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COURT OF APPEALS
WASHINGTON STATE
DIVISION ONE
JAN 13 2015
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Court of Appeals No. 68318-7-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

FOUNDATION MANAGEMENT, INC.
Respondent

vs.

WILLIAM J. BARKETT and JANE DOE BARKETT
Appellants

On Appeal from the King County Superior Court
KCSC Case No. 11-2-30122-2SEA

RESPONDENT'S BRIEF

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I. ASSIGNMENT OF ERROR

This case involves a simple promissory note and individual guaranty, and the obligation of appellant William J. Barkett (“Barkett”) on his guaranty. Plaintiff Foundation Management, Inc. (“FMI”) brought a Motion for Summary Judgment on its claims against Barkett as the guarantor. Barkett had no substantive defense to his liability under the guaranty, and notwithstanding using arguments that had already been rejected by prior courts, Judge Mary Yu of the King County Superior Court granted FMI’s motion and entered judgment in FMI’s favor.

Appellant Barkett has a pattern of entering into loan agreements and guarantees with third parties for millions of dollars, defaulting on those loans, and then seeking to argue that the loans are void as to public policy based upon the same failed arguments. Barkett now reargues before this court the same legal and factual arguments that were not only rejected by Judge Yu, but have previously been rejected by Judge Robert Lasnik of the United States District Court, Western District of Washington and Judge Robert C. Jones of the United States District Court of Nevada.

This appeal should be rejected because there is no question that appellant willingly (1) sought out plaintiff, a lender located in the State of Washington; (2) entered into the promissory note on behalf of his corporate entity with a lender in the State of Washington; (3) individually

guaranteed the note with a lender located in the State of Washington; and, (4) signed documents agreeing that Washington law and venue applied. Judge Yu correctly granted summary judgment, and the judgment in favor of FMI should be affirmed.

II. STATEMENT OF THE CASE

1. BACKGROUND FACTS

The underlying facts are straightforward:

In August 2007, Thomas Hazelrigg III of Centurion Financial Group (“CFG”), on behalf of Barkett approached FMI with the request to provide a “hard money” loan to Merjan. FMI did not seek out Merjan or Barkett. FMI is a Washington corporation, and all of the transactions occurred in Washington. Mr. Hazelrigg was in Washington; the law firm of Lasher Holzapfel et al. (who represented FMI and created all of the loan documents) was in Washington, and all of the documentation was specifically prepared under Washington law. CFG, on behalf of Barkett, packaged the loan, and then presented it to FMI. FMI has no offices or employees in the state of California. FMI never travelled to California to complete the transaction or make the loan. FMI did not solicit Barkett or Merjan to provide funding—Barkett, through Mr. Hazelrigg, in

Washington, contacted FMI.¹

On September 10, 2007, Merjan Financial Corporation (“Merjan”) signed a Commercial Promissory Note (“Note”) in the sum of \$1,400,000.

The Note was made payable to plaintiff FMI. Pursuant to that Note, FMI agreed to lend Merjan the sum of \$1,400,000 in exchange for Merjan’s payment of interest at a rate equal to 15%. The note provides that in the event of a default, interest shall accrue at a default rate of 36% per annum. Merjan agreed to pay interest only payments beginning on October 1, 2007, and on the first day of each month thereafter. Pursuant to the Note, all unpaid principal and accrued interest was due to be repaid, in full, twelve (12) months from the date of the Note, or September 10, 2008. An interest reserve of \$209,966.24 was held in reserve and disbursed monthly to FMI. In consideration for lending \$1,400,000 to Merjan, and as a condition precedent, FMI requested and received a personal, unconditional Guaranty from defendant Barkett.²

In September 2008, Merjan defaulted on the Note by not repaying the principal and accrued interest as due under the note on or before September 10, 2008. In November 2008 FMI received a check for \$3,000 from an entity known as BARUSA (which was one of the borrowers under

¹ *Id.*

² See Clerk’s Papers (CP) 28-48 (Declaration of Ken Sato, ¶¶1-5 and Exhibits 1, 2 and 3 thereto).

