STATE OF MICHIGAN

COURT OF APPEALS

DAVID WECKLE and JOAN WECKLE, Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,	UNPUBLISHED October 21, 2014
v	No. 316625 Oakland Circuit Court
ASKP, LLC, DAVID PETERSON and THERESA PETERSON, Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees.	LC No. 2011-120296-CK

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

PER CURIAM.

This action involves commercial lease agreements between plaintiffs/counter-defendants David and Joan Weckle, the lessors, and defendant/counter-plaintiff ASKP, LLC, the lessee, as well as personal guaranties that were alleged to have been signed by defendant/counter-plaintiffs David and Theresa Peterson. Defendants appeal as of right the trial court's finding, following a bench trial, that defendant ASKP[1] was liable for breaching its commercial leases with plaintiffs and that defendant David Peterson ("Peterson") was liable on a personal guaranty. In addition, defendants appeal the trial court's award of attorney fees to plaintiffs and the trial court's dismissal of their counterclaims. On cross-appeal, plaintiffs appeal as of right the trial court's order granting a no cause of action on their fraudulent transfers claim and on their claim to pierce the corporate veil. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2008, plaintiffs owned commercial property located at 10 North Washington Street in Oxford, Michigan. Michigan ASKP, an entity owned by Peterson, entered into a lease

[1] Because this case involves two entities that use the name "ASKP," one in Michigan, which is a defendant in this action, and one in Florida, we will refer to them as follows: defendant ASKP will hereinafter be "Michigan ASKP" and the Florida entity will be referred to as "Florida ASKP."

agreement with plaintiffs for one of the suites inside the building at 10 North Washington. Michigan ASKP operated a discount-clothing store called the "Red Tag Store." Thereafter, Michigan ASKP entered into three additional lease agreements for additional space inside the building. The leases were to terminate on May 31, 2010.

At issue in this case are two personal guaranties, one of which was alleged to have been signed by Peterson's wife, Theresa, in connection with the second lease agreement. The other guaranty was alleged to have been signed by both Theresa and Peterson in connection with the fourth lease agreement. The documents, labeled "UNLIMITED PERSONAL GUARANTY," were identical in their terms, and provided, in pertinent part:

> In consideration of the giving of credit to _____ of _____ (referred to hereinafter as the "Debtor"), and other good and sufficient considerations to the undersigned accruing, the undersigned hereby gives this Continuing Personal Guaranty to Dave & Joan Weckle (referred to hereinafter as the "Creditor"), and hereby guarantees the payment, of any and all indebtedness of the said Debtor to the said Creditor . . . due and owing at the present time, or that may hereafter be due and owing by said Debtor to said Creditor, and it is further agreed that if said bills are not paid when due, the undersigned will pay the same upon notice and demand.
>
> The undersigned, for itself, its successors and assigns, agrees that it is financially interested in the said Debtor and agrees to be held responsible for said obligations, precisely as if the same had been contracted and due and owing by the undersigned itself . . . .

In 2009, the Red Tag Store began experiencing losses, and on or about June 29, 2009, Michigan ASKP vacated the premises. Peterson testified that he made the July 2009 lease payments "out of the goodness of [his] heart" but thereafter ceased making lease payments on the abandoned premises. Peterson and Theresa then moved to Florida in search of a new business opportunity. The same day Michigan ASKP abandoned the leasehold, Peterson formed ASKP Group, LLC ("Florida ASKP"). In the fall of 2010, Peterson formed two entities, the "Fashion Outlet, LLC" and "Bikini Barn, LLC" and began selling discount clothing.

In July 2011, plaintiffs began the instant proceedings, alleging that Michigan ASKP was liable for unpaid obligations under the lease agreements and that Peterson and Theresa were liable on the personal guaranties. In answering the complaint, defendants denied that the individual defendants signed the personal guaranties at issue and filed a counterclaim, alleging fraudulent misrepresentation, negligent misrepresentation, and mistake. Subsequently, plaintiffs amended their complaint, alleging violation of the Michigan Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*, as well as a claim to pierce the corporate veil of Michigan ASKP and to hold Peterson personally liable for actions he caused Michigan ASKP to undertake.

The matter proceeded to a bench trial in January 2013. Peterson and Theresa denied that they signed a personal guaranty in connection with any of the four leases. Peterson, while denying that he signed a personal guaranty in connection with the fourth lease agreement, admitted that the signature on the document "looks to be like mine." He also testified that he

would have never signed a personal guaranty. However, he testified that he signed a personal guaranty in Florida for Florida ASKP, but only because it was required by the lessor.

