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No. 67953-8-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

AAA KARTAK GLASS, INC., d/b/a AAA KARTAK GLASS &
CLOSET, INC., a Washington Corporation,

Respondent,

v.

5TH & OLYMPIC, LLC, d/b/a SHILSHOLE BAY II, LLC; FIRST & LEE
CORPORATION; SHILSHOLE BAY II, LLC; JOSEPH SACOTTE
JANE DOE SACOTTE, husband and wife; and HARTFORD FIRE
INSURANCE COMPANY,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE JULIE SPECTOR
HONORABLE PATRICK OISHI

BRIEF OF APPELLANTS

FINKELSTEIN LAW OFFICE, PLLC

By: Fred S. Finkelstein
WSBA No. 14340

Attorneys for Appellants 5th & Olympic,
LLC and Joseph Sacotte and Jane
Doe Sacotte

600 University St., # 902
Seattle, WA 98101
Phone: (206) 587-2332

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I. INTRODUCTION

On summary judgment, the trial court held that defendant 5th & Olympic, LLC (“5th & Olympic”) is liable to plaintiff AAA Kartak Glass, Inc. (“Plaintiff”) in the principal amount of \$8,277 - plus interest at 18% per annum and attorney’s fees - for breaching a contract between Plaintiff and 5th & Olympic. The trial court also entered summary judgment against defendants Joseph Sacotte and Jane Doe Sacotte (“Sacotte”) personally in these same amounts.

Plaintiff’s claim against Sacotte and its claim for 18% interest and attorney’s fees against 5th & Olympic are based entirely on a credit application and personal guaranty (the “Personal Guaranty”) that 5th & Olympic and Sacotte signed in favor of another corporation. The trial court held that Plaintiff could use the terms of the Personal Guaranty for its own claims because the other corporation assigned the Personal Guaranty to Plaintiff when Plaintiff commenced this action.

The trial court’s ruling was in error because:

1. 5th & Olympic and Sacotte did not owe any money to the corporation that assigned the Personal Guaranty; and
2. The Personal Guarantee could not be assigned to Plaintiff because it is not a “negotiable instrument.”

II. ASSIGNMENTS OF ERROR

1. Judge Spector's February 11, 2011 Order [CP 63] - granting partial summary judgment in favor of Plaintiff - was in error because it held that Sacotte was personally liable and that 5th & Olympic was liable for 18% interest and attorney's fees.

2. Judge Oishi's November 1, 2011 Order [CP 125] - granting final summary judgment in favor of Plaintiff - was in error because it entered judgment against Sacotte and held that 5th & Olympic was liable for 18% interest and attorney's fees.

III. STATEMENT OF ISSUES

1. Whether Plaintiff can use the terms of the Personal Guaranty, which defendants signed in favor of another corporation, where defendants do not owe any money to the other corporation;

2. Whether Plaintiff can use the terms of the Personal Guaranty for its own claims where the Personal Guaranty is not a negotiable instrument and its terms could not be assigned to Plaintiff; and

3. Whether 5th & Olympic and Sacotte were required to file an appeal within 30 days of Judge Spector's February 11, 2011 Order, which entered partial summary judgment against them.

IV. STATEMENT OF THE CASE

A. Plaintiff And AAA Kartak Storefront & Glazing, Inc. Are Separate Corporations

Plaintiff and AAA Kartak Storefront & Glazing, Inc. (“Kartak Storefront”) have similar names; however, there is no dispute that they are separate corporations, with different UBI numbers, different filing dates with the Secretary of State, and different registered agents:

	<u>Plaintiff</u>	<u>Kartak Storefront</u>
UBI #	602443627 [CP 101]	602560825 [CP 103]
Filing Date	11/05/04 [CP 101]	11/05/05 [CP 103]
Reg. Agent	Ed Hoessman [CP 101]	Robbin Baird [CP 103]

B. 5th & Olympic And Sacotte Do Not Owe Any Money To Kartak Storefront

In 2008, 5th & Olympic hired Kartak Storefront to perform work on a project called the Sammamish Montessori School [CP 83]. On May 29, 2008, in connection with that project, 5th & Olympic and Sacotte signed the Personal Guaranty in favor of Kartak Storefront [CP 96]. The Personal Guaranty provides for 18% interest and attorney’s fees if Kartak Storefront is not paid and, also, for personal liability on the part of Sacotte [CP 96]. It is undisputed, however, that 5th & Olympic and Sacotte do not owe any money to Kartak Storefront [CP 93].

