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Court of Appeals No. 71042-7-I
King County Superior Court No. 12-2-07861-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RADIANCE CAPITAL, LLC,

RESPONDENT,

v.

NICHOLAS W. BARTZ,

APPELLANT.

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
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REPLY

Appellant Nicholas W. Bartz is not subject to personal jurisdiction in the Washington courts under either our long-arm statute or the express terms of the Personal Guarantee signed in his individual capacity. Furthermore, any and all disputes or issues relating to Bartz' Chapter 7 discharge in bankruptcy must be brought before and resolved in the U.S. Bankruptcy Court for the Eastern District of Michigan, which is also where Bartz resides.

A. *De Novo* Is The Proper Standard For This Court's Review Of The Trial Court's Denial Of Bartz' Rule 12(B)(2) Motion To Dismiss And Its Grant Of Radiance's Rule 56 Motion For Summary Judgment

The parties obviously disagree as to this Court's standard for reviewing the trial court's denial of Bartz' Rule 12(b)(2) Motion to Dismiss and its grant of Radiance's Rule 56 Motion for Summary Judgment. Resolution of this dispute lies in the fact that it is the language of the Personal Guarantee that is at the heart of this controversy, and not whether the separate forum selection clause itself is fair and reasonable. Bartz contends that the appropriate standard of review here is *de novo* (focusing on the Personal Guarantee signed by Bartz in his individual capacity); whereas, Radiance contends that the appropriate standard of review is an abuse of discretion (focusing on the forum selection clause signed only by Health Pro Solutions, LLC).

Here, the general rules for *de novo* appellate review apply because (1) a trial court's denial of a Motion to Dismiss under Rule 12(b)(2) is reviewed

de novo,[1] and (2) a trial court's grant of a Motion for Summary Judgment under Rule 56, on grounds that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law, is reviewed *de novo*.[2] Because the trial court made its decisions as *matters of law* under CR 12(b)(2) and CR 56 without specifically stating the basis for its rulings (whether on the language of the Personal Guarantee or on the forum selection clause itself), the appropriate standard of review by this Court is *de novo* with no deference given to the trial court's decisions.

B. Bartz Is Not Subject To Personal Jurisdiction By Washington Courts Under Our Long-Arm Statute, RCW 4.28.185

Long-arm jurisdiction is constitutionally-grounded and may only be exercised under those clear circumstances where (1) the out-of-state defendant purposefully avails himself of the forum state; (2) the cause of action arises directly from the transaction between the parties; and (3) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767-68, 783 P.2d

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[1] *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006) (the denial of a motion to dismiss for lack of jurisdiction under CR 12(b)(2) is reviewed *de novo*); *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997) (dismissal for lack of jurisdiction under CR 12(b)(2) presents a question of law reviewed *de novo*); *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.*, 9 Wn. App. 284, 289, 513 P.2d 102 (1973) (motion to dismiss under CR 12(b)(2) for lack of personal jurisdiction is treated as one for summary judgment when evidence outside the pleadings is filed).

[2] *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion."); *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

78 (1989).

Here, the dispositive prong is the first; namely, whether Bartz purposefully availed himself of the State of Washington. The key factor is whether Bartz himself negotiated an ongoing business relationship with Radiance that has substantive effects and creates future obligations in Washington. Under the facts of our case, where considered in the light most favorably to Bartz, this element is clearly absent. There were no negotiations of the Equipment Financing Agreement or Personal Guarantee at all involving Bartz (all language was standard boilerplate drafted by Radiance), as the contract was sought by an Arizona independent broker and signed in Arizona. There were no visits by Bartz to the State of Washington or phone calls or any other communications between Bartz and Radiance. The equipment financed by the Agreement between Health Pro Solutions, LLC and Radiance was delivered directly to the State of Michigan and has never touched the State of Washington. Mere execution of a contract with a Washington resident will not suffice, there must be the actual contemplation that some future phase of the transaction will take place in the State of Washington. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 565-66, 226 P.3d 141 (2010). Here, there was no contemplation that any future phase of the Equipment Financing Agreement, including use of the equipment financed thereby, would take place in the State of Washington. This was solely a one-time loan between Health Pro Solutions, LLC and Radiance.

In our case and reviewed *de novo*, Radiance has failed to demonstrate that the exercise of personal jurisdiction by the King County Superior Court over Michigan-resident Bartz meets the criteria of Washington's long-arm statute and satisfies constitutional due process requirements. Washington courts cannot claim long-arm personal jurisdiction over Bartz.

C. The Personal Guarantee Bartz Signed In His Individual Capacity Does Not Submit Him To The Personal Jurisdiction Of Washington Courts

In our case, it is the Personal Guarantee alone that controls whether or not Bartz, a citizen of the State of Michigan, voluntarily agreed to submit himself to the personal jurisdiction of the Washington courts. The provisions of the separate forum selection clause do not directly come into play unless the language of the Personal Guarantee evinces the clear and unequivocal intent by Bartz to submit himself personally to Washington jurisdiction. The express language of the Personal Guarantee does not do so, and the provisions of the forum selection clause are rendered moot.

