

FILED
Court of Appeals
Division III
State of Washington
9/17/2020 2:59 PM

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

UMPQUA BANK,

Respondent,

v.

CHARLES A. GUNZEL, III, et al,

Appellant

No. 374009

APPELLANT'S REPLY BRIEF

Bret Uhrich, WSBA #45595
Attorney for Charles A. Gunzel III, Appellant

1333 Columbia Park Trail, Ste. 220
Richland, WA 99352
(509) 735-4444 – Telephone
(509) 735-7140 – Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... II

A. Oregon Case Law Unambiguously States
That Where A Personal Guaranty And An
Underlying Debt Are Parallel, The Cause
Of Action On The Personal Guaranty
“Accrues Upon Maturity Of The Note”.....2

B. The “Intent” Of The Parties Is Irrelevant
Regarding When The Cause Of Action
Accrues On The Guaranty, Accrual Is A
Question Of Law.....3

C. Oregon Law Does Not Allow For Blanket
Waivers Of All Defenses Which Include
Waivers Contrary To Public Policy..... 4

D. Gunzel Is Not Estopped From Asserting
The Defense Of Statute Of Limitations.....6

E. Court should disregard factual assertions
without citation or otherwise supported by
the record..... 7

CONCLUSION8

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Beck v. Gen. Ins. Co. of Am.</i> , 18 P.2d 579, 583 (Or. 1933)	5-6
<i>Bennett v. City of Salem</i> , 235 P.2d 772 (Or. 1951)	6-7
<i>Biomass One, L.P. v. S-P Const.</i> , 799 P.2d 152, 154 (Or. 1990)	5
<i>Brennen v. City of Eugene</i> , 591 P.2d 719 (Or. 1979)	3
<i>Brown v. Babcock</i> , 540 P.2d 1402 (Or. 1975)	3
<i>Corona v. Corona</i> , 329 P.3d 701, 708 (N.M. Ct. App. 2014)	8
<i>Donohoe v. Mid-Valley Glass Co.</i> , 735 P.2d 11, 12 (Or. App. 1987)	6-7
<i>Eustis v. Park-O-Lator Corp.</i> , 435 P.2d 802, 804 (Or. 1967)	2
<i>Evans v. Finley</i> , 111 P.2d 833, 834 (Or. 1941)	5
<i>Fed. Deposit Ins. Corp. v. Petersen</i> , 770 F.2d 141, 143 (10th Cir. 1985)	8
<i>J. A. Campbell Company v. Holsum Baking Company</i>	6
<i>Lemond v. State, Dep't of Licensing</i> , 143 Wn. App. 797, 807, 180 P.3d 829, 834 (2008)	7
<i>Marinelli v. Lombardi</i> , 196 A. 701, 703 (N.J. 1938)	8
<i>Mitchell v. Campbell</i> , 13 P. 190, 192 (Or. 1886)	5
<i>Moini v. Hewes</i> , 763 P.2d 414, 417 (Or. App. 1988)	3-4
<i>Pyle v. Kernan</i> , 36 P.2d 580, 583 (1934))	5
<i>Stevens v. Bispham</i> , 851 P.2d 556, 560 (Or. 1993)	3
<i>Voicelink Data Servs., Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 619, 937 P.2d 1158 (1997)	7
<i>W. J. Seufert Land Company v. Greenfield</i> , 496 P.2d 197 (Or. 1972)	4-5
Statutes	Page(s)
ORS 12.010	3
ORS 12.240	1
Court Rules	Page(s)
RAP 10.3	7

Secondary Sources	Page(s)
B. H. Glenn., <i>Validity of contractual time period, shorter than statute of limitations, for bringing action</i> , 6 A.L.R.3d 1197 (Originally published in 1966)	5

In order to prevail in this action, Respondent Umpqua Bank (Umpqua) must show that there were payments made by Charles Gunzel under the Guaranty Agreement in order to receive the benefit of ORS 12.240. “Whenever any payment of principal or interest is made after it has become due, upon an existing contract, whether it is a bill of exchange, promissory note, bond, or other evidence of indebtedness, the limitation shall commence from the time the last payment was made.” ORS 12.240 (emphasis added). The undisputed evidence is that no such payments were ever made on the Guaranty Agreement. *See CP 220*. While Umpqua puts great emphasis on the duration of the Guaranty Agreement, statutes of limitation do not commence or begin to run from duration, they accrue upon breach.

It is undisputed that Gunzel breached the Guaranty Agreement when Cornerstone failed to make payment due in full on the underlying note on May 28, 2009. Umpqua could have brought suit for this breach at any time prior to May 28, 2015. Indeed, the Guaranty Agreement explicitly provides for such action. *CP 70* (“Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender’s remedies against anyone else obligated to pay the Indebtedness...”). Umpqua could have also required Gunzel to sign the Promissory Note as a co-borrower. Umpqua

did not take any of these actions. Instead, almost ten years after breach of the Guaranty Agreement, Umpqua commenced this action. Because the statute of limitations is six years, the action is barred. As a result, the Court should reverse.

