FILED
Court of Appeals
Division III
State of Washington
8/18/2020 4:49 PM

NO. 374009

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

UMPQUA BANK,

Respondent,

v.

CHARLES A. GUNZEL III, et al.,

Appellant.

RESPONDENT UMPQUA BANK'S RESPONSE BRIEF

Daniel A. Brown, WSBA #22028
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
Email: dbrown@williamskastner.com
sleake@williamskastner.com

Attorneys for Respondent Umpqua Bank

Table of Contents

I. INTRODUCTION 1

II. ISSUES PRESENTED 3

1. Whether the trial court correctly concluded that Gunzel's continued payments on the Note after its maturity date extended the statute of limitations on its corresponding personal guaranty in accordance with Oregon law? 3

2. Whether the trial court correctly concluded that Gunzel's personal guaranty accrued at the same rate as the Note. 3

3. Whether the trial court correctly concluded that the personal guaranty did not prospectively waived the statute of limitations defense but instead precluded Gunzel from arguing the statute of limitations had lapsed on the personal guaranty when it had not lapsed on the Note. 3

4. Whether Umpqua is entitled to attorneys' fees on appeal. 3

III. RESPONSE TO STATEMENT OF THE CASE 3

IV. ARGUMENT 9

A. The Unambiguous Personal Guarantees Indicate that Gunzel Intended to Remain Liable for the Debt until it was Paid Off. 10

1. The Statute of Limitations Runs at the Same Rate on the Underlying Debt and the Personal Guaranty 11

2. Gunzel's Preferred 'Interpretation' Renders the Guaranty Meaningless 14

B. Gunzel Repeatedly Waived the Statutes of Limitations Defense in Accordance with the Law in Oregon and Washington 17

1. Waivers of Defenses like the Statute of Limitations are Enforceable in Oregon. 18

2. Waivers of the Defenses like the Statute of Limitations are Enforceable Under Washington Law. 21

C. Umpqua is Entitled to Attorneys' Fees 23

V. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Alder v. Fred Lind Manor,
153 Wn.2d 331 (2004) 10

Bagley v. Mt. Bachelor, Inc.,
340 P.3d 27 (Or. 2014) 18, 19

Biomass One v. S-P Construction,
799 P.2d 152 (Or. App. 1990).....19

Bliss v. Southern Pacific Co. et al.,
321 P.2d 324 (Or. 1958) 18

Eustis v. Park-O-Lator Corp.,
435 P.2d. 802 (Or. 1967) 13

Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC,
155 Wn. App. 643 (2010) 21

Fujitsu Microelectronics, Inc. v. Lam Research Corp.,
27 P.3d 493 (Or. App. 2001).....18

