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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

NATIONAL CITY BANK
Plaintiff

Case No: CV-09-701583

Judge: BRENDAN J SHEEHAN

JAYNE HERAK, ET AL
Defendant

JOURNAL ENTRY

83 DISP.COURT TRIAL - FINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW. O.S.J.
COURT COST ASSESSED AS EACH THEIR OWN.

Judge Signature

Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NATIONAL CITY BANK,)	CASE NO. CV 09 701583
)	
Plaintiff,)	JUDGE BRENDAN J. SHEEHAN
)	
v.)	
)	
JAYNE HERAK, <i>et al.</i> ,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Defendants.)	



This matter proceeded to bench trial on April 23, 2010. The Court finds as follows:

1. The parties entered the following stipulations on the record:
 - a. Defendants, on behalf of RPH & Associates, Inc., applied for and received a small business credit account from Plaintiff;
 - b. RPH & Associates, Inc. defaulted on the subject credit account;
 - c. RPH & Associates, Inc. is liable to Plaintiff for the amount stated in Plaintiff's Complaint;
 - d. Except for the information that was handwritten in the credit application, including "X"s in Section 4 of the application, Plaintiff's Exhibit 1, entitled Small Business Credit Application, is a a true and accurate copy of the applications executed by Defendants on behalf of RPH & Associates, Inc.;
 - e. Plaintiff's Exhibit 2 is a true and accurate copy of accounting statements that were mailed to RPH & Associates, Inc. each month regarding the subject credit account; and
 - f. Defendants were potential shareholders or people of interest with RPH & Associates, Inc.

2. Defendant Jayne Herak testified that she became acquainted with Cynthia Gray, an employee of Plaintiff National City Bank, through their mutual involvement in the Downtown Merchants Association.

3. Defendant Jayne Herak testified that Ms. Gray repeatedly advised her to obtain a small business loan for RPH & Associates, Inc. Ms. Herak further testified that she always informed Ms. Gray that no small business loan would be considered if it required a personal guarantee. Ms. Herak testified that Ms. Gray assured her that RPH & Associates, Inc. could obtain a loan without a personal guarantee.

4. Ultimately, RPH & Associates, Inc. applied for a small business loan with Ms. Gray at National City Bank. Upon applying for a small business loan on behalf of RPH & Associates, Inc., each of the individual defendants, Jayne Herak, Christopher Herak and Richard Rohlke, testified that they had expressed to Plaintiff's employee, Cynthia Gray, the requirement that any loan made to RPH & Associates, Inc. be made without a personal guarantee by any of the individual defendants.

5. Each of the individual defendants, Jayne Herak, Christopher Herak and Richard Rohlke, testified that the Small Business Loan Application was not completed as presented in Exhibit 1. Specifically, each of the individual defendants testified that the box in Section 4 of the application, which provides "I intend to apply as a guarantor of the obligations of a business, including sole proprietors", was not checked at the time each of them signed the application.

6. Defendant Richard Rohlke further testified that Plaintiff deducted funds from his personal account to apply as payment on the RPH & Associates, Inc. loan. He contacted

a representative of National City Bank to inform them of what he believed to be an error, noting that the small business loan did not create personal liability on his part. National City Bank reversed the charges, crediting Mr. Rohlke's account with the funds previously withdrawn.

7. The only witness on Plaintiff's behalf was Tom Morris, an employee of National City Bank who was familiar with processing and collecting upon completed loan applications. Mr. Morris was not present when the loan documents at issue were executed.

8. In reviewing the terms of a contract, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations if a contract is clear and unambiguous. *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph two of syllabus; *Uebelacker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268, 271.

9. It is well-settled Ohio law that the party alteration of a contract must show that (1) the alteration is a material part of the instrument; (2) it was made intentionally by the party seeking to enforce it without the consent of the other party; and (3) it was done after the execution and delivery of the instrument and after it had taken effect. *Davis v. Bauer* (1884), 41 Ohio St. 257.

10. When evidence is introduced tending to prove the subsequent alteration of a document, the time that the alteration was made is a question of fact to be determined from the evidence. *Fensler v. Sterling, Admr.* (1937), 132 Ohio St. 498, 508.

11. Courts construe guaranty agreements in the same manner as they interpret contracts. *G.F. Business Equip. v. Liston* (1982), 7 Ohio App.3d 223, 224. However, a guarantor may be bound only by the express terms of his contract. When the language of the contract or intent of the parties is ambiguous or equally capable of two meanings, the

interpretation most favorable to the guarantor should be adopted. *Haserot Gold Medal, Inc. v. Velotta* (1975) 1975 WL 183000, 2.

12. Additionally, where, as here, the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413.

13. Viewing the evidence presented under applicable law, Plaintiff National City Bank failed to establish by a preponderance of the evidence that Defendants Jayne Herak, Christopher Herak and Richard Rohlke entered into a contract with National City Bank as guarantors. Accordingly, **JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS JAYNE HERAK, CHRISTOPHER HERAK AND RICHARD ROHLKE AND AGAINST PLAINTIFF NATIONAL CITY BANK. EACH PARTY TO BEAR THEIR OWN COSTS.**

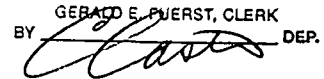
IT IS SO ORDERED.

7/13/10
Dated: July 13, 2010


JUDGE BRENDAN J. SHEEHAN

RECEIVED FOR FILING

JUL 14 2010

GERARD E. PVERST, CLERK
BY  DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 13th day of July, 2010:

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