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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 FEB 19 PM 1:41

Case No. 69405-7-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

MARIANNE JONES, individually, and the
marital community comprised of MARIANNE
JONES and PATRICK A.T. JONES, wife and husband

PETITIONERS,

v.

EGP INVESTMENTS, LLC,

RESPONDENT

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellants Marianne K. Jones, individually, and the marital community comprised of Marianne Jones and Patrick A.T. Jones, wife and husband (“Jones”) seek reversal of (1) the judgment entered against them in favor of respondent EGP Investments, LLC (“EGP”)(CP 110-103), (2) the order denying Jones’ cross motion to dismiss EGP’s complaint (CP 104-105), and (3) the supplemental Judgment and Order for attorney’s fees and costs in favor of EGP (CP 106-108).

Upon reversal of the trial court’s judgments, this Court should dismiss EGP’s claims against Jones, and award Jones their attorney’s fees and costs for defending EGP’s action and on appeal under the terms and conditions of the contract EGP sought to enforce.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error

Assignment of Error No. 1: The trial court erred in entering the judgments against Jones and failing to dismiss EGP’s claims as requested by Jones.

B. Issues Pertaining to Assignments of Error

Issue No. 1 (Pertaining to Assignments of Error No. 1): Whether the account at issue constitutes a revolving charge account or a business line.

Issue No. 2 (Pertaining to Assignments of Error No. 1): Whether a written guaranty agreement exists between EGP and Jones.

Issue No. 3 (Pertaining to Assignments of Error No. 1): If the account at issue was only a business line based upon an oral agreement, and the only guaranty agreement is an oral agreement, whether the statute of limitations on EGP's claims based upon the business line and for breach of an guaranty agreement is two years under Cal. Civ. Code § 339.

Issue No. 4 (Pertaining to Assignments of Error No. 1): If the applicable statute of limitations is two years, whether EGP commenced its action Jones within the statute of limitations.

III. STATEMENT OF THE CASE

A. The only account between EGP and Jones is a business line of credit issued to Jones Law Group, PLLC based upon an oral agreement.

EGP acknowledged that the EGP's claim was based upon a commercial line issued to Jones Law Group, PLLC¹, and did not involve a consumer credit card account. (8/22/2012 RP at 8:19-21.)

The evidence supports this. The only contract that existed between EGP and Jones was oral; there was no written signature; there is no writing containing any signature, date, or identities of the parties. (7/13/2012 RP at 25:23; 8/22/2012 RP at 14:21-25.)

B. The evidence establishes only the existence of an oral guaranty.

On July 13, 2012, the trial court clarified and EGP's counsel agreed that the only reason EGP could sue Marianne Jones personally is the existence of a personal guaranty. (7/13/2012 RP at 16:4-9.) The trial court stated, and EGP's counsel agreed, that the guaranty agreement must

¹ Jones Law Group, PLLC was not named a part to this lawsuit prior to the time EGP brought its only for summary judgment or Jones brought their cross motion to dismiss. Jones Law Group, PLLC was not named as a party until the Court granted EGP's motion to amend on August 22, 2012. (CP 68.) The amended complaint, which is not the subject of this appeal, identified some identical and some different defendants and was not filed by EGP until October 17, 2012. The Court may take judicial notice of the amendment at Sub #84

be separated out from the underlying corporate liability. (7/13/2012 RP at 16:17-20.)

In making its judgment, the Court specifically ordered, as a matter of law, that EGP was entitled to judgment against Jones on EGP's claim for breach of contract based upon the guaranty. (CP 78, lines 13-14.)

However, the evidence does not support the Court's order. There was no written signature on a personal guarantee. (7/13/2012 RP at 26:1-2.) The boilerplate writing submitted by EGP as the terms and conditions for a business line was not dated and did not name Marianne Jones or anyone else by name. (8/22/2012 RP at 6:11 and 21:21-25.) The transcript of the oral application itself stated that it was an oral agreement. (8/22/2012 RP at 14:25-15:2.)

C. California law applies.

There is no dispute that California law applies to any agreement that resulted from the oral application by Jones. (7/13/2012 RP at 24:18-25:1; 8/22/2012 RP at 6:15-23 and 15:2-4.) The evidence supports this. The transcript itself stated that the agreement was oral, and the statute of limitations on oral agreements is two years under California law. (8/22/2012 RP at 14:25-15:2.)

D. Deficiency of EGP's pleadings; and lack of service or filing within applicable two-year statute of limitations.

The last action by Jones regarding this account was a payment on November 13, 2009. (8/22/2012 RP at 13-14.)

