NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 05/31/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTTSDALE COMMERCIAL DEVELOPMENTS, INC., a Maryland corporation, Plaintiff/Appellee, v. EULER HERMES AMERICAN CREDIT INDEMNITY COMPANY, a Maryland corporation, Defendant/Appellant.	No. 1 CA-CV 10-0708 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-027700

The Honorable Robert H. Oberbillig, Judge

The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

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D O W N I E, Judge

¶1 Euler Hermes American Credit Indemnity Company ("Euler") appeals from the grant of partial summary judgment to Scottsdale Commercial Developments, Inc. ("SCD").[1] Because we conclude that genuine issues of material fact exist that preclude summary judgment, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

I. The Credit Insurance Policy

¶2 Credit insurance insures against loss or damage resulting from the failure of debtors to pay obligations owed to an insured. *See, e.g.,* A.R.S. § 20-252(8). SCD, which sold interactive electronic "whiteboards" for educational use, purchased a credit insurance policy (the "Policy") from Euler in July 2005. The Policy excludes coverage for disputed invoices, which we discuss in depth *infra*.

¶3 In December 2005, SCD asked Euler to increase coverage for one of its customers--a Mexican company named Inteltech,

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[1] SCD was previously named GTCO CalComp, Inc. and is referred to as such throughout the record. For ease of reference, we call the company by its current name.

S.A. de C.V. ("Inteltech").[2] Euler agreed to increase Inteltech's coverage limit to $5,000,000 on the condition that SCD obtain a "VALID AND LEGALLY BINDING GUARANTEE" from Inteltech's parent company, Merik SA de CV ("Merik"), and Inteltech's customer, Dell Computer de Mexico SA de CV ("Dell").

II. SCD's Insurance Claim

¶4 Inteltech was an SCD representative for the "Enciclomedia Project," which entailed supplying interactive whiteboards to over 125,000 public school classrooms in Mexico. SCD and Inteltech signed various agreements, including an addendum giving Inteltech a discount of $369,600 on purchases. Inteltech accepted goods from SCD but refused to pay invoices totaling $1,269,760.

¶5 In November 2006, SCD submitted an insurance claim to Euler for $1,269,760. During Euler's claims investigation, Inteltech advised it was not in default and claimed SCD breached its contractual duties; Inteltech also claimed the invoice amounts failed to reflect the agreed-upon discount. Euler's vice president of recovery, Linda Clash, sent an email to SCD stating:

> Confirming our telephone conversation of yesterday you indicated that you wanted your own counsel to handle this claim and I

[2] Under the Policy, each of the insured's customers has a coverage or credit limit. The individually-approved credit limits are set forth in endorsements to the Policy.

> agreed to this. Since it is clear, the debtor is disputing the debt and any potential loss payment due you would be held in abeyance until a final judgment is issued in [SCD's] favor or the debtor acknowledges owing the debt, we feel there is no need to file your claim at this time.
>
> In view of this, we are recommending that you allow [Euler] to grant you an extension for filing this claim with the expectations that once a resolution is reached, you can reactivate the original claim filing and we would recognize the original postmark date of 11/20/06.

¶6 SCD filed a proceeding in the Superior Court of Justice of the Federal District in Mexico in an effort to obtain Inteltech's position on matters relevant to the invoices. Inteltech was served with a notice of hearing that warned that the facts alleged by SCD would be deemed admitted or acknowledged if Inteltech failed to appear. Inteltech did not appear. The Mexican court reviewed the questions SCD had posed and accepted those it deemed legally appropriate, including an acknowledgment (the "default acknowledgement") that Inteltech owed SCD an amount equal to 80% of the purchase price for the last 2480 products delivered, or $1,269,760. Inteltech unsuccessfully appealed the default acknowledgement.

¶7 After obtaining the default acknowledgement, SCD re-submitted its insurance claim. Euler denied the claim, stating:

> After a comprehensive review of the circumstances surrounding the Inteltech claim, we have found that there is no

> coverage applicable. The merits of this decision are anchored in the requirements outlined in the credit limit endorsement . . . .
>
> The credit limit endorsement of (5) five million dollars USD, was approved on Inteltech contingent on a "valid and legally binding guarantee of both Merik SA de CV in Mexico and Dell Computer de Mexico SA de CV.
>
> Since the conditions set forth in the credit limit endorsement have not been met, we hereby reject this as a covered claim.