the Deed of Trust, and one of Barkett's entities), as reimbursement for an appraisal cost incurred by FMI.³ On November 2, 2009, Barkett made a payment of \$107,000 towards the debt. Finally, Barkett wired \$3,500 to FMI on January 14, 2011. Except for those payments, neither Merjan nor Barkett have made further payments on account.⁴

The total amount owed, crediting the \$107,000 and \$3,500 payments on account, and adding accrued interest and late fees equaled \$3,094,000.00. As the unconditional guarantor, and by the terms of the guaranty, defendant Barkett was responsible for repayment of the debt without further demand or recourse by FMI against Merjan and/or the security.⁵

The loan to Merjan and guaranty signed by Barkett were done so under Washington law. The loans were not made in California. As the undisputed evidence demonstrated, all of the loans were made, solicited, and documented in Washington State.⁶ Mr. Barkett signed the promissory notes on behalf of the borrower entities. In each note, the borrower expressly represented and warranted that the loan was "***negotiated and consummated in the State of Washington.***" (Emphasis added, See Promissory Note, page 5).

3 CP29 (Declaration of Ken Sato, ¶6)

4 *Id.* (Declaration of Ken Sato, ¶¶7-8)

5 CP 30 (Declaration of Ken Sato, ¶9)

2. PROCEDURAL BACKGROUND

Pursuant to the terms of the Guaranty and Promissory Note, defendant Barkett agreed to venue and jurisdiction in the King County Superior Court, in the State of Washington. Barkett further agreed “[t]his Guaranty shall be governed by and construed and enforced under the laws of the State of Washington....” On September 1, 2011, FMI filed suit against defendant Barkett under the Guaranty in the King County Superior Court, under King County Superior Court Cause No. 11-2-30122-2. Barkett was served, and originally answered pro se. On January 13, 2012, FMI moved for summary judgment. Defendant Barkett was represented by counsel for the Motion for Summary Judgment, and counsel filed opposition. As part of the opposition, defendant Barkett argued that the Guaranty was void based upon the fact that (1) FMI was not a Licensed Lender in California; (2) FMI’s transaction with Barkett was “illegal”; (3) the interest rate was “usurious”; and, (4) the King County Superior Court should apply California Law. The King County Superior Court considered and rejected this arguments, finding that defendant Barkett had knowingly entered into the Guaranty, had agreed to Washington law and venue, and that the usury laws did not apply. The Court entered judgment

6 CP 28-48 (Exhibits 1 through 3); CP 232-234 (Reply Declaration of Ken Sato)

in favor of plaintiff FMI.

III. ARGUMENT

1. STANDARD OF REVIEW

An appeal of a summary judgment is reviewed de novo. *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004). A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

2. THE WASHINGTON COURT HAD JURISDICTION OVER DEFENDANT BARKETT

Under Washington law, the distinction between special and general appearances has been abolished. *Matthies v. Knodel*, 19 Wash.App. 1, 573 P.2d 1332 (1977). A defendant may now object to personal jurisdiction under Civil Rule 12(b). However, the objection to jurisdiction may be waived under the provisions of Civil Rule 12(g) and (h).

Defendant Barkett did not raise any objections to personal jurisdiction in the court below, and the defense was not asserted as an affirmative defense in the King County Superior Court.⁷

Defendant Barkett appeared and answered in the King County

⁷ CP 49-53; CP 54-64

Superior Court. Barkett *did not* raise an affirmative defense of lack of personal jurisdiction in Washington. Barkett hired legal counsel and opposed the Motion for Summary Judgment. Barkett again did not raise personal jurisdictional issues. Of more significance is the fact that Barkett stipulated to the jurisdiction and venue of the King County Superior Court. §13 of the Guaranty provides: “The Guaranty shall be governed by and construed and enforced under the laws of the State of Washington and venue for any action shall like (sic) the federal or state courts of King County, Washington without giving effects to conflict of laws principles.”⁸

Barkett had a full opportunity to have the Washington court adjudicate his jurisdictional claims. Barkett knowingly waived those defenses. Barkett willingly signed the Guaranty, as well as the promissory note on behalf of Merjan, stipulating to Washington law and venue.

