

Nos. A09-859 and A09-995

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State of Minnesota  
**In Court of Appeals**

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Starlite Limited Partnership,

*Respondent,*

vs.

Landry's Restaurants, Inc.  
f/k/a Landry's Seafood Restaurants, Inc.,  
a Delaware corporation,

*Appellant.*

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**RESPONDENT'S BRIEF**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... ii**

**STATEMENT OF THE ISSUES..... 1**

**STATEMENT OF THE CASE..... 2**

**STATEMENT OF THE FACTS..... 3**

**SUMMARY OF ARGUMENT ..... 5**

**STANDARD OF REVIEW ..... 6**

**ARGUMENT ..... 7**

**I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE  
LEASE WAS ACCEPTED AND IS VALID AND ENFORCEABLE.. 7**

**II. THE TRIAL COURT CORRECTLY CONCLUDED THAT  
SEAFOOD HOUSE WAIVED ITS RIGHT TO DECLARE THE  
LEASE VOID. .... 9**

**III. THE TRIAL COURT CORRECTLY CONCLUDED THAT  
STARLITE’S MONTHLY RESIDENT STATEMENTS  
CONSTITUTED WRITTEN DEMAND FOR PAYMENT UNDER  
THE GUARANTY. .... 12**

**1. Landry’s is Absolutely Liable under its Lease Guaranty..... 12**

**2. The Resident Statements Were Sufficient “Written Demand”  
for Payment Under the Guaranty..... 14**

**CONCLUSION..... 16**

## TABLE OF AUTHORITIES

### Cases

<i>Beirne v. Alaska State Hous. Auth.</i> , 454 P.2d 262 (Alaska 1969) .....	10
<i>Callender v. Kalscheuer</i> , 184 N.W.2d 811 (Minn. 1971).....	8
<i>Cederstand v. Lutheran Bhd.</i> , 117 N.W.2d 213 (Minn. 1962) .....	1, 7
<i>Charmoll Fashions, Inc. v. Otto</i> , 248 N.W.2d 717 (Minn. 1976).....	2, 14
<i>Creative Consultants, Inc. v. Gaylord</i> , 603 N.W.2d 654 (Minn. Ct. App. 1987).....	9
<i>Currie State Bank v. Schmitz</i> , 628 N.W.2d 205 (Minn. 2001).....	2, 12, 14
<i>Dahmes v. Indus. Credit. Co.</i> , 110 N.W.2d 484 (Minn. 1961) .....	14
<i>Dayton Devel. Co. v. Gilman Fin. Servs., Inc.</i> , 419 F.3d 852 (8th Cir. 2005).....	9
<i>Fingerhut Corp. v. Suburban Nat'l Bank</i> , 460 N.W.2d 63 (Minn. App. 1990).....	6
<i>Fischer v. Pinskeminn</i> , 243 N.W.2d 733 (Minn. 1976) .....	1, 9
<i>Houston Dairy, Inc. v. John Hancock Mut. Life Ins. Co.</i> , 643 F.2d 1185 (5th Cir. 1981) .....	11,12
<i>Indianhead Truck Line, Inc. v. Hvidsten Trans., Inc.</i> , 128 N.W.2d 334 (Minn. 1964) ....	13
<i>Kansas City v. Indus. Gas Co.</i> , 28 P.2d 968 (Kan. 1934) .....	10
<i>Knudsen v. Transp. Leasing/Contract, Inc.</i> , 672 N.W.2d 221(Minn. Ct. App. 2003).....	13
<i>Markman v. H.A. Bruntjen Co.</i> , 81 N.W.2d 858 (Minn. 1957) .....	7
<i>Montgomery Ward &amp; Co. v. County of Hennepin</i> , 450 N.W.2d 299 (Minn. 1990) .....	1, 9
<i>Nichols v. Nichols</i> , 141 A.2d 746 (Md. 1958) .....	10
<i>Pollard v. Southdale Gardens of Edina Condominium Ass'n</i> , 698 N.W.2d 449 (Minn. Ct. App. 2005) .....	7
<i>Rooney v. Dayton-Hudson Corp.</i> , 246 N.W.2d 170 (Minn. 1976) .....	10
<i>Roshek Realty Co. v. Roshek Bros. Co.</i> , 87 N.W.2d 8 (Iowa 1957) .....	2, 15, 16
<i>Sabò v. Fasano</i> , 201 Cal. Rptr. 270 (Cal. Ct. App. 1984) .....	10
<i>Starr v. Starr</i> , 251 N.W.2d 341 (Minn. 1977).....	13
<i>TPI/CMS St. Paul Ltd. P'ship v. Expansion Enters., Inc.</i> , No. C5-94-1980, 1995 WL 296014 (Minn. Ct. App. May 16, 1995).....	11
<i>W.D. Leedy &amp; Co. v. Shirley</i> , 104 S.E.2d 580 (Ga. Ct. App. 1958) .....	10