III. Inteltech Lawsuit

¶8 Inteltech sued SCD in Mexico, alleging SCD breached its contractual obligations, including an alleged exclusivity agreement. Inteltech claimed damages of $1,439,100. SCD filed a counterclaim against Inteltech, demanding the amount of the unpaid invoices--$1,269,760--and arguing Inteltech had forfeited any discount by not paying timely. Inteltech responded to the counterclaim, alleging that SCD lost its right to payment "because it breached the Exclusivity Agreement . . . before the price of such products had become due and payable."

IV. Arizona Litigation

¶9 SCD sued Euler in Maricopa County Superior Court, alleging breach of contract and bad faith/breach of the covenant of good faith and fair dealing. SCD also sought a declaratory judgment as to insurance coverage.

¶10 SCD moved for partial summary judgment on its breach of contract claim. Euler responded in opposition, contending that genuine issues of material fact existed. The superior court granted SCD's motion. It recognized that SCD and Inteltech were engaged in ongoing litigation in Mexico, but found the Mexican dispute "centers on an alleged distributorship agreement entered into by [SCD] and [Inteltech], rather than focusing on a dispute over the account receivable or goods debt that is at issue in this matter." Thus, the court concluded the Mexican dispute is "a collateral matter which does not constitute a valid defense in this matter." The court made additional findings, including that Inteltech owed SCD $1,269,760, that SCD established an acknowledgement of that debt by Inteltech, and that SCD complied with the Policy's guarantee requirements.

¶11 Euler requested a final judgment pursuant to Rule 54(b), Arizona Rules of Civil Procedure ("Rule"), which the superior court signed.[3] Euler timely appealed.

DISCUSSION

¶12 We review the grant of summary judgment *de novo*. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We independently

[3] A motions panel of this Court denied SCD's motion to dismiss the appeal, concluding the Rule 54(b) language in the judgment was appropriate.

determine whether the trial court correctly applied the law and whether disputed issues of fact exist. *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 10, 994 P.2d 1039, 1042 (App. 2000). We view the facts in the light most favorable to Euler, against which judgment was entered. *Riley, Hoggatt & Suagee, P.C. v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044-45 (1993).

1. Disputed Invoices

¶13 Euler contends the Inteltech invoices are "Disputed Invoices," as defined by the Policy, rendering SCD's insurance claim premature and the entry of partial summary judgment erroneous. The Policy states:

> The following credit losses are not covered under this Policy unless specifically included by Endorsement;
>
> . . . .
>
> C. Any **Disputed Invoice**; provided however, that at such time as the Invoice is no longer a **Disputed Invoice**, it shall constitute a covered loss hereunder to the extent it otherwise qualifies as a covered loss[.][4]

The Policy defines a "Disputed Invoice" as follows:

> **Disputed Invoice** means an invoice that a **Buyer** has objected to paying either in whole or in part that has not been reduced to a final and enforceable judgment[.] Final judgments must be obtained in a jurisdiction

[4] The policy also states: "if any invoice to a **Buyer** is a **Disputed Invoice**, no loss payment shall be due to you for that **Buyer** until such time as there are no **Disputed Invoices** to that **Buyer**.

> in which the **Buyer** has assets[.] In addition, an invoice that is subject to the assertion of an offset or counterclaim is also a **Disputed Invoice**[.]

¶14 Interpretation of an insurance contract is a question of law. *First Am. Title Ins. Co. v. Action Acquisition, L.L.C.*, 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (2008). "Provisions of insurance policies are to be construed in a manner according to their plain and ordinary meaning." *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982). "[E]xclusions in an insurance contract are strictly construed in favor of coverage and against the insurer." *Warfe v. Rocky Mountain Fire & Cas. Co.*, 121 Ariz. 262, 264, 589 P.2d 905, 907 (App. 1978). However, where parties have bound themselves to a lawful contract, we cannot alter, revise, extend, or modify the terms of the contract. *Mining Inv. Group, L.L.C. v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008).

¶15 We have no difficulty concluding that Inteltech has "objected to paying [SCD's invoices] either in whole or in part." The question then becomes whether Inteltech's alleged debt has "been reduced to a final and enforceable judgment."[5]

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[5] SCD argued below that Euler was estopped from "taking the view that only a final judgment will trigger the Policy's payment obligation." On appeal, SCD suggests that Clash's email established a different standard for coverage but does not develop this argument. The Policy states that changes to its

¶16 The nature and effect of the Mexican default acknowledgement is disputed and, under the unique facts of this case, poses a mixed question of fact and law. Euler's evidence suggests the default acknowledgment is not a "final and enforceable judgment" or its functional equivalent. Euler has submitted an affidavit from Mexican attorney Eduardo Siqueiros T., who states:

> [T]he debt . . . which is the subject of dispute in this case is clearly disputed and is the subject of pending litigation between Inteltech and [SCD] in Mexico in which multiple defenses to such indebtedness have been raised by Inteltech. The dispute and Mexican litigation have not yet been fully and finally resolved by a court of competent jurisdiction.

