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Court of Appeals
Division II
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No. 53494-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KIMBERLY HAN,
Appellants/Plaintiffs

v.

ROBERT E. MARTIN,
Respondent/Defendant

APPELLANTS' OPENING BRIEF

Kelly DeLaat-Maher
WSBA No. 26201
Attorneys for Appellant
Smith Alling, PS
1501 Dock Street
Tacoma, WA 98402
253-627-1091 ▪ 253-627-0123 (fax)
Kelly@smithalling.com; Teri@smithalling.com

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COMES NOW Appellant, Kimberly Han, by and through her attorney of record, Kelly DeLaat-Maher of Smith Alling P.S., and submits Appellant's Brief on appeal as follows:

I. ASSIGNMENTS OF ERROR

1. The trial court erred by granting Martin's Motion for Summary Judgment entered on March 29, 2019.
2. The trial court erred in denying Han's Motion for Reconsideration by Order entered on April 9, 2019.

II. ISSUES PRESENTED

1. The trial court erred as a matter of law by granting Martin's Motion for Summary Judgment when Han presented issues of material fact as to the nature of the monies provided Han from Martin. (Assignment of Error No. 1.)
2. The trial court further erred as a matter of law by denying Han's Motion for Reconsideration as to the Order Granting Summary Judgment. (Assignment of Error No. 2.)

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Kimberly Han (hereinafter "Han") is a native of Korea, and English is not her native language. She has difficulty reading and writing in English, and review of deposition transcripts and the Verbatim Report of

Proceedings support the suggestion that she is not fluent in spoken English. See CP 46-66; Verbatim Report of Proceedings. Indeed, the trial court in this matter recognized that English was not Han's first language. VRP 17:24-25. During a crucial portion of the action before the trial court, she was representing herself pro se, following the withdrawal of her attorney. CP 111-112.

Han met Robert Martin (hereinafter "Martin") many years ago. It is undisputed that they were close friends, supporting and helping each other. CP 38, 52. In 2008, she began assisting him with his medical and physical needs following cancer treatments. CP 33. Care included helping with self-care, ensuring physical safety, monitoring his medications, assisting with transportation to doctor appointments, housekeeping, yard work, and food preparation. *Id.*, CP 79. This relationship continued for approximately 8 years, during which Han met Martin's needs on a 24 hour on-call basis. CP 33. Han was not paid during that time frame for the services she provided Martin. CP 34.

Prior to and during the events leading to this action, Han was involved in the timber industry, exporting timber to Korea. CP 49. That business suffered a downturn approximately three to four years prior to the filing of this action. CP 50. Martin subsequently volunteered to assist in

rebuilding Han's credit so that she could continue in her business ventures.

CP 56 (Deposition of Kimberly Han 37:3-7.)

In furtherance of the offer to build Han's credit, Martin decided to co-sign a loan from Kitsap Credit Union to Han in the amount of \$234,357.18 in December, 2015. CP 6. The loan was secured by Martin's Certificates of Deposit. *Id.* In addition, Martin advised Han that if she defaulted on the loan and his Certificates of Deposited were forfeited, the monies would essentially be considered a gift and she would forego any additional inheritance upon his death. CP 79.

In response to Interrogatories, Han described the purpose of the loan as follows:

The purpose of the loan was actually a gift to help me recover and rebuild my credit that was hurt from a timber business foreclosure. He said that he couldn't take his money with him and that he will help me recover my credit by repaying the loan to myself (he was a co-signor). When I could no longer pay on the loan then he said that the money that I received would be the only sum of money that I would get from him.

CP 79. Thus, to summarize, Martin volunteered to co-sign on the loan and provide the collateral securing the loan due to their long friendship and the care-giving nature of their relationship. In the event that she repaid the loan in full, she would still receive the Certificate of Deposit that secured the loan as her "inheritance." If she was unable to repay the loan, and the

Certificate of Deposit forfeited, she would nonetheless benefit in that she would receive all the money that he would have provided her in the event of his death.

