank sued the elder Creeches and the younger Creeches. The trial court ruled in favor of the defendants, based upon the trial court's interpretation of bankruptcy law. On appeal, this Court affirmed the ruling in favor of the elder Creeches, but reversed as to the younger Creeches on their guaranty, rejecting the argument of the younger Creeches that the bank should be estopped from claiming a default because the bank agreed to accept reduced payments and entered into a stipulation with the older Creeches to extend the time for payment.

Our Court of Appeals has followed the majority of jurisdictions in adopting the Restatement (Third) of Suretyship and Guaranty (1996) as controlling law on this issue. In reversing the trial court in this case, the Court of Appeals cited its own earlier decision of *Dimeo v. Nupetco Associates, LLC*, 2013 UT App 188, f.n. 2 (“While DiMeo argues that the time extension for repayment granted to Michael Strand, as well as his interest-only payments, were material modifications of the original contract, such minor alterations are not of the nature or degree that would trigger a discharge of their pledge of security under suretyship law. *See* Restatement (Third) of Suretyship and Guaranty §41 (1996)”) This reasoning is particularly true in our case, where the very lease agreement that Ms. Cao was contractually bound to uphold, provided in Section 27.01, that

One or more waivers of any covenant or condition by Landlord shall not be construed as a waiver of a subsequent breach of the same covenant or condition and the consent or approval to or of any

subsequent or similar act by Tenant. (Plaintiff's Ex. 2, ¶ 27.01 at p.18).

The lease provided that the landlord could waive a default in the timely payment of rent. In this case, none of the terms of the lease was changed. The leased space remained the same. The lease term remained the same. The monthly rent due under the lease was not changed. None of the other conditions or obligations was changed. The letter allowing Lin time to pay the delinquent rent made it clear that the underlying terms of the lease remained the same, by stating, "These payments will be in addition to the monthly charges as per your lease agreement." (Defendant's Ex 2).

As stated in Restatement (Third) of Suretyship and Guaranty, (1996),

§50. Effect on Secondary Obligation of Obligee's Lack of Action to Enforce Underlying Obligation

(1) Delay by the obligee [Riverview] in taking action against the principal obligor [Lin] with respect to the underlying obligation, or failure of the obligee to take such action, does not discharge the secondary obligor [Cao] with respect to the secondary obligation except as provided:

- (a) by applicable statute;
- (b) by agreement of the parties;
- (c) in §43 of this Restatement²; or
- (d) in subsection (2) of this section.

(2) If the failure of efforts by the obligee to obtain satisfaction of the underlying obligation is a condition of the secondary obligor's duty pursuant to the secondary obligation, the secondary obligor is discharged to the extent that the obligee's failure to act with reasonable promptness against the principal obligor is the cause of the obligee's inability to collect from the principal obligor.

² §43 provides that if the obligee delays to the extent that the statute of limitations bars action on the obligation, the secondary obligor may be discharged.

None of the exceptions listed applies. There is no applicable statute or any agreement that would discharge Ms. Cao. There is no statute of limitations issue, because all of the delinquent rent was paid. Ms. Cao's obligation and guaranty was not conditioned on Riverview's efforts to obtain satisfaction from Mr. Lin. Accordingly, Ms. Cao is still obligated under her guaranty, even if the court were to find that she was only a guarantor of Lin's performance and not primarily liable for the rent payments. The following illustrations are given on page 50 of the above referenced Restatement and fit squarely within the facts of this case, if the court were to determine that Ms. Cao is only secondarily liable:

1. P owes C \$1,000.00 with S as secondary obligor. P defaults and S requests C to sue P. C refuses. Thereafter C sues S. C's refusal to sue will not prevent C from obtaining and enforcing judgment against S.
2. P owes C \$1,000.00 with S as secondary obligor. P defaults and C conducts a series of negotiations with P in respect of payment without modifying the contract between C and P. The negotiations are fruitless. Although P was solvent at the time of default, P becomes wholly insolvent during the period of the delay. S is not discharged from its secondary obligation by reason of the delay.