Siqueiros avows that, under Mexican law, the default acknowledgement "cannot, of itself, be considered as sufficient to evidence the existence of a debt." He disagrees with SCD's expert, who opined that Inteltech admitted owing the debt in the default acknowledgement proceedings. Siqueiros stated:

> Based on my review of the files of the litigation . . . and my knowledge of Mexican

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terms must be in writing and signed by Euler's president and secretary. The issue of estoppel raises factual questions that the superior court may consider on remand. *See, e.g., Valencia Energy Co. v. Ariz. Dep't of Revenue,* 191 Ariz. 565, 576-77, ¶ 35, 959 P.2d 1256, 1267-68 (1998) (setting forth the elements of equitable estoppel). We note that the court did not specifically rule on this issue in resolving the motion for partial summary judgment.

> law and procedure, I disagree with the conclusions contained in paragraph 7 of the Pereznieto Declaration which states that, "*. . . Inteltech is deemed to have . . . acknowledged owing [SCD] a debt in the amount of US$1,269,760*[.]"
>
> . . . .
>
> To the contrary, Inteltech is actively contesting the debt, and the validity of the debt is a matter ultimately to be determined by the court, subject to any appeals. If [SCD] is ultimately successful, this determination will be in the form of a judgment that would render the debt enforceable and collectible. Currently, that is not the case.

Siqueiros described the default acknowledgement as a preliminary step, not a final adjudication of liability, stating:

> [A] judicial "acknowledgment" is <u>a means to prepare a subsequent trial</u>. . . . Despite the occurrence of a "default acknowledgement", such as in this case, a defendant is not barred from contesting the debt in future proceedings. This is precisely what Inteltech has done here.

¶17 The parties also disagree about whether, in the Mexican litigation, Inteltech may assert offsets to the invoices. Inteltech alleges in that litigation that SCD is not entitled to payment because SCD breached its contractual obligations before the invoices fell due. Inteltech's Mexican attorney has submitted an affidavit avowing that such offsets

are proper. SCD disagrees. It will be up to the Mexican courts to make that determination.[6]

¶18 We also disagree with the superior court's conclusion that adopting Euler's position would necessarily "result in a finding rendering this contract illusory which is contrary to Arizona law." Illusory coverage exists if a policy "would not pay benefits under any reasonably expected set of circumstances." *Monticello Ins. Co. v. Mike's Speedway Lounge, Inc.*, 949 F. Supp. 694, 699 (S.D. Ind. 1996). The exclusion at issue here does not eliminate coverage entirely. But it does require SCD to obtain a final and enforceable judgment against Inteltech for disputed invoices.[7]

¶19 Genuine issues of material fact exist regarding coverage under the Policy. The superior court erred by granting judgment as a matter of law on the breach of contract claim.

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[6] The agreement between SCD and Inteltech states that the parties have "surrendered to the law and jurisdiction of the courts of Mexico, D.F. for the case of controversy." Thus, SCD's reliance on the Uniform Commercial Code and cases such as *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 465 F.3d 946 (9th Cir. 2006), to support its offset argument is unpersuasive. The parties have not briefed Mexican law.

[7] It is unclear whether the superior court's finding regarding illusory coverage was also based on the guarantee requirement discussed *infra.* Because there are disputed factual issues regarding that requirement, it is not possible to determine at this juncture whether the guarantee requirement might render the increased policy limits illusory.

2. Guarantees

¶20 Euler also challenges the superior court's determination that, as a matter of law, SCD complied with certain "guarantee" requirements. Before increasing the coverage limits for Inteltech, Euler required a "valid and legally binding guarantee" from both Merik and Dell. The parties disagree about what was necessary to satisfy this condition.

¶21 A contract is not ambiguous merely because the parties disagree as to its meaning. *In re Estate of Lamparella,* 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005). However, the "guarantee" requirement at issue here is susceptible to conflicting interpretations. If the language of the agreement and the surrounding circumstances and evidence establish a controversy, the question is properly presented to the jury. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 159, 854 P.2d 1134, 1145 (1993).