### Other Authorities

1 E. Allan Farnsworth, <i>Farnsworth on Contracts</i> § 3.19 (2d ed. 1990).....	11
1 Samuel Williston & Richard A. Lord, <i>A Treatise on the Law of Contracts</i> § 5:5 (4th ed. 1990) .....	7
<i>A Treatise on the Law of Contracts</i> § 6.56 (4th ed. 2007).....	11
<i>Restatement (Second) of Contracts</i> § 70 (1981) .....	11

## STATEMENT OF THE ISSUES

### **I. Did the trial court correctly conclude that the written Lease agreement is valid and enforceable?**

On motion for summary judgment, the trial court concluded that there is no genuine dispute that Starlite, as landlord, and Seafood House, as tenant, executed a Lease agreement, “and then performed in accordance with the contract for the next nine years,” including Seafood House’s construction and operation of a “Joe’s Crab Shack” restaurant on the leased premises and its payment of rent and taxes. (Appellant’s Addendum (“ADD”) at 6). On these undisputed facts, the trial court held, as a matter of law, that “[Seafood House] waived the relatively technical requirement that [Starlite] execute the contract within six days,” and that the “lease agreement is therefore valid and enforceable.” (Appellant’s Appendix (“A”) at 7).

#### Apposite Authority:

*Cederstand v. Lutheran Bhd.*, 117 N.W.2d 213 (Minn. 1962)

*Fischer v. Pinskeminn*, 243 N.W.2d 733 (Minn. 1976)

*Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990)

### **II. Did the trial court correctly conclude that Starlite’s monthly “Resident Statements” constituted a “written demand” for payment under the Lease Guaranty?**

On motion for summary judgment, the trial court concluded that the Lease Guaranty “does not require that the written demand for payments be in any particular form,” and that monthly “Resident Statements” which included the “amount due” “are sufficient as a matter of law to constitute a written demand for payment under the

guaranty.” (ADD 9). The trial court therefore calculated liability under the Guaranty from May 2007, which is the date of the first Resident Statement showing past due rent. (*Id.*).

Apposite Authority:

*Currie State Bank v. Schmitz*, 628 N.W.2d 205 (Minn. 2001)

*Charmoll Fashions, Inc. v. Otto*, 248 N.W.2d 717 (Minn. 1976)

*Roshek Realty Co. v. Roshek Bros. Co.*, 87 N.W.2d 8 (Iowa 1957)

**STATEMENT OF THE CASE**

On January 6, 2009, Respondent Starlite Limited Partnership (“Starlite”) filed this action in the Fourth Judicial District Court, Hennepin County, the Honorable Regina M. Chu presiding, seeking to recover the balance due under Appellant Landry’s Restaurants, Inc.’s (“Landry’s”) April 1998 guaranty of a commercial Ground Lease Agreement (the “Lease”) between Starlite, as landlord, and Landry’s Seafood House--Minnesota, Inc. (“Seafood House”), as tenant. There is no dispute that Seafood House failed to pay the June 2007 rent due under the Lease, and has not paid any rent, taxes or other charges due and owing since that date.

Appellant Landry’s alleged in its defense that the written commercial Lease was not valid or enforceable because it had not been executed by Starlite within six days; but was instead executed five days past the deadline for acceptance. (ADD 5-6). Landry’s also claimed that, even if the Lease were valid, it did not receive a written demand for payment as required by the Guaranty until January 29, 2009, and therefore cannot be held liable for any damages accruing before that date. (*Id.*).

