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Consolidated with
NO. 227642

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

Cashmere Valley Bank, a Washington corporation,

Respondent

v.

Terry B. Brender, a single man,

Appellant

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. ASSIGNMENT OF ERROR

Whether the trial court correctly dismissed Terry B. Brender's ("Brender") counterclaims and affirmative defenses.

II. STATEMENT OF CASE

Brender is in default on a promissory note dated November 30, 2001 (the "2001 Note") and payable to Cashmere Valley Bank ("CVB" or the "Bank"). (CP 579-600, 748-755).

When signing the 2001 Note, Brender also signed a Disbursement Request and Authorization, and a Notice of Final Agreement evidencing the amount of his debt owed CVB. (CP 579-600; 748-755).

Brender signed the 2001 Note to refinance two prior loans he had with CVB. The first loan was made in 1993 in the amount of \$358,095.70 (the "1993 Loan"). The second loan was a short-term, unsecured line of credit, made in 1999 in the amount of \$33,040 (the "1999 Loan"). (CP 217-231; 326-348; 748-755).

After CVB filed suit against Brender to collect on the 2001 Note, Brender claimed CVB improperly changed the initial terms of the 1993 Loan. Brender claims the initial terms of the 1993 Loan were for Brender to repay the \$358,095.70 he borrowed at 8.5% interest over 15 years, with quarterly payments of \$7,500. (CP 748-755). Brender cannot produce a

copy of this alleged promissory note. (CP 69-77). CVB denies such a note ever existed. (CP 326-348; 748-755). The true initial terms of the 1993 Loan were for Brender to repay the \$358,095.70 at 8.5% in quarterly payments of \$7,840.67 until the 1993 Loan's balloon payment due in June 2006. (CP 69-77; 326-348). The payment of \$7,840.67 was based on a 15 year amortization. (CP 326-348).

Regardless of the actual initial repayment terms of the 1993 Loan, Brender and CVB revised those terms on about October 1, 1993 when Brender signed a second promissory note that increased the amount of the quarterly payments to \$10,694.44 (the "Revised Note"). (CP 326-348; 748-755). Brender signed the Revised Note, because the quarterly payments on the initial note did not cover the 1993 Loan's interest accrual. The initial note had a negative amortization. It had Brender paying CVB less than the accumulated interest due and making no reduction to the 1993 Loan's principal balance. (CP 326-348). At quarterly payments of \$10,694.44, the Revised Note correctly amortized \$358,095.70 at 8.5% over 15 years. The Revised Note allowed Brender to reduce his principal balance while remaining current on his interest payments. Besides the increased quarterly payments, the Revised Note did not change any terms of the initial promissory note Brender signed. (CP 326-348).

After executing the Revised Note, Brender aggressively made payments on the 1993 Loan. By the time of the 1993 Loan's maturity in June 1996, Brender had paid CVB \$45,713.22 more than he was obligated under the Revised Note. (CP 579-600).

In June 1996, the 1993 Loan fully matured and its unpaid balance became due and owing in full. To payoff the 1993 Loan, Brender signed a new promissory note, which renewed the 1993 Loan (the "1996 Renewal") (CP 748-755; 326-348). Brender admits signing the 1996 Renewal. (CP 748-755). At the time of entering into the 1996 Renewal, Brender also signed a Disbursement Request and Authorization, and a Notice of Final Agreement evidencing his debt owed CVB. (CP 579-600).

After the 1996 Renewal, Brender made the quarterly payments owed CVB, as required by the 1996 Renewal. (CP 748-755). These payments were in excess of the \$7,500 Brender alleged he was required to make. CVB also sent Brender bill statements showing Brender the amount of these quarterly payments. (CP 579-600).

As indicated above, in 1999 Brender borrowed additional funds from CVB. At the time of making the 1999 Loan, Brender provided CVB with a financial statement showing the amount Brender believed due on the 1996 Renewal to be about \$225,000 and that the quarterly payments on the 1996 Renewal were about \$7,950. (CP 326-348).

Brender signed the 2001 Note to refinance the 1999 Loan and the 1996 Renewal into one loan. (CP 217-231; 326-348; 748-755).

About one year after signing the 2001 Note, Brender went into default and CVB sued. (CP 756-777). In defense, Brender claimed, for the first time, that CVB improperly changed the initial terms of the 1993 Loan. However, Brender admits he knew of these changes on about October 1, 1993. (CP 748-755).

III. ARGUMENT

A. Brender Cannot Rely on Discovery Rule

The Discovery Rule does not toll the limitations period when an aggrieved party, through the exercise of due diligence, could have discovered that a claim existed. Hudson v. Condon, 101 Wn. App. 866, 875 (Div. III 2000). Thus, to survive summary judgment, Brender must prove he could not have discovered that CVB had Brender sign the Revise Note within the statute of limitations period. G.W. Const. Corp. v. Professional Services Industries, Inc., 70 Wn. App. 360, 367 (Div. I 1993). As explained below, Brender knew of (or should have known of) the changes to the initial repayment terms of the 1993 Loan as far back as October 1, 1993.