Court's from other jurisdictions have also cited Restatement (Third) of Suretyship and Guaranty, *supra*, as controlling. See *John T. Callahan & Sons v. Dykeman Elec. Co., Inc.* 266 F. Supp. 2d 208, 238 (D. Mass 2003) ("Accordingly, Callahan's delay in declaring a default, even if it prejudiced Wassau's ability to obtain reimbursement from the principal obligors under the general indemnity

agreement, does not discharge Wassau from its obligations under the performance bond.”)

Court’s from other jurisdictions have also ruled that an extension of time to pay an obligation, is not normally considered to be a material modification of the underlying obligation and will not affect the guarantor’s obligation to pay, unless the extension materially adversely impacts the guarantor, such as increasing his risk, or materially changing his obligation. See *Modern Photo Offset Supply v. Woodfield Group*, 663 N.E.2d 547, 551 (Ind. Ct. App. 1996), citing *Cunningham v. Mid State Bank* 544 N.E.2D 530,534 (Ind. Ct. App. 1989). (“[A] material alteration which will effect the discharge of a guarantor must be a change which alters the legal identity of the principal’s contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position.”) In our case, this did not happen. Allowing Lin time to pay the delinquent rent worked to Ms. Cao’s benefit rather than detriment, by reducing the delinquency owed by Mr. Lin and ultimately, by Ms. Cao. Had Riverview evicted Lin in 2010, as requested by Ms. Cao, Ms. Cao would have owed over \$20,000.00, plus the court costs and attorney’s fees of the action, plus such additional rent as it came due until another suitable tenant could be found for the leased space. This is particularly true, where Utah’s unlawful detainer statute is clear, that if a tenant under a lease is evicted for non-payment of rent, that does not release the tenant, and in this case Cao as guarantor,

from the payment of rent for the remainder of the lease term. §78B-6-811(1)(d)(i) provides:

A forfeiture under (1)(c) ["If the proceeding is for unlawful detainer after . . . a default in the payment of rent"] does not release a defendant from any obligation for payments on a lease for the remainder of the lease's term.

As Ms. Mitchell testified at trial, in 2010, the commercial lease market was distressed and Riverview had other vacancies in the shopping center at the time that could not be filled. Because of those conditions, she thought it best to work with Mr. Lin by allowing him time to make up the delinquent rent, keeping him as a rent paying tenant, rather than have another vacancy in the shopping mall with no income from that unit for the foreseeable future. (R. 242, p18). Ms. Mitchell was correct in her analysis. All of the delinquency was paid, relieving Ms. Cao of that liability under her agreement and guaranty.

This case is strikingly similar to the case of *WXI/Z Southwest Malls v. Mueller*, 137 N.M. 343, 110 P.3d 1080 (2005). In *Mueller*, Mr. and Ms. Ritter entered into a ten year lease with the landlord. Eight years into the lease, the Ritters sought to assign the lease to the Muellers, who would continue to operate the business. The landlord consented to the assignment on the condition that the Ritters would continue to be liable for rent and would guaranty the lease. The assignment signed by the Ritters, contained the requested provisions. The lease was subsequently assigned to an entity in which the Muellers had some interest, and

again the landlord consented to the assignment on the condition that the Ritters and the Muellers would continue to be liable for the rent and would be guarantors of the lease. These terms were included in the new assignment. The new tenant failed to pay the monthly rent and the landlord failed to evict the tenant or take action to terminate the lease. The new tenant did not surrender possession of the premises and two years after the tenant stopped paying rent, the landlord brought suit against the Ritters, the Muellers and the new tenant. The Muellers and the new tenant filed for bankruptcy and were discharged. The Ritters defended the action, claiming that they were discharged from the obligation because the landlord failed to notify them of the delinquency and failed to take any action to evict the tenant or terminate the lease. The trial court denied the landlord's motion for summary judgment. The appellate court reversed, holding that the tenants' guaranty was absolute, that the landlord was not required to give any notice of the latest assignee tenant's default in the payment of rent and that the contract signed by the Ritters, being clear and unambiguous, would be enforced according to its terms.