Starlite filed its motion for summary judgment on January 22, 2009. On March 17, 2009, the trial court filed its Order granting Starlite's motion for summary judgment, and denying Landry's request that judgment be entered in its favor *sua sponte*. (Order Granting Plaintiff's Motion for Summary Judgment and Memorandum, ADD 2). On May 13, 2009, Judgment was entered in favor of Starlite and against Landry's in the amount of \$194,395.78, plus \$23,291.14 in attorney's fees, for a total judgment amount of \$217,686.92. (ADD 1).

### STATEMENT OF THE FACTS

On or about April 30, 1998, Starlite, as landlord, and Seafood House, as tenant, entered into a commercial, non-residential Ground Lease Agreement for certain real property in Ramsey County, Minnesota. (A 5-25). Contemporaneously with the execution of the Lease, Seafood House's corporate parent, Landry's, executed a Guaranty for, among other things:

**(a) the full, faithful and timely payment and performance by [Seafood House] of all of the payments, covenants and other obligations of [Seafood House] under or pursuant to the Lease . . . and (c) the full and timely payment of the costs of enforcing this Guaranty (collectively, the "Guaranteed Obligations").**

(A 26) (emphasis added).

Landry's also promised in its Guaranty that:

**[i]f [Seafood House] shall default at any time in the payment or performance of any of the Guaranteed Obligations, then [Landry's], at its expense, shall on demand of [Starlite] fully and promptly, and well and truly, pay and perform the Guaranteed Obligations, and in addition shall on [Starlite's] demand pay to [Starlite] any and all sums due to [Starlite], including (without limitation) all interest on past due obligations of [Seafood House], costs advanced by [Starlite], and damages and all expenses (including reasonable attorneys' fees**

**and litigation costs), that may arise in consequence of [Seafood House's] default.**

(A 26-27) (emphasis added).

In accordance with the Lease terms, Seafood House constructed a building on the leased premises and, for a period of nine years, it operated a "Joe's Crab Shack" restaurant from that location and otherwise fully performed under the Lease, including the payment of rent and taxes. (ADD 4; A 2). After May 2007, however, Seafood House stopped paying rent, closed the restaurant, and walked away from its obligations under the Lease. (*Id.*).

Each and every month during the Lease term Starlite delivered "Resident Statements" to Seafood House and Landry's that: (i) identified Starlite as the sender; (ii) identified Landry's as the recipient; (iii) included the mailing date; (iv) stated the due date of the rental payment; (v) provided a description of the monthly rental charge; (vi) stated the total amount of rent due and past due; (vii) stated the amount paid; and (viii) stated the total balance due under the Lease. (A 32-50). Although Seafood House stopped making rent payments in June 2007, Starlite continued to send updated Resident Statements to Landry's every month, each of which showed the past due rent and other charges. (*Id.*).

In addition to the monthly Resident Statements, and as a prelude to this lawsuit, on or about January 29, 2008, Starlite sent a letter to Landry's describing the existing defaults, and reminding Landry's of its continuing obligations under the express terms of its Guaranty. (A 51-52). Because Landry's had not responded either to the Resident

Statements or the more formal demand, on or about July 18, 2008, Starlite provided Landry's with a final demand for payment. (A 54-55). This action followed.

### **SUMMARY OF ARGUMENT**

The facts are not in dispute. Seafood House, as tenant, executed a commercial Ground Lease Agreement on April 30, 1998. At the same time, Seafood House's corporate parent, Landry's, executed its Guaranty of the Lease. Eleven days later, on May 11, 1998, Starlite, as landlord, counter-signed the Lease. After Starlite executed and accepted the Lease, Seafood House constructed a building on the leased premises, and it operated a "Joe's Crab Shack" from that location and otherwise fully complied with all of the Lease terms, including the payment of rent and taxes, for nine years. Not until June 2007 did Seafood House stop paying rent and otherwise cease performing its Lease obligations.

In an effort to avoid its liability under the Guaranty, Landry's first claims that the Lease is not valid, because Lease Section 18.3 requires that Starlite sign and accept it within six days, not eleven days of execution by Seafood House. As the trial court correctly determined, and as explained more fully below, that argument is contrary both to the undisputed facts and the law, because through nine years of conduct consistent with the terms of the Lease Seafood House unequivocally waived its right to rely on the "relatively technical" deadline for Starlite's acceptance of the Lease. (ADD 7).

