IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MILLCREEK SHOPPING CENTER, LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
v.	)	C.A. No. N13C-11-145 (PRW)
JENNER ENTERPRISES, INC., a Delaware corporation, MICHAEL P. LEVITSKY and JANET LEVITSKY,	)	
Defendants.	)	

Date Submitted: April 15, 2016
Date Decided: June 30, 2016

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT JANET LEVITSKY IS LIABLE TO PLAINTIFF MILLCREEK SHOPPING CENTER, LLC, ON HER PERSONAL GUARANTY

Thomas C. Marconi, Esquire, Losco & Marconi, P.A., Attorneys for Plaintiff.

Donald L. Gouge, Jr., Esquire, Donald L. Gouge, Jr., LLC, Attorney for Defendant Janet Levitsky.

Scott Wilcox, Esquire, Whiteford Taylor & Preston, LLC, Attorneys for Jenner Enterprises and Michael P. Levitsky

PARKER, Commissioner

PROCEDURAL HISTORY

1. In this action Plaintiff Millcreek Shopping Center, LLC ("Millcreek"), the Landlord, seeks damages against Jenner Enterprises, Inc. ("Jenner"), the tenant, for its breach of contract involving a commercial real property lease for an approximately 5,220 square foot rental suite in the Millcreek Shopping Center located on Kirkwood Highway in Wilmington, Delaware (the "Rental Unit").

2. A lease agreement was entered into on October 17, 2000, for the Rental Unit (the "October 17, 2000 Lease Agreement"). As an inducement to the Landlord to enter into the October 17, 2000 Lease Agreement, Defendants Michael P. Levitsky and Janet Levitsky executed a personal guaranty guaranteeing the full and complete performance on behalf of Jenner of the October 17, 2000 Lease Agreement. The Personal Guaranty was executed the same day as the October 17, 2000 Lease Agreement and was attached to, and made a part of, that lease agreement.

3. In this action, Millcreek seeks to hold these individuals liable pursuant to their personal guaranty as a result of Jenner's breach of contract.

4. Following oral argument on Millcreek's Motion for Summary Judgment, Millcreek and Defendants Jenner and Michael P. Levitsky agreed, and the court ordered, that the amount of money damages incurred by Millcreek as a result of Jenner's breach of the lease will be decided by binding arbitration.[1]

5. In addition, Defendant Michael P. Levitsky admitted that he was liable to Millcreek under the personal guaranty.

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[1] See, Order dated November 10, 2014, Superior Court Docket No. 59.

6. There are two matters remaining in this case. The first is whether Defendant Janet Levitsky is liable to Millcreek under the personal guaranty contained in the October 17, 2000 Lease Agreement. The second is that a determination needs to be made by way of binding arbitration as to the amount of money damages Millcreek incurred as a result of Jenner's breach of the lease.

7. These two matters were referred to the undersigned commissioner, who was directed to submit proposed findings of fact and recommendations for the disposition of the issue of Janet Levitsky's personal liability and to hold a binding arbitration to determine the amount of money damages owed to Millcreek as a result of the breach of the lease.[2]

8. On November 13, 2014, Jenner filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Delaware.[3] As part of the bankruptcy action, that court entered an order temporarily extending the bankruptcy stay to Defendants Janet Levitsky and Michael Levitsky.[4]

9. Some time after the filing of the bankruptcy petition by Jenner, the parties advised this court that the temporary stay entered by the Bankruptcy Court as to Defendants Michael and Janet Levitsky expired, and this matter could proceed forward.

10. A February 1, 2016 teleconference was held and it was decided that the remaining liability issue, whether Janet Levitsky is liable to Millcreek under the personal guaranty contained in the lease, would be decided first and following that decision, a binding arbitration will be held to determine the amount of money damages incurred by Millcreek as a result of Jenner's breach of the lease.

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[2] Order dated November 10, 2014, Superior Court Docket No. 59.
[3] See, Superior Court Docket Nos. 61, 62, 63.
[4] See, May 7, 2015 letter advising of the bankruptcy court's May 6, 2015 Order extending the temporary stay, Superior Court Docket No. 75.

