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NO. 69365-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COLUMBIA ASSET RECOVERY GROUP, LLC,
a Washington limited liability corporation,

Appellant,

v.

JOSEPH R. KELLY, as the Successor Personal Representative of
THE ESTATE OF WILLIAM D. PHILLIPS, SR., deceased.

Respondent.

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by entering its Order Granting the Estate of William D. Phillips' Motion to Dismiss the Complaint for Lack of Personal Jurisdiction. ("the Dismissal Order"), CP 957-58.

2. The trial court erred by entering its Order Granting Plaintiff Columbia Asset Recovery Group's Motion for Reconsideration ("the Reconsideration Order"), CP 1126-27, insofar as the Reconsideration Order did not vacate the Dismissal Order's dismissal of the Complaint and held only that such dismissal is "without prejudice."

II. ISSUES PERTAINING TO BOTH ASSIGNMENTS OF ERROR

1. By taking from the Bank an assignment of the Bank's rights against the Estate under the Note and Agreement, did CARG somehow discharge the payment and choice of venue provisions against the Estate?

2. For purposes of answering Issue 1, does it matter that CARG is a limited liability company that was formed and is owned by an individual, Tim Kennedy, who was a guarantor of the Estate's obligation as the primary obligor on the Note?

III. STATEMENT OF THE CASE

This case is not factually complex. In June, 2009, the borrowers, William Phillips and Atlantic Frost Holdings, LLC (“AFH”), a Delaware limited liability company, executed a Commercial Line of Credit Agreement and Note (“Note”) in the principal amount of \$1,000,000 payable to Columbia State Bank, and a Business Loan Agreement (“Agreement”). CP 2, 30, 36-38. While Phillips and AFH were the two primary obligors, Tim Kennedy personally guaranteed payment of the Note, if Phillips and AFH did not. CP 2, 30, 41. The Note contained a provision providing for payment to be made in Seattle. CP 36 (Promise to Pay). In the Agreement and Note, the borrowers also waived objection to jurisdiction in Seattle on the ground that they were not residents of the Bank’s locality, CP 34 (Jurisdiction), which is Seattle. CP 30, 36.

Following Phillips’ death in a 2010 airplane crash, the Personal Representative of the Phillips Estate negotiated extensions of the Note. CP 259-267. The Agreement and Note finally became due in April 2011. CP 3, 11, 77. AFH did not pay; neither did the Phillips estate. CP 3, 9, 443.

Columbia State Bank called on Kennedy to make good on his guarantee. Kennedy formed Columbia Asset Recovery Group, LLC (“CARG”), a Washington limited liability company. CARG then paid the

Bank \$1,026,071.94 and took an assignment of the Bank's rights under the Note and Agreement. CP 147-51. CARG then brought suit to enforce the Note and Agreement in King County Superior Court against the Phillips Estate. CP 1-5.

Moving to dismiss under CR 12(b)(2), CP 6-21, the Phillips Estate argued that Kennedy and CARG were alter egos and that by virtue of the assignment to CARG, Kennedy had fulfilled his own obligation as guarantor, and had thereby discharged the Note. Because the Note was discharged by the assignment to CARG, the Phillips Estate argued further, the provisions in the Note and Agreement for jurisdiction and venue King County were also discharged (CP 9-19, 409-13. CP 412 n.6), and no longer provided a contractual basis for exercising personal jurisdiction over the Estate in Washington. CP 18-19, 411-13.

In response, CARG argued that the assignment of a Note and Agreement to an LLC formed by a Guarantor does not discharge a Note and Agreement especially where such a discharge was not intended by any of the parties to the assignment. CARG also argued that even if CARG was an alter ego of the Guarantor (for which there was no evidence, whatsoever), the alter ego guarantors would be subrogated to the Bank's rights under the Agreement and Note including the right to the venue and jurisdiction provisions. CP 400. Moreover, performance of the

obligations under the Note and Agreement were due in Seattle WA. There was therefore, specific jurisdiction for enforcement of the obligations in Seattle even in the absence of the contractual venue and jurisdiction provisions. CARG separately sought summary judgment in another motion. CP 215-20.