In our case, Ms. Cao and her company, L and C Unlimited Corp. were the prior tenants of the subject property. She had personally assumed and guaranteed all of L & C's obligations under the lease. She requested that she be allowed to assign the lease to Lin. The landlord would not allow the assignment to a new lessee, unless she agreed to remain personally obligated on the lease, which she did.

Her guarantee is absolute and unconditional, clear and unambiguous. It should be enforced according to its terms.

III. THE ISSUES RAISED BY CAO DID NOT REQUIRE A REMAND TO THE TRIAL COURT FOR DETERMINATION

Cao argues that she only guaranteed performance of the original lease, through April 30, 2008. She argues that under the Assignment and Guaranty dated March 9, 2006 (Plaintiff's Exhibit 7), L and C Unlimited Corp. signed the document as assignor and Cao only signed as guarantor of the remaining term of the prior lease. Cao is mistaken. If the intent of having Cao sign the document as guarantor was truly nothing more than that, having her sign Exhibit 7 was superfluous. She was already obligated as guarantor under the previous lease. Plaintiff's Exhibit 6 provided:

Xiao Yan Cao, an individual, shall be the guarantor and hereby guarantees performance of all covenants, conditions and obligations and duties required of tenant under said lease from and after October 1, 2003.

The fact that Ms. Cao never raised this particular issue, either in the earlier case involving these same parties and the same lease (Civil #10090874, Petitioner's Statement of Facts #4, at page 5 of Petitioner's brief), or at the trial of this case, evidences her acknowledgment that her guaranty continued through the extended period of the lease, through September 30, 2013. The intent of the parties in assigning and extending the lease beyond 2008, is clear. Cao Was a guarantor of the previous lease and the landlord required her to continue her guaranty through

the extended period, particularly where the lease was being assigned to a new tenant. Paragraph 3 of Plaintiff's Exhibit 7, which Ms. Cao signed, provides:

Assignor and **Guarantor [Ms. Cao]** agree to and shall remain obligated to Landlord for the full performance of all covenants, conditions and duties required of Tenant under the Lease and shall not be relieved of any performance of obligations thereunder as the result of this assignment. (Emphasis added).

Paragraph 11 of Exhibit 7 defined the term of "the lease" she guaranteed:

The lease term shall be extended for an additional five (5) year period commencing October 1, 2008 and ending September 30, 2013 (hereinafter "Extension Term")

Ms Cao recognized and understood that she was guaranteeing the tenant's obligations beyond the initial term of the lease and through the extended term. When she learned in 2010, two years after she now claims that her guaranty ended, that Mr. Lin was delinquent in paying rent she requested that PC Riverview evict Lin from the premises. Her reasons for doing so, as she first argued in her Appellee's brief filed in the Utah Court of Appeals:

By evicting Defendant Lin, Defendant Cao sought to protect her own position. After an eviction, Defendant Cao could have either reestablished herself in the business or she could have sold the business to a more stable business owner. (Pages 20-21 of Brief of Appellee Xiao Yan Cao in the Utah Court of Appeals).

If Ms. Cao's guaranty had ended in 2008, as she now argues, she could not have either reestablished herself in the business, or sold the business in 2010.

Even in her brief before this Court, she argues at page 23,

Defendant Cao's refusal to consent to the Workout [in 2010] was not without reason. Plaintiff allowed Defendant Lin to make partial rent payments for several months without notifying Defendant Cao. During this time, Defendant Cao's financial burden increased without any notice from either party.

Had her guaranty expired in 2008, her financial burden would not have increased in 2010.