11. A briefing schedule was entered at the February 1, 2016 telephone conference. Briefing is now complete on the issue of Ms. Levitsky's personal liability for any damages. This is the court's decision on that issue.

FINDINGS OF FACTS

12. On October 17, 2000, Jenner, as tenant, and Gilpin, Van Trump and Montgomery, Inc. ("Gilpin"), as landlord, entered into the October 17, 2000 Lease Agreement for the Rental Unit.[5]

13. In 2003, Plaintiff Millcreek Shopping Center, LLC was formed as a wholly-owned subsidiary of Gilpin and the lease was assigned to Plaintiff Millcreek in July of 2003.[6]

14. Jenner, the tenant, owned and operated a *Fast Signs* franchise at the Rental Unit.

15. Jenner is a Delaware corporation. Defendants Michael P. Levitsky and Janet Levitsky, were married at the time the October 17, 2000 Lease Agreement was entered into. Prior to October 17, 2000, each of them owned 50% of the issued and outstanding common stock of Jenner.[7]

16. At all times relevant hereto, Michael Levitsky served as the president of Jenner and Janet Levitsky served as the secretary.[8]

17. Although both Michael Levitsky and Janet Levitsky were shareholders and officers of Jenner, Michael Levitsky ran the day-to-day operations of Jenner.

18. The Levitskys have been separated since 2004 and they were formally divorced in January 2014.

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[5] October 17, 2000 Lease Agreement is attached as Exhibit 1 to Superior Court Docket No. 82-Millcreek Shopping Center's Brief in Support of its Position that Janet Levitsky Remains Liable on Her Personal Guaranty.
[6] Affidavit of Ann G. Riley attached as Exhibit 8, ¶2 to Superior Court Docket No. 82.
[7] Superior Court Docket No. 82, at pg. 2.
[8] Superior Court Docket No. 82, Exhibit 6, Janet Levitsky's Answers to Interrogatories, at Response to Interrogatory No. 6.

19. As an inducement to the Landlord to enter into October 17, 2000 Lease Agreement, Defendants Michael P. Levitsky and Janet Levitsky executed a Personal Guaranty pursuant to which they, among other things, personally guaranteed the full and complete performance of Jenner's obligations under the October 17, 2000 Lease Agreement. The Personal Guaranty expressly provided that "this guaranty shall remain and continue in full force and effect as to any renewal, modification or extension of this Lease."[9]

20. The Personal Guaranty was executed by Michael and Janet Levitsky on the same day, October 17, 2000, that the October 17, 2000 Lease Agreement was executed by Jenner. The Personal Guaranty was attached to, and made a part of, the October 17, 2000 Lease Agreement. Indeed, the Personal Guaranty is page 14 of the October 17, 2000 Lease Agreement.[10]

21. The initial term of the October 17, 2000 Lease Agreement was for a period of five years. The October 17, 2000 Lease Agreement permitted Jenner to extend the term of the lease for two additional five year terms, if it so desired.[11]

22. The Lease Agreement also provided that if Jenner did not renew the October 17, 2000 Lease Agreement at the end of the initial five year lease term the lease term was to continue as a month to month tenancy. The Lease Agreement expressly provided that as a month to month hold over tenant, Jenner would still be subject to all the terms, conditions, covenants and agreements of the lease. The October 17, 2000 Lease Agreement required each party to give the other 30 days written notice of an intention to vacate the premises if Jenner continued to occupy

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[9] October 17, 2000 Lease Agreement, page 14, attached as Exhibit 1 to Superior Court Docket No. 82

[10] October 17, 2000 Lease Agreement, page 14, attached as Exhibit 1 to Superior Court Docket No. 82

[11] October 17, 2000 Lease Agreement, Exhibit B to the Lease, attached as Exhibit 1 to Superior Court Docket No. 82.

the Rental Unit after the expiration of the five year lease term as long as Jenner was not in default of any terms of the lease.[12]

23. The initial term of the lease commenced on November 1, 2000 and ended on October 31, 2005. From October 31, 2005 to some time before September 22, 2006, Jenner continued to occupy the Rental Unit and fully complied with all other terms and conditions of the lease.