In addition, Peterson testified that, after Michigan ASKP abandoned the leaseholds, it stopped doing business, but remained in existence. A bank account in the company's name remained open, and Peterson placed some of his own funds into the account. He used those funds to pay certain expenses after he moved to Florida, including attorney fees incurred in forming the new Florida entities. He testified that, at the time, he had not yet opened a bank account for Florida ASKP and that he did not think he did anything wrong by paying some of Florida ASKP's obligations with money from the Michigan ASKP bank account. He also moved clothing racks and a display counter that had previously been in the Red Tag Store to Florida and he used those items in the new Florida retail stores. In addition, he testified that he used funds he placed in the Michigan ASKP account to pay Michigan ASKP's debt to Macy's, which he alleged he was required to pay before he could order merchandise for the Florida entities.

Plaintiff David Weckle ("Weckle") testified that he recalled that Person and Theresa signed personal guaranties in connection with each of the four lease agreements. Yet, he only produced the two guaranties noted above at trial. He testified that he told the Petersons that he would not proceed with a commercial lease agreement unless they agreed to sign personal guaranties. He also specifically recalled the date when the Petersons signed the personal guaranty that purported to be connected to the fourth lease agreement.

Concerning the losses he incurred after the breach of the leases and plaintiffs' efforts to mitigate damages, Weckle testified that after Michigan ASKP abandoned the leasehold, plaintiffs attempted to re-lease the property but were unable to do so. They were eventually forced to sell the property on or about April 20, 2010, which was approximately one month before the lease terms ended.

The trial court issued an oral opinion, finding that Peterson lacked credibility when he denied signing the personal guaranty. Conversely, the trial court found that Weckle was credible in his testimony that Peterson signed the personal guaranty, as well as in his testimony that he insisted on the Petersons signing personal guaranties. In addition, although the trial court noted that the personal guaranty allegedly signed by Peterson was missing some terms, the document nevertheless expressed an intent to create a personal guaranty for Michigan ASKP's obligations under all four lease agreements with plaintiffs. Regarding Theresa, the trial court found her testimony credible, and thus, it found that she did not sign either of the personal guaranties at issue. The trial court entered judgment against Michigan ASKP and Peterson.

Next, the trial court dismissed defendants' counterclaims, reasoning that because it found Weckle credible, there was no merit to defendants' assertions of fraudulent misrepresentation, negligent misrepresentation, or mistake.

Concerning plaintiffs' fraudulent transfer claim and their claim to pierce the corporate veil, the trial court found that Peterson used Michigan ASKP as an instrumentality of himself, but concluded that plaintiffs failed to meet their burden of establishing fraud. It reasoned that, although Peterson used funds from the Michigan ASKP bank account to pay some of the obligations of Florida ASKP, he did not do so with the intent to defraud plaintiffs. Rather, the trial court found that Peterson was simply "apathetic" toward plaintiffs and that he used the funds in the Michigan ASKP bank account in a manner that he thought would further his business interests.

Lastly, the trial court awarded attorney fees to plaintiffs based on provisions of the lease agreements that provided for an award of reasonable attorney fees. After subtracting costs, the trial court granted plaintiffs one-third of the total damages award in this case. This appeal followed.

II. ISSUES RAISED BY DEFENDANTS

A. DAVID PETERSON'S LIABILITY ON THE PERSONAL GUARANTY

Defendants first contend that the trial court clearly erred by finding that Peterson intended to be bound by the personal guaranty signed in connection with the fourth lease agreement for two reasons: (1) the evidence did not show that he signed the agreement; and (2) the agreement lacks several terms and does not evidence mutual intent. "We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Chelsea Inv Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "Special deference is given to the trial court's findings when they are based on the credibility of the witnesses." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

"Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern." *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (citation and quotation omitted). Our Supreme Court has explained that a guaranty contract "is a special kind of contract[,]" and explained that courts "must approach with caution a claim that the parties have formed a guaranty contract." *Bandit Indus, Inc v Hobbs Intern, Inc (After Remand)*, 463 Mich 504, 511-512; 620 NW2d 531 (2001). This is because "[o]rdinary experience teaches that assumption of another's debt is a substantial undertaking, and thus the courts will not assume such an obligation in the absence of a clearly expressed intention to do so." *Id.* at 512. Consequently, "a personal guarantee cannot be implied from language that fails to clearly and unambiguously reflect an intention to assume such a responsibility." *Id.* at 514. However, while a guaranty contract must clearly and unambiguously reflect the parties' intent, "[n]o specific form of language is necessary . . . such documents 'are freely given without much care as to the language' and [ ] 'technical nicety should not, therefore, be applied in their construction.' " *Id.*, quoting *Columbus Sewer Pipe Co v Ganser*, 58 Mich 385, 391; 25 NW 377 (1885).