Grey v. Leach,
158 Wn. App. 837 (2010) 11

Hartman v. Anderson,
49 Wn.2d 154 (1956) 20

Hazen v. Cook,
293 Or. 232, 646 P.2d 33 (Or. 1982) 23

Hoffman Construction Co. v. Fred S. James & Co.,
836 P.2d 703 (Or. 1992) 11

J.A. Campbell Co. v. Holsum Baking Co.,
15 Wn.2d 239 (1942) 22

James v. Clackamas,
299 P.3d 526 (Or. 2013) 10

Johnson v. School Dist. No. 12, Wallowa County,
312 P.2d 591 (Or. 1957) 11

Kaiser v. Idlemam,
108 P. 193 (Or. 1910) 14

Pelly v. Panasyuk,
2 Wn. App. 2d 848, 865-66 (2018).....11

Pioneer Resources, LLC v. Lemargie,
27 P.3d 520 (Or. App. 2001).....10

Pyle v. Kernan,
36 P.2d 580 (Or. 1934) 19

State v. Northwest Magnesite Co.,
28 Wn.2d 1 (1947) 20

Swint v. Swint,
395 P.2d 114 (Or. 1965) 20

Taplett v. Khela,
60 Wn. App. 751 (1991) 22

W. J. Seufert Land v. Greenfield,
496 P.2d 197 (Or. 1972) 19, 20

Yogman v. Parrott,
937 P.2d 1019 (Or. 1997) 10

Young v. Mobil Oil Corp.,
735 P2d 654 (Or. App. 1987).....19

STATE STATUTES

ORS 12.080(1) 9

ORS 12.240.....1, 9, 12, 14, 16

ORS 20.096.....23

RCW 4.16.280 .....1, 9

RULES

RAP 18.1.....23

I. INTRODUCTION

This appeal centers on the sanctity of contract and the unambiguous language of a written personal guaranty on a line of credit evidenced by a common place commercial promissory note (the "Note"). This loan arrangement, including the Note and related personal guaranty, was entered into between Umpqua Bank ("Umpqua") and Charles A. Gunzel III ("Gunzel"). Between 2004 and 2007 whereby Gunzel personally guaranteed hundreds of thousands of dollars loaned by Umpqua to his closely held corporation, Cornerstone Building Co. ("Cornerstone").

While the Note became fully due and payable in 2009, it remained unpaid, Gunzel continued to make payments in partial satisfaction of the company's obligations on the Note (and his own personal obligations on the guaranty) until 2013. Doing so forestalled Umpqua's collection actions on both the Note and the personal guaranty. In accordance with Oregon law (the Note and personal guaranty are both governed by Oregon law as Cornerstone was based in Oregon), these continued payments on the debt extended the statute of limitations. ORS 12.240, *see also* Washington's equivalent, RCW 4.16.280. Thus, while the cause of action against Gunzel based on Gunzel's personal guaranties accrued upon the maturity of the Note (i.e., 2009), the payments through 2013 extended the statute of limitations. Umpqua subsequently timely brought this collection action

against Gunzel (his company had already gone under and ceased operations) in 2019, within the six year statute of limitations on a written contract under Oregon law.

To be sure, Gunzel made a calculated and conscience choice to continue making payments on the Note even after its maturity. Because a promissory note and a personal guaranty related thereto are not legally separable, Gunzel's payments on the Note extended both its maturity and the maturity of his personal guaranty for statute of limitations purposes.

Now, Gunzel seeks to renege on the clear state of the law. This is despite the fact that the personal guaranty is express, unambiguous, binding, and was relied upon to the mutual benefit of both Gunzel and Umpqua for years. It specifically provides that it is effective and binding on the guarantor (Gunzel) for as long as the underlying debt remains outstanding, so long as the statute of limitations on the underlying debt has not lapsed. The purpose of such language is to avoid precisely the argument Gunzel attempted below, and failed, as well as he asserts now on appeal.

Gunzel has never denied the existence of the debt. Gunzel has never denied the amount of the debt. His sole defense to repayment is based on the specious and legally indefensible (as well as illogical) argument that somehow his personal guaranty of the debt is totally divorced from the Note. The trial court had no trouble rejecting Gunzel's argument, entering

judgment in favor of Umpqua on January 22, 2020 and awarding Umpqua entitlement to its attorney fees and costs in accordance with the terms of the loan documents. This Court should do the same.

Accordingly, Umpqua asks this Court to uphold the January 22, 2020 Order and deny Gunzel's request to find the personal guaranty accrued at a different time than the Note when the plain language of the guaranty requires it to be binding and enforceable so long as the Note remains unpaid and enforceable.

II. ISSUES PRESENTED

1. Whether the trial court correctly concluded that Gunzel's continued payments on the Note after its maturity date extended the statute of limitations on its corresponding personal guaranty in accordance with Oregon law?

2. Whether the trial court correctly concluded that Gunzel's personal guaranty accrued at the same rate as the Note.

3. Whether the trial court correctly concluded that the personal guaranty did not prospectively waived the statute of limitations defense but instead precluded Gunzel from arguing the statute of limitations had lapsed on the personal guaranty when it had not lapsed on the Note.

4. Whether Umpqua is entitled to attorneys' fees on appeal.

III. RESPONSE TO STATEMENT OF THE CASE

Gunzel is the founder and President of his closely held company, Cornerstone. Umpqua entered into a commercial loan agreement with

Cornerstone, including the Note executed by Gunzel his personal guaranty as further security for the debt. CP 169.

In fact, Gunzel personally guaranteed repayment of the loan no less than four times. Between May 28, 2005 and May 21, 2007, Gunzel, on behalf of Cornerstone, entered into a series of Modifications Agreement (the last being in May 21, 2007) wherein the maturity date of the Note was extended several times along with an interest rate change. *See* CP 169 – 180. Each time, Gunzel executed an additional personal guaranty. *See* CP 41 – 73.

