COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

ESSEX COUNTY No. 2007-P-1757

DRUMMERS PROPERTIES, LLC,

PLAINTIFF-APPELLANT AND CROSS-APPELLEE,

v.

MAZZON ANSWERS, INC., Defendant,

and THEODORE M. POPANDREAS,

DEFENDANT-APPELLEE AND CROSS-APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE
SALEM DIVISION OF THE DISTRICT COURT DEPARTMENT
DOCKET NO. 0136-SU-0903

BRIEF FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT THEODORE M. POPANDREAS

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[1] Issues 1 and 2 concern the grounds that, in affirming the trial court the Appellate Division relied upon. Because "a correct ruling of the trial court will be upheld, even if the appellate court relies on a different ground than the one relied upon by the trial court", Kelly v. Avon Tape, Inc., 417 Mass. 587 590 (1994), and because an appellee who has prevailed below, "may present on appeal any ground which was previously asserted below in support of the judgment," Brear v. Fegan, 447 Mass. 68, 76 (2006), without the necessity of filing a cross appeal, id., Popandreas presents in this brief arguments with respect to issues 3-8 as alternative grounds upon which this court should affirm the decisions below.

8. Did the trial court err in striking appellee and cross-appellant Popandreas' jury claim?

STATEMENT OF THE CASE.

Nature of the Case, Course of Proceedings and Disposition below.

In its complaint,[2] plaintiff-appellant Drummers Properties, LLC ("Drummers") sought a judgment for possession of commercial premises against its lessee, defendant Mazzon Answers, Inc. ("Answers"), and damages of $993,514.20 for breach of the lease, including liquidated damages of $962,375.60, plus interest and attorneys' fees, against Answers and against defendant-appellee and cross-appellant Theodore M. Popandreas ("Popandreas"), alleged to be a guarantor.[3]

Popandreas denied liability on the guaranty, interposing affirmative defenses, including fraud in the factum, mistake and unconscionability.[4] He also raised affirmative defenses to the claims on the lease, including, among others, the invalidity of the liquidated damages provision. Id. Before holding a

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[2] Docket, p. 1, Appendix ("App.").
[3] Complaint, App. 4-5; Trial Court Findings of Fact ("TCF"), App. 1589.
[4] "...Amended...Answer...and Jury Claim," App. 29-34.

five day bench trial,[5] the trial court struck Popandreas' claim for a jury trial.[6]

The trial court found for Drummers and against Answers for possession and damages of $982,104.62 plus interest at 18% per annum and attorneys' fees, and for Popandreas and against Drummers on the claim on the guaranty.[7] After entry of judgments,[8] Drummers and Popandreas timely appealed.[9] On appeal, Drummers did not contend that any of the trial judge's subsidiary findings of fact were clearly erroneous.

The Appellate Division affirmed the trial court's judgment for Popandreas on the guaranty issues,[10] ruling that the trial judge's findings of fact were "based on a reasonable view of the evidence and entirely plausible, and that his conclusions were founded on correct legal principles,"[11] and it was unnecessary to consider the cross-appeal lease issues.[12]

On May 30, 2007, Drummers timely appealed.

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[5] Docket, pp. 6-10.
[6] Docket, p. 5.
[7] "Findings of Fact, Rulings....," App. 1587-1630.
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[9] App. 1632, 1660.
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[12] Opinion, App. 1698.

Statement of Relevant Facts.

(a) The Guaranty Issues.