The trial court did not clearly err in finding that Peterson signed the agreement. Weckle testified that he witnessed Peterson sign the personal guaranty in connection with the fourth lease

agreement. He also testified that he was adamant about defendants signing a personal guaranty. Although Peterson denied that he signed the document, the trial court found that his testimony lacked credibility, and we defer to that credibility determination. *Woodington*, 288 Mich App 355.

To the extent defendants argue that the trial court erred by considering the personal guaranties signed in connection with the Florida leases because such guaranties were irrelevant, their argument is meritless. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Evidence bearing on a witness's credibility is always relevant[.]" *In re Dearmon*, 303 Mich App 684, 696; 847 NW2d 514 (2014). The fact that Peterson signed personal guaranties in Florida had a tendency to make less probable his declaration that he never signed personal guaranties.[2]

Further, to the extent defendants argue that the trial court erred by ignoring the mandate of *Bandit Indus*, 463 Mich at 505, that in order to find a personal guaranty, the intent of the parties must be "clearly manifested[,]" such argument must also fail. In *Bandit Indus*, the issue was whether a fax stating that "you will be paid when we are paid," and which was signed by the president of the defendant corporation, created a personal guaranty by the president of the defendant corporation. *Id.* at 506. In that case, it was undisputed that the plaintiff sought a personal guaranty. *Id.* at 514. Our Supreme Court explained that, although the facts showed that the plaintiff sought a personal guaranty, such a guaranty could not be imposed without "an unambiguous expression of the guarantor's intention to accept that responsibility." *Id.* The Court concluded that the promise to pay the plaintiff when "we are" reflected an intent to pay the plaintiff from corporate funds, and was not clear evidence of an unambiguous intent to create a personal guaranty. *Id.*

In contrast to *Bandit Indus*, the language employed in the personal guaranty at issue clearly expressed an intent to create a personal guaranty. Notably, the agreement provided that it was an "UNLIMITED PERSONAL GUARANTY." It also provided that Peterson, the undersigned on the agreement, "gives this Continuing Personal Guaranty to Dave and Joan Weckle" and "hereby guarantees the payment, *of any and all indebtedness of the said Debtor to the said Creditor*," "*due and owing at the present time*, or that may thereafter be due and owing . . . ." (Emphasis added). Further, Peterson, by signing the agreement, agreed that he was "financially interested in the said Debtor and agree[d] to be held responsible for said obligations, precisely as if the same had been contracted and due and owing by the undersigned [himself]." This language expressly and unambiguously provides that the parties intended to create a personal guaranty. Cf. *Bandit Indus*, 463 Mich at 514. Thus, any claim by defendants that the personal guaranty at issue lacked a clearly expressed intention to create a personal guaranty is without merit.

[2] Defendants do not raise a challenge under MRE 404(b). Thus, we do not consider whether the evidence was admissible under MRE 404(b).

In addition to arguing that Peterson did not sign the personal guaranty at issue, defendants take issue with the form of the guaranty, arguing that it is missing several details and terms, thereby rendering the document incapable of containing the parties' mutual assent to enter into a personal guaranty. Contract formation requires mutuality, which is to be judged by an objective standard. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006). Here, the guaranty contract at issue is missing several terms, most notably: (1) it fails to identify the party whose debt is guaranteed; (2) it contains no reference to the lease agreements; and (3) the spaces provided in the contract for the day and month of the execution of the agreement are left blank. Furthermore, the agreement refers to "goods sold and furnished by the said Creditor [plaintiffs David and Joan Weckle]," when it is undisputed that no goods were ever furnished or sold between the parties.