On October 1, 1993, Brender claims he had a “behind closed door meeting” with Jim Geary of CVB. At this closed door meeting, Brender

claims Mr. Geary “cornered” Brender and “insisted” he sign the Revised Note. (CP 748-755). Brender also alleges Mr. Geary did not let Brender have a copy of the Revised Note, read it, or ask questions about it. (CP 748-755). This closed door meeting put Brender on notice of his alleged claims against CVB. Brender, however, waited until 2003 to bring suit against CVB for events that occurred ten (10) years prior.

Brender was further put on notice of his alleged claims when CVB sent Brender reminder statements showing the amount of the quarterly payment due under the Revised Note (\$10,694.44). (CP 579-600). These statements again put Brender on notice of CVB’s demand for quarterly payments greater than what Brender claims he believed due (\$7,500).

Further, in May 1996, CVB sent Brender a billing statement showing that the total amount due on the 1993 Loan (\$269,695.32) was due in full on June 6, 1996. (CP 579-600). This statement again put Brender on notice that CVB demanded full payment on the 1993 Loan prior to when Brender claims he believed the 1993 Loan was due (i.e., May 2008).

In June 1996, Brender paid off the Revised Note by refinancing that debt into the 1996 Renewal. At that time, Brender signed a new promissory note, a Notice of Final Agreement, and a Disbursement Request and Authorization stating the amount being refinanced. (CP 579-

600). This payoff and the above-listed documents again put Brender on notice of his claims.

After the 1996 Renewal, CVB continued to send Brender reminder statements of his next quarterly payments due. These statements again advised Brender that his payments were greater than the \$7,500 Brender claims he was required to pay. (CP 579-600).

Based on these undisputed facts, CVB respectfully requests that this Court affirm the following ruling of the trial court:

In the present case, Defendant alleges a series of arguably improper actions by Plaintiff dating back to 1993. These include being forced by threat behind closed doors to sign loan documents without the opportunity to review them and unilateral changes made by Plaintiff which raised Defendant's monthly payment obligation. Further, as previously noted, as early as 1996, Defendant signed another Promissory Note indicating the then-owed balance. All of these occurrences are significant, in the Court's view, to have put Defendant on notice of potential wrong doing by Plaintiff. Defendant could have exercised due diligence at that time to discover his cause of action. Accordingly, the Court concludes that the discovery rule affords Defendant no relief here.

(CP 255-264).

B. Account Stated Applies to Brender's Case

The Doctrine of Accounts Stated applies when a debtor has admitted, expressly or by implication, the amount of a debt owed a

creditor. Accounts Stated operates as a debtor's promise to pay that debt. Goodwin v. Northwestern Mut. Life Ins. Co., 196 Wash. 391, 410 (1938).

Brender cites Rustlewood Ass'n v. Mason County, 96 Wn. App. 788 (Div. II 1999), in hopes of avoiding the trial court's correct application of the Doctrine of Accounts Stated. As explained below, the unique facts of Rustlewood do not apply to Brender's case.

Rustlewood dealt with Mason County's efforts to collect pre-set utility fees against the members of the Rustlewood Homeowner's Association in excess of those fees the County had collected over the prior 12 years. The County had underestimated the amount of the fees, because it miscalculated the true cost of providing the utilities. Although finding for the homeowners, the Court rejected their Accounts Stated defense, finding Accounts Stated does not apply to the County's pre-set utility fees. The Court ruled that "... periodic residential utility rates do not constitute an account stated because single item liquidated debts for a sum certain do not often qualify for this defense." Id. at 788-89. The Court went on to state that the Doctrine of Accounts Stated applies to situations "... where the amount a party owes at a given moment it is difficult, if no impossible to fix precisely". Id. at 398. Unlike Brender's reading of Rustlewood, Division II did rule that the Doctrine of Accounts Stated applies only in

cases of open account. Rather, the Court stated the Doctrine applies to any financial relationship involving an accounting of the debt due:

When a party in such a financial relationship presents an accounting and the other party assents to its correctness, the accounting is accepted as the debt owed; this agreement, explicit or implicit, constitutes an account stated.

Id. at 398 (citing Corbin on Contracts).

The Doctrine of Accounts Stated applies to Brender's case. Brender and CVB had a financial relationship that required the accounting of Brender's payments on the 1993 Loan and the Loan's accrued interest. From May 1993 to the date CVB filed this lawsuit, Brender admitted the amount CVB claimed due and never disputed CVB's calculations of interest due. These admissions are found in the following undisputed facts, all of which the trial court correctly rely on to apply the Doctrine of Accounts Stated:

1. After entry into the 1993 Loan, Brender executed three promissory notes acknowledging the amount he owed CVB. These notes are the Revised Note, the 1996 Renewal, and the 2001 Note. Brender also signed Notices of Final Agreement and Disbursement Requests and Authorizations that evidenced the amount due.

2. Brender acknowledged the amount of the 1993 Loan in a personal financial statement he signed in 1999 and delivered to the Bank.

3. Since 1993, Brender received billing statements from CVB advising him of his payment amounts, which payments Brender made without protest from 1993 to 2002.

