

NOTICE  
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2019 IL App (5th) 180296-U

NO. 5-18-0296

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

MANUFACTURERS AND TRADERS	)	Appeal from the
TRUST COMPANY,	)	Circuit Court of
	)	Madison County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-L-326
	)	
GREENVILLE GASTROENTEROLOGY,	)	
SC; PETER S. KIM; and ANGELA R. KIM,	)	
	)	
Defendants and Third-Party Plaintiffs-	)	
Appellants	)	Honorable
	)	William A. Mudge,
(Cutera, Inc., Third-Party Defendant).	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court’s order entering summary judgment in favor of finance company in breach of contract actions is affirmed because there was no evidence that financing and guaranty agreements were not authentic, allowing duplicates of agreements was not unfair, and guarantor’s delayed signature did not require new consideration for personal guaranty.

¶ 2 The plaintiff, Manufacturers and Traders Trust Company, filed an action to collect sums due pursuant to a financing agreement (the Agreement) with the defendant, Greenville Gastroenterology, SC (Greenville Gastroenterology), and guaranty agreements

with the defendants, Peter S. Kim and Angela R. Kim. The plaintiff sought damages for the corporate defendant's failure to make monthly payments as required under the terms of the financing agreement and the individual defendants' failure to make payments as required under the terms of the guaranty agreements. The defendants filed a third-party complaint against third-party defendant, Cutera, Incorporated, which sold allegedly-defective medical equipment that was the subject of the financing agreement.

¶ 3 The circuit court granted summary judgment in favor of the plaintiff for its actions against the defendants and found no just reason to delay enforcement or appeal (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). On appeal, the defendants assert that the circuit court abused its discretion in finding that there was no just reason to delay enforcement or appeal, that the circuit court erred in granting summary judgment in favor of the plaintiff because it improperly ruled on duplicates of the Agreement, and that the circuit court erred in finding that the guaranty agreement Peter signed (the Peter Kim Guaranty) was enforceable. For the following reasons, we affirm.

¶ 4 **BACKGROUND**

¶ 5 DeLage Landen Financial Services (DLL) provided financing for equipment used commercially by entering into partnership agreements with vendors and manufacturers. When vendors or manufacturers sold their equipment to customers, rather than selling the equipment to customers directly for a purchase price, the vendors or manufacturers provided customers with the option of leasing or financing through DLL. On May 31, 2007, Greenville Gastroenterology executed an agreement (the Agreement) with DLL for the lease of a Cutera Full XEO laser (the equipment). In the Agreement, a duplicate of

which was attached to the plaintiff's complaint, DLL provided financing to Greenville Gastroenterology to pay for the use of the equipment. The Agreement required 72 monthly payments of \$3226.93. The Agreement revealed that Greenville Gastroenterology's agent signed as lessee, "agree[ing] to all of the Terms and Conditions contained in both pages" of the Agreement and "understand[ing] that this is a non-cancelable [l]ease for the full term shown above." Paragraph 15 of the Agreement provided as follows:

"[The lessor] may declare the entire balance of the unpaid [l]ease [p]ayments for the full term immediately due and payable, sue for and receive all [l]ease [p]ayments and any other payments then accrued or accelerated under this [l]ease or any other agreement plus the estimated fair market value of the [e]quipment at the end of the originally scheduled [t]erm, and all accelerated [l]ease [p]ayments \*\*\*. [The lessee] [is] also required to pay: (i) all expenses incurred \*\*\* in connection with the enforcement of any remedies \*\*\* and (ii) reasonable attorneys' fees."

Paragraph 20 of the Agreement provided that the lease was a finance lease as defined in article 2A of the Uniform Commercial Code.

¶ 6 DLL's agent's signature on the Agreement was dated June 29, 2007. Angela signed individually in the guaranty section of the Agreement, "unconditionally guarant[eeing] prompt payment of all the [l]essee's obligations" and "waiv[ing] notice of acceptance and all other notices or demands of any kind." Although Peter's name was printed along with Angela's name on the guaranty section contained within the

Agreement, his signature remained absent. However, on July 6, 2007, Peter signed a separate personal guaranty document, the Peter Kim Guaranty, “unconditionally guarantee[ing] to [l]essor \*\*\* the prompt payment of all rent \*\*\* due and owing under the [l]ease.”