On September 1, 2011, EGP served an unfiled complaint on Marianne Jones, and her marital community.² (CP 3.) The 3-page complaint requested only payment on an account it alleged was held by Marianne K. Jones and the marital community comprised of Marianne Jones and Patrick A.T. Jones doing business as Jones Law Group, PLLC. (CP 1-2.) Patrick A.T. Jones was not named as a party to the action. (CP 4.) Nothing in the complaint alleged a personal guaranty by Jones, and nothing was pled in the Complaint that would give rise to the personal liability of Jones. (7/13/2012 RP at 21:15-18, 26:14-17.)

On September 8, 2011, Jones Law Group, PLLC appeared for Jones in this action and demanded that the lawsuit be filed within 14 days. (CP 19-20.) EGP did not file its Complaint against Jones within 14 days and waited more than one month until October 11, 2011, to file, at which

²The address where EGP attempted service on Ms. Jones on September 1, 2011, was not Ms. Jones' usual place of abode, which was changed in 2006. (Id.) Jones' new residence in Hunts Point was purchased prior to Jones' separate property agreement in 2008. (7/13/2012 RP at 22:21-24) Jones had provided her new residence address to EGP. (7/13/2012 RP at 23:17-19) She also had her driver's license and voter's registration changed to her Hunts Point address. (7/13/2012 RP at 23:19-20.)

time EGP improperly caused the case to be assigned to the Kent Regional Justice Center. (CP 48.) Thus, since EGP did not file its Complaint within 14 days of the demand for filing, any service that EGP may have obtained was therefore void under CR 3. (CP 3.) EGP conceded that the September 1, 2011 service was void. (8/22/2012 RP 12:8-9.)

EGP also acknowledges that it did not effectuate service within 90 days of filing its Complaint on October 11, 2011. (8/22/2012 RP at 11:1-4.) More than 90 days after EGP finally filed its Complaint, EGP attempted service of process on January 31, 2012, at which time it attempted substitute service on Patrick A.T. Jones, who was not a party to the action.³ (CP 3-4.) EGP acknowledged that if a two-year statute of limitations applies, the statute of limitations ran within the 90 period after the filing of the Complaint on October 11, 2011. (8/22/2012 RP at 15:17-16:8.)

³ In addition, Patrick A.T. Jones' usual place of abode was not at 11911 NE 34th Street, Bellevue, Washington, and he had changed his residence address in 2006, just as Marianne Jones had. (CP 21-22.) Like Marianne Jones, Patrick A.T. Jones also changed his personal residence to include 8301 Hunts Point Circle, Hunts Point, WA. (CP 21-22.)

IV. ARGUMENT

A. Standard of review.

Summary judgment is appropriate “where the pleadings, depositions, affidavits and admissions on file show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn.App. 542, 545, 13 P.3d 240 (2000). Accordingly, Washington courts review the facts, and reasonable inferences drawn from the facts, in the light most favorable to the nonmoving party. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn.App. 643, 644, 230 P.3d 625 (2010).

When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, Washington courts review the trial court's ruling under the de novo standard of review for summary judgment. *Freestone Capital Partners*, 155 Wn.App. at 644, citing *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn.App. 699, 707-08, 919 P.2d 1243 (1966); *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn.App. 542, 545, 13 P.3d 240 (2000).

B. The judgments entered against Jones must be reversed, and EGP's complaint against Jones must be dismissed.

1. The account at issue constituted a business line and not a consumer revolving charge account.

The trial court entered a finding of fact that Defendant Marianne K. Jones's law firm obtained money, goods, and/or services under a revolving charge account. (CP 102.) However, it is undisputed that the account at issue was not a consumer credit card. In fact, EGP admitted that the account was a commercial line issued to Jones Law Group, PLLC. (8/22/12 RP at 8:19-21.)

California law distinguishes between a credit card issued for business purposes and a credit card issued for consumer purposes, namely, a credit card, which is a revolving charge account. *Archer v. United Rentals, Inc.*, 195 Cal.App. 4th 807, 824, 126 Cal.Rptr. 3d 118 (2011), *citing* Cal. Civ. Code § 1747.02 (“[A] plain reading of section 1747.02, subdivision (d), as a whole and in context, leads us to conclude that a credit card issued for business purposes, namely, a business credit card, is distinct from a credit card issued for consumer purposes, namely, a personal credit card.” The specific holdings of *Archer* included that business credit cards are not included under the SBCCA's privacy protections, which is not an issue in this case but is important to note due

to the distinction between personal credit cards and business cards.) Thus, as clarified by *Archer*, the business line between EGP and Jones Law Group, PLLC does not constitute a revolving charge account.