24. Some time before September 22, 2006, Millcreek and Jenner agreed to extend the October 17, 2000 Lease Agreement for a five year period, until October 31, 2011, with an option to extend that lease a second time for an additional five years, until October 31, 2016. In addition, Millcreek and Jenner agreed that the lease may be extended for an additional one year period after the second five year extension so that effectively the lease could remain in place until October 31, 2017.[13] Millcreek confirmed the parties (Millcreek and Jenner) understanding as to the continuation of the October 17, 2000 Lease Agreement by letter dated September 22, 2006.[14]

25. At all times from the commencement of the lease through October 31, 2011, Jenner continued to occupy the Rental Unit and complied with the terms and conditions of the October 17, 2000 Lease Agreement.

26. On November 1, 2011, Millcreek and Jenner entered into an "Amendment of Commercial Lease" ("2011 Amendment").[15] This document consisted of two pages. It contained recitals that the Lease Agreement dated October 17, 2000 was in full force and effect and that the parties intended to modify and amend certain provisions of that Lease Agreement.

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[12] October 17, 2000 Lease Agreement ¶7, attached as Exhibit 1 to Superior Court Docket No. 82.
[13] Superior Court Docket No. 82, Exhibit 2, September 22, 2006 letter from Ann G. Riley of Millcreek to Mike Levitsky confirming the continuation of the lease.
[14] Superior Court Docket No. 82, Exhibit 2, September 22, 2006 letter from Ann G. Riley of Millcreek to Mike Levitsky confirming the continuation of the lease.
[15] Superior Court Docket No. 82, Exhibit 3, Amendment of Commercial Lease dated November 1, 2011.

27. The 2011 Amendment made a few modifications to the October 17, 2000 Lease Agreement. The 2011 Amendment contained the following changes: 1) the term of the tenancy was changed to month-to-month beginning November 1, 2011; 2) Jenner had the right to terminate the Lease Agreement upon not less than 180 days prior written notice to Millcreek; and 3) the rental installment was changed from being due once per month to twice per month.[16]

28. The 2011 Amendment expressly provided: "Except as provided hereinabove, all of the terms and conditions of the lease agreement dated October 17, 2000 and subsequently amended, shall remain in full force and effect without modification."[17]

29. Both Michael P. Levitsky and Janet Levitsky signed the 2011 Amendment on behalf of Jenner.[18]

30. Janet Levitsky signed the 2011 Amendment in her capacity as Secretary to Jenner.[19]

31. At the time Janet Levitsky signed the 2011 Amendment, on November 1, 2011, she was separated from Michael P. Levitsky.

32. By signing the 2011 Amendment as Secretary to Jenner, Janet Levitsky bound Jenner to the 2011 Amendment. The 2011 Amendment, which Janet Levitsky executed as an officer of Jenner, expressly stated that the October 17, 2000 Lease Agreement was in full force and effect.

33. Janet Levitsky signed the Personal Guaranty on October 17, 2000 guaranteeing the full performance of Jenner's obligations under the October 17, 2000 Lease Agreement, and to any renewal, modification or extension of that lease agreement.

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[16] Superior Court Docket No. 82, Exhibit 3, Amendment of Commercial Lease dated November 1, 2011.
[17] Superior Court Docket No. 82, Exhibit 3, Amendment of Commercial Lease dated November 1, 2011.
[18] Superior Court Docket No. 82, Exhibit 3, Amendment of Commercial Lease dated November 1, 2011.
[19] Superior Court Docket No. 82, Exhibit 3, Amendment of Commercial Lease dated November 1, 2011; Superior Court Docket No. 82, Exhibit 6, Janet Levitsky's Responses to Interrogatories, Response No. 46.

34. By signing the 2011 Amendment, Janet Levitsky as Secretary to Jenner bound Jenner to that contract which expressly stated that the October 17, 2000 Lease Agreement was in full force and effect.

35. After Janet Levitsky signed the 2011 Amendment in her capacity as Secretary to Jenner, Jenner breached its obligations under the October 17, 2000 Lease Agreement.