3. BARKETT’S ARGUMENT REGARDING ILLEGALITY HAS BEEN TRIED, AND REJECTED TWICE, IN SIMILAR COURT ACTIONS, AND HE SHOULD BE COLLATERALLY ESTOPPED FROM RAISING THIS ARGUMENT AGAIN

Faced with no viable defense in this matter, and unable to meet their burden under CR 56 of providing actual evidence to establish triable issues of fact, Barkett has repeatedly resorted to an argument that has been

8 CP 28-48

rejected by two federal judges—Judge Robert Lasnik of the Western District of Washington and Judge Robert C. Jones of the Nevada District Court— and now Judge Mary Yu of the King County Superior Court: That FMI was conducting business in the state of California “illegally”.

First in the matter of *WF Capital, Inc. v. William J. Barkett and Lisa Barkett*, USDC WDWA C10-524, WF Capital sued the Barketts on their loan and guaranties. Barkett made the *same exact* arguments in that case—that the loan and guaranty was illegal because WF Capital was not licensed in California.⁹ It is apparent that the same exact promissory notes and guaranties in the *WF Capital* matter were used for FMI’s loan to Merjan.¹⁰ In the *WF Capital* matter, Judge Robert Lasnik granted summary judgment against Barkett, and rejected their illegality defense, finding that the parties explicitly contracted for a choice of law in Washington, and should be given the benefit of the bargain they negotiated for:

The Commercial Promissory Notes, Guaranties, and Forbearance Agreement repeatedly affirm that the defendants are bound by their terms and are now in default. The Barketts do not deny that they signed these agreements, nor do they deny that the loans have not been re-paid. By signing these agreements, the Barketts objectively manifested their intent to be bound to their terms. *As a matter of law, they have breached their duties under these agreements, not only by failing to repay the loans but also by asserting the very*

9 CP 131-231 (See Exhibits 6, 7, 8 and 9 to the Declaration of Brian H. Krikorian)
10 CP 232-234, ¶6.

defenses they now present. (Emphasis added).¹¹

In the matter of *The Richard and Sheila J. McKnight 2000 Family Trust v. William Barkett, et al.*, USDC District of Nevada, Case No. 10-cv-1617 RCJ, Barkett made similar arguments as well.¹² In that case Judge Robert C. Jones of the Nevada U.S. District Court also rejected the illegality arguments advanced by Barkett, noting:

Defendants argue that certain California laws make the Castaic III loan agreement and the Guaranty illegal. But the Castaic III loan agreement includes a choice-of-law clause in favor of the substantive law of Nevada. (See Promissory Note ¶ 18(a)). *Defendants argue as if they were unaware of the choice-of-law clause.* (Emphasis added).¹³

The elements of collateral estoppel require: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987) quoting *Malland v. Department of Retirement Sys.*, 103 Wash.2d 484, 489, 694 P.2d 16 (1985). In each of these cases, Barkett and his entities have engineered loans amounting to tens-of-millions of dollars from entities outside of

11 CP 131-231 (Exhibit 9, page 8)

12 *Id.* (See Exhibits 4 and 5 to the Declaration of Brian H. Krikorian)

13 *Id.* (See Exhibit 5, page 12)

California. In each case, Barkett *knowingly* signed loan documents from lenders in Washington and Nevada, *knowingly* borrowed and received the benefit of millions of dollars, and *knowingly* signed documents providing a choice of law as the state of Washington or Nevada.¹⁴

FMI respectfully submits that this court, like Judges Yu, Lasnik and Jones, should reject what is an obvious ploy on behalf of Barkett—to borrow millions of dollars, sign binding documents at arms length, default on the loans, and then argue the entire transaction was “illegal.” Barkett has now, unsuccessfully, made this argument at least three (3) times. He should be collaterally estopped from raising it yet again. .