Alternatively, Landry's claims that the Resident Statements it received each and every month were not valid written notices of demand for payment under the Guaranty, and therefore its liability extends back only to January 2008, when a more formal demand

notice was sent, and not to June 2007, when Seafood House originally defaulted. Again, the argument is without factual or legal support.

The Guaranty provides that Landry's is liable up to an amount that "would be payable under the Lease during the period . . . beginning on the date on which [Starlite] makes a written demand . . . upon [Landry's] to make payments . . .[.]" (A 26). As the trial court appropriately noted, the Guaranty does not say that the "written demand" for payment has to be in any particular form; and it is undisputed that the Resident Statements put Landry's on notice that Seafood House was in default of its Lease obligations because each statement clearly indicates that rent and other charges are past due and unpaid. Under the plain terms of the Guaranty, if Seafood House is not making those payments, the guarantor, Landry's, must.

For these, and all of the reasons below, the trial court correctly concluded that the Lease is valid and enforceable, and that the Resident Statements were sufficient "written notice" of demand for payment under the Guaranty. Accordingly, the trial court's Order and Judgment should be affirmed in all respects.

#### **STANDARD OF REVIEW**

Where the material facts are not in dispute, the only issue on appeal is whether the trial court erred in its application of the law. *Fingerhut Corp. v. Suburban Nat'l Bank*, 460 N.W.2d 63, 65 (Minn. App. 1990).

## ARGUMENT

### **I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE LEASE WAS ACCEPTED AND IS VALID AND ENFORCEABLE.**

“Whether a contract is formed is judged by the objective conduct of the parties and not their subjective intent.” *Cederstand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962). Consequently, an acceptance which does not substantially and materially alter the terms of the offer gives rise to a valid contract. *Markman v. H.A. Bruntjen Co.*, 81 N.W.2d 858, 862 (Minn. 1957).

The facts are not in dispute. Seafood House executed the Lease on April 30, 1998, and Starlite counter-signed it eleven days later; as presented and without any alterations whatsoever. After Starlite executed the Lease, Seafood House took possession of the leased premises, constructed a building, operated a “Joe’s Crab Shack” restaurant business and paid rent and real estate taxes according to the Lease terms for nine years.

Contrary to the undisputed facts, Landry’s asks this Court to find that no Lease agreement ever existed because Starlite signed the document five days too late. The argument is contrary to law and fact.

As the trial court pointed out, “a written contract may be modified by subsequent acts and conduct of the parties to the contract.” (ADD 6, citing to *Pollard v. Southdale Gardens of Edina Condominium Ass’n*, 698 N.W.2d 449, 453 (Minn. Ct. App. 2005)). More specifically, as stated by one well-respected commentator, “[o]ften, an offeror who has imposed a limit of time in its offer does not in fact insist upon it . . . [and a] manifestation of continued willingness on the part of the offeror will extend the time

during which acceptance may occur, constituting in effect a new offer, which may be accepted and if so accepted will ripen into a contract.” 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 5:5 (4th ed. 1990).

Again, there is no dispute that the parties’ acts and conduct for more than nine years were fully consistent with the Lease terms, right down to the letter; and were entirely inconsistent with the term that required Starlite to sign and deliver the Lease within six days after it was executed by Landry’s. As such, it is the six-day acceptance term, not the Lease in its entirety, that is void.

Landry’s reliance on *Callender v. Kalscheuer*, 184 N.W.2d 811 (Minn. 1971), is misplaced, because that case is on a completely different factual footing than this one. In *Callender*, one party offered to sell real property to another, with the stated condition that the offer must be accepted in six days. When the buyer purported to accept the offer three days after it had expired, the seller instead sold to a third party. On those narrow facts, the Court concluded that a contract of sale had never been formed.

Here, unlike in *Callender*, Seafood House did not manifest any intention to declare its offer to enter into the Lease to be off the table. Just the opposite, when Starlite formally accepted by signing and delivering the Lease after the stated deadline, Seafood House not only occupied the premises -- it built a restaurant on the site and paid rent and taxes for the next nine years.