Han utilized the money she received to purchase timber for her business, as well as an investment property. CP 57-58. Han did make several payments on the loan. CP 110. However, Han was unable to make a final payment on the loan in December, 2016. CP 62-63. Han expected to be able to request an extension on the loan with Martin. CP 63. However, by that time Martin and Han had a disagreement, and Martin did not want Han to come to his home anymore. CP 54, 63. As a result, the loan went into default, and the certificates of deposit were used to pay off the remaining principal balance of the loan. CP 66, CP 110.

Han's perception that she would not have to repay Martin the certificates of deposit is evident upon careful examination of her discovery answers and deposition testimony that were attached to Martin's counsel's Declaration in support of a Motion for Summary Judgment. In response to an Interrogatory as to whether she owed Martin for default on the loan, Han replied as follows:

I do not owe him any money. The "loan" was where I would be paying myself back in order to establish credit. At the end of the term, it was known by the Plaintiff that I would have received both the original loan and at the same time had re-established my credit. After the CD's were taken by the

bank, he stated that I now have received everything that he was going to give me.

CP 79.

Han also testified at deposition as to the character of the loan secured by Martin's Certificates of Deposit. She testified as follows:

This is supposed to go to my own account and the Mr. Martin's account that Mr. Martin helped me out to open up account, and then go to account and then build up my credit, build up money. And then once—he say that way, even once he die, I have good credit and I got some money from him, because I already pre-taken out.

You already got debts. If you spend them all this, and then there is everything else that go to somewhere else and not for you anymore. So that's what he said. So I have to be ready to make a payment for myself as a savings.

CP 62 (Deposition of Han p. 53:10-20). In response to questioning, she continued to describe the use of the certificates of deposit as a draw on her "inheritance" as follows:

Q. Your received the proceeds to the loan. You got the \$234,000?

A. Yes, he said that's for me.

Q. Okay. I'm just asking you the one question. I'm asking you a yes-or-no question. You received the proceeds of that loan?

....

A. He let me pre-draw out.

CP 65 (deposition of Han p. 56:2-10). She went on as follows:

Q. . . .And the loan was secured by two certificates of deposit that Mr. Martin held at Kitsap Federal Credit Union?

A. Yes. He said he was going to give it to me, that one, when he dies.

Q. Okay. And you defaulted on your obligations because you didn't make the December payment, the balloon payment at the end of the loan?

A. Yeah. That was I'm pre-draw, then he said that I have to put the money in, then after he dies I have something.

CP 65 (Deposition of Han p. 56:14-23). Finally, she testified as follows:

Q. . . .And so the two certificates of deposit were forfeited and paid off the loan? Or do you dispute that, that Mr. Martin lost his two certificates of deposit?

A. Well, he – there was already - - he already tell me ahead of time. He said, "If you use up all this so you don't pay back and then you're not going to have anything."

...

Q. But is that true, that the certificate of deposit were used to pay off the loan?

A. Well that's probably that's what he did. Instead of giving me after he's dead, he probably pay off a pre-payoff. And then he said if he have to do that and then I'm not to get anything from him. That's what he said.

Q. And so you think that it's just a wash now because you would have gotten that money when he died anyway.

CP 66 (Deposition of Kimberly Han p. 58).

In summary, it has consistently been Han's position that the certificates of deposit securing the loan were a gift. When they were forfeited by default on the bank loan, Han exhausted receipt of any additional monies from Martin that were promised as her inheritance.

B. PROCEDURAL HISTORY

Martin filed this action on November 16, 2017 with a Summons and Complaint. CP 1-8. Martin's initial Complaint sought foreclosure on

a Promissory Note and Deed of Trust encumbering certain property located in Kitsap County, along with a claim for restitution associated with the loan from Kitsap Credit Union and CD forfeiture. CP 1-8. Martin subsequently moved for an order dismissing the foreclosure claim. CP 14-15. That Motion was granted via Order entered on January 12, 2018. CP 16-17.