The trial court did not rule on CARG's motion for summary judgment. Instead, the trial court granted the Estate's CR 12(b)(2) motion, entering the Estate's proposed order dismissing CARG's complaint with prejudice. CP 957-58.

On CARG's timely filed motion for reconsideration, CP 1028-37, the trial court entered an order entitled "Order Granting Plaintiff Columbia Asset Recovery Group's Motion for Reconsideration." But the Order on Reconsideration still operated to dismiss CARG's Complaint although, this time, without prejudice to CARG's right to refile elsewhere. CP 1126-27. CARG timely appealed. CP 1128-34.

IV. ARGUMENT

A. Standard of Review.

Neither of the orders from which CARG appeals purport to resolve issues of fact. The basis for the superior court's decision seems to have been that it agreed with the Phillips Estate that the Agreement and Note were discharged by operation of law when CARG paid the Bank for an

assignment of the Note and Agreement. If so, then the ruling was a legal one rather than a discretionary one, and the standard of review is *de novo*. (trial court's determination of personal jurisdiction is reviewed *de novo* when the underlying facts are undisputed); *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999) (same). This Court thus must determine whether the Note and Agreement including their venue provisions were indeed discharged by the Bank's assignment.

B. Although the Order on Reconsideration Makes the Court's Earlier Order of Dismissal "Without Prejudice," the Order on Reconsideration Does Not Affect the Earlier Order's Holding that CARG May Not Invoke a Washington Court's Jurisdiction over the Person of the Phillips Estate.

The "dismissal without prejudice" provision in the trial court's order on CARG's motion for reconsideration, CP 1127, may create the impression that CARG is now free to refile an action against the Phillips Estate in Washington. To so read the two orders would be incorrect. The trial court left intact its *dismissal* of CARG's complaint, and that dismissal was based solely on an argument that personal jurisdiction over the Phillips Estate does not exist. Thus, the order on reconsideration serves only to provide CARG with an argument, should it file the same action in another jurisdiction, that its claim against the Phillips Estate is not barred by *res judicata*; it does not enable CARG to refile in Washington.

C. The Trial Court's Dismissal Order(s) Must Be Reversed Because the Note and Agreement Were Not Discharged by an Assignment Where CARG Paid to Acquire the Bank's Rights to Payment and Enforcement of the Note in King County.

The reasoning based on which the trial court granted the Estate's CR 12(b)(2) motion is not explained in the court's order(s), but the argument the Estate made was that CARG was really the alter ego of a Guarantor and that therefore CARG's payment to the Bank to acquire an assignment of the Bank's rights operated to discharge the Agreement and Note, rendering the King County payment and venue provisions null and void, and thus precluding CARG from suing the Estate in Washington. If the Estate's "discharge" argument was legally incorrect, the trial court's CR 12(b)(2) dismissal order is incorrect as well.

D. CARG's Payment to the Bank in Exchange for Assignment of the Bank's Rights Did Not Discharge the Estate's Obligation as Principal Obligor under the Note and Agreement.

1. The Agreement and Note are both contracts.

On its face, the Agreement is a contract, and the Estate did not argue otherwise. "As between the maker and the payee, a promissory note is only a simple contract to pay money." *Vancouver Nat'l Bank v. Katz*, 142 Wash. 306, 313, 252 P. 934 (1927); *see also Reid v. Cramer*, 24 Wn. App. 742, 744, 603 P.2d 851 (1979).

2. Phillips' estate succeeded to his obligations under the Note and Agreement.

The Phillips Estate is bound by Phillips' consent to venue in Seattle in the Agreement and to his agreement to pay the Note in Seattle. See e.g. *In re Murphy's Estate*, 191 Wash. 180, 192, 71 P.2d 6, 18 (1937) (“It is incumbent upon the executor to carry out binding contracts made by decedent in his lifetime”). In the extension agreements, the Estate also bound itself to the payment and venue provisions in the Note and Agreement. CP 259-267.