¶ 7 On December 27, 2007, the Agreement was assigned by DLL to Court Square Leasing, the predecessor by merger to the plaintiff. In September 2009, servicing of the lease was transferred to the plaintiff. Greenville Gastroenterology had paid a total of 21 payments on the lease from inception until September 2009 and made no payments thereafter.

¶ 8 The plaintiff first filed its complaint in Pennsylvania, but on May 23, 2011, the Pennsylvania court dismissed the plaintiff’s action for lack of personal jurisdiction. *Manufacturers & Traders Trust Co. v. Greenville Gastroenterology, et al.*, No. 2010-CF-15424 (May 23, 2011). Accordingly, on March 11, 2015, the plaintiff filed a three-count complaint in the circuit court of Madison County for breach of contract against Greenville Gastroenterology (count I) and breach of guaranty against Peter and Angela (counts II and III) based on outstanding rental payments on the Agreement. The plaintiff alleged that the Agreement went into default on March 1, 2009, and the amount due and owing was \$155,948.

¶ 9 On January 22, 2016, the defendants filed a second motion to dismiss the plaintiff’s action, alleging that essential terms and conditions of the Agreement attached to the plaintiff’s initial complaint were illegible as a matter of law. The defendants argued that because the Agreement was illegible, it must be considered as a partial oral

agreement. The defendants further argued that with regard to count III directed against Peter, in addition to the Peter Kim Guaranty being illegible, it was not enforceable because it was executed more than a month after the Agreement, and was therefore not supported by consideration. Thereafter, on August 30, 2017, the defendants filed a motion to amend their answer seeking to add the defense of contract illegibility. The defendants asserted that this defense was part of the original affirmative defenses presented but was inadvertently not included in the amended answer to the complaint.

¶ 10 On July 21, 2017, the plaintiff filed a motion for summary judgment. On August 30, 2017, the defendants filed a reply to the plaintiff's motion for summary judgment, alleging that no portion of the Agreement was enforceable because it was illegible, and therefore, considered an oral contract and barred pursuant to the statute of limitations for enforcement of oral contracts. On September 26, 2017, the plaintiff filed a reply in support of its motion for summary judgment and attached an affidavit executed by Kenneth Fries on September 15, 2017. In Fries' affidavit, he stated that he was a custodian of records and had acquired personal knowledge of the facts of the case by reviewing the record of the account history and all other records as it related to the Agreement. Fries attested that the computerized books and records of the account at issue were made and maintained in the ordinary course of the plaintiff's business. Fries attested to the amount due and owing on the Agreement.

¶ 11 On September 28, 2017, the circuit court entered an order granting the plaintiff leave to supplement the record with a clearer copy of the Agreement and Peter Kim Guaranty, which had been tendered in open court. On October 5, 2017, the plaintiff filed

a duplicate of the Agreement. On October 18, 2017, the defendants filed a response to the plaintiff's supplement of the record. The defendants argued that the supplemental copies submitted by the plaintiff were not accompanied with an affidavit or other system of verification, that they were not original documents, and that they were inconsistently clearer than the copies previously submitted during the litigation. In the plaintiff's reply filed on November 1, 2017, the plaintiff argued that at the conclusion of the hearing on the plaintiff's motion for summary judgment on September 28, 2017, when the plaintiff tendered the clearer document copies, and the circuit court granted the plaintiff leave to supplement the record, the defendants proffered no objection to supplementing the record.