Upon the August 1999 sale of the stock of Popandreas' company, Expertise Consulting Services, Inc. ("ECS") to Mazzon, Inc. ("Mazzon"), ECS became a subsidiary of Mazzon, a publicly held company, and Popandreas, until June 30, 2000, continued to be employed by ECS as its President and Chief Executive Officer, reporting directly to Richard P. Flack ("Flack"), the CEO of Mazzon.[13] His duties included assisting in the business start-up of Answers, a newly-formed subsidiary of Mazzon.[14]

At the direction of Flack,[15] Popandreas, in January 2000, located office space premises at a Drummers facility.[16] [17] [18] Dealing with Drummers' Andrew Baylor ("Baylor"),[19] Popandreas negotiated the "business terms" of a lease.[20] At no time did Drummers communicate to Popandreas or anyone else that Drummers

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[13] Popandreas Restated and Amended Request for Findings of Fact("MRF") 1-5, App. 1302-03; Trial Court Findings of Fact ("TCF"), 1-5, App. 1591.
[14] MRF 6, App. 1303-1304; TCF 6, App. 1591.
[15] MRF 8, App. 1304; TCF 8, App. 1591.
[16] MRF 9, App. 1304; TCF 9, App. 1591.
[17] MRF 10, App. 1304; TCF 10, App. 1591.
[18] MRF 11-29, App. 1305-10; TCF 11-29, App. 1591-2.
[19] Id.; MRF 11, 36, App. 1305, 1313; TCF 11, 36, App. 1591, 1593.
[20] MRF 31, 32, App. 1311; TCF 31, 32, App. 1592.

wanted a guaranty of a lease,[21] [22]with the result that at no time was Popandreas aware that Drummers wanted him to be a guarantor.[23] [24] Nowhere on any iteration of the lease document did Popandreas' name (until weeks later when Drummers signed[25]) appear in typed, printed or other form on the document.[26]

In a February 24, 2000, fax to Popandreas, Baylor, making no reference to a guaranty, enclosed a draft of a lease to "Mazzon, Inc."[27] that had no indication that any guarantor was sought.[28]

Upon his receipt of Baylor's draft, Popandreas, on February 25, 2000, sent it to Attorney Michael J. Betcher ("Betcher")[29] who commented on the draft lease[30] but not on the form of guaranty[31] because he reasonably believed[32] that Mazzon, a publicly held company, would not be asked to supply a guarantor and that, as the

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[21] MRF 31, 34A-D, App. 1311-12; TCF 31, 34A-D, App. 1592.
[22] MRF 35, App. 1313; TCF 35, App. 1592.
[23] MRF 31-32, App. 1311; TCF 31-32, App. 1592.
[24] MRF 33, 38, 55, App. 1312, 38, 1320-21; TCF 33, 38, 55, App. 1592-93.
[25] MRF 96, App. 1333; TCF 96, App. 1596.
[26] MRF 34A-D, App. 1312; TCF 34A-D, App. 1592.
[27] MRF 36, App. 1313; TCF 34A-D, App. 1592.
[28] MRF 37, App. 1313; TCF 37, App. 1593.
[29] MRF 39, App. 1314; TCF 39, App. 1593.
[30] MRF 40, App. 1314; TCF 40, App. 1593.
[31] MRF 41, App. 1314; TCF 41, App. 1593.
[32] MRF 43, App. 1316; TCF 43, App. 1593.

blanks in the guaranty form, in contrast to those in the lease form, were not filled in, there was nothing on the document to indicate that a guaranty was being sought or considered by anyone.[33] [34]

By mid-to late February 2000, Popandreas and Flack were in disagreement as to Flack's running of the Mazzon and Answers businesses, Popandreas believing that Flack had been exercising poor business judgment in, among other things, appointing persons who were not qualified for their new positions.[35] This meant to Popandreas that the Mazzon companies would fail[36] and resulted in his telling Flack that if the changes were to become final, he would "strongly consider leaving," and deciding that, as soon as practicable after he resolved a dispute concerning the earn-out requirements of his employment contract, he

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[33] MRF 42, App. 1315; TCF 42, App. 1593.

[34] Drummers with other potential lessees sometimes had disregarded the pre-printed guaranty form in blank. MRF 26, App. 1310; TCF 26, App. 1592.