A. Oregon Case Law Unambiguously States That Where A Personal Guaranty And An Underlying Debt Are Parallel, The Cause Of Action On The Personal Guaranty “Accrues Upon Maturity Of The Note...”

In the Respondent’s Brief, Umpqua Bank seeks to distinguish the case at hand from the facts of *Eustis v. Park-O-Lator*. *Respondent’s Brief*, pgs. 13-14. The underlying facts in *Eustis* are indeed different because *Eustis* involved a promissory note and personal guaranty with different triggering events. 435 P.2d 802, 804 (Or. 1967). The problem for Umpqua is that the court in *Eustis* also provides instruction regarding accrual when the promissory note and guaranty are coextensive:

In the usual contract in which the guarantor guarantees the payment of a note, the cause of action against the guarantor accrues upon the maturity of the note and the statute of limitations runs on the guaranty at the same time it runs on the note.

Id (citing *Michelin Tire Co. v. Fisher*, 240 P. 895 (Or. 1925)) (emphasis added). This is the situation currently before the Court. The cause of action for breach of the Guaranty Agreement accrued upon maturity of the underlying debt.

B. The “Intent” Of The Parties Is Irrelevant Regarding When The Cause Of Action Accrues On The Guaranty, Accrual Is A Question Of Law.

Umpqua further argues that the language of the Guaranty Agreement evidences an intent for causes of action under the Guaranty Agreement to arise at the same time as the underlying debt. *See generally Respondent’s Brief, pgs. 10-12.* Whether the Guaranty Agreement demonstrates such intent is irrelevant. Statutes of limitation are unsurprisingly a question of statute, not a party’s intent. ORS 12.010 (“Actions shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute.”). “Depending on the case, the question of when harm occurs may be a question of fact or a question of law.” *Stevens v. Bispham*, 851 P.2d 556, 560 (Or. 1993) (*citing Brown v. Babcock*, 540 P.2d 1402 (Or. 1975)) (legal malpractice). This means “‘harm’ in the legal sense, *i.e.*, a collection of facts that the law is prepared to recognize as constituting the ‘harm’ element of a claim....” *Id* (*citing Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979)).

It is undisputed that the “harm,” or in this case, the “damage” element of a breach of contract claim occurred when Gunzel breached the Guaranty Agreement in May of 2009. *See Moini v. Hewes*, 763 P.2d 414, 417 (Or. App. 1988) (“Damage is an essential element of any breach of

contract action.”). Nothing in the Guaranty Agreement suggests that accrual of the cause of action was delayed to a later date. *CP 70*. Instead, Umpqua is effectively arguing that the cause of action accrued both on May 28, 2009 when the debt came due and the later date of December 13, 2013 despite the fact that no payments were made under the Guaranty Agreement. *CP 220*. The “intent” of the parties does not and cannot alter the date of accrual, nor does it create multiple dates of accrual.

C. Oregon Law Does Not Allow For Blanket Waivers Of All Defenses Which Include Waivers Contrary To Public Policy.

The Court should reverse in this matter because the statute of limitation waiver is unenforceable under Oregon law. In the Respondent’s Brief, Umpqua argues that “waivers of defenses like statute of limitations are enforceable in Oregon.” *Respondent’s Brief, pg. 18*. However, the case law cited does not support this proposition. Umpqua cites *W. J. Seufert Land Company v. Greenfield* in regard to blanket waivers of defenses. 496 P.2d 197 (Or. 1972). In *Greenfield*, the defendants executed an agreement in which they agreed to “assert no defense whatsoever to any action” on the contract. *Id.* at 198. On appeal, the defendants argued that this clause rendered the agreement void in its entirety because the clause violated public policy. *Id.* The court on appeal disagreed that the entire contract was rendered void by the provision. *Id.* at 200. Instead, the court reasoned

that each defense and purported waiver thereof must be considered individually. *Id.* The court noted that it had “previously declined to state any ‘hard and fast rule’ for determining whether a contract is invalid as against public policy, but have held that each case must be determined in the light of its own facts...” *Id.* (quoting *Pyle v. Kernan*, 36 P.2d 580, 583 (1934)). As to waivers of the statute of limitations, the Supreme Court for the State of Oregon has spoken: such waivers are void for violation of public policy. *See Mitchell v. Campbell*, 13 P. 190, 192 (Or. 1886); *Evans v. Finley*, 111 P.2d 833, 834 (Or. 1941).