The trial court did not accept Landry’s argument, made for the first time more than ten years after the fact, that there never was a Lease, because every objective fact indicates otherwise. (ADD 6-7). Because the facts remain the same on this appeal, so

too should the result. Seafood House knowingly and willingly entered into, performed and received all the benefits of the Lease. Landry's, as Seafood House's guarantor, cannot now, as a matter of convenience, erase the last ten years and deny that the Lease ever existed.

## **II. THE TRIAL COURT CORRECTLY CONCLUDED THAT SEAFOOD HOUSE WAIVED ITS RIGHT TO DECLARE THE LEASE VOID.**

“The continued performance of a party to a contract despite the other party's failure to comply with a term of the agreement constitutes a voluntary waiver of that contract term.” (ADD 6, citing *Fischer v. Pinskeminn*, 243 N.W.2d 733, 735 (Minn. 1976); *Dayton Devel. Co. v. Gilman Fin. Servs., Inc.*, 419 F.3d 852, 858 (8th Cir. 2005); *Creative Consultants, Inc. v. Gaylord*, 603 N.W.2d 654, 657 (Minn. Ct. App. 1987)). “Waiver is the ‘voluntary and intentional relinquishment or abandonment of a known right.’” *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 302 (Minn. 1990). “The question of waiver may be decided as a matter of law where the facts are not in dispute.” *Id.*

As explained above, the facts that demonstrate Seafood House's intentional and unequivocal relinquishment of its right to declare the Lease void when it was not signed and returned in six days are not in dispute. Seafood House occupied the leased premises, built a restaurant, operated the restaurant, paid rent and real estate taxes, and otherwise complied with the letter of the Lease for nine years. In the trial court's own words, “[t]hese facts demonstrate as a matter of law that [Seafood House] waived the relatively

technical requirement that [Starlite] execute the contract within six days.” (ADD 7). Landry’s has not cited to any authorities that would mandate a different result.<sup>1</sup>

As but one example, Landry’s reliance upon *Rooney v. Dayton-Hudson Corp.*, 246 N.W.2d 170 (Minn. 1976), to support its argument that there was no waiver is entirely off the mark. In *Rooney*, a deed and other documents relating to the sale of a department store building were deposited into an escrow account, along with a letter providing instructions for the escrow agent. The escrow instructions stated that the agent may deliver the deed to the property if the potential purchaser deposited an additional sum of money on or before October 31, 1973. The purchaser was ultimately unable to secure financing and requested an extension of time to make the deposit. The seller refused the request for an extension, and ultimately sold the subject property to a third party. *Id.* at 172-73.

As did the seller in *Rooney*, when the six-day acceptance deadline passed without a signed Lease from Starlite, Seafood House could have walked away. Unlike *Rooney*, however, Seafood House did not reject Starlite’s written acceptance as untimely, but instead chose to occupy the leased premises, build and operate a restaurant, pay rent and taxes and otherwise comply with every Lease term. As the trial court found, that

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<sup>1</sup> Other jurisdictions that have considered the question are also of the view that one who makes an offer and fixes a time for its acceptance may waive the time of acceptance term. *See, e.g., Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Cal. Ct. App. 1984) (applying the well-settled maxim that a contracting party may waive conditions placed in a contract solely for that party’s benefit, such as the means of acceptance, to a case involving a time limit imposed by the offeror for acceptance by the offeree); *Kansas City v. Indus. Gas Co.*, 28 P.2d 968, 970 (Kan. 1934); *W.D. Leedy & Co. v. Shirley*, 104 S.E.2d 580, 585 (Ga. Ct. App. 1958); *Nichols v. Nichols*, 141 A.2d 746, 748 (Md. 1958); *Beirne v. Alaska State Hous. Auth.*, 454 P.2d 262, 264-65 (Alaska 1969).

conduct, which occurred over a period of nine years, is a clear and unequivocal waiver of Seafood House's right to stand on its right to reject an untimely acceptance.