On June 27, 2007, Gunzel, on behalf of Cornerstone, entered into a Change in Terms Agreement with Umpqua whereby the maximum credit line previously of $100,000 pursuant to the Note, was increased to $200,000 and the maturity date was once more extended, this time to May 28, 2009. CP 175. At this same time (June 27, 2007), Gunzel executed another commercial guaranty personally guaranteeing all the indebtedness of Cornerstone. CP 70 – 73.

By their express terms, the personal guaranty's signed by Gunzel are continuing guarantees that are effective for the duration and enforceability of the underlying loan:

> This Guaranty will take effect when received by the Lender ... **and will continue in full force until all the Indebtedness incurred or contracted for ... have been fully and finally**

> **paid** and satisfied and **all of Guarantor's other obligations under the Guaranty shall have been performed in full.**

CP 127, 130, 133, 137 (emphasis added).

In other words, the guaranty would not expire simply because the maturity date of the Note came and went, instead, Gunzel promised in writing that he would remain liable "until all the Indebtedness" incurred by his company had been repaid to the bank.

To perfect the enforceability of this guaranty and as a precondition to the extension of credit from Umpqua, Gunzel specifically and expressly waived his right to raise the statute of limitations as a defense to his obligations under his numerous continuing guaranties for the sole purpose of ensuring the Note and guaranty ran at the same rate:

> GUARANTOR'S WAIVERS
>
> Guarantor also waives any and all rights or defenses based on surety or impairment of collateral including, but not limited to, any rights or defenses arising by reason of ...(E) **any statute of limitations,** if at any time any action or suit brought by Lender against Guarantor is commenced, **there is outstanding indebtedness which is not barred by any applicable statute of limitations.**

CP 127, 130, 134, 138 (emphasis added).

In other words, so long as there was an outstanding debt that, itself, was not yet barred by any applicable statute of limitations, Gunzel agreed that he would not be able to assert any statute of limitations defense with

regard to his guaranty – which was specifically provided to incentivize Umpqua into lending the underlying funds to his company in the first instance and as security for exactly this eventuality of non-payment by the company. In doing so, Gunzel even went so far to expressly acknowledge the effect of his waiver of any defense regarding the statute of limitations (among other defenses):

> GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS.
>
> Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable **and not contrary to public policy or law.**

CP 128, 131, 134, 138 (emphasis added).[1]

Gunzel does not dispute that he entered into these agreements with Umpqua to personally guarantee repayment of the Cornerstone loan. Gunzel also does not dispute that, when Cornerstone's underlying indebtedness became due on the face of the Note on May 28, 2009, Cornerstone (and Gunzel) failed to have all sums due and owing paid by this maturity date. CP 220.

[1] Both the Note and the personal guaranty also contain an attorneys' fee provision, permitting Umpqua to recover attorneys' fees and costs incurred as a result of a lawsuit to enforce the terms of the Note and/or personal guaranty. CP 128-29.

Umpqua chose not to foreclose on the Note immediately and instead permitted Gunzel to continue to make payments rather than filing suit, which he did. In fact, Gunzel was personally responsible for continuing to direct payments to Umpqua on the outstanding debt up to and through December 16, 2013.

Ultimately, this action was brought by Umpqua on March 25, 2019 in Benton County Superior Court to enforce Gunzel's personal guaranty since Cornerstone is defunct and no further payments were received. CP 1. On April 26, 2019, Gunzel answered Umpqua's complaint. In that Answer, Gunzel did not dispute that Cornerstone ultimately owes Umpqua "approximately $280,000." CP 187 – 88. Gunzel also admitted that "as par[t] (sic) of the Loan relationship, Gunzel agreed to and did execute certain Commercial Guarantees." CP 188. Moreover, he asserted only two affirmative defenses to payment: marital bankruptcy (relating to his current spouse) and the statute of limitations. CP 188.