[35] Including, among others, Timothy M. Feeney ("Feeney"), whom Flack intended to appoint as Executive Vice-President-Finance of Answers, MRF 50, App. 1319; TCF 50, App. 1593, and soon to become the Chief Financial Officer of Mazzon. MRF 44, App. 1316; TCF 44, App. 1593. Popandreas thought Feeney a "phenomenal controller" but lacked experience to be a CFO of a public company. Tr. 6.13.02, p. 110, l. 22-p. 111, l. 18, App. 652-53.
p. 110, l. 22 - p. 111, l. 15

[36] MRF 45, App. 1316; TCF 45, App. 1593.

would leave the Mazzon group,[37] which in June 2000, he did, pursuant to a severance agreement.[38]

In late February 2000, at Flack's direction, Popandreas turned over to Feeney the negotiations of the lease [39] [40] and Popandreas had no further knowledge of, or participation in, the negotiations.[41]

Feeney then carried on the negotiations with Baylor, including telling him that the lessee should be changed from Mazzon, Inc. to "Mazzon Answers, Inc."[42] and that <u>if</u> Drummers wanted a guarantor of a lease, it would have to be Mazzon, the corporate parent of Answers, not any individual.[43] Consequently, Drummers knew either that Baylor and Feeney had agreed that if there were to be a guarantor, it would be a corporate guarantor (Mazzon) or that there had been no meeting of the minds.[44]

Thereafter, Baylor prepared a lease that identified Answers, not Mazzon, as the lessee and

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[37] MRF 46, App. 1317; TCF 46, App. 1593.
[38] MRF 47, App. 1317; TCF 47, App. 1593.
[39] MRF 48, App. 1318; TCF 48, App. 1593.
[40] The then draft identified "Mazzon, Inc." as the lessee. MRF 53, App. 1320; TCF 53, App. 1593.
[41] MRF 49, App. 1319; TCF 49, App. 1593.
[42] MRF 54, App. 1320; TCF 54, App. 1593.
[43] MRF 55, 61, App. 1320-21, 1324; TCF 55, 61, App. 1593-94.
[44] MRF 56A, App. 1321-22; TCF 56A, App. 1594.

which had none of the blanks on the preprinted form of guaranty filled in.[45] Nor did it have "Mazzon, Inc." or the name of any individual or other corporate guarantor typed or filled in on the guaranty portion; but the document did have, in red ink, large "X" marks in the places where Drummers desired signatures[46] which were intended by Drummers to be a representation that the document contained the final terms of the transaction as negotiated and approved by both sides, "reduced to writing," and as being the "culmination and final product" of the negotiations.[47] The trial court found that this representation was not true.[48]

In the late morning of March 7, 2000, Baylor arrived at the office of ECS and Answers with lease documents, each with the guaranty form still in blank and red "X" marks on each set.[49] He was greeted by Denise Fuller ("Fuller"), an assistant to Popandreas, who brought Baylor to a conference room and left.[50]

When Fuller apprised Popandreas of Baylor's arrival with documents to sign, Popandreas questioned

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[45] MRF 58, App. 1323; TCF 58, App. 1594.
[46] MRF 57, App. 1322-1323; TCF 57, App. 1594.
[47] MRF 59, App. 1323; TCF 59, App. 1594.
[48] MRF 59A, App. 1323; TCF 59A, App. 1594.
[49] MRF 60, App. 1324; TCF 60, App. 1594.
[50] MRF 62, 63, App. 1324-25; TCF 62, 63, App. 1594.

her if he or Feeney should sign them, asking her to discuss the matter with Feeney.[51] Following her conversation with Feeney, Fuller returned with direction from him that Popandreas should sign.[52]

When Popandreas, who was about to leave for an early afternoon business flight to San Francisco,[53] asked Baylor if the lease documents, with the red "X" marks that Baylor had placed on the conference room table, represented the lease transaction as negotiated and approved by both sides and by counsel for the Mazzon group, Baylor answered, "Yes,"[54] by which, the trial court found, Baylor assured Popandreas that the documents represented the transaction as negotiated and approved by both sides and their respective counsel.[55] Believing, and relying upon, Baylor's assurances, Popandreas, placed his signature on the documents where Baylor had placed the red "X" marks.[56]