A lack of certain terms is not necessarily fatal to a contract. *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 359-360; 320 NW2d 836 (1982). See also *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). Further, "judicial avoidance of contractual obligations because of indefiniteness is not favored under Michigan law, and so when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 14; 824 NW2d 202 (2012). "This sound rule is premised in part on the principle that parties to contracts should not be readily able to evade their obligations using after-the-fact assertions of indefiniteness." *Id.* at 17. Although certain terms are missing from an agreement, the trial court may, through the use of extrinsic evidence, supply the terms and may enforce the agreement so long as the promises and performances to be rendered by each party are set forth with reasonable certainty. *Id.* at 18. See also *Waites v Miller*, 244 Mich 267, 272; 221 NW 171 (1928); *Brotman v Roelofs*, 70 Mich App 719, 727; 246 NW2d 368 (1976) ("Written provisions which are indefinite may be clarified by extrinsic factors."). In addition, where, as here, a contract is required to be reduced to a writing that is signed by the party to be charged, see MCL 566.132(1)(b) (requiring that a promise to answer for the debt of another be reduced to a writing that is signed by the party to be charged), the writing need not contain all of the terms and details of the agreement in order to be enforceable, see *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prods, Inc (On Remand)*, 265 Mich App 105, 114; 693 NW2d 394 (2005).

We find that the promises and performances of Peterson, the guarantor, were set forth with reasonable certainty. As noted, the agreement provided that it was an "UNLIMITED PERSONAL GUARANTY" and a continuing one expressly given to "Dave and Joan Weckle." It also provided that Peterson, the undersigned on the agreement, "hereby guarantees the payment, *of any and all indebtedness of the said Debtor to the said Creditor*," "*due and owing at the present time, or that may thereafter be due and owing . . .* (emphasis added)." Based on this language, it was clear that Peterson agreed to be liable for any and all indebtedness that the unnamed debtor owed to plaintiffs. Thus, the issue becomes: whether the failure of the guaranty contract to expressly identify the party whose obligations were being guaranteed renders the contract incapable of being enforced. In resolving that issue, we are mindful that our courts do not look favorably on arguments that a contract cannot be enforced because of the indefiniteness of a term." *Calhoun Co*, 297 Mich App at 17.

The trial court did not err in supplying the requisite terms and by finding that the guaranty was intended to guaranty the obligations incurred by Michigan ASKP in its leases with

plaintiffs. Given the lease agreements in this case, which Peterson also signed in his capacity as the sole member of Michigan ASKP, the trial court did not clearly err by finding that the personal guaranty meant to refer to the lease agreements entered into by Michigan ASKP. Indeed, the personal guaranty stated that Peterson was "financially interested in" the debt or obligation owed to plaintiffs, and there was no evidence presented at trial of any other debt or obligation owed to plaintiffs in which Peterson would have had a financial interest. In addition, the testimony of Weckle, which the trial court found credible, supports the trial court's finding that the personal guaranty was meant to guaranty the obligations that Michigan ASKP incurred on its lease agreements. Notably, Weckle testified that Peterson signed the personal guaranty at issue at approximately the same time he signed the fourth lease agreement, and that the personal guaranty was meant to refer to the lease agreements.[3] As such, we conclude that the trial court did not err by supplying the requisite terms or by finding that the personal guaranty was enforceable. See *Calhoun Co*, 297 Mich App at 19; *Brotman*, 70 Mich App at 727.

B. WHETHER THE PERSONAL GUARANTY APPLIES TO ALL LEASES

Next, defendants argue that, assuming the personal guaranty is enforceable, the trial court erred by concluding that it applied to all four leases. They contend it should only be read to guaranty Michigan ASKP's obligations under the fourth lease agreement. The interpretation of a contract is an issue of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "[I]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning." *Zahn v Kroger Co of Mich*, 483 Mich 34, 41; 764 NW2d 207 (2009).

In *Bandit Indus*, 463 Mich at 513, our Supreme Court explained that "[a] guarantor is not liable beyond the express terms of his contract." (Citation and quotation omitted). The contract must contain "an unambiguous expression of the guarantor's intention to accept that responsibility." *Id.* at 514. In addition, as a general rule, a contract applies prospectively only. See *In re Estate of Slack*, 202 Mich App 627, 630; 509 NW2d 861 (1993).

The guaranty at issue provides that it applies to "any and all indebtedness" that is "due and owing at the present time, or that may hereafter be due and owing . . . ." The words "any" and "all" are not defined in the agreement, so this Court may consult a dictionary in order to ascertain the plain meaning of the terms. *Holland v Trinity Health Care Corp*, 287 Mich App

[3] Although defendants note the lack of day and month on the guaranty, such omission does not render the agreement unenforceable. As this Court recognized in *Hawker v Northern Mich Hosp, Inc*, 164 Mich App 314, 323; 416 NW2d 428 (1987), "[u]nder general contract principles, an otherwise enforceable agreement is not rendered unenforceable due to the absence of a date set forth on the face of the document. Instead, the date may be established through parol evidence." *Hawker v Northern Mich Hosp, Inc*, 164 Mich App 314, 323; 416 NW2d 428 (1987). Here, Weckle's testimony established that the contract was signed in connection with the signing of the fourth lease agreement.