On July 16, 2019, Gunzel filed a motion for summary judgment seeking an order dismissing Umpqua's claim on the purported basis that that because the indebtedness under the note became due in 2009 the statute of limitations on the personal guaranty had run and was thus unenforceable. CP 4. By Order dated October 2, 2019, the Court denied Gunzel's motion seeking application of the statute of limitations, finding Umpqua's claims

were not barred as a matter of law. In the Order, the Court made the following pertinent Conclusions of Law:

- 8. The cause of action against Charles A. Gunzel III by Umpqua Bank, based on Mr. Gunzel's personal guaranties, accrued upon maturity of the promissory note, *i.e.* May 28, 2009, which was extended by payments made through December 16, 2013.

- 9. The cause of action against Charles A. Gunzel III by Umpqua Bank was filed within the statute of limitations, *i.e.* prior to December 16, 2019 which is six years after the last payment was made on the promissory note, *i.e.* December 16, 2013.

CP 156 – 57.

The Court having denied Gunzel's sole applicable affirmative defense to his own liability, Umpqua shortly thereafter filed a motion for summary judgment on October 17, 2019. CP 158. Umpqua noted that the amount and existence of the debt was not in dispute, and that the Court had already found that Gunzel's personal guaranty of the Note was not barred under the statute of limitations because Gunzel's payments of interest and principle on the debt extended the statute of limitations. CP 158.

Gunzel failed to respond to Umpqua's motion for summary judgment under the time allowed by the Civil Rules, and after bringing a motion to shorten time on a motion to continue, requested the Court continue the deadline for Gunzel to respond on the merits. Arguably in error, the Court granted this request, and Gunzel subsequently filed its Response on December 30, 2019 (more than two months after Umpqua's

initial filing). After hearing oral argument in January 2020, the Benton County Superior Court took the matter under advisement and subsequently granted Umpqua's motion for summary judgment, finding Gunzel liable for the debt. CP 234. The Court entered a judgment awarding Umpqua the outstanding debt on the Note plus its entitlement to attorneys' fees and costs under the pertinent loan document provisions. CP 234. This appeal by Gunzel followed.

IV. ARGUMENT

Under Oregon law, as in Washington, the statute of limitations for breach of a written contract is six years. ORS 12.080(1). The underlying indebtedness became due on May 28, 2009, and Gunzel's failure to have all debts repaid at that time was in breach of the Note and his personal guaranty. Oregon's six year statute of limitations on the collection of debts and began running at that time. However, payments of principal and interest will extend the statute of limitations on payment of a promissory note. ORS 12.240; *accord* RCW 4.16.280. Because Umpqua accepted Gunzel's payments on the Note though December 16, 2013, the statute of limitations was extended to December 16, 2019 – the last payment plus six years.

Gunzel's sole defense to the enforceability of his personal guaranty(ies) is that the statute of limitations lapsed in 2015, six years after the Note's 2009 maturity date. This argument is fatally flawed for two

reasons: First, the various personal guarantees are unambiguous. Gunzel guaranteed the debt until it was paid off because his personal guaranty was effective for the duration of the loan. Second, to further ensure the effectiveness of this guaranty and avoid this legally defective argument, Gunzel expressly and specifically waived any right to claim the statute of limitations had lapsed on his guaranty so long as the statute of limitations had not lapsed on the underlying debt.

A. The Unambiguous Personal Guarantees Indicate that Gunzel Intended to Remain Liable for the Debt until it was Paid Off

It is black letter law of contracts that the parties to a contract shall be bound by its terms. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 344 (2004). Under the Oregon law governing this dispute, a court's role "in interpreting a contract… is to determine the parties' intent." *Pioneer Resources, LLC v. Lemargie*, 27 P.3d 520, 522 (Or. App. 2001), *James v. Clackamas*, 299 P.3d 526, 532 (Or. 2013). "We do that by looking first to the language of the written instrument itself and considering its text in the context of the document as a whole. If the text's meaning is unambiguous, the analysis ends." *Pioneer Resources*, 27 P.3d at 522, citing *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997).

Of course, "[i]nterpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the

language meaningless or ineffective." *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 865-66 (2018) (*quoting Grey v. Leach*, 158 Wn. App. 837, 850 (2010)); *see also Hoffman Construction Co. v. Fred S. James & Co*., 836 P.2d 703, 705 (Or. 1992) ("We assume that parties to an insurance contract do not create meaningless provisions."); *Johnson v. School Dist. No. 12, Wallowa County*, 312 P.2d 591, 592 (Or. 1957) ("[W]e are obliged, if possible, to construe the contract so as to give effect to all its provisions."). Giving all provisions contained in the personal guaranty leads to only one conclusion: the personal guaranty is enforceable for the duration of the debt, so long as the underlying debt itself remains enforceable.