C. Because 5th & Olympic And Sacotte Do Not Owe Any Money To Kartak Storefront, The “Assignment Of Claim” Did Not Confer Any Additional Rights On Plaintiff

In 2009, 5th & Olympic hired Plaintiff to perform work on a construction project located at 1600 Denny Ave. E. in Seattle (the “Project”) [CP 83]. 5th & Olympic and Sacotte did not sign a credit application or personal guaranty in favor of Plaintiff; in fact, there is not even a signed contract between 5th & Olympic and Plaintiff for the Project [CP 83]. As such, no document between Plaintiff and defendants gives Plaintiff the right to recover 18% interest and fees from 5th & Olympic or to assert a claim against Sacotte personally.

Having no claim against Sacotte and no claim for 18% interest and fees against 5th & Olympic, Plaintiff sought to manufacture such claims by obtaining an “Assignment of Claim” (the “Assignment of Claim”) from Kartak Storefront [CP 99]. According to the Assignment of Claim, which is dated March 5, 2010, Kartak Storefront assigned and transferred to Plaintiff “all rights, title and interest to receive payment” from 5th & Olympic and Sacotte [CP 99]. However, because 5th & Olympic and Sacotte do not owe Kartak Storefront any money [CP 93], the Assignment of Claim did not give Plaintiff any additional rights or claims against 5th & Olympic or Sacotte.

D. Judge Spector And Judge Oishi Erred In Ruling That Plaintiff Could Use The Personal Guaranty To Expand Its Claims Against 5th & Olympic And Sacotte

Plaintiff's first summary judgment motion was noted for February 11, 2011 before Judge Spector [CP 9]. In opposition to the motion [CP 59] and at oral argument, 5th & Olympic and Sacotte argued that Plaintiff could not use the terms of the Personal Guaranty to expand its claims against them because the Personal Guaranty was signed in favor of Kartak Storefront. Judge Spector disagreed, stating:

But people buy paper all the time. Companies buy papers all the time. You know, you have a mortgage on a house and then the mortgage company turns around and sells it to Freddie Mac or, you know. And you could assign that without the original person of the contract not even being aware of that.

February 11, 2011 Verbatim Report of Proceeding, at 12. As set forth below, Judge Spector was mistaken because the Personal Guaranty is not a negotiable instrument and could not be assigned to Plaintiff.

At the February 11, 2011 hearing, Judge Spector granted partial summary judgment in favor of Plaintiff, holding that 5th & Olympic and Sacotte were liable to Plaintiff for 18% interest and attorney's fees [CP 63]. Judge Spector did not enter final judgment because she concluded there was a genuine issue of material fact regarding the principal amount owed [CP 63 - 65].

Subsequently, the case was transferred to Judge Oishi, and Plaintiff noted a motion for summary judgment on November 4, 2011 [CP 68].¹ In response to the motion [CP 82], 5th & Olympic and Sacotte again argued that Plaintiff could not use the terms of the Personal Guaranty to expand its own claims against them. On November 1, 2011, Judge Oishi entered final judgment in favor of Plaintiff [CP 125]. 5th & Olympic and Sacotte then timely filed a notice of appeal [CP 130].

V. ARGUMENT

A. **The Assignment Of Claim Gave Plaintiff No Additional Rights Or Claims Because Defendants Do Not Owe Any Money To Kartak Storefront**

The Assignment of Claim [CP 99] provides in relevant part:

That AAA Kartak Storefront & Glazing, Inc., assignor, for value received, does hereby assign and transfer to AAA Kartak Glass, Inc., d/b/a AAA Kartak Glass & Closet, Inc. all rights, title and interest to receive payment from 5th & Olympic, LLC, Shilshole Bay II, LLC, Joseph J. Sacotte, and First Church and any and all other associated corporations owned and or controlled by Joseph J. Sacotte and all amounts relating thereto, including, but not limited to, interest, attorney's fees and all costs.