36. In November 2013, Millcreek filed the subject action to recover damages as a result of Jenner's default of the October 17, 2000 Lease Agreement.

37. Janet Levitsky by her actions in signing the 2011 Amendment in her capacity as an officer of Jenner bound Jenner to the extension/modification/renewal of the October 17, 2000 Lease Agreement by the clear, unambiguous and express language of that contract. In so doing, Janet Levitsky also bound herself on the Personal Guaranty guaranteeing Jenner's obligations to fully perform its obligations under that lease agreement.

38. Michael P. Levitsky admitted that the personal guaranty has never been rescinded, altered, cancelled, amended or modified in any way and that he is bound by its terms.[20]

39. Janet Levitsky is also liable to Millcreek pursuant to her Personal Guaranty for Jenner's breach of contract which arose in 2013 after she signed the 2011 Amendment binding Jenner to the renewal/extension/modification of the October 17, 2000 Lease Agreement.

CONCLUSIONS OF LAW

40. At the onset, it is noted that commercial leases are not governed by the Residential Landlord-Tenant Code[21] and parties to a commercial lease are free to contract however they so desire. Prior to 1996, Delaware's Landlord-Tenant Code applied to residential and commercial

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[20] Superior Court Docket No. 82, Exhibit 5, Michael Levitsky's Supplemental Responses to Interrogatories, Responses 1-2.

[21] 25 *Del.C.* § 5101 et seq.

leases. After 1996, commercial rental agreements were excluded.[22] This case involves a commercial lease that was entered into in 2000, after Delaware's Landlord-Tenant Code was changed to exclude commercial leases. Consequently, Delaware's Residential Landlord-Tenant Code has no bearing on this case.

41. A commercial lease is governed by general contract principles and the parties are bound by the language of the agreement(s) they negotiated.[23]

42. A guaranty is an agreement to pay the debt of another in the event that the primary debtor defaults.[24] Guaranty obligations are interpreted according to the same standards as general contracts.[25] The intent of the parties must prevail.[26] Whether the guaranty is a continuing guaranty is a matter of contract interpretation which is a matter of law for the court.[27]

43. The issue as to whether a guarantor of a lease agreement remains liable under the guaranty appears to turn on whether or not the guarantor consented to the extension of the lease. In those cases in which a lease has been extended or renewed with the guarantor's consent, the guarantor who consented to the extension of the lease on behalf of the primary debtor is not discharged of his/her obligations.[28] Indeed, when a guarantor on a personal guaranty signs an agreement indicating that the terms of the original lease has been renewed, the personal guaranty guaranteeing the fulfillment of those obligations is also revived and in effect.[29] In those cases in

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[22] See, *Independence Mall v. Wahl,* 2012 WL 6945505 (Del.Super. 2012).
[23] *Independence Mall v. Wahl,* 2012 WL 6945505 (Del.Super. 2012); *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5 (Del.C.C.P. 2015).
[24] *Chestnut Hill Plaza Holdings Corp. v. Parkway Cleaners, Inc.,* 2011 WL 1885256, at * 5 (Del.Super. 2011).
[25] *Falco v. Alpha Affiliates, Inc.,* 2000 WL 727116, at * 6-8 (Del.Dist. 2000).
[26] *Wilmington & N.R. Co. v. Delaware Valley Ry. Co. Inc.,* 1999 WL 4683705, at *5 (Del.Super.); *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5 (Del.C.C.P. 2015).
[27] *Falco v. Alpha Affiliates, Inc.,* 2000 WL 727116, at * 6 (Del.Dist. 2000).
[28] See, *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P. 2015).
[29] *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P. 2015).

which a lease has been extended or renewed without the guarantor's consent, the guarantor is discharged of his/her obligations.[30]

44. When making the determination as to whether or not the guarantor consented to the extension of the lease on behalf of the primary debtor, the first consideration is whether there is a written instrument reflecting the guarantor's intent. If there is a written instrument in which the guarantor consented to the extension of the lease on behalf of the primary debtor, and that written instrument is clear and unambiguous on its face, parol evidence is not to be considered.[31] If, on the other hand, the intention of the party is not clear from the written instrument itself, the court will consider testimony pertaining to antecedent agreements, communications and other facts which bear on the proper interpretation of the written instrument.[32]