¶ 12 On January 15, 2018, the defendants filed a first-amended third-party complaint against Cutera, Incorporated. On March 1, 2018, the circuit court entered summary judgment in the plaintiff's favor on the plaintiff's action against the defendants. The circuit court held that the defendants had not submitted competent evidentiary material pursuant to Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) (involving requirements for affidavits in support of or in opposition to a motion for summary judgment) in opposition to Fries' affidavit, which had been filed in support of the plaintiff's motion for summary judgment. The circuit court concluded that a short period of time between the execution of the Agreement and the Peter Kim Guaranty did not require new consideration to enforce the Peter Kim Guaranty. The circuit court further held that although the defendants alleged that the duplicate of the Agreement attached to the complaint was illegible and therefore not valid, the circuit court had allowed the

plaintiff to supplement the record with a clearer duplicate than the one originally attached to the complaint. The circuit court noted that Illinois Rule of Evidence 1003 allowed for the admission of a duplicate to the same extent as the original unless a genuine question was raised about the original's authenticity. The circuit court held that "[t]his ha[d] not been done with competent evidence."

¶ 13 On March 20, 2018, the plaintiff filed a motion to clarify the circuit court's order, and on March 26, 2018, the defendants filed a motion to reconsider the circuit court's order. In objecting to the plaintiff's supplement of copies of the Agreement and the Peter Kim Guaranty, the defendants cited Illinois Rule of Evidence 1002 and argued that the plaintiff must prove prior existence of the original, its unavailability, the authenticity of the substitute, and diligence in attempting to procure the original. On April 26, 2018, the circuit court denied the defendants' motion to reconsider, granted the plaintiff's motion to clarify the March 1, 2018, order, and entered judgment in the plaintiff's favor, totaling \$244,236.37, including damages of \$230,380.86, attorney fees of \$13,385.50, and costs of \$470.01. The circuit court held that it was a final and appealable order with no just cause to delay execution or appeal. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). On May 24, 2018, the defendants filed a timely notice of appeal.

¶ 14

#### ANALYSIS

¶ 15 The defendants argue that the circuit court abused its discretion in entering a finding, pursuant to Illinois Supreme Court Rule 304(a), that there was no just reason to delay enforcement or appeal of its order entering summary judgment in the plaintiff's favor and awarding damages. The defendants argue that the circuit court's Rule 304(a)

finding was not requested by any party and that the third-party complaint remained pending and could potentially involve new evidence pertaining to the plaintiff's complaint against the defendants. The defendants argue that the court's finding of the final and appealable status of this decision will prohibit the court from revisiting new evidence which may provide additional defenses to the defendants.

¶ 16 Rule 304(a) provides that if multiple parties or claims for relief are involved in an action, a party may appeal a final judgment as to one or more but fewer than all of the claims only if the circuit court has made an express written finding that there is no just reason to delay enforcement or appeal of its order. The purpose of Rule 304(a) is to discourage piecemeal appeals in the absence of a just reason and to remove the uncertainty which exists when a final judgment is entered on fewer than all the matters in controversy. *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990); *Lozman v. Putnam*, 328 Ill. App. 3d 761, 767 (2002), as modified (Apr. 18, 2002).

¶ 17 “An order which includes language stating that it was entered pursuant to Rule 304(a) nevertheless may not be appealable unless it is a final judgment.” *Lozman*, 328 Ill. App. 3d at 767. A judgment is “final” if “it terminates the litigation between the parties on the merits or disposes of the rights of the parties either on the entire controversy or a definite and separate part thereof.” *Id.* at 768. “The circuit court may enter an order with the necessary Rule 304(a) language; however, the reviewing court is not precluded from making an independent assessment of the nature of the order.” *Id.* “A key factor in determining the finality of an order appealed from pursuant to Rule 304(a) is whether the



bases for recovery under the counts that were dismissed are different from those in the remaining counts.” *Id.* “In addition, the reviewing court may analyze the precise nature of the conflict remaining between the parties and the effect that the judgment in question will have on that conflict.” *Id.* “The circuit court’s grant of Rule 304(a) relief as entered here is reviewed under an abuse of discretion standard.” *Id.* at 771.