524, 527-528; 791 NW2d 724 (2010). The word "any" is defined as "whatever or whichever it may be . . . in whatever quantity or number . . . every; all[.]" *Random House Webster's College Dictionary* (2005). The word "all" is defined to mean "the whole or full amount of . . . the whole number of . . . the whole quantity or amount[.]" *Random House Webster's College Dictionary* (2005).

Contrary to defendants' contentions, the language employed in the personal guaranty unambiguously expresses an intent for the personal guaranty to apply to all obligations owed to plaintiffs, which would include plaintiffs' claims for rent under all four leases. Although the guaranty was executed in connection with the fourth lease, the agreement contained broad, encompassing language expressing an intent to apply to "any and all indebtedness." Such indebtedness was not, as defendants contend, confined to indebtedness on the fourth lease agreement. Rather, the plain language of the guaranty contract referred to "the whole quantity or amount" owed, or "the whole or full amount" owed by Michigan ASKP. This language clearly and unambiguously expresses an intent to apply to Michigan ASKP's obligations on all four lease agreements.

C. AMOUNT OF DAMAGES

Defendants next argue that the trial court erred in awarding damages for unpaid rent after the building was sold and by awarding damages for CAM[4] charges. "As with other findings of fact, an award of damages is reviewed on appeal pursuant to the clearly erroneous standard." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). "Accordingly, the goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Id.* at 625-626. "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Turning first to the trial court's decision to award damages for unpaid rent after the sale of the building, we note that a landlord, when seeking damages under a lease agreement, has a duty to take reasonable actions to minimize the extent of damages arising from a breach of a lease agreement. *M & V Barocas v THC, Inc*, 216 Mich App 447, 450; 549 NW2d 86 (1996). "The defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages." *Landin v HealthSource Saginaw, Inc*, __ Mich App __; __ NW2d __ (Docket No. 309258, issued June 3, 2014), slip op at 10.

In general, we conclude that a lessor can satisfy the duty to mitigate damages by selling the property. See, e.g., *BLT Burger DC, LLC v Norvin 1301 CT, LLC*, 86 A3d 1139, 1146-1148

[4] "CAM charges" refer to common area maintenance charges.

(DC, 2014), *Krasne v Tedeschi & Grasso*, 436 Mass 103, 109; 762 NW2d 841 (2002), and *McGuire v City of Jersey City*, 125 NJ 310, 321; 593 A2d 309 (1991).[5] Where the sale of the property resulted in a price that compensated the landlord for the value of future rental income, there can be no damages awarded for lost rental income. See, *McGuire*, 125 NJ at 321-322 ("If the landlord received a sale price that compensates for the value of the future rental income of the property, then the lessee's liability for such rentals ends at the time of sale."). See also *Krasne*, 436 Mass at 109 (holding that an award of post-sale rent was improper where the sale of the property compensated the landlord for "the lease term and beyond.").

In awarding plaintiffs damages for unpaid rent after the sale of the property, the trial court stated that "[d]amages would have been less had the defendant—for that rationale, the Court concludes that damages would have been less had the defendant David Peterson and ASKP not breached . . . ." Defendants have the burden of showing that plaintiffs failed to mitigate their damages. See *Lawrence*, 445 Mich at 15. Here, defendants did not present any evidence to suggest that the sale of the property placed plaintiffs in a better or worse position than they would have been in had Michigan ASKP not breached the lease agreement. The trial court, finding this was a close issue, "charge[d] that question against the defendant[s]." Defendants have not presented any evidence to suggest that the trial court's finding was clearly erroneous. Indeed, defendants provide nothing more than bald assertions on appeal that plaintiffs received a windfall and they make no effort to quantify whether the sale of the property compensated plaintiffs for unpaid rent.[6] Nor do defendants make any argument that the damages awarded in this case were not proved with certainty. Further, defendants do not even calculate the amount of unpaid rent for which they claim they should not be responsible. As such, we conclude that defendants fail to establish that the trial court's damages award was clearly erroneous. See *Woodington*, 288 Mich App 355.