This is supported by Cal. Civ. Code § 1747.02(d) under which “cardholder” is defined as:

[A] natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person. For purposes of Sections 1747.05, 1747.10, and 1747.20, the term includes any person to whom a credit card is issued for any purpose, including business, commercial, or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of that credit card to another person.

While the purpose used by a cardholder can include business purposes, under California law, a corporation is not a natural person. *Caressa Camille, Inv. v. Alcoholic Beverage Control Appeals Bd.*, 99 Cal. App. 4th 1094, 1102, 121 Cal.Rptr. 758 (2002), citing *Paradise v. Nowlin*, 86 Cal.App.2d 897, 898, 195 P.2d 867 (1948). Thus, the primary account holder would be required to be a natural person, and not a corporation as in this case.

EGP’s complaint asserted only a claim against Marianne Jones and her marital community based upon a consumer credit card account, but the evidence presented by EGP in its motion for summary judgment, by its

own admission, did not support the existence of a consumer credit card account as defined by Cal. Civ. Code § 1747.02(d). (8/22/12 RP at 8:19-21 (EGP admitted that the account was a commercial line issued to Jones Law Group, PLLC).) No revolving charge account exists between Marianne Jones and her marital community and EGP, and therefore it was improper for the trial court to find that that Jones obtained money, goods, and/or services under a revolving charge account. (CP 78) In addition, EGP cannot establish the existence of a consumer credit card account between it and Jones Law Group, PLLC because Jones Law Group, PLLC is not a natural person to whom a consumer credit card can be issued for consumer credit purposes.

EGP admitted that the account of Jones Law Group, PLLC was a commercial line, and there is an absence of any other evidence establishing that it is a consumer credit card. The only account that possibly could have existed in this matter is a business line between EGP and Jones Law Group, PLLC, who was not named as a party in EGP's complaint. The Court must find as a matter of law that there is no revolving credit card account between Marianne Jones and her marital community and EGP, and the trial court's finding that Jones' law firm obtained money, goods, and/or services under a revolving charge account must be reversed.

2. No written guaranty agreement can be established between EGP and Jones.

Cal. Civ. Proc. § 2792 provides:

Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation. (*Emphasis added.*)

Cal. Civ. Proc. § 2793 provides:

Except as prescribed by the next section [Cal. Civ. Proc. Code § 2794], a suretyship obligation must be in writing, and signed by the surety; but the writing need not express a consideration.

Cal. Civ. Proc. Code § 2794(4) further provides:

A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

(4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person

EGP's claim for breach of a written guaranty agreement fails because there is no allegation of separate consideration to Ms. Jones as the surety. Under Cal. Civ. Proc. § 2792, a suretyship does not require consideration if it is done at the same time as the original promise, but in all other situations there must be consideration. Under Cal. Civ. Proc.

Code § 2793, except as provided in Cal. Civ. Proc. § 2794, a suretyship obligation must be in writing and signed by the surety but need not express consideration. Since the EGP relied solely upon Cal. Civ. Proc. § 2794(4) as authority for the guarantee, which specifically refers to a guarantee where consideration has been given, the guarantee must be in writing and signed by the guarantor under Cal. Civ. Proc. § 2793, and separate consideration is required under Civ. Proc. Code § 2792.

Cal. Civ. Code §§ 2792 and 2794(4) do not apply in this instance because any suretyship obligation was entered into at the same time as the original obligation, and no separate consideration was necessary. As a result, the exception under Cal. Civ. Code § 2794(4) did not apply, and the guaranty was required to be in writing under Cal. Civ. Code § 2793. EGP's account application and transcript of application do not meet the requirements of a written guaranty under Civ. Proc. Code §§ 2792-2794. Therefore, the only guaranty that can be established between EGP and Jones is an oral guaranty.

3. EGP failed to commence its action against Jones based upon a commercial line or oral guaranty agreement within the statute of limitations.

The statute of limitations on an oral contract under California law is two years. Cal. Civ. Proc. § 339(1).

Here, it has been established that EGP's claim for nonpayment was based upon an oral agreement for a business line of credit. It has further been established that the only claim EGP could maintain for breach of the guaranty was based upon an oral guaranty. (*See Jones' brief, supra* at 7-11)

The last action to occur related to Jones' business line of credit was a payment on November 13, 2009. (8/22/2012 RP at 13-14) Thus, EGP would have had to commence its action against Jones no later than November 13, 2011, and it failed to do so.