4. THE TRANSACTION OCCURRED IN WASHINGTON AND, PURSUANT TO THE AGREEMENTS, WASHINGTON LAW APPLIES

Defendants lack any legal basis for their contention that the loans and guarantees are unenforceable because FMI had not obtained a “Certificate of Qualification” in California. Relying on California Corporate Code § 2105, Barkett argues that FMI is attempting enforce an illegal, and therefore unconscionable, contract in the State of California. Here, the loans were not made in California and, therefore, the California Corporate Code is inapplicable. As the undisputed evidence shows, all of

¹⁴ It should be noted that in the *WF Capital* matter, the same law firm that provides the Barketts with declaration testimony here (Gilmore, Wood, Vinnard & Magness), nonetheless provided WF Capital noting that the loans were, in fact, valid loans. That same law firm then argued, on behalf of the Barketts, the loans were illegal. *Id.* (See

the loans were made, solicited, and documented in Washington State.

Barkett failed to submit any evidence contradicting his affirmative agreements and statements in the loan documents or FMI's description of the loan transaction. Even if Barkett was correct that California law were to apply, a Certificate of Qualification is required only if FMI entered into "repeated and successive transactions of its business in this state." Cal. Corp. Code § 191(a). The loans here do not constitute "repeated and successive transactions." See *Thorner v. Selective Cam Transmission Co.*, 180 Cal. App. 2d 89, 91-92 (1960) (holding that five loans between an out-of-state lender and a California borrower did not constitute "transacting business" in California under predecessor statutes to California Corporations Code Sections 2105 and 2033 where the loan documents were negotiated and executed in California, but the final loans were issued out of the lender's home state); see also *Detsch & Co. v. Calbar, Inc.*, 228 Cal. App. 2d 556, 570 (1964) (plaintiff was not transacting business in California where sole contacts in the state were through relationship with defendants).

Washington law holds that Section 187 of the Restatement (Second) of Conflict of Laws (1971) ("Restatement") provides the rule for conflict of laws problems in which the parties have made an express

Exhibits 7 and 8)

contractual choice of law. In *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 694 (2007) the Washington Supreme Court held that sound policy dictates that contractual choice-of-law provisions usually be honored:

The Restatement, expounding on core choice-of-law principles, explains that in applying section 187, “protecting the justified expectations of the parties ... come[s] to the fore.” Restatement § 6 cmt. c. “Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” Id. cmt. g. Likewise, “[p]redictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions.” Id. cmt. i.

Erwin, 161 Wn.2d at 699.

In his Order rejecting Barkett’s prior argument, Judge Lasnik in the *WF Capital* matter applied the test under Restatement 187(2)(b) to determine if the choice of Washington law would overcome the presumption of a choice of law provision. In concluding that the Barketts had not met their burden, Judge Lasnik noted that “[i]n order to overcome the express choice-of-law provisions in these agreements, defendants would have to satisfy all three Section 187(2)(b) factors. They have satisfied none. The Court applies Washington law.”¹⁵ Here Barkett should be estopped from asserting that he did not enter into the contract in Washington. See *Kramarevcky v. Dept. of Social and Health Services*, 122 Wash.2d 738, 743, 863 P.2d 535 (equitable estoppel applies where (1)

a party's admission, statement or act is inconsistent with its later claim; (2) there is action by another party in reliance on the first party's act, statement or admission; and (3) an injury would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission).

5. THE LOANS ARE NOT SUBJECT TO WASHINGTON, OR CALIFORNIA, USURY LAWS

Because the Loans were negotiated and made in Washington State, California usury laws simply do not apply. Defendants have made no argument and provide no evidence that the Loans would be usurious under applicable Washington State law. In fact—they are not, since RCW 19.52.080 provides that the Washington State usury statute does not apply to loans that are primarily for commercial or business purposes. There is no evidence denying the fact that these loans were loaned to an entity for business purposes, and secured and guaranteed for business purposes.