45. The issue in this case is whether the October 17, 2000 Lease Agreement was in effect at the time of Jenner's breach of its contractual obligations in 2013, and whether Janet Levitsky consented to the October 17, 2000 Lease Agreement being in effect at the time of Jenner's breach. If she consented to the renewal or extension of the October 17, 2000 Lease Agreement then she is bound by the Personal Guaranty guaranteeing Jenner's performance of its obligations under that lease agreement. If the October 17, 2000 Lease Agreement had been extended, revived or renewed without her knowledge or consent, then she would not be bound by the Personal Guaranty.

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[30] See, *Samsel Rope & Marine Supply Co. v. Burgess,* 2007 WL 613935, * 3-4 (OhioApp. 2007).
[31] *Wilmington & N.R. Co. v. Delaware Valley Ry. Co. Inc.,* 1999 WL 4683705, at *5 (Del.Super.); *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5-7 (Del.C.C.P.. 2015).
[32] *Pellaton v. The Bank of New York,* 592 A.2d 473, 478 (Del. 1991).

46. The 2011 Amendment is dispositive of this issue. Michael P. Levitsky signed the 2011 Amendment on behalf of Jenner and Janet Levitsky signed the 2011 Amendment as Secretary to Jenner "attesting"[33], affirming as true or genuine, the terms of the document.

47. Janet Levitsky consented to the renewal of the October 17, 2000 Lease Agreement on behalf of Jenner in her capacity as Secretary to Jenner when she signed the 2011 Amendment on behalf of Jenner. The 2011 Amendment that she signed on behalf of Jenner expressly stated that the October 17, 2000 Lease Agreement was in full force and effect. By binding Jenner to the renewal, revival, or ratification of the October 17, 2000 Lease Agreement, she bound herself on the Personal Guaranty guaranteeing Jenner's full performance under that lease agreement. At the time of Jenner's breach in 2013, the October 17, 2000 Lease Agreement was in full force and effect as per the clear and unambiguous language of the 2011 Amendment and Janet Levitsky is liable on the Personal Guaranty guaranteeing Jenner's obligations under that lease agreement.

48. A person who signs or accepts a written instrument is bound by its written terms, in the absence of fraud.[34] When a contract is clear and unambiguous on its face, parol evidence should not be admitted to vary or contradict those unambiguous provisions of the contract.[35]

49. If Janet Levitsky wanted to make any additional modifications to the October 17, 2000 Lease Agreement by changing the applicability of her Personal Guaranty, *she* should have instructed Millcreek that an additional change to the October 17, 2000 Lease Agreement was desired in the 2011 Amendment prior to signing the contract. She did not.

50. In *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,*[36]a case which somewhat resembles the subject action, a commercial lease was entered into which provided for a five year

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[33] To attest: to affirm to be true or genuine, to authenticate by signing as a witness. Black's Law Dictionary (10th ed. 2014).

[34] *Pellaton v. The Bank of New York,* 592 A.2d 473, 477 (Del. 1991); *Morales v. Sun Construction, Inc.,* 541 F.3d 218, 221-223 (3rd Cir., 2008).

[35] *Pellaton v. Bank of New York,* 592 A.2d 473, 478-479 (Del. 1991).

term with an option for two more five year renewals. After the initial five year term expired, the tenant did not seek to renew or terminate the lease. The Landlord increased the monthly rental payment and the tenant continued to pay. Nearly two years after the initial five year term ended, the tenant signed a document titled "Memorandum of Lease Agreement" acknowledging the continuation of the lease. The parties' business relationship ran efficiently until 2013, when the tenant fell behind on rental payments. The court held that the personal guaranty provided with the original lease extended to the Memorandum of Lease Agreement, executed two years after the initial lease term ended. The court held that although the Memorandum of Lease Agreement did not contain a signature line for a guarantor, it did indicate that an option to renew has been granted, and with that option, a reaffirmance of the original conditions of the lease agreement.[37]