Personal guarantees are simply contracts, the construction and interpretation of which is subject to commonplace contract rules. *Seattle-First National Bank v. Hawk*, 17 Wn. App. 251, 562 P.2d 260 (1977).[3] The construction and interpretation of contracts is a question of law reviewed *de*

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[3] The "general rule [is] that guaranty agreements are to be strictly construed in favor of the guarantor . . . and the liability of a guarantor cannot be extended by construction." Alces, *The Efficacy Of Guaranty Contracts In Sophisticated Commercial Transactions*, 61 North Carolina Law Review 655, 673 (1983).

novo.[4] Washington courts follow the objective manifestation theory of contracts to determine the parties' intent, and thus construe what was in fact written and not what was perhaps intended to be written. *Hearst Communications, Inc. v. Seattle Times Company*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).[5]

The express language of the Personal Guarantee does not state that Bartz submits himself to the personal jurisdiction of the State of Washington, and Radiance has not proven by competent substantial evidence the objective manifestation of mutual intent that Bartz submitted himself to the personal jurisdiction of Washington; in fact, the clear competent evidence is that Bartz had no such intent. CP at 124, ¶ 17. The actual language of the Personal Guarantee states only that "[t]he undersigned guarantee and promise to make all of the payments and perform all Debtors' obligations as specified in this Equipment Financing Agreement." CP at 132. It neither includes nor references the forum selection clause to which the DEBTOR (solely Health Pro Solutions, LLC) agreed in the Equipment Financing Agreement. Moreover, the "perform[ance of] Debtors' obligations" is a tangible duty that can be measured, the nonperformance of which gives rise to a breach of contract,

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[4] *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010); *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

[5] Courts cannot under the guise of construing a contract rewrite it or add language which the parties could have inserted but did not do so. *American Manufacturers Mutual Insurance Company v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Levi Strauss & Company v. Aetna Casualty & Surety Company*, 184 Cal.App.3d 1479, 1486 (1986).

such as Health Pro Solutions' express duties to maintain the equipment, to have the equipment insured, to pay taxes, and the like. *See, e.g.*, Equipment Financing Agreement, Paragraphs 6 - 15, 20 (CP at 129-30). Perhaps most telling as to the parties' objective manifestation of mutual intent regarding the meaning of the word "obligations" is the following express contractual provision:

> **If Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligations**, and Debtor shall (a) reimburse Creditor the cost of such performance and related expenses, and (b) pay Creditor the late charge contemplated in Paragraph 21 on the cost and expenses of such performance.

CP at 129 (Paragraph 14, emphasis added). This provision is totally counter-intuitive to any objective manifestation of mutual intent that Bartz was somehow ***obligated*** to submit himself to the personal jurisdiction of the Washington courts (for to construe in this manner would mean that Radiance could take Bartz' place in its own lawsuit against him??) .[6]

Under applicable and relevant rules of contract construction, and construed in favor of Bartz and most strongly against Radiance where reviewed by this Court *de novo*, by signing the Personal Guarantee individually Bartz did not submit himself to the personal jurisdiction of Washington

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[6] A guarantee only promises a creditor that the guarantor will perform in the event of nonperformance by the debtor. *B & D Leasing Company v. Ager*, 50 Wn. App. 299, 306, 748 P.2d 652 (1988). But "a guarantor is not to be held liable beyond the express terms of his or her engagement. If there is a question of meaning, the guaranty is construed against the party who drew it up or against the party benefited." *Matsushita Electric Corporation of America v. Salopek*, 57 Wn. App. 242, 246-47, 787 P.2d 963 (1990).

courts. The King County Superior Court therefore did not have personal jurisdiction over Michigan citizen Nicholas W. Bartz under and pursuant to the Personal Guarantee signed by him in his individual capacity.

CONCLUSIONS

Based on the foregoing and on its *de novo* review, this Court should find and conclude that the King County Court did not have good and sufficient personal jurisdiction over out-of-state resident Nicholas W. Bartz. For the grounds set forth in CR 12(b)(2), this Court should reverse the trial court orders on Summary Judgment and remand this matter to the trial court with instructions to grant Bartz' Motion to Dismiss and dismiss Radiance Capital's Complaint *in toto* for lack of personal jurisdiction. And any bankruptcy issues involving Bartz and his Chapter 7 discharge must be resolved in the U.S. Bankruptcy Court in the State of Michigan.

In addition, Bartz respectfully requests this Court grant him his reasonable attorney fees and costs incurred for defense of this action based on jurisdictional grounds under and pursuant to RCW 4.28.185(5). RAP 18.1.

Dated this 16th day of March, 2014.

Respectfully submitted,

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