Han filed a Declaration on February 7, 2019 outlining her response to the Complaint. CP 24-31. Therein, she indicated that Martin had told her that the Kitsap Credit Union loan would be all that she would be all the inheritance monies she would receive from him, in the event he paid off the loan and passed away. CP 28. Han subsequently retained counsel and filed an Answer, Affirmative Defenses and Counterclaim on March 27, 2018. CP 32-34. Martin replied to the Counterclaim on April 18, 2018. CP 35-36.

Martin filed a Motion for Summary Judgment on January 3, 2019, seeking restitution from Han based upon unjust enrichment. CP 37-42. In support of the Motion, Martin's attorney filed a Declaration containing excerpts of Han's deposition transcripts, and written answers to Interrogatories and Requests for Production, including all of the excerpts outlined herein. CP 43-110. Martin himself did not file any Declaration in support of the motion. Han's attorney subsequently withdrew, effective

February 1, 2019, shortly before the February 8 date noted for the summary judgment hearing. CP 111-112.

The Court subsequently administratively continued the summary judgment hearing until February 15. On that date, Han requested additional time to hire an attorney and file her response. The court granted her request, requiring a written response to be filed before February 26, 2019. CP 118. The Court also awarded Martin fees, which he documented via Declaration on February 20, 2019. CP 119-120.

Han filed her response to Summary Judgment on February 26, 2019. CP 122-125. She did not file a Declaration in support of her response. However, she did outline facts, each of which she had previously testified to and were contained in the deposition excerpts provided by Martin's counsel, Mr. Horton. In her response to Summary Judgment, she states as follows:

Mr. Martin cosigned on a loan for Ms. Han and pledged certificates of deposit for security. He stated to her that he was helping her to establish her credit. He did this because they were friends and he stated that in the future he would be giving her these certificates of deposit in any event. Ms. Han believed that his pledge of this collateral was a gift because they were friends and he was merely helping her out.

CP 122. These facts are supported by her deposition transcripts and Interrogatory Answers included in Mr. Horton's Declaration. Specifically,

her Interrogatory response provided that the loan was a gift to help rebuild her credit. CP 79. She testified in deposition that once he died, she would have reestablished her credit, and received the CD's from him. CP 62 (Deposition p. 53); CP 65 (Deposition p. 56); CP 66 (Deposition p. 58).

The Court heard argument on March 29, 2019, and granted Martin's Motion for Summary Judgment by entering a total judgment in the amount of \$296,779.73. Judgment included a principal balance of \$234,357.18, \$937.50 in attorney's fees, and \$61,485.05. CP 144-146. The principal judgment amount was for the entire amount of the loan, and does not appear to take into account the payments made by Ms. Han on the loan from Kitsap Credit Union which reduced the principal balance to \$222,742.78. CP 99, CP 110.

Han filed a Motion for Reconsideration. CP 147. The Court denied the Motion on April 9, 2019. CP 148-149. Han timely appealed. CP 158-166.

IV. ARGUMENT

A. STANDARD OF REVIEW

On review of an Order for Summary Judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in

reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

On an appeal, the appellate court must engage in the same inquiry as the trial court, “. . . construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v. City of Seattle*, 148 Wn.App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellested v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716 (1993)).

B. THE TRIAL COURT ERRED IN GRANTING MARTIN’S MOTION FOR SUMMARY JUDGMENT AND DENYING RECONSIDERATION WHEN GENUINE ISSUES OF MATERIAL FACT WERE PRESENTED SUGGESTING A GIFT

The trial court erred when it granted Martin’s Motion for Summary Judgment. Evidence was presented to the trial court that raised a genuine issue of material as to whether Martin intended a gift. Indeed, the only testimony presented by either party was Han’s, who consistently testified in deposition that the use of the CD’s constituted a gift. Martin did not refer to that testimony in his Motion, although the excerpts were provided to the court. Instead, Martin only focused on Han’s statement that she knew she was obligated to pay the loan with Kitsap Credit Union and that it defaulted. CP 39. By contrast, Martin did not present an affidavit based

upon personal knowledge that contradicted Han's testimony of a gift. Notwithstanding, the court only focused on Han's procedural failure to file a separate Declaration or Affidavit along with her Response. VRP 6:4-14. The court failed to construe the facts and reasonable inferences in the manner most favorable to Han as the nonmoving party.