51. It is important to note that in *Shoppes of Mount Pleasant, LLC*, the guarantor on the Personal Guaranty of the initial lease term was a signatory on behalf of the company on the Memorandum of Lease Agreement. The court held that when the Memorandum of Lease Agreement was entered into on behalf of the company indicating that terms of the original lease has been renewed, the personal guaranty guaranteeing the fulfillment of those obligations was also revived and in effect.[38]

52. Janet Levitsky contends that she is not liable on her Personal Guaranty because after the expiration of the initial lease term on October 31, 2005, Jenner's status was that of a hold-over tenant, that the October 17, 2000 Lease Agreement was no longer in full force and effect, and that all her obligations under the Personal Guaranty ceased to exist.

53. Contrary to Janet Levitsky's contention that once a lease is expired it will always remain expired, there is nothing precluding the parties to an expired lease to subsequently renew the

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[36] The *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,*[36] 2015 WL 3824118, *4 (Del.C.C.P. 2015).
[37] *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5-7 (Del.C.C.P. 2015).
[38] *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P.. 2015).

terms of that lease, if the lease has not been expressly terminated, when they mutually desire to do so.[39] Parties to a commercial lease are free to enter into subsequent agreements which define, redefine, clarify or change their relationship.[40]

54. Moreover, it does not matter what Jenner's status was after the initial lease term expired and before November 1, 2011 for the disposition of the issue presented here. It does not matter what Janet Levitsky believed Jenner's status to be during this time period. What matters is that at the time of the breach, in 2013, the 2011 Amendment was in place, that Janet Levitsky signed the 2011 Amendment on behalf of Jenner, and that the 2011 Amendment clearly and unambiguously stated that the October 17, 2000 Lease Agreement was in full force and effect.

55. By signing the 2011 Amendment, Janet Levitsky on behalf of Jenner, ratified, revived and extended the October 17, 2000 Lease Agreement. The October 17, 2000 Lease Agreement was in full force and effect as per the 2011 Amendment at the time of the breach in 2013, and Janet Levitsky is liable on her personal guaranty.

56. As an aside, it is noted that the relationship of parties to a commercial lease agreement can change over time. If either party expressly terminates the lease, the lease is at an end. After a lease is expressly terminated, the tenant would become a hold over tenant if the tenant remained on the premises.[41] In this case, neither party expressly terminated the lease. It appears that they both continued to treat their ongoing relationship as a continuation of the lease agreement.

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[39] See, *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P. 2015).

[40] See, *Samsel Rope & Marine Supply Co. v. Burgess,* 2007 WL 613935 (OhioApp. 2007); *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5-7 (Del.C.C.P. 2015)(a subsequent agreement can be entered into during a seemingly hold-over tenancy showing a clear intent to continue the agreement in the manner in which it was consummated at the time of the original lease).

[41] See, *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P. 2015).

57. If neither party expressly terminates the lease, the parties to a commercial lease are free to contract, and to subsequently contract, however they so desire. Here, after the initial expiration of the lease, the parties (Jenner and Millcreek) appear to have at first orally contracted or through their course of conduct agreed to continue the lease agreement. Indeed, the October 17, 2000 Lease Agreement permitted Jenner to remain at the Rental Unit after the expiration of the initial lease term on a month to month tenancy and that all other terms, conditions, covenants and agreements of that lease agreement were to remain in place.

58. Then on September 22, 2006, the parties (Jenner and Millcreek) memorialized their agreement to continue the lease agreement. It appears that Jenner and Millcreek believed that the October 17, 2000 Lease Agreement governed their relationship from the inception of that agreement throughout their entire relationship.