It is a basic maxim of contract interpretation, that contracts are interpreted in accordance with the plain meaning of their terms, absent some ambiguity. *Central Florida Invs. V. Parkwest Assocs.*, 2002 UT 3, ¶12, 40 P.3d 599. (“If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language and the contract may be interpreted as a matter of law.”) See also *Merrick Young Inc. v. Wal Mart Real Estate Bus. Trust*, 2011 UT App 164, ¶17, 257 P.3d 1031. (“The goal of contract interpretation is to give effect to the contracting parties’ intentions at the time the contract was made.”).

In order for the landlord to allow the assignment of the lease to Lin, the landlord required Ms. Cao, who was obligated before the assignment to perform all of the covenants, conditions, etc. of the tenant, to continue to be primarily liable when the new tenant (Lin) became the lessee. The contract term is clear and unambiguous. Ms. Cao is jointly and severally liable, along with Mr. Lin, for the payment of the rent.

Ms. Cao also argues that there was no appropriate assignment of the Lease to Riverview. She makes this argument, even though she states as a Fact in her opening Brief, "3. On or about June 19, 2006, PC Riverview acquired the leased property from Riverview Properties." Brief of Petitioner, page 5.

Plaintiff's Ex. 1, the Assignment of the property and leases to Riverview, was offered in this case and was received as evidence by the trial Court. Rule 78B-5-608, U.C.A., states "A writing may be proved either (1) by anyone who saw the writing executed." Rule 901, Utah Rules of Evidence, states that an item of evidence may be authenticated by "*b(1) Testimony of a witness with knowledge. Testimony that an item is what it is claimed to be.*" The document was properly authenticated by Grace Mitchell, president of PC Riverview, who testified that it was what it was, that she signed the document and witnessed the signatures of the other parties to the Assignment. (R. 242, p.9). Cao offered no evidence to the contrary. There really is no dispute that Plaintiff acquired the subject property, including the lease at issue here. All of the parties were aware that PC Riverview was the owner and landlord of the property. Ms. Mitchell testified that PC Riverview owns the property (R. 242, p.8) and that Lin had been paying rent to PC Riverview under the terms of the lease at issue (R. 242, p. 19).

Cao seems to argue that since she was not aware of the sale to PC Riverview, that somehow voids her guaranty. She cites no authority for the proposition that the

owner of real property must notify the guarantor of a lease on the property, that the property will be sold. In this case, the lease itself provided that the landlord could sell the property, and if it did, the lessee had to accept the purchaser as the new landlord. Section 13.2 of the Lease (Plaintiff's Tr. Ex. 2) provides:

ATTORNMEN^T. In the event any proceeding is brought for the foreclosure of, or in the event of exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the Leased Premises, or in the event Landlord conveys in a sale all of its rights and duties in and to the Lease and Leased Premises, Tenant shall attorn to the Purchaser upon any such foreclosure or sale and shall recognize such purchaser as the Landlord under this Lease. (Emphasis added).

The facts of this case dictate that Ms. Cao is obligated to pay Riverview for the rent owed under the lease. The Assignment and Extension Agreement signed by Ms. Cao in 2006, extended the term of the Lease to September 30, 2013. By the terms of the Agreement, Ms. Cao agreed to be personally responsible for and guaranteed the full performance of all covenants, conditions and obligations and duties required of Tenant under the Lease, including the payment of rent through September 30, 2013. By August 2010, Lin was delinquent in rent payments a total of \$23,951.28. (Defendant's Ex. 2). By written agreement, Riverview agreed to allow Lin approximately five months to catch up the delinquent rent, while continuing to pay the ongoing, current rent. (Defendant's Ex. 2). The agreement extending time to pay the delinquency made no changes in the underlying lease. The leased premises remained the same, the term of the lease did not change, the

monthly rent stayed the same. Mr. Lin did make up the payments required by the agreement after the Complaint was filed and he stayed current for the next three years. (R. 242, pp.28, 29). When Mr. Lin vacated the leased premises at the end of the lease term, he owed only \$5,003.50 (R. 4), much less than what was owed when the agreement allowing him time to make up the delinquency was signed. This amounted to slightly less than one month's rent due under the subject lease, which was \$5,004.00 per month. (Plaintiff's Ex. 2, para. 12).