¶22 A "guarantee" has been defined as "[t]he assurance that a contract or legal act will be duly carried out." *Black's Law Dictionary* 772 (9th ed. 2009). A "guaranty," on the other hand, has been 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 who is liable in the first instance." *Id.* at

773 (9th ed. 2009). *Black's Law Dictionary* describes a distinction between these two terms:

> In practice, *guarantee*, n., is the usual term, seen often, for example, in the context of consumer warranties or other assurances of quality or performance. *Guaranty*, in contrast, is now used primarily in financial and banking contexts in the sense "a promise to answer for the debt of another."

Id. at 772 (9th ed. 2009) (quoting Bryan A. Garner, *A Dictionary of Modern Legal Usage* 394 (2d ed. 1995)).

¶23 Euler uses "guarantee" and "guaranty" interchangeably and cites several cases in support of its interpretation. *See, e.g., Howard v. Associated Grocers*, 123 Ariz. 593, 595, 601 P.2d 593, 595 (1979) ("A guarantee is a promise to pay an obligation between a creditor and debtor."); *Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, 219-222, ¶¶ 6-18, 52 P.3d 786, 788-91 (App. 2002) (discussing issues concerning a guaranty contract); *Phoenix Arbor Plaza, Ltd. v. Dauderman*, 163 Ariz. 27, 29, 785 P.2d 1215, 1217 (App. 1989) ("A guarantee is a contract secondary or collateral to the principal contractual obligations which it guarantees."). SCD contends Euler's interpretation "glosses over the distinction between [the terms] and hides the fact that the term 'guarantee' as it is used in the Policy is at best ambiguous and at worst does not mean what [Euler] says it does."

¶24 We agree that the term "guarantee," as used, is ambiguous. The document signed by Dell reads:

> In compliance with our agreement and in conformity with the provisions of the fifth clause of the supply agreement entered into by Inteltech . . . and Dell . . . on the eighth day of November, 2005, we hereby act in the name and on behalf of Dell México to declare its liability and obligation to pay all the sums owed to Inteltech pursuant to the provisions of the aforementioned agreement in proper time and form.
>
> We likewise inform you that Dell México has all the monetary resources required to fulfill the payment obligations that may arise pursuant to the aforementioned supply agreement.

¶25 According to Euler, this document is nothing more than an affirmation of the existing agreement between Inteltech and Dell, not a promise to pay Inteltech's debts to SCD.[8] If Euler was, as a matter of fact, entitled to a written promise by Dell to be liable for debts Inteltech owed to SCD, the sufficiency of this document is questionable.

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[8] In contrast, the "guarantee" Merik signed reads:

> This Guarantee Letter is signed by Grupo Merik, S.A. de C.V. ("Merik"), a company duly organized an [sic] existing under the law of Mexico, in relation to the Agreement executed between [SCD] and Inteltech . . . on October 28, 2005 . . . .
>
> Through this Guarantee Letter, Merik jointly secures any and all payment obligations of Inteltech before [SCD] derived from or related to the Complete Agreement.

¶26 Although Euler claims the Merik guarantee is also invalid, it has waived this argument. Euler conceded below that SCD "did secure the required guarantee from Merik S.A. de C.V. in Mexico of Inteltech's obligations to [SCD]."[9] Its admissions are binding. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) ("An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is therefore to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it." (quoting IX John H. Wigmore, *Evidence* § 2588) (alterations omitted)).

¶27 The superior court properly ruled that the Merik guarantee was sufficient. However, genuine issues of material fact exist regarding the adequacy of the Dell guarantee.

CONCLUSION

¶28 We reverse the grant of partial summary judgment on the breach of contract claim. We also reverse the determination that, as a matter of law, the Dell guarantee was sufficient. We remand to the superior court for further proceedings consistent with this decision. Both Euler and SCD have requested

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[9] In the same document, Euler conceded SCD "did secure a valid and legally binding guarantee of [Merik]."

attorneys' fees on appeal under A.R.S. § 12-341.01. Because neither party has yet prevailed on the merits, we decline to award fees. After the case is resolved on the merits, the superior court may consider fees incurred on appeal in determining any fee award to the prevailing party. Euler was successful in attaining reversal of the superior court's rulings and is thus entitled to recover its appellate costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

MARGARET H. DOWNIE, Judge

CONCURRING:

DIANE M. JOHNSEN, Presiding Judge

JON W. THOMPSON, Judge