¶ 18 In this case, the circuit court’s order entering judgment in the plaintiff’s favor decided cognizable claims for relief, relying on the Agreement and the Peter Kim Guaranty to ultimately dispose of the plaintiff’s breach of contract claims against the defendants. As noted by the plaintiff, the Agreement was a commercial finance lease, executed solely for the plaintiff to provide financing to pay for the use of the equipment. Although there has been no final judgment with respect to the defendants’ third-party claim against Cutera, Incorporated, the bases of recovery for the separate actions are different. In the defendants’ third-party action, the defendants sought money damages, alleging that they relied on misrepresentations Cutera, Incorporated, presented with regard to the equipment. In entering summary judgment in the plaintiff’s favor on its breach of contract claims against the defendants, based on the Agreement and the Peter Kim Guaranty, the circuit court disposed of these distinct causes of action. Because the circuit court’s order disposed of the rights of the parties on a separate and definite part of the controversy, the order granting summary judgment on the plaintiff’s claims against the defendants was a final judgment with respect to those claims. We therefore consider the defendants’ appeal.

¶ 19 Although summary judgment is a drastic means of disposing of litigation, it is an appropriate measure in cases where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390-91 (1993). A nonmoving party risks entry of summary judgment when he fails to file counteraffidavits to rebut assertions made in the movant’s affidavits in support for summary judgment because the trial court considers as true all assertions made in the moving party’s affidavit when the nonmoving party fails to file opposing affidavits. *Diggs v. Suburban Medical Center*, 191 Ill. App. 3d 828, 833 (1989). “Whether the entry of summary judgment was appropriate is a matter we review *de novo*.” *Progressive Universal Insurance Co. v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 128 (2005).

¶ 20 The defendants contend that their allegation of illegibility was sufficient to create a genuine issue of material fact to preclude summary judgment. The plaintiff counters that the defendants have forfeited their right to raise this issue because the only defendant who raised illegibility as a defense in the trial court was Angela, as it related to her guaranty. The plaintiff asserts that Greenville Gastroenterology and Peter have forfeited this argument because they did not raise the issue in their amended answer and because they admitted to the existence of certain terms of the lease, which would be impossible if the lease were illegible.

¶ 21 Issues not raised before the trial court are considered forfeited, and a party may not raise such issues for the first time on appeal. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 300-01 (2006). However, the record before us on appeal reveals that this

issue was raised before the circuit court. On August 26, 2016, Greenville Gastroenterology and Angela filed an answer and affirmative defenses to the plaintiff's complaint, alleging that the Agreement and the guaranties were illegible and thus unenforceable. Likewise, the defendants also filed a reply to the plaintiff's motion for summary judgment, alleging that no portion of the Agreement was enforceable because it was illegible, and therefore, considered an oral contract and barred pursuant to the statute of limitations for enforcement of oral contracts. As a result of the defendants' arguments before it, the circuit court ruled on the illegibility issue, finding that the plaintiff had supplemented the record with a clearer, legible copy of the Agreement, which was properly allowed pursuant to Illinois Rule of Evidence 1003, and that no genuine question was raised about the original's authenticity. Accordingly, we will address the defendants' contentions regarding the illegibility of the documents. See, *e.g.*, *Caro v. Blagojevich*, 385 Ill. App. 3d 704, 710-11 (2008) (even if plaintiffs' argument had been only a few sentences, "it is clear that plaintiffs adequately raised the issue at the outset of this cause and argued it before the trial court to that court's satisfaction, and defendants' assertions otherwise are wasted words").

¶ 22 The defendants argue that the circuit court erred in granting summary judgment in the plaintiff's favor based on the Agreement because the duplicate attached to the complaint was illegible, and therefore, the contract should have been considered oral for purposes of the applicable statute of limitations, which would bar the plaintiff's action. The defendants argue that the circuit court incorrectly allowed the plaintiff to supplement the record with a clearer duplicate of the Agreement and should have required the

plaintiff to file the original of the Agreement. The defendants assert the same argument to the guaranty section of the Agreement executed by Angela and the Peter Kim Guaranty and therefore contend that the guarantees are also unenforceable. The defendants also argue that “[t]he [c]ourt erred in the application of the law (best evidence rule) by allowing the [p]laintiff to supplement the record without the adequate explanation as to where the ORIGINAL document would be found.”