Landry's citation to *TPI/CMS St. Paul Ltd. P'ship v. Expansion Enters., Inc.*, No. C5-94-1980, 1995 WL 296014 (Minn. Ct. App. May 16, 1995), gets it no further. That case, unlike this one, concerns a third-party assignment of an admittedly void lease. In *TPI/CMS*, no one even argued on appeal that the underlying lease was not void, so the court had no choice but to assume that it was a nullity and could not, therefore, be assigned to a third party. *Id.* at \*1. Here, in contrast, Starlite and Seafood House are both original parties to the Lease in question, both fully performed according to its terms for nine years, and they mutually recognized the Lease as valid and binding. Consequently, *TPI/CMS*, like the other cases to which Landry's cites, does nothing to change the fact that Seafood House knowingly and willingly waived any right it may otherwise have had to declare the Lease void for late acceptance.

The bottom line is that, in every case to which Landry's cites, the offeror ultimately exhibited an unwillingness to enter into the contract with a late-accepting party. Like the offerors in those cases, way back in April 1998 Seafood House could have invoked the six-day acceptance term, and it could have rejected the Lease. The difference here is that Seafood House never stood on its contractual right, but instead accepted the Lease Starlite had signed five days after the stated deadline without reservation, and thereafter fully performed its end of the Lease bargain for nine years.<sup>2</sup>

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<sup>2</sup> As an alternative to waiver, Starlite's "late" acceptance could be viewed as a counteroffer that was, in turn, accepted by Seafood House. *See, e.g., Houston Dairy, Inc.*

Finally, the Court should take note of the fact that, when Seafood House stopped paying rent in the summer of 2007 and walked away from the leased premises, it retained Cambridge Commercial Realty (“Cambridge”) to “list” the property. (A 62). Through Cambridge, Seafood House sought to sublease the leased premises, and it even procured “a few interested parties to a potential sublease of the Premises.” (*Id.*). If there were never a Lease in the first instance, however, as Landry’s now tells this Court, then there would be nothing for Seafood House to “sublease” other than an undefined tenancy at will. Again, the undisputed facts are entirely at odds with the legal arguments Landry’s now makes.

The trial court was correct in finding that, “[a]s a matter of law, the undisputed facts establish that Seafood House has waived the requirement that [Starlite] sign the contract within six days.” (ADD 7). This Court should affirm.

**III. THE TRIAL COURT CORRECTLY CONCLUDED THAT STARLITE’S MONTHLY RESIDENT STATEMENTS CONSTITUTED WRITTEN DEMAND FOR PAYMENT UNDER THE GUARANTY.**

**1. Landry’s is Absolutely Liable under its Lease Guaranty.**

“Parties who sign plainly written documents must be held liable, otherwise such documents ‘would be entirely worthless and chaos would prevail in . . . business relations.’” *Schmitz*, 628 N.W.2d at 210. “[W]hen a contract is unambiguous, a court gives effect to the parties’ intentions as expressed in the four corners of the instrument,

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*v. John Hancock Mut. Life Ins. Co.*, 643 F.2d 1185 (5th Cir. 1981); *Restatement (Second) of Contracts* § 70 (1981); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 6.56 (4th ed. 2007); 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.19 (2d ed. 1990).

and clear, plain, and unambiguous terms are conclusive of that intent.” *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. Ct. App. 2003), *review denied* (Minn. Feb. 25, 2004). *See also Starr v. Starr*, 251 N.W.2d 341, 342 (Minn. 1977) (if a contract is unambiguous, there is no need for judicial construction to determine the parties’ intent); *Indianhead Truck Line, Inc. v. Hvidsten Trans., Inc.*, 128 N.W.2d 334, 340 (Minn. 1964) (where the parties’ agreements are plain and unambiguous, there is no room for construction, but rather the court must enforce the agreements according to their terms).

Landry’s agreed to guarantee the “full, faithful, and timely payment” of Seafood House’s “payments, covenants and other obligations” in the event of Seafood House’s default under the Lease. (A 26). Landry’s Guaranty provides, in precise terms, that:

**If [Seafood House] shall default at any time in the payment or performance of any of the Guaranteed Obligations, then [Landry’s], at its expense, shall on demand of [Starlite] fully and promptly, and well and truly, pay and perform the Guaranteed Obligations, and in addition shall on [Starlite’s] demand pay to [Starlite] any and all sums due to [Starlite], including (without limitation) all interest on past due obligations of [Seafood House], costs advanced by [Starlite], and damages and all expenses (including reasonable attorneys’ fees and litigation costs), that may arise in consequence of [Seafood House’s] default.**

(A 26-27) (emphasis added).