Next, we find that the trial court did not clearly err when it awarded plaintiffs damages for CAM charges for which Michigan ASKP would have been responsible during the lease term. Paragraph 5 of the lease agreements stated that Michigan ASKP was liable for CAM charges on the leased premises during the lease terms. At trial, plaintiff David Weckle testified that, after Michigan ASKP vacated the premises, the CAM charges for which Michigan ASKP would have been responsible totaled $8,022. He also testified that plaintiffs were forced to incur those costs because of Michigan ASKP's breach. There is no evidence that some other tenant assumed the space and covered those charges. Thus, the CAM charges were a direct, natural, and proximate result of Michigan ASKP's breach, and plaintiffs were entitled to recover the cost of paying the CAM charges. See *Corl*, 450 Mich at 625; *Alan Custom Homes, Inc*, 265 Mich App at 512.

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[5] Decisions from foreign jurisdictions are not binding but may be considered as persuasive authority. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

[6] Defendants claim that plaintiffs should not be permitted to recover for rent payments due after the property was sold because Weckle admitted as much during his trial testimony. Although Weckle testified that he should not be entitled to recover damages for unpaid rent after the sale of the property, the trial court struck such testimony, as it called for a legal conclusion.

D. REASONABLENESS OF ATTORNEY FEES

Defendants next challenge the reasonableness of the trial court's attorney fee award, which the trial court awarded pursuant to the terms of the lease agreements. "This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion." *Souden v Souden*, 303 Mich App 406, 414; 844 NW2d 151 (2013). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* (citation and quotation omitted).

The burden of establishing the reasonableness of attorney fees is on the party seeking compensation. *Adair v State (On Fourth Remand)*, 301 Mich App 547, 553; 836 NW2d 742 (2013). "[T]here exists no precise formula by which a court may assess the reasonableness of an attorney fee." *In re Temple Marital Trust*, 278 Mich App 122, 138; 748 NW2d 265 (2008). However, "[i]n making this reasonableness determination, the trial court should consider the eight factors listed in MRPC 1.5(a)." *Dep't of Transp v Randolph*, 461 Mich 757, 766; 610 NW2d 893 (2000). The factors listed in MRPC 1.5(a) are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

Concerning the fourth factor—the results obtained—which is the only factor defendants dispute on appeal, this Court has explained that a reasonable fee should be proportionate to the results obtained. *Augustine v Allstate Ins Co*, 292 Mich App 408, 437; 807 NW2d 77 (2011).

The record reveals that the trial court considered the factors listed above in determining a reasonable fee award in this case. Plaintiffs' counsel represented that, had he not charged a contingency fee in this case, fees would have been over $35,000, based on counsel's standard hourly rate of $250 per hour. Defense counsel agreed, "that amount of time, if you were billing on an hourly rate, would not be inappropriate." Defense counsel also stipulated that a rate of $250 per hour would be a reasonable rate. The trial court considered this evidence, and concluded that the time, skill, and labor involved in this case was not extensive and that plaintiffs' attorney's skill or expertise was not in dispute. The trial court also found that the

nature of the professional relationship at issue was not relevant or disputed in this matter and that there was no evidence that accepting this case precluded plaintiffs' attorney from taking other employment. Concerning the fee customarily charged, the trial court found, as was stipulated by the parties, that $250 per hour was a reasonable fee.

Defendants argue that the trial court failed to consider the results obtained in this case, but the record reveals otherwise. As to the amount in question and results obtained, the trial court expressly acknowledged that plaintiffs did not prevail on every claim. It also acknowledged that defendants sought to have the amount of fees awarded reduced in light of these unsuccessful claims. Nevertheless, because the trial court awarded plaintiffs the full amount of damages they sought in this case, it found that the unsuccessful claims did not warrant decreasing the amount of fees awarded. In addition, the trial court considered the fact that plaintiffs had a contingent-fee agreement with their attorney, and concluded, based on all of the factors, that awarding attorney fees in accordance with the contingent-fee agreement was reasonable. In total, the trial court awarded $19,677.93 in attorney fees.

