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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

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

As a favor, Mr. Martin co-signed for a loan for Ms. Han. Ms. Han admits she was obligated to pay off the loan, and that Mr. Martin expected her to pay off the loan. Ms. Han made payments on the loan but defaulted when she could not pay the principal in a balloon payment. She had used the money for her sole benefit. Because Mr. Martin co-signed on the loan, and put his certificates of deposit as collateral, the certificates of deposit were forfeited.

Pursuant to Washington law and the Restatement of Restitution, Ms. Han was unjustly enriched and should be required to pay back Mr. Martin.

When faced with this lawsuit Ms. Han invented the idea that because she thought Mr. Martin promised her a testamentary gift, and that she would lose that promised gift if she defaulted, the pledged certificates of deposit were a gift and she is not liable. But a promise to make a testamentary gift is unenforceable. The trial court's granting of Mr. Martin's motion for summary judgment should be affirmed.

II. STATEMENT OF THE CASE

Bob Martin is 89 years old.[1] He and Ms. Han were neighbors and friends.[2] They helped each other out.[3] He was nice, and caring, to her.[4] The relationship was platonic, because, Ms. Hans says, Mr. Martin is "old."[5] She took care of him when he was sick. Mr. Martin cared for Ms. Han as much as she took care of him.[6] In order for her to build up her credit, Mr. Martin co-signed a loan for Ms. Han and put up certificates of deposit as collateral.[7] The loan was issued by Kitsap Federal Credit Union where Mr. Martin had the certificates of deposit.[8]

On December 23, 2015, Ms. Han received the proceeds of the loan, $234,357.18.[9] She used it to purchase waterfront property;[10] logs[11] (Ms. Han had a business trading in timber);[12] and to make repairs to a rental property.[13] Ms. Han concedes the loan was for her benefit.[14] She concedes she was obligated to pay it back, and she intended at the inception of the

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[1] CP 108.
[2] CP 15-17.
[3] CP 7.
[4] CP 7.
[5] CP 7.
[6] CP 29, 53.
[7] CP 56-57, 106-110.
[8] CP 104-110.
[9] CP 40, 106-110.
[10] CP 38.
[11] CP 38.
[12] CP 48-50; 57.
[13] CP 58; 60.
[14] CP 64.

loan that she would pay it back.[15] She concedes that Mr. Martin had the expectation that Ms. Han would pay the loan.[16] But she defaulted on the loan.[17] The certificates of deposit were applied to the default.[18]

Prior to Ms. Han defaulting on the loan Ms. Han and Mr. Martin became estranged.[19] Ms. Han is upset that Mr. Martin's testamentary plans no longer include her. She wrote in her response to the summons "And Heidi wants to manage all of Mr. [Martin's] rentals, and Mr[] Martin said since when he die [sic] and he [cannot] take it with him, and Heidi can have all when he die, and now Mr. Martin also said Heidi asked him to have his Will to change and take out [Autumn's] for his power of attorney!"[20]

When the loan became due, Ms. Han wanted to extend the loan term,[21] but did not apply to do so.[22] She recognized that she had to do something but did not do anything because Mr. Martin did not call her.[23]

Ms. Han justifies this by claiming she was entitled to the certificates of deposit. She claims this because Mr. Martin allegedly made statements

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[15] CP 60-61.
[16] CP 124.
[17] CP 62-63, 65.
[18] CP 105.
[19] CP 29-31.
[20] CP 29.
[21] CP 63.
[22] CP 63.
[23] CP 63.

to her before they were estranged that Mr. Martin would leave the certificates to her when he died.[24]

Mr. Martin moved for summary judgment.[25] Ms. Han filed a response but did not file any affidavits or declarations to support her.[26] The Court determined, based on the record, that Ms. Martin was entitled to judgment as a matter of law.[27]

III. ARGUMENT

A. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE ARE NO MATERIAL DISPUTED FACTS.