The trial court found that (1) Popandreas reasonably believed that Feeney already had read and

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[51] MRF 65, App. 1325; TCF 65, App. 1594.
[52] MRF 66, App. 1325-26; TCF 66, App. 1594.
[53] MRF 64, 66 App. 1325, 1325-26; TCF 64,66 App. 1594.
[54] MRF 67-69, App. 1326; TCF 67-69, App. 1594.
[55] MRF 69, App. 1326; TCF 69, App. 1594.
[56] MRF 76, App. 1328-1329; TCF 76, App. 1594.

approved the documents as the final documents[57] [58]; (2) He reasonably believed[59] that he was acting in a corporate and not individual capacity[60]; (3) He would not have signed the blank guaranty had not Baylor placed the red "X" marks on the document[61]; (4) At no time on March 7, 2000, did he understand that he was signing as a personal guarantor[62]; (5) His understanding and actions in signing the lease and guaranty documents upon the assurance of Baylor and the Drummers representation, were reasonable [63] [64] [65]; and, (6) The Drummers representation was not true.[66]

The trial court also found that no reasonable person in Popandreas' position would have signed such a personal guaranty -- of a five year lease at a monthly rate in excess of $20,000 (a potential liability in excess of $1,200,000), to Answers, a company he did not control, a company he had decided

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[57] MRF, Requested General Finding § B I(b)(4), App. 1341; TCF § B I(b)(4), App. 1597.
[58] MRF 77, App. 1329; TCF 77, App. 1595.
[59] MRF 77, App. 1329; TCF 77, App. 1595.
[60] MRF 78, App. 1329; TCF 78, App. 1595.
[61] MRF 78A, App. 1329; TCF 78A, App. 1595.
[62] MRF 83, App. 1330; TCF 83, App. 1595.
[63] MRF 84, App. 1331; TCF 84, App. 1595.
[64] MRF 95, App. 1333; TCF 95, App. 1596..
[65] MRF 79, App. 1595; TCF 79, App. 1329.
[66] MRF 59A, 70A, App. 1323, 1326; TCF 59A, 70A, App. 1594.

to leave, and whose bad business decisions, he believed, would cause the Mazzon group to fail.[67]

The trial judge found that even though Popandreas signed the documents without reading them, Drummers, by making the guaranty an individual, personal guaranty, not an Mazzon corporate guaranty, had altered the documents as read and negotiated by Feeney, changing the transaction to include a personal guaranty, with the result that Popandreas' signature was not an effective assent to the altered terms.[68]

The trial court found that: (1) The risk of mistake was not allocated to Popandreas by agreement; (2) He neither knew nor should have known that he had limited knowledge concerning the facts to which his mistake related; (3) He made appropriate inquiries and was misled by both Baylor's oral assurance and the red "X" marks on the documents, which Drummers intended, and Popandreas understood, to represent the transaction as negotiated and approved by all.[69]

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[67] MRF 90, App. 1332; TCF 90, App. 1595.
[68] MRF Requested General Finding § B (I)(b)(7), App. 1342, TCF 1597.
[69] MRF Requested General Finding § B (I)(c)(8)((1)-(2), App. 1343-44; TCF § B (I)(c)(8)((1)-(2), App. 1598.

The trial judge found that it was not reasonable to allocate the risk of mistake to Popandreas. [70] A guaranty was not a material element in Drummers' decision to lease the premises to Answers. [71]

The trial judge also found that enforcement of the guaranty would be unconscionable as an obvious departure from that which a reasonable person would engage, and because the sum total of its provisions drives too hard a bargain for a court of conscience to assist. [72] [73]

Affirming the trial court's ruling on the guaranty issues, the Appellate Division stated:

> ... {T]he trial judge's finding ... was founded upon a reasonable view of the evidence and clearly plausible.... ... nothing in the lease negotiations or in his dealings with Drummers gave [Popandreas] any reason to believe that his personal guaranty was being sought. ... the [CFO] ... told ... Drummers ... that if there was to be a guarantor ... it would be Mazzon, Inc. ... On the day Popandreas signed the lease, Drummers' leasing officer assured him that the

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[70] MRF Requested General Finding § B (I)(c)(8)(c) (1)-(26), App. 1344-49 TCF 8C (10-(26), App. 1598.
[71] MRF 91, App. 1332-1333; TCF 91, App. 1595. At no time did Drummers make a credit worthiness analysis of Mazzon, Answers, Popandreas, ECS or any other person MRF 92, App. 1333; TCF 92, App. 1595. As far as Drummers was concerned, Popandreas could have been "in the middle of a chapter 7" bankruptcy. MRF 93, App. 1333; TCF 93, App. 1595.
[72] MRF Requested General Finding 8D, (1)-(26), App. 1349-55; TCF 8D (10-(26), App. 1598.
[73] Id.

> lease had been approved by counsel for "the Mazzon group," thereby giving him the impression that both Mazzon entities were involved. A careful reading of the lease would not have alerted Popandreas that he was giving a personal guaranty. Names were not printed on the forms. The trial judge could well have concluded that Popandreas assumed that Drummers would later type in the entity on behalf of which Popandreas was signing. Thus, unlike the situation in Federico [v. Brockton Credit Union], the very essence of the agreement was in issue as opposed to merely one of its terms. As to the essence or nature of the agreement, the judge could have found that there was no meeting of the minds.[74]

(b) The Lease Issues.

The lease[75] has an acceleration of rent and liquidated damages provision (¶ 20), but it lacks a present value feature[76] and there is no evidence in the record upon which to establish one.[77]

On June 5, 2001, Drummers sent a notice of rent due to Answers, indicating that a failure to cure the default within ten days, would result in a "declar[ation] that the term of the lease ended without further notice...."[78] The Drummers position was that the lease had been "terminated" at the expiration of the ten day period, and that at the end

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[74]Opinion, App. 1698.
[75] Trial Exhibit 17 App. 436.
[76] "Discounting a future obligation to a present condition" MRF 101, App. 1334-35; TCF 101, App. 1596.
[77] MRF 102, App. 1335; TCF 102, App. 1596.
[78] MRF 103, App. 1335; TCF 103, App. 1596.

of the ten days, the "relationship" with lessee Answers had "ended."[79]

On June 22, 2001, Drummers asserted exclusive rights to possession of the leased premises by accepting from Answers, and depositing, a check for $10,000, with the endorsement, "received for use and occupancy, not as rent, reserving all rights to possession and otherwise."[80] Upon the expiration of the ten day period, the lease was terminated by the Drummers assertion of possession and dominion of the leased premises to the exclusion of Answers[81] and Answers completely vacated the premises.[82]

On November 26, 2001, without any prior notice of any kind to Answers or Popandreas that it was doing so for the benefit of either of them (but, in fact, doing so only for its own account and benefit), Drummers entered into a written agreement with Altova, Inc. ("Altova") to perform construction and refurbishing work in, and to lease to Altova for a term extending beyond April 2005, the last month of the Answers term,

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[79] MRF 104, App. 1335; TCF 104, App. 1596.
[80] MRF 105, App. 1336; TCF 105, App. 1596.
[81] MRF 106, App. 1336; TCF 106, App. 1596.
[82] MRF 109, App. 1337; TCF 109, App. 1596.

approximately one half of the Answers premises,[83] completing the work by December 15, 2001, including changing of the locks, and Altova took occupancy in January 2002.[84] [85]

The initial Answers monthly rent was $20,325.58 per month (an annual per square foot rate of approximately $15) for 15,292 square feet, increased per the lease, as of January 1, 2001, to $21,138.60 per month.[86] The Altova rent, for approximately one-half of the Answers space, was at the initial approximate rate of $25 per square foot (less a discount for timely payment for the first year only).[87] Drummers never advertised or otherwise marketed the premises or any portion of it at a rate less than $25 or at $15 or less per square foot.[88]