In personam jurisdiction over resident individuals is obtained either by serving the defendant personally or by substitute service, *i.e.*, "leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein." *Lepeska v Farley*, 67 Wash.App. 548, 551, 833 P.2d 437 (1992); RCW 4.28.080(15). If the case is unfiled, under CR 3 the Plaintiff must file the action within 14 days, if a demand is made. CR 3(a) provides:

Methods. Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. **Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days after service of the demand or the service shall be void.** An action shall not be deemed commenced for the

purpose of tolling any statute of limitations except as provided in RCW 4.16.170. (*Emphasis added*)

Moreover, if a EGP fails to properly serve at least one defendant within a period of 90 days from the date the case is filed with the Court, the action is deemed to not have been commenced for the purpose of tolling the statute of limitations under RCW 4.16.170, which provides:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. **If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint.** If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. **If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.** (*Emphasis added*)

On September 8, 2011, after EGP served an unfiled Summons and Complaint on Marianne K. Jones, Ms. Jones sent EGP's counsel a notice of appearance and requested that the action be filed. (CP 19-20) Under CR 3, EGP was required to file the action within 14 days, but EGP failed to

file the action within 14 days. Therefore, any service that may have been obtained on Ms. Jones personally was void under CR 3.⁴

EGP did not file its complaint until October 11, 2011. (CP 48-53) After EGP finally filed its Complaint, EGP did not attempt service on any of the named Defendants prior to the expiration of the statute of limitations on November 13, 2011. EGP had until January 9, 2012, to perfect its October 11, 2011 filing, and EGP failed to make proper service on any of the Defendants within 90 days of the filing of the Complaint. Thus, under RCC 4.16.170, the action was deemed not to have been commenced.

Upon the determination that any account between Plaintiff and any of the Defendants does not constitute a consumer credit card account, is not an account based upon a writing, and any guaranty agreement also is not based upon a writing, the Court must find that the two-year statute of limitations applies to any action brought by the Plaintiff against any of the Defendants. In that event, EGP would have been required to commence this action, by timely filing and service under CR 3(a) and RCW 4.16.170, prior to November 13, 2011. EGP failed to do this, and the two-year

⁴ In addition, the address where Ms. Jones was served was not the place of abode for either her or the marital community of her or Patrick A.T. Jones. (CP 17-18; 21-22)

statute of limitations ran on EGP's claim without EGP commencing the action as required under Cal. Civ. Proc. § 339(1).

Absent the proper commencement of the action against Jones, the trial court lacked jurisdiction to enter the judgments against Jones, and the judgments must be reversed. This Court should further dismiss EGP's complaint against Jones.

C. Jones is entitled to their attorney's fees and costs in defending EGP's action in the trial court and on appeal.

In addition, even when a contract containing an attorney's fee provision is invalidated, attorney fees and costs are awarded to the prevailing party. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), citing *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-122, 63 P.3d 779 (2003); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash.App. 188, 196-97, 692 P.2d 867 (1984); *Yuan v. Chow*, 96 Wash.App. 909, 915-18, 982 P.2d 647 (1999); and *Styken v. Panell*, 66 Wash.App. 566, 572-73, 832 P.2d 890 (1992). Thus, if the Court finds in favor of Jones on appeal, Jones should be awarded their attorney's fees and costs for defending EGP's action and on appeal under the terms and conditions of the contract EGP sought to enforce.

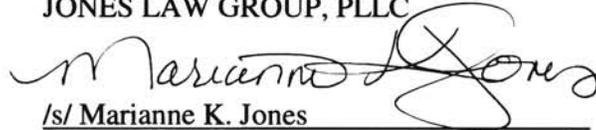
V. CONCLUSION

The appellate court should reverse the judgments entered in favor of EGP against Jones and dismiss EGP's claims against Jones with prejudice.

The appellate court should also award Jones their attorney's fees and costs incurred in defending EGP's action in the trial court and on appeal.

RESPECTFULLY SUBMITTED this 14th day of February, 2013.

JONES LAW GROUP, PLLC

A handwritten signature in cursive script, appearing to read "Marianne K. Jones", is written over a horizontal line.

/s/ Marianne K. Jones

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Case No. 69405-7-I

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MARIANNE JONES, individually, and the
marital community comprised of MARIANNE
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EGP INVESTMENTS, LLC,

RESPONDENT

PROOF OF SERVICE OF
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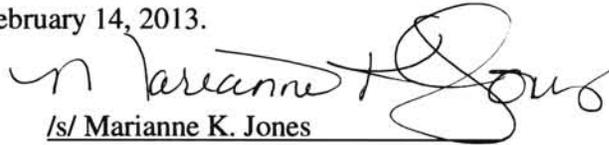
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I hereby certify that I served Appellant's Opening Brief on the attorney for the respondent:

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