Said assignee is hereby authorized and empowered

¹ Based on Plaintiff's Note for Motion [CP 68] and the usual practice regarding summary judgment motions, defendants believed Plaintiff's motion was set for oral argument at 9:00 a.m. Apparently, however, Plaintiff set the motion without oral argument. Judge Oishi ruled on Plaintiff's motion without oral argument on November 1, 2011.

by assignor to demand, settle, reassign, or institute any legal action which assignor might otherwise bring for the enforcement or collection of said sums due or to become due (emphasis added).²

The plain language of the Assignment of Claim only gave Plaintiff the right to assert any claims that Kartak Storefront might have against 5th & Olympic and Sacotte. This is in accord with Washington law. See, e.g., Walter Implement, Inc. v. Focht, 42 Wn. App. 104, 107-08, 709 P.2d 1215 (1985)³ (“assignee of a nonnegotiable chose in action simply stands in the shoes of the assignor”); Rodin v. O’Beirn, 3 Wn. App. 327, 330, 474 P.2d 903 (1970) (“assignee of a non-negotiable chose in action [ac]quires no greater right than was possessed by his assignor, and simply stands in the shoes of the latter”) (citation omitted).

Because Kartak Storefront is not owed any money by 5th & Olympic or Sacotte, the Assignment of Claim gave Plaintiff no new rights or claims. Therefore, Plaintiff was not entitled to 18% interest or fees from 5th & Olympic and it was not entitled to a judgment against Sacotte

² This clause is entirely consistent with defendants’ argument that the Assignment of Claim is of no effect because Kartak Storefront is not owed any money by defendants and therefore has no right to commence “any legal action” against defendants.

³ Walter was reversed in part on other grounds. Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 730 P.2d 1340 (1987).

personally. Hansen Service, Inc. v. Lunn, 155 Wn. 182, 191, 283 P. 695 (1930) (“liability of the guarantor cannot be enlarged beyond the strict intent of his contract”). See also Seattle-First National Bank v. Hawk, 17 Wn. App. 251, 256, 562 P.2d 260 (1977) (“It is a fundamental rule that guarantors can be held only upon the strict terms of their contract, as a contract to answer for the debt of another must be explicit and is strictly construed”).

B. Plaintiff Could Not Use The Terms Of The Personal Guaranty For Its Own Claims Because The Personal Guaranty Is Not A Negotiable Instrument

At the February 11, 2011 hearing, Judge Spector likened the Personal Guaranty to a mortgage and stated that companies “sell paper” all the time. February 11, 2011 Verbatim Report of Proceeding, at 12. However, the Personal Guaranty is not “paper” because it is not a negotiable instrument.

RCW 62A.3-104(a) sets forth the requirements of a negotiable instrument. It provides in relevant part:

“negotiable instrument” means an unconditional promise or order to pay a fixed amount of money . . . , if it:

- (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . . (emphasis added).

The Personal Guaranty is not a negotiable instrument because it: (1) does not specify the “fixed amount of money” to be paid, (2) is not “payable to bearer or to order,” and (3) incorporates additional obligations and promises between the parties. Walter, 42 Wn. App. at 107, fn. 3 (lease in favor of assignor could not be negotiated by assignee because lease did not contain the “order or bearer” language and it “incorporates additional obligations and promises between the parties”); Rodin, 3 Wn. App. at 329 (real estate contract purchased by bank could not be negotiated by bank because contract was not a negotiable instrument).

Because the Personal Guaranty is not a negotiable instrument, it cannot be used to expand Plaintiff’s own claims against 5th & Olympic and Sacotte. C.I.T. Corp. v. Strain, 178 Wn. 260, 264, 34 P.2d 440 (1934) (personal guaranty in favor of assignor could not be used by assignee because a “guaranty is not negotiable”). See also Walter, 42 Wn. App. at 107 (same - lease); Rodin, 3 Wn. App. at 329 (same - real estate contract).