On this record, the trial court did not abuse its discretion. Although defendants contend that the trial court failed to take into consideration the results obtained, the record reveals otherwise. Moreover, defendants significantly mischaracterize the results obtained in this case by characterizing plaintiffs as "unsuccessful litigants." Contrary to defendants' assertion, plaintiffs were successful in this action. They were awarded the entire amount of damages that they sought in this case. Further, while defendants contend that the fee award was inappropriate because defendants admitted that Michigan ASKP breached the lease, thereby making this a simple case with uncontested liability, they ignore the fact that they disputed the total amount of damages, including CAM charges and the last month of rent. Plaintiffs sought, and were awarded, damages for both of those items. Consequently, this was not an action were plaintiffs were unsuccessful, nor is it a case where the damage amount was admitted. Finally, to the extent defendants argue that the trial court abused its discretion by awarding attorney fees for time spent on claims that were dismissed, such argument is without merit. Where plaintiffs claimed that the total amount expended in this case, billing at counsel's normal hourly rate, $35,000, an award, based on a contingent-fee agreement, of $19,677.93 is not unreasonable, and demonstrates that the trial court did not award fees for all of the work done by plaintiffs' counsel. Accordingly, the trial court did not abuse its discretion by awarding reasonable attorney fees based on the contingent-fee agreement between plaintiffs and their counsel. See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co*, 279 Mich App 691, 701; 760 NW2d 574 (2008) (finding, based on all of the factors, that an award of attorney fees consistent with a contingent-fee arrangement was not an abuse of discretion).[7]

[7] In passing, and with little analysis, defendants appear to argue that the trial court abused its discretion when it granted reconsideration, reversing its earlier ruling that plaintiffs were not entitled to fees beyond the date when defendants admitted that Michigan ASKP breached the leases by failing to pay rent. This issue is not in defendants' statement of questions presented; therefore, this Court need not consider it. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, such an argument is meritless because, as noted, although Michigan

E. DEFENDANTS' COUNTERCLAIM

Lastly, defendants contend that the trial court erred when it dismissed their counterclaim. Defendants alleged fraudulent misrepresentation, negligent misrepresentation, and mistake in reference to the personal guaranty signed by Peterson. This issue is meritless. As noted, the trial court found that Peterson's testimony regarding whether he signed the personal guaranty lacked credibility. And, the trial court found credible Weckle's testimony that he told Peterson a personal guaranty was required. It also found credible Weckle's testimony that Peterson signed the personal guaranty in his presence. We do not interfere with those credibility determinations. *Woodington*, 288 Mich App 355. Because the trial court's factual findings were not clearly erroneous, there is no merit to any assertion by defendants that plaintiffs fraudulently induced Peterson into signing the guaranty, that they negligently induced him into doing so, or that Peterson was mistaken about what he was signing.

III. PLAINTIFFS' CROSS-APPEAL

On cross-appeal, plaintiffs argue that the trial court erred by dismissing their claims to pierce the corporate veil and for relief under the UFTA. The trial court found that plaintiffs' failure to establish fraud was fatal to both claims. "An appellate court's review of a decision not to pierce the corporate veil is de novo because of the equitable nature of the remedy." *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 509; 802 NW2d 712 (2010). In addition, this Court reviews the trial court's factual findings for clear error. *Chelsea Inv Group*, 288 Mich App at 250.

Both of plaintiffs' issues involve the same operative facts and allege fraud or wrongdoing by Peterson in his role as the owner/member of Michigan ASKP related to the transfer of funds and assets. We first consider, and reject, plaintiffs' claim that the trial court erred by refusing to pierce the corporate veil. "In general, the law treats a corporation[8] as an entirely separate entity from its stockholders . . . ." *Lakeview Commons*, 290 Mich App at 509 (citation and quotation marks omitted). "However, the courts can ignore this corporate fiction when it is invoked to subvert justice." *Id.* In certain cases, courts piece the corporate veil protecting shareholders and hold offending shareholders liable. *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 642 n 4; 802 NW2 717 (2010). "Piercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff." *Lakeview Commons*, 290 Mich App at 510.

Concerning the first element, there is ample evidence that Peterson abused the corporate form and used various limited liability companies as an instrumentality of himself. Most notably, he used the Michigan ASKP bank account to pay for expenses incurred on behalf of the

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ASKP admitted that it violated the lease agreements, defendants continued to dispute the amount due under the leases throughout trial.

[8] "The rules regarding piercing a corporate veil are applicable in determining whether to pierce the corporate veil of a limited-liability company." *Florence Cement Co v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011).

Florida entities. However, we do not find clearly erroneous the trial court's conclusion that plaintiffs failed to satisfy their burden of establishing fraud. Peterson testified, and such testimony was unrebutted, that he deposited his own funds as well as funds borrowed from family members into the Michigan ASKP bank account after the Michigan retail outlet closed and that he used those funds to pay some of the obligations of the Florida entities. Thus, while Peterson clearly abused the corporate form, this was not a case where he diverted existing funds in order to avoid paying plaintiffs. As the trial court recognized, the evidence in this case tends to support that Peterson was simply apathetic toward plaintiffs, not that he tried to defraud them or hinder their collection efforts. Indeed, after abandoning the leaseholds, Peterson paid one additional month's rent, as he explained, "out of the goodness of [his] heart," and thereafter did not seem concerned with his obligations to plaintiffs. The evidence presented does not support that the trial court clearly erred. See *Woodington*, 288 Mich App at 355; Cf. *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 459-460; 559 NW2d 379 (1996) (explaining that where a corporation is manipulated to the prejudice of third parties, it may be necessary to pierce the corporate veil).