IV. CAO WAS NOT JUST A SURETY. SHE WAS PERSONALLY OBLIGATED TO PAY THE LEASE PAYMENTS

Ms. Cao argues that she should be released from her guaranty because she was not informed of Lin's delinquency and was not consulted when Riverview and Lin agreed to the extension of payments. As the Court of Appeals noted, the guaranty agreement signed by Ms. Cao "contained no provisions spelling out particular rights in favor of Cao, such as a right to notice or a bar on extensions or modifications absent her consent." Court of Appeals Decision page 3.

Cao guaranteed full performance of all obligations of Lin. Under the guaranty, she was primarily liable for the rent, not just a surety, as she argues. Being primarily liable, it was her obligation, not that of Riverview, to stay in touch with her co-obligor regarding the lease payments.

A contract of guaranty may be absolute, or it may be conditional. An absolute guaranty is one where the guarantor has promised that if the debtor does

not pay the obligation when it is due, the guarantor will do so. The liability of the guarantor becomes fixed on default of the debtor. “A guaranty of the payment of an obligation, without words of limitation or condition, is construed as an absolute or unconditional guaranty.” 38 Am Jur2d *Guaranty* §21. Ms. Cao’s guaranty was absolute and unconditional. She agreed to remain obligated to pay all of the rent and other charges that accrued under the lease for the full term of the lease, which did not terminate until September 30, 2013. The language of the guaranty cited above, has no words of limitation or condition. Ms. Cao absolutely and unconditionally guaranteed the payment of rent, along with the performance of all of the other terms of the lease through the end of the lease term, which was September 30, 2013. When Mr. Lin failed to pay the rent, Ms. Cao became primarily and personally obligated to do so under her guaranty.

Personal guarantees are in common usage in today’s business world. Banks, lenders, creditors, seller’s of merchandise and landlords all use them and rely on their enforceability. Riverview is a commercial property landlord and obtains personal guarantees on most of its leases. Banks and other creditors probably do substantially the same, when dealing with a corporate entity or an individual with limited financial resources. If personal, absolute, unconditional guarantees are not enforceable if the creditor extends the time for payment of the debt, we must all change the way we do business. If a creditor could not work with the debtor in an attempt to allow time to catch up on past due amounts owed, there would certainly

be fewer loans made to corporate defendants and individuals with limited financial resources, less credit would be extended, leasing property by a proposed tenant would be more difficult and many more lawsuits would be filed,. That is not the law, nor should it be. The case law, as well as the treatises, such as Am Jur 2nd *Guaranty* and the Restatement 3rd Suretyship and Guaranty cited above, support Riverview's position. Allowing a debtor additional time to pay an obligation does not amount to a material modification of the debt and does not affect its enforceability against the personal guarantor. This is particularly true, where the guaranty is absolute and unconditional, as is Cao's.

CONCLUSION

Based upon the foregoing, Riverview submits that the Utah Court of Appeals correctly reversed the Trial Court in ruling that the lease was not materially modified, and that Ms. Cao's guaranty were valid and enforceable. The facts are sufficiently clear that no remand is necessary.

Riverview respectfully requests that the decision of the Utah Court of Appeals be affirmed and that the Trial Court be directed to enter judgment in favor of Riverview and against Ms. Cao, jointly and severally with Mr. Lin. Riverview requests that it also be awarded its Court costs and attorney's fees, including its costs and attorney's fees incurred on appeal.

Dated this 17th day of February, 2017.

/s/ Carl E. Kingston
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2017, I mailed two true and correct copies of the foregoing **RESPONDENT'S BRIEF** to the following via U.S. mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Utah R. App. P.24(f)(1) because this brief contains 6,002 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, 13 point font, Times New Roman.

Dated February 17th, 2017.

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