The standard of review for a summary judgment order is de novo.[28]

Ms. Han asserts that the Sluys failed to meet their burden on summary judgment. But a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.[29] The moving party must identify

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[24] CP 66.
[25] CP 144-146.
[26] CP 122-125.
[27] CP 122-125.
[28] *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).
[29] *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)).

portions of the record, with the affidavits which demonstrate the absence of a genuine issue of material fact.[30]

The trial court did not err. The undisputed facts, taken in a light most favorable to Ms. Han, were as follows:

- Ms. Han received the proceeds of the loan, $234,357.18.[31]
- She used it the money to benefit her.[32]
- Ms. Han concedes the loan was for her benefit.[33]
- She intended at the inception of the loan to pay it back.[34]
- Mr. Martin co-signed "...without any expectation other than Ms. Han would pay the loan."[35]
- She defaulted on the loan.[36]
- Mr. Martin paid off the default.[37]

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[30] *White v. Kent Medical Center, Inc.*, 61 Wn.App. 163, 170, 810 P.2d 4, 9 (1991) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553; *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).
[31] Id. at 40; 106-110.
[32] CP 38; 48-50, 57-58; 60-61; 64.
[33] CP 64.
[34] CP 60-61.
[35] CP 124.
[36] CP 62-63, 65.
[37]CP 105.

The undisputed facts show that Ms. Han benefited from the loan. Because she failed to uphold her obligation to pay the loan, her enrichment is unjust.

B. UNDER WASHINGTON LAW AND THE RESTATEMENT OF RESTITUTION MS. HAN IS LIABLE TO MR. MARTIN BECAUSE HE PAID HER OBLIGATION.

"A person who is unjustly enriched at the expense of another is liable in restitution to the other."[38] "Quasi contracts, or contracts implied by law, are founded on the equitable principle of unjust enrichment that one should not be 'unjustly enriched at the expense of another.'"[39]

In *Columbia Cmty. Bank v. Newman Park, LLC*,[40] our Supreme Court held that where a person paid the obligation of another due to the other's default the defaulting party is unjustly enriched, and liable to the person that paid the obligation.

That Court explicitly adopted the Restatement (Third) of Mortgages § 7.6.[41] That section states, in part, that "subrogation is appropriate to

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[38] *Mazon v. Krafchick*, 158 Wn.2d 440, 458, 144 P.3d 1168 (2006) (citing Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, Mar. 31, 2000)).
[39] *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473, 482 (2007) citing *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989) (quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363, 367, 301 P.2d 759 (1956)).
[40] 177 Wn. 2d 566, 580, 304 P.3d 472, 478 (2013).
[41] *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn. 2d 566, 580, 304 P.3d 472, 478 (2013)

prevent unjust enrichment if the person seeking subrogation performs the obligation…under a legal duty to do so."[42]

Here, subrogation is appropriate to prevent unjust enrichment because Mr. Martin was under a legal duty to pay the loan taken out by Ms. Han and did so through the forfeiture of the certificates of deposit.

Section 23 of the Restatement is directly on point:

> (1) If the claimant renders to a third person a performance for which claimant and defendant are jointly and severally liable, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.
>
> (2) There is unjust enrichment in such a case to the extent that
>
> (a) the effect of the claimant's intervention is to reduce an enforceable obligation of the defendant to the third person, and
>
> (b) as between the claimant and the defendant, the obligation discharged (or the part thereof for which the claimant seeks restitution) was primarily the responsibility of the defendant.[43]

It is undisputed that Mr. Martin rendered performance for which the parties were jointly responsible to the bank. There is unjust enrichment because Ms. Han's obligation was reduced, and the obligation was solely

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[42] Id. citing Restatement (Third) of Mortgages § 7.6.
[43] Restatement (Third) of Restitution and Unjust Enrichment § 23 (2011).

the responsibility of the Ms. Han. Common sense also dictates this result – Ms. Han agreed to pay the obligation. Mr. Martin reasonably relied on her agreement to do so. She benefitted from the loan. She unjustly failed to abide by her obligation. Her enrichment is unjust.