Similarly, we find that the trial court did not clearly err in concluding that plaintiffs failed to establish fraud that would warrant permitting plaintiffs to reach the assets of the Florida entities under the UFTA. The UFTA provides a creditor with a cause of action if a debtor transfers assets in a fraudulent manner. See MCL 566.34; MCL 566.35. "The UFTA specifically provides for avoiding a fraudulent transfer or attaching a particular fraudulently transferred asset" or other property of the transferee. *Estes v Titus*, 481 Mich 573, 586-587; 751 NW2d 493 (2008). See also MCL 566.37. Pertinent to plaintiffs' claims in this case, MCL 566.34(1) provides that:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Regarding an intent to defraud under MCL 566.34(1), a creditor may establish fraud by pleading and proving the "badges of fraud" listed in MCL 566.34(2). See *Estes*, 481 Mich at 592. These include, among others, consideration of whether:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all of the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.
>
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [MCL 566.34(2).]

The UFTA adopts a broad definition of the word "transfer," defining the term to mean: "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(*l*). Given that this definition includes "payment of money," there were transactions that fit the statutory definition of a "transfer" in this case. Notably, Peterson admitted that he placed funds in the bank account of Michigan ASKP and that he used those funds to pay certain obligations on behalf of the Florida entities.

However, while there were transfers, we find that the trial court did not clearly err in finding that there was no intent to defraud, delay, or hinder plaintiffs. As the trial court noted, the record reveals that Peterson caused Michigan ASKP to make payments to certain creditors such as Macy's, and such evidence showed that Peterson chose to pay some creditors to the exclusion of others. However, we find the trial court did not clearly err in concluding that paying one creditor to the exclusion of others, when, as was the case here, the debtor's funds are

limited, does not demonstrate fraudulent intent. Further, this was not a case where Peterson stripped Michigan ASKP of funds and assets to avoid paying creditors. Rather, he continued to put money into the bank account of Michigan ASKP from his own personal funds and used that money—in a clear abuse of the corporate form—to pay the obligations of the new Florida entities. On this record, we do not conclude that the trial court clearly erred in finding that there was no evidence of an intent to defraud, hinder, or delay plaintiffs in their collection efforts. See *Woodington*, 288 Mich App at 355.

In addition, the evidence presented does not show a valid claim under MCL 566.34(1)(b),[9] which provides a cause of action for a transfer that was made:

> Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Concerning the first element—that the debtor engaged in a transfer without receiving a reasonably equivalent value in exchange for the transfer—the evidence shows that Michigan ASKP received value for some, but not all of the transfers in this case. Michigan ASKP received value for its payment of pre-existing debt to Macy's. See MCL 566.33(1) (explaining that value is given if, in exchange for the transfer, "an antecedent debt is secured or satisfied."). However, Michigan ASKP did not receive value for some of the other transfers, such as the payment of obligations incurred by the Florida entities in the form of attorney fees. Those transfers did not satisfy the debts of Michigan ASKP. Thus, the first element is satisfied with regard to some of the transfers at issue. See MCL 566.34(1)(b).

The second element of MCL 566.34(b) has two prongs, and the evidence produced in this case does not establish either prong. Concerning the first prong, there is no evidence that the debtor, Michigan ASKP was engaged or about to engage in a business transaction for which its remaining assets were unreasonably small; indeed, the record reveals that Michigan ASKP did not engage in any business transactions after the transfers. See MCL 566.34(1)(b)(*i*). Plaintiffs make no argument with regard to the second prong, so any argument related thereto is considered abandoned. See *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 678; 649 NW2d 760 (2002). Furthermore, any argument with regard to the second prong would be meritless because there is no evidence in the record that the debtor, Michigan ASKP, intended to incur, or

[9] The trial court did not address MCL 566.34(1)(b), but plaintiffs raised a claim under MCL 566.34(1)(b) in their Third Amended Complaint. Thus, we will address the issue. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

believed it would incur, debts beyond its ability to pay as they became due. See MCL 566.34(1)(b)(*ii*).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Talbot
/s/ Jane M. Beckering