Based on the foregoing, the Bank requests this Court affirm the trial court's dismissal of Brender's claims and defenses.

C. Brender's Affirmative Defenses Should be Dismissed

Brender mistakenly relies on Seattle First National Bank, NA v. Siebol, 64 Wn. App. 401 (Div. III 1992) and Buty v. Goldfinch, 47 Wash. 532 (1913) to assert his affirmative defenses survive the statutes of limitations. As explained below, these cases are distinguishable from Brender's situation.

Siebol and Buty should be distinguished, because Brender waived his right to challenge the Revised Note. Brender's waiver is found in his signing the Revised Note and making payments to CVB as required by that note and its renewals. Under these circumstances, the trial court correctly distinguished Brender's case. See Jones v. Best, 134 Wn.2d 232, 241-42 (1998) ("A waiver is an intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive...")

An example of waiver and its application to Brender's case is found in Coovert v. Ingwersen, 37 Wn.2d 797 (1951). In Coovert, the

Supreme Court used the Doctrine of Waiver to stop purchasers from rescinding their agreement to buy a furnace. The Court ruled the purchasers waived their right to rescind by continuing to use and enjoy the furnace for over one year prior to demanding rescission. The Court stated:

If respondents ever had a right to rescind, they waived it by their long use of the heating system, is well taken. We quote from 9 Am. Jur. 389, § 45:

“Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he remains silent, and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.”

We are of the opinion that is a correct statement of the prevailing general law.

Covert v. Ingwersen, supra.

The analysis in Covert is equally true in Brender’s case. Brender waived any defenses he may have had related to the 1993 Loan by executing the Revised Note and making payments on the Revised Note (and its renewals) until November 2002.

Based on the foregoing, the Bank requests this Court affirm the dismissal of Brender’s affirmative defenses.

**D. Brender Cannot State Claims for Fraud, Misrepresentation,
Breach of Contract, or Breach of Covenant of
Good Faith and Fair Dealings**

Brender must prove his claims/defenses of fraud and misrepresentation by clear, cogent, and convincing evidence. WPI 160.01 and 160.02. Brender cannot meet this high burden of proof. There is no evidence CVB made a false representation of a material fact to Brender. Further, there is no evidence that Brender was ignorant of the alleged false statement made by CVB and relied on the truth of that alleged false statement. The undisputed evidence is that CVB told Brender to sign the Revised Note which modified the initial terms of the 1993 Loan and Brender signed the Revised Note. (CP 748-755). CVB did what it told Brender it intended to do. Based on the Revised Note, CVB increased the quarterly payments on the 1993 Loan to cover the interest accrual and to reduce the principal balance due.

Further, Brender can present no evidence of damages to support his breach of contract, breach of covenant, and fraud, misrepresentation claims/defenses. It is undisputed that Brender borrowed \$358,095.70 from CVB in 1993 and \$33,040.00 from CVB in 1999. Brender refinanced the 1993 Loan and the 1999 Loan into the 2001 Note. Interest on the 2001 Note is at 9.5%. This is the same interest rate Brender agreed to when he signed the 1996 Renewal. In short, Brender is still obligated to repay the

Bank the money he borrowed in 1993 and in 1999 and at the same interest rate. The only difference is the time Brender has to pay back these loans. CVB gave Brender more time. Even Brender cannot show how he has been damaged:

Q What about have you calculated how the bank has damaged you?

A **It will be worked on.**

Q Well, have you calculated it yet?

A **Well, there's damages relative to this payments structure. There probably is consequential damages as a result of this money situation. And that will have to addressed when we're ready to address it, I guess.**

Q Well, we've been litigating this for almost a year. Have you bothered to calculate your damages yet?

A **You know, I guess in answer to your question, if I had—if you had \$10 and you obligated 5 of it, and you ended up giving up seven dollars and a half as a result of the paper changing, how would your damages reflect to you after a period of time?**

Q Mr. Brender, we'll be here all day—

A **Just an example.**

Q —and tomorrow if you don't answer the question.

A **I'm just giving the example.**

Q Have you calculated your damages?

A **I told you I hadn't got into that yet. I've been working on that. Okay? We're going to get it done.**

Q So you have no idea what your damages are?

A **They could be severe.**

Q But you haven't calculated them yet?

A Probably going to have an expert help me. Okay?

Q You haven't calculated your damages yet, so you don't know what your damages are, do you?

A Just to sit down and tell you an exact figure, I have no idea, no.

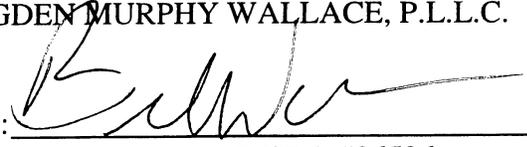
(CP 407-517).

IV. CONCLUSION

Based on the foregoing, CVB respectfully requests this Court affirm the Order of the Chelan County Superior Court dismissing Brender's counterclaims and affirmative defenses.

RESPECTFULLY SUBMITTED this 17th day of November, 2004.

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