The requirements for a completed gift are: (1) an intention of the donor to presently give; (2) a subject matter capable of passing by delivery; (3) an actual delivery; and (4) an acceptance by the donee. *Henderson v. Tagg*, 68 Wash.2d 188, 192, 412 P.2d 112 (1966); *In re Gallinger's Estate*, 31 Wash.2d 823, 832, 199 P.2d 575 (1948); 38 C.J.S. Gifts § 10 (1943); 38 Am.Jur.2d *Gifts* § 18 (1968). An incomplete or unexecuted gift confers no right upon the donee; it is unenforceable at law or equity. *Oman v. Yates*, 70 Wash.2d 181, 186–187, 422 P.2d 489 (1967); 38 C.J.S. Gifts §§ 10, 16 and 62 (1943).

In *Whalen v. Lanier*, 29 Wn.2d 299, 186 P.2d 919 (1947), the court examined whether property was deeded as a gift to the defendants. In examining the elements of a gift of personal property, the court stated as follows:

In order to constitute a gift of personal property, it is necessary (a) that there be an intention on the part of the donor to personally give; (b) a subject matter capable of passing by delivery; (c) an actual delivery at the time; (d) the delivery must divest the donor of present dominion and

control over the property absolutely and irrevocably and confer upon the donee the dominion and control; and (e) a gift will not be presumed, but he who asserts title by this means must prove it by evidence which is 'clear, convincing, strong, and satisfactory.'

Id. at 312.

In the case at hand, Han testified in deposition that Martin intended to give her the CDs, both as security on the Kitsap Credit Union loan and in the event of his death. Martin was not obligated to co-sign the loan, nor was he obligated to provide security for that loan. His intention to do so was a gift to Han based upon their undisputed friendship. The CDs are a subject matter capable of passing by delivery, in that they were offered as collateral for the loan. The CDs were further actually delivered and accepted, by virtue of their placement as collateral on the loan. In turn, Martin was divested of dominion and control over the CDs when they were offered as collateral, and ultimately forfeited. In sum, Han has raised genuine issues of material fact as to the nature of the CDs as a gift. Summary Judgment on that issue was improper.

C. HAN WAS NOT UNJUSTLY ENRICHED BECAUSE MARTIN WAS A VOLUNTEER

In his Motion for Summary Judgment, Martin claimed that Han was unjustly enriched by the use of the CD's as collateral for the loan when the loan was defaulted. Han was not unjustly enriched. Martin's actions were

that of a volunteer and genuine issues of material fact exist that should have prevented summary judgment on that issue.

Unjust enrichment occurs when one retains money or benefits that, in justice and equity, belong to another. *Wright v. Dave Johnson Ins. Inc.*, 167 Wn.App. 758, 774, 275 P.3d 339 (2012). A person is unjustly enriched when he or she profits or enriches himself or herself at the expense of another contrary to equity. *Norcom Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 490, 254 P.3d 835 (2011). The enrichment must be unjust both under the circumstances and as between the two parties to the transaction. *Id.*

Washington recognizes two variations of the doctrine of unjust enrichment. The first contains two elements: (1) The enrichment of the defendant must be unjust; and (2) the plaintiff cannot be a volunteer. *Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 165, 775 P.2d 681 (1989); *Trane Co. v. Randolph Plumbing & Heating*, 44 Wn.App. 438, 442, 722 P.2d 1325 (1986); *Smith v. Dalton*, 58 Wn.App. 876, 795 P.2d 706 (1990); *Ellenburg v. Larson Fruit Co.*, 66 Wn.App. 246, 251-52, 835 P.2d 225 (1992). The other variation of unjust enrichment is based upon the following three elements: “(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the

defendant to retain the benefit without payment.” *Puget Sound Security Patrol, Inc. v. Bates*, 197 Wn.App. 461, 475, 389 P.3d 709 (2017).