¶ 23 “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required,” except as provided elsewhere by statute or by the Illinois Rules of Evidence. Ill. R. Evid. 1002 (eff. Jan. 1, 2011). However, pursuant to Illinois Rule of Evidence 1003 (eff. Jan. 1, 2011) a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Illinois Rule of Evidence 1003 codified the *Bowman* (*People v. Bowman*, 95 Ill. App. 3d 1137, 1143 (1981)) standard. The court in *Bowman* recognized “that the accuracy of a duplicate resulting from the reproduction of the contents of an original is in most cases no longer a significant issue.” *Bowman*, 95 Ill. App. 3d at 1143; see also *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 30.

¶ 24 We reject the defendants’ contention that the circuit court improperly considered the duplicates of the Agreement and the Peter Kim Guaranty in the record. Although the defendants argue that only the original document could demonstrate that it was authentic, Illinois Rule of Evidence 1003 provides that a duplicate is admissible unless a genuine

question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original. Ill. R. Evid. 1003 (eff. Jan. 1, 2011). The defendants raised no question as to the authenticity of the original Agreement or Peter Kim Guaranty (see Ill. R. Evid. 1003 (eff. Jan. 1, 2011)), and the defendants raised no argument that the content and terms of the original agreements were at issue. See *Law Offices of Colleen M. McLaughlin*, 2011 IL App (1st) 101849, ¶ 31; see also *Indian Valley Golf Club, Inc. v. Village of Long Grove*, 173 Ill. App. 3d 909, 920 (1988) (rejecting the defendant’s best evidence objection where the defendant raised no issue as to the authenticity of the original deeds in the case other than objecting on a purely technical basis). Moreover, despite the defendants’ contention that the plaintiff was required to explain where the original document could be found, the availability of an original document is not an element of Rule 1003, and it is not a basis for overturning the trial court’s ruling.

¶ 25 The defendants also failed to demonstrate that admission of the duplicates in lieu of the originals was unfair under the circumstances. See Ill. R. Evid. 1003 (eff. Jan. 1, 2011). As noted by the plaintiff, the defendants have implicitly conceded the legibility of many of the terms in the Agreement. For example, Greenville Gastroenterology admitted the Agreement’s payment schedule and filed an amended answer to the plaintiff’s complaint where it alleged, as part of an affirmative defense, that the plaintiff “failed to comply with the provisions of Paragraph 15 of the initial [l]ease by failing to mitigate its losses.” In his answer, Peter admitted that “the terms of the [l]ease and [g]uaranty state that in the event payments were not made as agreed, late fees would accrue.” Peter also implicitly conceded the legibility of paragraph 15 of the Agreement by referencing its

mitigation-of-losses language and quoting the word “reasonable” as having been omitted from the plaintiff’s complaint with regard to collection of attorney fees. Moreover, the defendants failed to allege that these duplicates, showing their signatures, were not the agreements they consented to or to identify which terms of the agreement were illegible.

¶ 26 “Our long-standing evidentiary rule as adopted in *Bowman* allows the admission of duplicates of documents unless (1) there is an issue as to the authenticity of the original or (2) its admission would be unfair,” and the defendants showed neither circumstance here. See *Law Offices of Colleen M. McLaughlin*, 2011 IL App (1st) 101849, ¶ 37; Ill. R. Evid. 1003 (eff. Jan. 1, 2011); see also 735 ILCS 5/2-606 (West 2014) (common law pleadings, including agreements attached to complaint, are admissible in evidence with no further foundational or evidentiary requirements for their admission into evidence). Because the defendants failed to sufficiently challenge the duplicates as required under the Illinois Rules of Evidence, we cannot say that the circuit court abused its discretion by admitting the duplicates in lieu of the originals or in relying on the duplicates to enter summary judgment in the plaintiff’s favor.