As at the end of 2002 (the closing arguments in this case took place on January 3, 2003), the still vacant half of the Answers space was being offered by Drummers at $29.95 per square foot.[89]

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[83] MRF 110, App. 1337; TCF 110, App. 1596.
[84] MRF 111, App. 1337; TCF 111, App. 1596.
[85] The work was done at a significantly inflated cost of $41,000. MRF 112, App. 1338; TCF 112, App. 1596.
[86] MRF 114, App. 1338; TCF 114, App. 1596.
[87] MRF 115, App. 1338; TCF 115, App. 1596.
[88] MRF 117, App. 1339; TCF 117, App. 1597.
[89] MRF 118, App. 1339; TCF 118, App. 1597.

Drummers took the positions at trial that the acceleration-liquidated damages provision could be invoked by Drummers even if Answers had failed to pay an invoice for as little as $500, which, according to Drummers, would be a "substantial" invoice within the meaning and context of the lease provision at issue;[90] and that it is entitled not only to the liquidated damages it claims, but also to all of the rent paid and payable by Altova.[91]

SUMMARY OF ARGUMENT.

This court may not set aside the trial court's findings of fact as "clearly erroneous" if such findings are supported on any reasonable view of the evidence, including all rational inferences of which it was susceptible. So long as the judge's account is plausible in light of the entire record, an appellate court should decline to reverse it. See infra, pp. 22-23.

Drummers misrepresents that the picture appearing on page 9 of its brief is of the guaranty "as executed by Popandreas." While the picture shows Popandreas'

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[90] MRF 119, 120, App. 1339-40; TCF 119,120, App. 1597.
[91] MRF 114-121, App. 1338-40; TCF 114-121, App. 1596-97.

name typewritten under his signature, Drummers added Popandreas' typewritten name under his signature weeks after he signed. See infra, p.23.

In its brief to the Appellate Division, Drummers did not challenge as clearly erroneous any of the trial judge's subsidiary findings of fact. In its brief to this court, however, it purports to challenge as "clearly erroneous" the finding that the answer ("yes") of its agent (Baylor) to Popandreas' question if the documents he wanted Popandreas to sign had been "approved" by all concerned, was "untrue." This court should disregard this argument. See infra, pp. 23-24. First, as the finding was not challenged in the court below, it may not be challenged in this court. Second, Drummers also waived the claim by taking the exact opposite position before the Appellate Division. Third, assuming, arguendo, that this court should consider the point, the claim has no merit given the other findings of the trail court.

The Drummers claim that there was "not a shred of evidence" that Baylor intentionally lied to Popandreas, is not correct. See infra, p. 25. Although Popandreas is not required to show intentional lying in order to establish fraud in the

factum, there are ample findings by the judge that Baylor knowingly lied.

Drummers also challenges as "clearly erroneous" the ruling of the Appellate Division that "a careful reading would not have alerted" Popandreas that he was signing a personal guaranty. This ruling was based on the subsidiary findings of the trial judge (not challenged by Drummers) which amply support the Appellate Division's observation. See infra, p. 26.

The trial court correctly ruled that the guaranty was obtained by Drummers through fraud in the factum because Drummers induced Popandreas to sign the guaranty without knowledge, or reasonable opportunity to know, of its true nature or essential terms. See infra, pp. 25-32. Fraud in the factum exists where a party knows the general nature of the document signed, but is excusably ignorant of its essential terms. See infra, pp. 25-28/ Whether the document signed by Popandreas imposed a personal liability on him was such an essential term. See infra, pp. 27-28.