Both formulations recognize that the fact that a person benefits from another is not sufficient to require the other to make restitution under an unjust enrichment theory – in order for the doctrine to apply, the enrichment must be determined to be unjust. *Lynch v. Deaconess Medical Center, supra*, at 165-66. A volunteer act or a donor is not entitled to a claim of unjust enrichment.

Whether a person acts as a volunteer is determined in light of all the surrounding circumstances. *Ellenburg v. Larson Fruit Co., Inc., supra* at 251. These circumstances include whether the benefits were conferred at the request of the party benefited; whether the party benefited knew of the payment, but stood back and let the party make the payment; and whether the benefits were necessary to protect the interest of the party who conferred the benefit or the party who benefited thereby. *Id.* at 251-252.

In the case at hand, Han’s deposition excerpts reveal that Martin volunteered to help her rebuild her credit by co-signing on the loan and offering his collateral, which he ultimately intended as a gift. No evidence was presented that Han specifically requested he make the contribution. Although she was clearly aware that he was co-signing the loan and supplying collateral, issues of material fact remain as to whether he was co-

signing the loan for his benefit or Han's, when the benefit was made in furtherance of their relationship. In sum, equity will not aid a volunteer. *Norris v. Tebrich*, 65 Wn.2d 238, 241, 396 P.2d 637 (1964). Genuine issues of material fact should have prevented summary judgment on that issue, and the matter should be remanded for trial and further proceedings.

D. THE JUDGMENT ENTERED DOES NOT TAKE INTO ACCOUNT THE PAYMENTS MADE ON THE LOAN

The court entered judgment in the total amount of the loan, despite evidence being presented by Martin that payments had been made on the loan by Han that reduced the balance to \$222,742.98. CP 99, 110. Even if this court does not find genuine issues of material fact preventing summary judgment, the court should nonetheless remand for a proper calculation of damages.

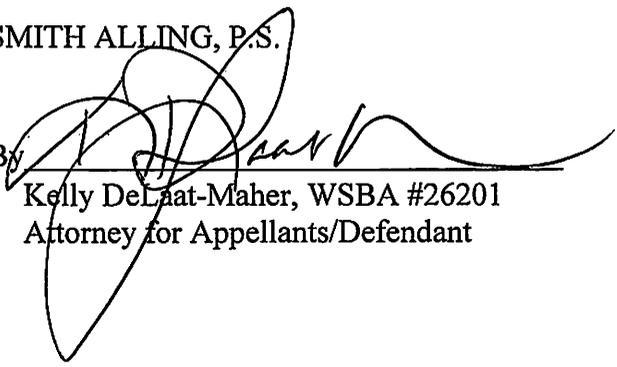
V. CONCLUSION

Based upon the foregoing, Han respectfully requests that the Court reverse the trial court's Order Granting Summary Judgment and remand for further proceedings. The pleadings and sworn statements, construed in the manner most favorable to the nonmoving party, raise genuine issues of material fact as to the nature of the security provided by Martin for purposes of the loan. Further, the amount of the judgment is not supported by the evidence presented.

RESPECTFULLY SUBMITTED this 27 day of September,
2019.

SMITH ALLING, P.S.

By


Kelly DeLaat-Maher, WSBA #26201
Attorney for Appellants/Defendant

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury of the laws of the State of Washington, that on September 27, 2019, I caused a copy of the foregoing to be served to the following in the manner noted below:

| | |
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| Attorneys for Respondent David P. Horton, WSBA#27123 3212 NW Byron St, Ste 104 Silverdale, WA 98383-9154 dhorton@kitsaplawgroup.com tracey@thwpllc.com | <input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> US Mail, Certified <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email |
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DATED at Tacoma, Washington, this 27th day of September, 2019.



Teri Parr, Legal Assistant
Smith Alling, PS

SMITH ALLING, P.S.

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