Next, Umpqua argues that waivers of statutes of limitations are enforceable because Oregon has enforced contracts reducing the statute of limitations to a smaller time period. *Biomass One, L.P. v. S-P Const.*, 799 P.2d 152, 154 (Or. 1990). *Biomass* does not address the whether the provision violates public policy. *Id.* at 154-55. More importantly, shortening the statute of limitations prospectively in a contract is universally treated differently than purporting to lengthen or remove the statute of limitations altogether. Such limitations are “valid if the stipulated period of time is reasonable.” 6 A.L.R.3d 1197 (Originally published in 1966) *accord Beck v. Gen. Ins. Co. of Am.*, 18 P.2d 579, 583 (Or. 1933) (“But there is nothing in the policy or object of such statutes which forbids the parties to

an agreement to provide a shorter period, provided the time is not unreasonably short.”).

Finally, Umpqua cites *J. A. Campbell Company. v. Holsum Baking Company* for the proposition that lengthening the statute of limitations is permissible in Washington. 15 Wn.2d 239, 255, 130 P.2d 333, 340 (1942). Respectfully, Umpqua is emphasizing the incorrect portion of the block quote. The court’s decision is explicitly in regard to tolling or reaffirmation agreements “made after the statute has commenced to run but before it has fully run...” *Id* (emphasis added). To fit the facts of this case, Gunzel would have needed to sign an affirmation or tolling agreement after the cause of action accrued on May 28, 2009. Such agreement does not exist.

D. Gunzel Is Not Estopped From Asserting The Defense Of Statute Of Limitations.

In the alternative to arguing that waivers of statutes of limitation are enforceable, Umpqua suggests that Gunzel may be estopped from asserting the defense. This suggestion is unsupported by Oregon case law. A party “can be equitably estopped by verbal representations or conduct from invoking a statute of limitations defense” only upon meeting the following elements:

- (1) [T]here must be a false representation;
- (2) it must be made with knowledge of the facts;
- (3) the other party must have been ignorant of the truth;
- (4) it must have been made with the intention that it should be acted upon by the other

party; and (5) the other party must have been induced to act upon it.

Donohoe v. Mid-Valley Glass Co., 735 P.2d 11, 12 (Or. App. 1987) (quoting *Bennett v. City of Salem*, 235 P.2d 772 (Or. 1951)). To meet these elements, Umpqua would need to show a false representation by Gunzel which induced Umpqua from taking action on the personal guaranty. There is no evidence of any such communication. The doctrine of equitable estoppel is not available to Umpqua to bring this action within the statute of limitations.

E. Court should disregard factual assertions without citation or otherwise supported by the record.

Under RAP 10.3(a)(4), “[r]eference to the record must be included for each factual statement.” Throughout the brief, Umpqua asserts facts which are unsupported by the record. *See e.g. Respondent’s Brief*, pg. 1 (“Gunzel continued to make payments in partial satisfaction of the company’s obligation on the Note); pg. 2 (“To be sure, Gunzel made a calculated and conscience choice to continue making payments on the Note even after it’s maturity). The Court should disregard assertions of fact which are not supported by the record. *Lemond v. State, Dep’t of Licensing*, 143 Wn. App. 797, 807, 180 P.3d 829, 834 (2008) (citing *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 619, 937 P.2d 1158 (1997)).

CONCLUSION

The Court should reverse the ruling of the trial court, and remand for entry of dismissal of the claims against Gunzel with prejudice because this action was barred by the statute of limitations. While Umpqua suggests that this conclusion will cause chaos among lenders, Gunzel merely asks that this Court recognize that the same rules apply to Umpqua that apply to everyone else. This is the conclusion which is not only required by Oregon law, but the same conclusion that many other jurisdictions have arrived at as well. *See e.g. Corona v. Corona*, 329 P.3d 701, 708 (N.M. Ct. App. 2014); *Marinelli v. Lombardi*, 196 A. 701, 703 (N.J. 1938); *Fed. Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985). Umpqua had six full years to bring its action against Gunzel. It did not do so within the allowed period of time. As a result, the Court should reverse.

DATED this 17th day of September 2020.



BRET UHRICH, WSBA #45595

WALKER HEYE MEEHAN & EISINGER PLLC

September 17, 2020 - 2:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37400-9
Appellate Court Case Title: Umpqua Bank v. Charles A. Gunzel, III, et al
Superior Court Case Number: 19-2-00789-1

The following documents have been uploaded:

- 374009_Briefs_20200917145818D3430556_5014.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief - Final.pdf

A copy of the uploaded files will be sent to:

- dbrown@williamskastner.com
- ndelarosa@walkerheye.com
- sleake@williamskastner.com

Comments:

Sender Name: Bret Uhrich - Email: buhrich@walkerheye.com
Address:
1333 COLUMBIA PARK TRL STE 220
RICHLAND, WA, 99352-4713
Phone: 509-735-4444

Note: The Filing Id is 20200917145818D3430556