Popandreas neither knew nor had reasonable opportunity to know that he was signing a personal guaranty of the Drummers lease. See infra, pp. 28-32. The trial court found that Popandreas did not know

that the document he signed included his personal guaranty. See infra, pp. 28-29. Nor should he have known. Where, as in this case, a corporate officer is called upon to sign a document (the lease) on behalf of the corporation but the document is the product of negotiations handled by other corporate officers, and where, as in the present case as found by the trial judge, the signing officer reasonably believes that the document in its final form has been read and approved by those other officers or the corporation's attorneys, the signing officer acts reasonably in not reading the document himself before signing it. See infra, pp. 29-30. The trial judge correctly found that Drummers' agent, Baylor, had assured Popandreas that the lessee, Answers, had approved the documents and that Popandreas' reliance on that assurance was reasonable. See infra, pp. 30-32. The Appellate Division further noted that "A careful reading of the lease would not have alerted Popandreas that he was giving a personal guaranty." App. 1698.

The trial court properly held that the guaranty was voidable on the basis of unilateral mistake. See infra, pp.32-37. Popandreas did not bear the risk of mistake. See infra, pp. 33-35. He did not act in

conscious ignorance (see infra, pp. 33-34), and it would be unreasonable under these circumstances for this court to allocate the risk to Popandreas because: (1) as the trial court found, Popandreas acted reasonably in signing the documents in light of the circumstances (see infra, pp.34=35_); (2) the mistake was caused by Drummers (see infra, pp. 36-37); and, (3) enforcement of the guaranty under the circumstances would be unconscionable, as the trial court, based upon numerous factual findings, found. See infra, p. 36.

With regard to the liability of Answers on the lease, the trial court erred in ruling that Drummers did not accept Answers' surrender of the premises, thereby releasing Answers from liability for rent accruing after the date of surrender. See infra, pp. 37-39. Because Drummers accepted Answers' surrender, the liquidated damages provision of the lease requires no further payment of rent by Answers. See infra, p. 39.

The trial court also erred in ruling that Drummers had no duty to mitigate its damages (see infra, pp. 39-40), that Drummers' total remuneration was not limited to its actual damages (see infra, p. 40), and that

Drummers had no duty to credit to Answers' account all amounts received from the replacement tenant. See infra, pp. 40-41.

The trial court also erred in failing to rule that the liquidated damages provision of the lease is an unenforceable penalty under the rule of Kelly v. Marx, 428 Mass. 877 (1999). See infra, pp.41-48 The liquidated damages provision is a penalty because actual damages were not difficult to ascertain and the liquidated damages provided for are not a reasonable estimate of actual damages. See infra, pp. 42-48. The parties themselves estimated the damages and provided for them in the security deposit required by the lease. See infra, pp. 42-43. Even assuming that liquidated damages in the amount of all rental payments for the remaining term was a reasonable estimate of Drummers damages in the event of Answers breach, the liquidated damages provision is an unenforceable penalty because it does not discount the accelerated damages to present value. See infra, pp. 43-45.

Even if the liquidated damages provision otherwise is enforceable, Drummers has waived it and it would be unconscionable to allow Drummers both to collect liquidated damages and to take possession and

re-let the premises for its own account. See infra, pp. 48-49.

The trial court also erred in striking Popandreas' claim to a jury trial on the enforceability of the guaranty because Popandreas' fraud and mistake arguments were legal defenses entitled to be decided by a jury. See infra, pp. 49-50.

ARGUMENT.

THE APPELLATE DIVISION PROPERLY AFFIRMED THE RULINGS OF THE TRIAL COURT THAT FRAUD IN THE FACTUM OR UNILATERAL MISTAKE RENDERED THE GUARANTY VOID (FRAUD IN THE FACTUM) OR VOIDABLE (UNILATERAL MISTAKE).

1. This court may not set aside the trial court's findings unless it finds them to be clearly erroneous.

This court must accept the trial court's findings of fact unless it determines them to be clearly erroneous.

> We do not set aside a judge's findings of fact unless they are clearly erroneous. A finding is clearly erroneous only when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. It is the appellant's burden to show that a finding of fact is clearly erroneous. In applying the clearly erroneous standard, [Mass. R. Civ. P. 52(a)...] requires that due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.... We