1. The Statute of Limitations Runs at the Same Rate on the Underlying Debt and the Personal Guaranty

In this case, the intent of the parties executing the personal guaranty is unambiguous. There is no dispute that the personal guaranty was effective until the underlying debt had been paid in full.

> This Guaranty will take effect when received by the Lender … **and will continue in full force until all the Indebtedness incurred or contracted for** … **have been fully and finally paid** and satisfied and **all of Guarantor's other obligations under the Guaranty shall have been performed in full**."

CP 127.

There is also no dispute that the personal guaranty included a waiver of the defense of statute of limitations so long as the underlying debt was not paid and not barred by the statute of limitations:

> Guarantor also waives any and all rights or defenses based on surety or impairment of collateral including, but not limited to, any rights or defenses arising by reason of …(E) **any statute of limitations**, if at any time any action or suit brought by Lender against Guarantor is commenced, **there is outstanding indebtedness which is not barred by any applicable statute of limitations**."

CP 127.

There is simply no way to read these two provisions together and determine that the parties intended the personal guaranty to accrue, as Gunzel argues, at a different rate than the underlying debt. Given the reality of the statute of limitations, the only way this intent could be enacted was if Gunzel acknowledged that he had no right to claim the statute of limitations applied to his personal guaranty when it had not yet expired against the underlying debt. That is precisely what the parties contracted to. This intent is in accord with Oregon (and Washington) law.

Umpqua's lawsuit against Gunzel was timely. As stated above, Oregon's six year statute of limitations on the collection of debts was extended by ORS 12.240 by Gunzel's voluntary payments running to the end of 2013. As president of Cornerstone, Gunzel personally directed that payment continue to be made through December 16, 2013. Because the

statute of limitations runs on a personal guaranty at the same time it runs on the underlying debt, the statute of limitations on the underlying debt and personal guaranty was accordingly extended by Cornerstone's payment in late 2013 to late 2019.

Gunzel's reliance on *Eustis v. Park-O-Lator Corp*., 435 P.2d. 802 (Or. 1967) is simply misplaced.[2] In *Eustis* the defendant agreed to assume personal liability for a promissory note, but only in the event Park-O-Lator was to become insolvent or file for bankruptcy. Thus, the Court held the parties to the unambiguous language of their contract: the corporation's liability would accrue on the maturity date of the note, while the guarantor's liability would not accrue until or unless the corporation became insolvent. *Id* at 804. Ultimately, the Court recognized that because the guarantor's obligation was conditioned on a specific event that may never occur, the statute of limitations against the guarantor was separate from the statute of limitations on the underlying debt. *Id*. at 804-5.

Unlike the *Eustis* guarantor, Gunzel's liability has existed since the debt was incurred by Cornerstone and not repaid – in other words, his guaranty ran parallel with the note and the underlying debt. While it is true that Cornerstone did not pay the note in full in 2009, the statute of

[2] Gunzel also attempted to rely on *Eustis* on his motion before the Benton County Superior Court. The Court did not find this case availing.

limitations on suing for Cornerstone's breach of contract was undisputedly extended in 2013 pursuant to ORS 12.240. Bizarrely, Gunzel recognizes "the guaranty executed by Gunzel was parallel to the obligations of the loans to Cornerstone Building Co." (see CP 12) but fails to recognize that if the guaranty is parallel to the underlying debt, the 2013 payment which extended the statute of limitations also must have extended the statute of limitations for Umpqua's claims against. Gunzel (or else it is not parallel). Because Gunzel's guaranty was for the lifetime of the debt (i.e. so long as it remained unpaid in full), his obligations ran parallel to the obligations on the underlying debt.

2. Gunzel's Preferred 'Interpretation' Renders the Guaranty Meaningless

As against the debtor, partial payments made by him to his creditor will stop the running of the statute of limitations, and mark the time from which the statute then begins to run; and the general rule is that the partial payment of a debt, which will prevent the statute of limitations from running against it, will also prevent the statute from running against the remedy on the security. ORS 12.240, *Kaiser v. Idlemam*, 108 P. 193, 194 (Or. 1910). This legal precept is not realistically disputed by Gunzel.