Likewise, the California Constitution and Civil Code also provide that loans made by real estate brokers *or secured by real property* are exempt from the usury laws. See Cal. Const. Art. XV, § 1 and California Civil Code §1916.1. This loan was made to Merjan as a commercial loan

15 See CP 131-231 (Exhibit 9, page 6, ll. 19-20)

and was secured by real property in California (see Exhibit 1 to the Declaration of Ken Sato).¹⁶ Under any analysis, the usury laws do not apply.

6. BARKETT IS UNCONDITIONALLY LIABLE TO FMI FOR ALL UNPAID PRINCIPAL AND ACCRUED INTEREST DUE UNDER THE NOTE

Barkett, as the guarantor, “unconditionally, irrevocably, and absolutely” guaranteed “without demand by Lender the full and prompt payment when due...of (a) the entire amount of principal and accrued interest under the Note, and (b) all other indebtedness, obligations, and liabilities of Borrower under the Loan documents....”

A guaranty of the payment of an obligation, without words of limitation or condition, is construed as an absolute or unconditional guaranty. *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 917, 506 P.2d 20 (1973). See *Century 21 Products, Inc. v. Glacier Sales*, 129 Wash.2d 406, 414, 918 P.2d 168 (1996)—holding: “A conditional guaranty is an undertaking to pay or perform if payment or performance cannot be obtained from the principal obligor by reasonable diligence.... An **absolute guaranty**, unlike a conditional one, *casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor....*” (Emphasis added).

16 CP 28-48

The unconditional nature of the guaranty is important because, except as provided by the guaranty, “though a loan may be inefficiently managed and with adverse consequences, neither inferior lienors nor absolute guarantors have any recourse against the lender unless it is alleged and proved that the lender acted in bad faith.” *Grayson v. Platis*, 95 Wash.App. 824, 978 P.2d 1105 (1999). Here there is no evidence, whatsoever, that FMI has acted in bad faith. Defendant Barkett has not denied he is liable under the guaranty or the amounts are owed.¹⁷ The bottom line is that except for one payment of \$107,000 in November 2009 and a wired payment of \$3,500 in January 2011, neither Merjan nor Barkett have honored their contractual obligation.

7. BARKETT IS LIABLE TO FMI FOR ALL COSTS AND ATTORNEY’S FEES INCURRED TO COLLECT ON THE GUARANTY, AND SHOULD BE ORDERED TO PAY FMI’S FEES ON APPEAL

Pursuant to Paragraph 1 of the Guaranty, Barkett absolutely guaranteed repayment of both the debt, as well as “all other indebtedness, obligations, and liabilities of Borrower under the Loan Documents including, without limitation, all costs of collection, attorney’s fees, court costs....” RCW 4.84.230 provides that “[i]n any action on a contract or lease entered into after September 21, 1977, where such contract or lease

17 CP 28-48 (Ken Sato Declaration, ¶¶6-9)

specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.”

Here, the guaranty and loan documents provide that Barkett guaranties payment of all costs of collection, including court costs and attorney’s fees. Pursuant to RAP 18.1(b), FMI requests this court order Barkett to pay its reasonable fees and expenses on appeal.

IV. CONCLUSION

For the foregoing reasons, FMI respectfully requests that this Court affirm the lower court’s granting of summary judgment in its favor, and affirm the judgment entered against Barkett. FMI further requests an award of attorney’s fees pursuant to RAP 18.1 as the prevailing party on appeal.

Dated: August 9, 2012

LAW OFFICES OF BRIAN H. KRIKORIAN

By 

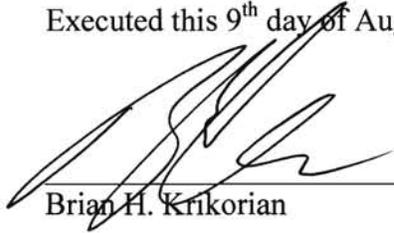
Brian H. Krikorian, WSBA # 27861
Attorneys for Respondent

On August 9, 2012, I caused to be served a copy of the document described as **Respondent's Brief** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

William and Lisa Barkett
800 Silverado Street #301
La Jolla, CA 92037

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 9th day of August, 2012.



Brian H. Krikorian