¶ 27 The defendants also argue that the circuit court erred in finding that the Peter Kim Guaranty, signed 36 days after the Agreement was signed by Greenville Gastroenterology’s agent, was enforceable because, the defendants argue, there was no consideration for the Peter Kim Guaranty. To support their argument, the defendants cite *First National Bank of Red Bud v. Chapman*, 51 Ill. App. 3d 738, 740 (1977). In *First National Bank of Red Bud*, the court held that “where the agreement of guaranty is executed contemporaneously with the original note or obligation, the consideration for

the note or obligation furnishes sufficient consideration for the agreement of guaranty.” *Id.* If the debt is incurred and the guaranty thereafter promises to pay or guarantee it, “some additional consideration is necessary to support such promise.” *Id.* “Consideration has been defined as ‘... some right, interest, profit or benefit accruing to one party or some forbearance, disadvantage, detriment, loss or responsibility given, suffered or undertaken by the other.’ [Citation.]” *Finn v. Heritage Bank & Trust Co.*, 178 Ill. App. 3d 609, 611-12 (1989).

¶ 28 The defendants note that Peter executed the Peter Kim Guaranty on July 6, 2007, 36 days after the Agreement was signed by Greenville Gastroenterology’s agent on May 31, 2007, and 13 days after the delivery of the unit into the possession of the defendants. Thus, the defendants argue, Peter’s signing of the guaranty was not an integral part of receiving the product or any other services relating to the leased machine, was not contemporaneous with the Agreement, and therefore lacked consideration. However, the defendants overlook that DLL’s agent signed the Agreement on DLL’s behalf on June 29, 2007, only seven days prior to Peter’s execution of the Peter Kim Guaranty.

¶ 29 In *L.D.S., LLC v. Southern Cross Food, Ltd.*, 2011 IL App (1st) 102379, ¶ 44, the landlord brought actions against the tenant for breach of lease and against the principal for breach of guaranty. The guaranty had been executed six days after the execution of the lease. *Id.* On appeal from the trial court’s order granting the principal’s motion to dismiss complaint, the appellate court nevertheless held that, especially where the guaranty allegedly referenced the lease, the landlord had sufficiently alleged that the two were executed contemporaneously, requiring no new consideration for the guaranty. *Id.*

¶ 47; see also *Vaughn v. Commissary Realty, Inc.*, 30 Ill. App. 2d 296, 301-03 (1961) (court concluded that passage of nine days between the execution of the lease and the execution of the guaranty was “without significance” and that guaranty was therefore considered as executed contemporaneously with lease).

¶ 30 Here, the Peter Kim Guaranty referenced the Agreement between Greenville Gastroenterology and DLL for the equipment, and Peter signed the document seven days after DLL’s agent had signed the Agreement. Additionally, in paragraph 10 of Kenneth Fries’ affidavit, he attested to the following:

“It was intended that Peter Kim also guaranty performance of the [l]ease by executing a personal guaranty on the [l]ease, but due to an oversight, his signature was not obtained. Therefore, Peter Kim executed a personal guaranty to the [l]ease on July 6, 2007.”

¶ 31 The circuit court held that “there is no competent evidence in the record indicating that the personal guarantees obtained from the Kims were not intended to be contemporaneously made by the contracting parties.” Thus, the circuit court concluded that Peter’s promise to personally guarantee Greenville Gastroenterology’s obligation was given as part of the transaction by which the guaranteed debt was created and did not require additional consideration for its enforcement. See *L.D.S., LLC*, 2011 IL App (1st) 102379. We agree with the circuit court’s conclusions. Accordingly, we conclude that Peter executed the Peter Kim Guaranty contemporaneously with the lease, and therefore, the Peter Kim Guaranty was enforceable without additional consideration.



¶ 32

## CONCLUSION

¶ 33 For the reasons stated, we affirm the circuit court's summary judgment in favor of the plaintiff.

¶ 34 Affirmed.