Gunzel's basic argument, rather, is that when the debt became due and owing in 2009, Umpqua's acceptance of additional payment by him

beyond the maturity date caused prejudice to Gunzel by extending the statute of limitations against Cornerstone beyond 2015 (the date at which the statute would have lapsed had the statute of limitations run from 2009 rather than 2019, the date at which the statute lapsed due to Gunzel's continued payments through 2013). This argument does not stand up to any basic scrutiny.

The purpose of allowing a debtor additional time to pay off a debt is to avoid litigation and collection actions and litigation, especially against a guarantor. If it is prejudicial to any party, it is the bank, who foregoes a legal right to sue for some time in hope of avoiding litigation. Likewise, Gunzel was the party that chose to continue making payments: *not Umpqua*. Furthermore, Gunzel argues that he did not consent to extending the maturity of the personal guaranty despite the payments extending the statute of limitations on the underlying debt. Umpqua is not making this argument, and never has. Instead, Umpqua merely notes that Gunzel's payments after the debt became due and owing extended the statute of limitations of the debt not the date of maturity.[3]

[3] To be sure, everyone involved in this case, Gunzel, Umpqua, and the trial court, understood that the debt had fully matured years ago. This is not about extending the maturity date but whether the law extends the limitations period and/or whether Gunzel's knowing waiver of any limitations defense is valid under the law.

Under Gunzel's theory, the sole shareholder or member of a company could continue stringing a bank along with periodic promises of payments from the corporate debtor, just long enough to release themselves from their own personal guaranty of the same debt. In turn, if a bank accepts even a single payment after the debt becomes due, thus extending the lifetime of the debt under ORS 12.240, the debtor/guarantor could then turn around and argue, as Gunzel does here, that extending the lifetime of the debt is prejudicial. The express waivers of this event found repeatedly within the loan documents are there to avoid just that situation and this argument.

Moreover, Gunzel's guaranty of Cornerstone's debt was not an arms-length transaction. Instead he was the founder and President of Cornerstone (his closely held company), and as President, he was in complete control of the payments that he directed be made or not made to Umpqua. Because Gunzel's guaranty was for the lifetime of the debt (i.e. so long as it remained unpaid in full), his obligations ran parallel to the obligations on the underlying debt. Any other interpretation renders both ORS 12.240 and the guaranty effectively meaningless.

B. Gunzel Repeatedly Waived the Statutes of Limitations Defense in Accordance with the Law in Oregon and Washington

Unable to reconcile the fact that the guaranty and Note accrue at the same rate, Gunzel also attempts to argue that the waiver language in the guaranty is a "prospective" waiver that is against public policy. To support this argument, Gunzel argues that the personal guaranty is a prospective waiver of the statute of limitations. Under such a theory, Gunzel's waiver of that defense would entail a waiver of his right to assert the statute of limitations for all time. Unfortunately for Gunzel, that simply is not what the contract language states:

> GUARANTOR'S WAIVERS
>
> Guarantor also waives any and all rights or defenses based on surety or impairment of collateral including, but not limited to, any rights or defenses arising by reason of ...(E) any statute of limitations, **if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness which is not barred by any applicable statute of limitations.**

CP 127 (emphasis added).

This language is unambiguous: so long as there was an outstanding debt that, itself, was not barred by any applicable statute of limitations, Gunzel agreed that he would not be able to assert any statute of limitations defense with regard to his guaranty. Thus, the only reason the waiver is effective is because the statute of limitations had not lapsed on the Note

itself, as explained above. The obvious purpose, therefore, of the waiver language is to ensure the Note and guaranty run at the same rate.

1. Waivers of Defenses like the Statute of Limitations are Enforceable in Oregon.

Moreover, even if Gunzel is right and the aforementioned contract language is a prospective waiver of the defense of the statute of limitations, such waivers are legal and enforceable in Oregon. It is a truism that a contract validly made between competent parties is not to be set aside lightly. *Bliss v. Southern Pacific Co. et al*., 321 P.2d 324, 329 (Or. 1958) ("When two or more persons competent for that purpose, upon a sufficient consideration, voluntarily agree to do or not to do a particular thing which may be lawfully done or omitted, they should be held to the consequences of their bargain."). "The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations." *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 33 (Or. 2014).