C. THE PROMISE TO MAKE A TESTIMENTARY GIFT IS NOT ENFORCEABLE.

To circumvent the undisputed facts and binding precedent, Ms. Han Ms. Han argues here that Mr. Martin's forfeiture of the security for Ms. Han's default on the loan was a gift. In her testimony she seemed to invent this fiction to justify her actions. She *guesses* that this is what Mr. Martin wanted to do, without any evidence of his actual intent. The record shows the evolution of this argument. In her deposition Ms. Han opined:

> 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 he have to do that and then I'm not going to get anything from him. [44]

That argument then evolved in her response to the summary judgment motion where she opines that "In a sense, the act of Mr. Martin co-signing the loan was a gift."[45]

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[44] CP 66.
[45] CP 123.

Now, she claims it was a gift. The requirements for a completed gift are (1) a donative intent; (2) delivery of the property must be as perfect as the nature of the property and the circumstances and surroundings will reasonably permit.[46]

A mere promise to make a testamentary gift is not enforceable.[47] Ms. Han's "guess" that Mr. Martin would have simply disinherited her – and it would be even – is not supported by the facts or the law. Even if Mr. Martin had promised Ms. Han the certificates of deposit when he died, he was free to change his mind. Further, the evidence is contrary to Ms. Han's guess. There was no gift because Ms. Han admits Mr. Martin expected her to pay the loan back.

There was no "delivery of the property" because Ms. Han never possessed the certificates of deposit. They were held by Mr. Martin until they were forfeited to the bank when Ms. Han defaulted on her obligations to pay the loan.

If Mr. Martin did wish to deliver the certificates of deposit to Ms. Han after his death he could have simply named her as the payable on death

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[46] *Oman v. Yates*, 70 Wn. 2d 181, 185, 422 P.2d 489, 493 (1967) citing *In re Gallinger's Estate*, 31 Wn.2d 823, 199 P.2d 575 (1948).
[47] *Id. citing Frank v. Gaylord*, 119 N.J.Eq. 427, 182 A. 614 (1936); *Banner Window Glass Co. v. Barriat,* 85 W.Va. 750, 102 S.E. 726 (1920); *In re Allhouse's Estate*, 304 Pa. 481, 156 A. 69, 96 A.L.R. 379 (1931); 24 Am.Jur. Gifts s 112 (1939).

beneficiary of the certificates. There is no evidence that he did. There is no evidence of delivery.

D. EVEN IF MR. MARTIN WAS A VOLUNTEER IT DOES NOT BAR HIS RECOVERY.

In *Columbia Cmty. Bank* the Washington Supreme Court has rejected the volunteer rule as a bar to equitable subrogation.[48] As such, Ms. Han cannot claim that Mr. Martin's claim fails because he was a volunteer because co-signed the loan[49] Should this court adopt a contrary rule regarding this circumstance, which is slightly different than the situation in *Columbia Cmty. Bank,* it would lead to any co-signer of a loan not be able to seek to be repaid by the person who defaulted – giving the person who defaulted no motivation to re-pay the loan (except whatever moral obligation they have) because they will have no legal obligation. The law should protect the co-signer.

E. MR. MARTIN CONCEDES THE PRINCIPAL AMOUNT OF THE JUDGMENT SHOULD HAVE BEEN $222,742.78.

Mr. Martin concedes the amount of the judgement was incorrect and should have been $222,742.78[50] plus interest calculated on that amount. The Court should remand for a recalculation of damages.

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[48] *See Columbia Cmty. Bank v. Newman Park*, LLC, 177 Wn. 2d 566, 570, 304 P.3d 472, 473 (2013).

[50] CP at 105.

IV. CONCLUSION

Mr. Martin co-signed for Ms. Han's obligation. She admits it was her obligation. Ms. Han took the proceeds of the loan. She used the proceeds for her benefit. She then defaulted. She was unjustly enriched. Her belief that it was an advancement on an inheritance is not a defense to this action because a promise to make a future gift is not enforceable, and the gift was never delivered. The trial court's summary judgment should be affirmed, and the case remanded for entry of a judgment to reflect the actual amount of Mr. Martin's loss.

Respectfully submitted this 13th day of December, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury of the laws of the State of Washington, that on December 13, 2019, I caused a copy of the foregoing to be served to the following in the manner noted below:

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DATED at Silverdale, Washington, this 13th day of December 2019.

Tracey Hamilton-Oril, Legal Assistant

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