59. Even when a lease agreement provides a specific time period for the renewal of the lease, the parties can, through their course of conduct, or through a written contract, agree to change those deadlines and to renew the terms of the original lease at a later time period than that provided for in the original lease.[42] As previously stated, parties to an expired lease are not precluded from subsequently renewing the terms of that lease, if the lease has not been expressly terminated, when they mutually desire to do so.[43]

60. All of the cases cited by Janet Levitsky in support of her contention that she is not liable under the Personal Guaranty to Millcreek for the damages at issue involve situations in which the guarantor was not a signatory to the lease extension or renewal or the lease was expressly terminated by a party. All of these cases are inapposite to the subject case, because in this case, Janet Levitsky was a signatory on behalf of Jenner to the lease extension.

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[42] See, *Samsel Rope & Marine Supply Co. v. Burgess,* 2007 WL 613935 (OhioApp. 2007); *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *5-7 (Del.C.C.P. 2015).

[43] See, *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc. and Gillen,* 2015 WL 3824118, *6 (Del.C.C.P. 2015).

61. In *Beatley v. Izzo,*[44] parents signed as guarantors of their daughter's off-campus apartment for one school year. The parents never signed any subsequent document agreeing to continue, renew or extend that lease. A different lease was entered into for the next school year, and the parents did not sign a new guaranty covering the second lease. Since there was no indication that the parents intended the second lease to be an extension or renewal of the original lease, the guaranty on the first lease was not enforceable as to second lease.

62. In another case cited by Janet Levitsky, *Samsel Rope & Marine Supply Co. v. Burgess,*[45] the guarantor to a commercial lease died before the lease was renewed on behalf of the company. The deceased guarantor had *not* been a signatory to the renewal of the lease on behalf of the company. The court held that the new agreement constituted a novation, releasing the deceased guarantor from liability. To hold otherwise would be as though the guarantor was contracting from the grave.[46]

63. In *Wilmington & N.R. Co. v. Delaware Valley Ry. Co. Inc.,* 1999 WL 4683705, at *5 (Del.Super.), the Delaware Superior Court found that the guarantee provision did not extend to rental payments after the lease concluded because the tenant expressly terminated the lease, but refused to leave. In *Wilmington & N.R. Co.*, the lease was not extended or renewed by anyone, let alone the guarantor of the original lease.

64. In another case cited by Janet Levitsky, *Trolley Square Associates v. Nielson,*[47] the lease had expired and the tenant became a hold-over. The guaranty guaranteed the obligations under the lease. If the lease was in effect, so to was the guaranty. In *Trolley Square Associates,* there

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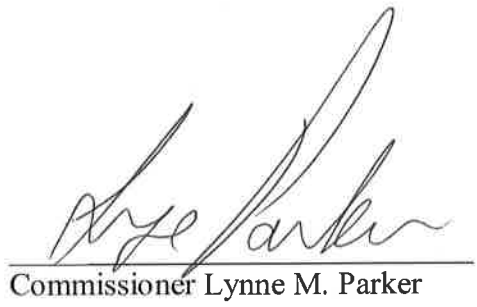
[44] *Beatley v. Izzo,* 2009 WL 1910960 (OhioApp. 2009).
[45] *Samsel Rope & Marine Supply Co. v. Burgess,* 2007 WL 613935 (OhioApp. 2007),
[46] *Samsel Rope & Marine Supply Co. v. Burgess,* 2007 WL 613935, * 3-4 (OhioApp. 2007).
[47] *Trolley Square Associates v. Nielson,* 886 P.2d 61, 68-69 (Utah.App. 1994).

was no lease in effect. The lease was not extended, renewed or modified. The guaranty did not extend to obligations incurred after the lease expired.[48]

CONCLUSION

For the reasons set forth herein, Janet Levitsky is liable on her Personal Guaranty for all damages incurred by Millcreek after November 1, 2011, the date she signed the 2011 Amendment in her capacity as Secretary of Jenner. The 2011 Amendment, by its express language, bound Jenner to the continuation of the October 17, 2000 Lease Agreement. Janet Levitsky, by her own conduct in binding Jenner to the continuation/renewal of the October 17, 2000 Lease Agreement, also bound herself on the Personal Guaranty guaranteeing the full performance of Jenner's contractual obligations under that lease agreement.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

[48] *Trolley Square Associates v. Nielson,* 886 P.2d 61, 68-69 (Utah.App. 1994).