Under Oregon law, parties are free to contract and waive various rights and responsibilities unless there is clear and concise evidence that the contract violates public policy. This right is so extensive that parties may contract to eliminate recovery entirely against each other, *Fujitsu Microelectronics, Inc. v. Lam Research Corp*., 27 P.3d 493, 495 (Or. App.

2001); waive all defenses, *W. J. Seufert Land v. Greenfield*, 496 P.2d 197, 200 (Or. 1972); and alter the statute of limitations, *Biomass One v. S-P Construction*, 799 P.2d 152, 154-55 (Or. App. 1990).

In fact, courts in Oregon will only interfere with the parties' freedom to contract when there is a violation of a public policy that is "clear and 'overpowering'." *Young v. Mobil Oil Corp.*, 735 P2d 654, 657 (Or. App. 1987). In determining whether an agreement is illegal because it is contrary to public policy, "[t]he test is the evil tendency of the contract and not its actual injury to the public in a particular instance." *Pyle v. Kernan*, 36 P.2d 580, 583 (Or. 1934). The fact that the effect of a contract provision may be harsh as applied to one of the contracting parties does not mean that the agreement is, for that reason alone, contrary to public policy. *Bagely,* 340 P.3d at 34.

Unable to address this inarguable point of law, Gunzel cites to numerous cases that discuss a frankly irrelevant theory, that prospective waivers of statutes of limitations are invalid. That is not, and never has been the issue in this case, as the waiver in the personal guaranty is not a prospective waiver of the statute of limitations.

However, even if Gunzel is right in that the waiver of the statute of limitations is prospective, he still faces the irreconcilable fact that waivers of <u>all</u> defenses are valid enforceable under Oregon law. *W.J. Seufert Land*

Co., 496 P.2d at 201 ("[T]he agreement between plaintiff and defendants under which defendants, **as guarantors**, agreed to **waive <u>all defenses</u>** to payment of the principal obligation other than actual payment was a valid agreement.") (emphasis added).

In *Seufert* the Oregon court held that a "contract provision under which one party agrees to waive all defenses is not ***per se invalid***, and does not render the entire contract void …" *W.J. Seufert Land Co.*, 496 P.2d at 200 (emphasis added). That court went on to find that "such a contract provision is only invalid when urged as a bar against a defense which may not be legally contracted away, while not invalid as a bar against a defense which may legally be the subject of such an agreement." *Id*.

Moreover, after convincing the bank to make four separate loans/extensions of credit based on Gunzel's personal promise to repay the debt for as long as it remained unpaid (i.e. accepting the benefits of those loans), Gunzel is now estopped from denying its applicability at this late date. *See, e.g., Hartman v. Anderson,* 49 Wn.2d 154, 159 (1956) (after party had accepted the benefits of the contract, it was estopped to deny liability therefrom); *State v. Northwest Magnesite Co.,* 28 Wn.2d 1, 76 (1947) (city, having accepted the benefits under the contract at issue, was estopped to deny the legality of the mode of payment made); *Swint v. Swint,* 395 P.2d 114, 116 (Or. 1965) (as husband had accepted the benefits of the parties

divorce decree and settlement agreement, he was estopped from repudiating that agreement at a later date).

The defense waived by Gunzel falls squarely under the "waivable defenses" rationale. Moreover, it simply makes sense that a personal guaranty on a loan should be effective so long as the underlying debt is enforceable and collectable. That is the precise effect of the waiver: it allows the personal guaranty to be enforced against Mr. Gunzel so long as the underlying debt remains unpaid and actionable. To hold otherwise would defeat Umpqua's reliance on the waiver in making the loan.

2. Waivers of the Defenses like the Statute of Limitations are Enforceable Under Washington Law.

Likewise, the waiver does not offend the public policy of Washington. Washington courts will enforce various clauses in a contract so long as applying them does not violate the fundamental public policy of the forum state. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 659 (2010) (relating to a choice of law provision). Accordingly, agreements waiving the statute of limitations are also enforceable under Washington law:

> Unless inhibited by some statutory provision, **an agreement to waive the statute of limitations**, made after the statute has commenced to run but before it has fully run, **is valid and binding upon the parties** if it is supported by a sufficient consideration and is for a definite period of time.