The Guaranty further provides that Landry’s obligations, as guarantor, are “independent of the obligations of [Seafood House],” and that Landry’s “waives any right or claim to require Landlord to proceed against [Seafood House] or pursue any other remedy in [Starlite’s] power whatsoever . . . [.]” (A 27).

Because Starlite is not required by the terms of the Guaranty to proceed first against its tenant, Seafood House, or to otherwise pursue any other remedies it may have, Landry's liability as guarantor became absolute upon Seafood House's default in June 2007. *See, e.g., Currie State Bank v. Schmitz*, 628 N.W.2d 205, 209 (Minn. 2001); *Charmoll Fashions, Inc. v. Otto*, 248 N.W.2d 717, 719-720 (Minn. 1976) (purpose of allowing note holder to proceed directly and independently against guarantor without first invoking other remedies is to "render the guaranty absolute as opposed to conditional"); *Dahmes v. Indus. Credit Co.*, 110 N.W.2d 484, 488-89 (Minn. 1961) (if guaranty is absolute the obligor becomes liable merely upon failure of debtor's performance). The language of the Guaranty is clear, unambiguous, and must be enforced according to its terms.

**2. The Resident Statements Were Sufficient "Written Demand" for Payment Under the Guaranty.**

Although its liability under the Guaranty is absolute, Landry's points to a provision of its Guaranty which limits its guaranty exposure to an amount that "would be payable under the Lease during the period . . . beginning on which [Starlite] makes a written demand . . . upon [Landry's] to make payments . . . [.]" (A 26). Relying on this provision, Landry's claims that the trial court should have awarded damages only from January 2008, and not June 2007. Again, Landry's argument is contrary to the undisputed facts.

Landry's admits that it received Resident Statements each month following Seafood House's default. Those Resident Statements: (i) identify Starlite as the sender;

(ii) identify Landry's as the recipient; (iii) include the mailing date; (iv) state the due date of the rental payment; (v) provide a description of the monthly rental charge; (vi) state the total amount of rent due and past due; (vii) state the amount paid; and (viii) total the balance due under the Lease. (A 32-50).

Although Landry's chooses to characterize the Resident Statements as mere statements of account, the trial court correctly observed that "the guaranty does not require that the written demand for payments be in any particular form; it only requires that the landlord make some type of written demand for payment." (ADD 9). Regardless of the label, therefore, a "Resident Statement" that includes the amount of rent due, the due date, and the amount past due is a demand for payment. There is no other purpose for sending the Resident Statements other than to collect the rent and other charges that are due.

As an example, in *Roshek Realty Co. v. Roshek Bros. Co.*, 87 N.W.2d 8 (Iowa 1957), the court considered whether the plaintiff had made a sufficient showing of written demand for unpaid rent as a prerequisite for declaring the subject lease forfeited. The lease provided that if a monthly rental payment remained due and unpaid for thirty days, and "demand therefor has been made by the Lessor in writing," then a forfeiture of the lease would occur. *Id.* at 10. Lessor mailed defendant lessee a written statement on the first day of each month which included, much like the Resident Statements here, the names of the lessor and lessee, their addresses, and the date and the amount of the rent due. *Id.* On these facts, the court "assume[d], without so holding, the statement . . . constitute[d] a written demand within the lease provision for forfeiture." *Id.* at 11. Only

because the lessor was unable to produce evidence that the defendant lessee actually received the monthly statement did the court ultimately hold that lessor failed to prove there was an adequate written demand. *Id.*

Landry's does not deny that it received the monthly Resident Statements, all of which are of record. (See Appellant's Brief at 4). Therefore, the trial court correctly concluded that the "Calculation Period" under the Guaranty began upon Landry's receipt of the June 25, 2007 Resident Statement, and it is responsible under the Guaranty for the full amount of the past due rent, taxes and other charges claimed by Starlite from and after June 2007.

#### CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed in all respects.

**HENSON & EFRON, P.A.**

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