The following hypothetical shows the correctness of such an outcome:

- Finkelstein Law Office, PLLC hires Moving Company and signs Moving Company's agreement (which provides for 18% interest and fees). Fred Finkelstein signs a personal guaranty. Finkelstein Law Office pays the bill in full and, therefore, Moving Company has no claims against Finkelstein Law Office or Fred Finkelstein;
- Later, Finkelstein Law Office hires Computer Consultant. Finkelstein Law Office does not sign a credit agreement and Fred Finkelstein does not sign a personal guaranty. Computer Consultant claims it is owed money;
- Moving Company assigns its credit agreement and personal guaranty to Computer Consultant (perhaps because, as here, the same person owns the two companies). Relying on the assignment, Computer Consultant claims Finkelstein Law Office is liable for 18% interest and attorney's fees and that Fred Finkelstein is personally liable for the debt.

Correct outcome: Computer Consultant cannot use the terms of Moving Company's credit agreement/personal guarantee to enhance its own claims because the document is not a negotiable instrument.

C. Defendants Did Not Have To Appeal Judge Spector's February 11, 2011 Order Within 30 Days Because It Was Not A Final Judgment Under CR 54(b)

Under CR 54(b), “the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.” CR 54(b) goes on to say that:

In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties (emphasis added).

In the trial court, Plaintiff argued that Judge Spector's February 11, 2011 Order was final and could not be revised [CP 118-19]. However, Washington law clearly provides that a partial summary judgment order, such as the one entered by Judge Spector, is not a final, appealable order even if it contains the pro forma language of a final order. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 300, 840 P.2d 860 (1992); Fox v. Sunmaster Products, Inc., 115 Wn.2d 498, 503-05, 798 P.2d 808 (1990). Therefore, Plaintiff's argument has no merit.

D. 5th & Olympic And Sacotte Are Entitled To Reasonable Attorney's Fees And Costs In The Trial Court And On Appeal

If they prevail on this appeal, 5th & Olympic and Sacotte are entitled to reasonable attorney's fees and costs in the trial court and on appeal under RCW 4.84.330. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (Prevailing party entitled to attorney's fees when contract containing fee provision is invalidated).

VI. CONCLUSION

This Court should reverse the trial court and hold that: (1) Plaintiff is not entitled to 18% interest or attorney's fees from 5th & Olympic, LLC and (2) Plaintiff is not entitled to a judgment against Joseph Sacotte and Jane Doe Sacotte. This Court should also hold that 5th & Olympic and Sacotte are entitled to reasonable attorney's fees and costs in the trial court and on appeal.

February 13, 2012

FINKELSTEIN LAW OFFICE, PLLC

By: 
Fred S. Finkelstein
WSBA No. 14340

Attorneys for Appellants 5th & Olympic,
LLC and Sacotte

2012 FEB 13 PM 2:51

No. 67953-8-I

**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION I**

AAA KARTAK GLASS, INC. DBA AAA KARTAK GLASS & CLOSET, INC., a
Washington state-chartered bank,

Respondent,

vs.

5TH & OLYMPIC, LLC, DBA SHILSHOLE BAY II, LLC, et al.,

Defendants.

DECLARATION OF MAILING/DELIVERY

I, Diane B. Moore, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: (1) I am employed by Finkelstein Law Office, PLLC; (2) At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below, I caused delivery and/or service the following documents:

1. BRIEF OF APPEALANTS;
2. Certificate of Service.

On the following persons in the manner as noted below:

<input checked="" type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via Email: mcgrathcor@aol.com Thomas F. McGrath, Jr. Law Office of Thomas F. McGrath Jr., PLLC 13555 Bel-Red Rd., Suite 124 Bellevue, WA 98005 Atty For: Respondents	<input checked="" type="checkbox"/> Via Legal Messenger <i>(original) + 1 copy</i> Washington State Court of Appeals, Div. I 600 University Street Seattle, WA 98101
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, February 13, 2012.


Diane B. Moore