J.A. Campbell Co. v. Holsum Baking Co., 15 Wn.2d 239, 255 (1942) (emphasis added), *see also Taplett v. Khela*, 60 Wn. App. 751, 759 (1991). There is no statutory provision in Washington or in Oregon prohibiting this personal guaranty and the waivers contained therein. Here, the guaranty specifically states that limitations does not begin to run and cannot be pleaded as a defense so long as any amount unpaid under the underlying debt that is not barred by limitations. It is thus supported by consideration and specifies a time during which the limitations defense is tolled.

The enforceability on the underlying debt was extended upon Cornerstone's 2013 payment as admitted in the motion, and Umpqua properly brought this action against Mr. Gunzel to enforce his personal guaranty of that underlying debt. Therefore his agreement to waive the statute of limitations as a defense is effective in both Oregon and Washington.

Finally, such waivers are commonly used by banks - *See* Westlaw Forms, Business Transactions Solutions, § 141:59 Individual continuing guaranty agreement—Master form, Attach. B, hereto (Guarantor "waives the benefit of any statute of limitations affecting the liability under this agreement or the enforcement of it, and agrees that any payment of any Indebtedness or other act that tolls any applicable statute of limitations will similarly operate to toll such statute of limitations applicable to the liability

under this agreement.”). Gunzel asks this Court to upend commercial law in the state of Washington (and Oregon), by finding that a commonly used clause in nearly every personal guaranty to ensure a guarantor remains liable for a debt so long as the debt remains enforceable is illegal. The trial court wisely declined to grant such a request. This Court should do the same.

C. Umpqua is Entitled to Attorneys’ Fees

Pursuant to RAP 18.1, Umpqua requests an award of its attorney’s fees on appeal. The trial court below awarded Umpqua its entitlement to attorney fees and costs as specifically allowed under all of the underlying loan documents, including specifically the various personal guaranties executed by Gunzel.[4] Accordingly, in prevailing on this appeal, Umpqua requests its award of attorney fees and costs on appeal as allowed under those same loan document and the law. ORS 20.096.; *see also, Hazen v. Cook*, 293 Or. 232, 234, 646 P.2d 33, 34 (Or. 1982) (mandating attorney fee award to successful lender after court reversed decision in favor of debtor and entered judgment for lender).

[4] At this point, the trial court has yet to fix the amount of such fees and costs which may result in the potential appeal of additional rulings by the debtor.

V. CONCLUSION

The trial court's conclusions and entry of judgment in favor of Umpqua were correct and the ruling of the trial court should be affirmed with Umpqua awarded its request for attorney fees and costs on this appeal.

RESPECTFULLY SUBMITTED this 18th day of August, 2020.

s/ Daniel A. Brown
Daniel A. Brown, WSBA #22028
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
Email: dbrown@williamskastner.com
sleake@williamskastner.com

Attorneys for Respondent Umpqua Bank

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date below, I caused a true and correct copy to be served on the following parties in the manner listed below:

Attorneys for Appellants: Bret Uhrich, WSBA 45595 WALKER HEYE MEEHAN 1333 Columbia Park Trail, #220 Richland, WA 99352 Tel (509) 735-4444 Fax (509) 735-7140 Email: *buhrich@walkerheye.com*	☑ Via COA Efiling Portal ☑ Via Electronic Mail ☐ Via U.S. Mail ☐ Via Overnight Courier

DATED this 18th day of August, 2020, at Seattle, Washington.

/s/Paula Polet
Paula Polet, Legal Assistant

WILLIAMS KASTNER

August 18, 2020 - 4:49 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_20200818164408D3407605_4390.pdf
  This File Contains:
  Briefs - Respondents Reply
  The Original File Name was Umpqua Response Brief - 7181094v1.pdf

A copy of the uploaded files will be sent to:

- buhrich@walkerheye.com
- dbrown@williamskastner.com
- dbulis@williamskastner.com
- kmelde@walkerheye.com
- ppolet@williamskastner.com

Comments:

Sender Name: Sean Leake - Email: sleake@williamskastner.com
Address:
601 UNION ST STE 4100
SEATTLE, WA, 98101-1368
Phone: 206-628-6655

Note: The Filing Id is 20200818164408D3407605