3. All contracts, including promissory notes, are assignable.

“[A]ll contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy.” *Puget Sound Bank v. Dept. of Revenue*, 123 Wn.2d 284, 288, 868 P.2d 127 (1994); See also *AAA Cabinets v. Accredited Surety & Cas. Co.*, 132 Wn. App. 202, 208, 130 P.3d 887 (2006). The Estate cited to the trial court no statute or public policy that prohibited the Bank from assigning either the Agreement or the Note to CARG.¹

¹ Promissory notes, in particular, are freely assignable under the UCC. RCW 72A.9A-109(a)(3) makes UCC Article 9A applicable to promissory notes, and RCW 62A.9A-408 makes almost any restriction on the assignment of a promissory note legally ineffective. Given the UCC's prohibition of restrictions on the assignment of promissory notes, any notion that an assignment can operate as an *inadvertent* discharge of the underlying debt is legally dubious. The Estate cited to the trial court no legal authority that inadvertent discharge can result from the assignment of a promissory note.

The discharge of a note can occur only by agreement, and thus intentionally. RCW 62A.3-601(a). The Phillips Estate offered no evidence, and it is implausible to suppose, that CARG and the Bank intended to discharge the Estate's obligations on the Note and Agreement when CARG paid the Bank more than a million dollars and took an assignment of the Bank's rights, including the Bank's security interest in certain assets and including a maritime mortgage.

4. CARG offered affirmative evidence, to which the Estate did not object, that the Bank and CARG *did not* intend to discharge the Estate's obligations on the Note and Agreement.

The intent of the parties was clear: to sell the underlying debt to CARG for purposes of collection against the Phillips Estate and/or the Bank's collateral. The contemporaneous transaction documents so provide. The Loan Purchase and Assignment Agreement between CARG and the Bank states that "The Bank has agreed to sell, and [CARG] has agreed to purchase[] the Loan..." CP 1016.

Barbara Hegstrom, a Vice President of Columbia State Bank, also testified by declaration that the purpose of the transaction was to convey Columbia State Bank's interest in the underlying debt to Kennedy, not to satisfy Kennedy's guaranty of the Loan:

Rather than discharging the indebtedness of the Phillips Estate and AFH as co-borrowers on the loan, however, the obvious intent of the sale and assignment of the loan to CARG pursuant to the Agreement was to transfer to CARG all rights and remedies of the lender under the loan documents.

CP 1024. There is no evidence, and even the Estate did not argue, that CARG was making a gift of discharge to the Estate when it paid the Bank to acquire the Bank's rights under the Note and Agreement.

5. The authorities the Estate cited in support of its "discharge" argument did not support that argument.

The Estate relied in the trial court on *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 459 P.2d 389 (1969), citing that decision for the proposition that assignment of a debt to a debtor results in extinguishment of the debt, CP 19, 409, and on *McChord Credit Union v. Parrish*, 61 Wn. App. 8, 809 P.2d 759 (1991), for the proposition that a guarantor is the same as a debtor, *see* CP 1115. The Estate's reliance on those decisions was misplaced and ignores, in any event, a guarantor's subrogation rights.

Home Indemnity did not involve a loan agreement, promissory note, or a guarantor. Instead, the case involved an automobile dealer bond under a specific statutory scheme. Although the facts of the case are complicated, what the court's decision stands for are two propositions. The first proposition is that a *surety's* obligation is discharged when

someone with both a claim against the surety's principal (in the principal's capacity as consignee) and a claim against the consignor, sues and obtains satisfaction of the claim from the consignor. Thus, "a claim against a consignee's surety, which relates to the subject matter of the consignment, [does not] survive an assignment to the consignor." *Home Indem*, 77 Wn.2d at 4-5. The issue here is not whether a *surety's* (or guarantor's) obligation was discharged; Kennedy, not the Phillips Estate, is the guarantor/surety in the current analysis and the Phillips Estate is the principal or primary obligor. See *Century 21 Prods. v. Glacier Sales*, 129 Wn.2d 406, 412 n.2, 918 P.2d 168 (1996) (the terms guarantor and surety are used interchangeably). Nor is this a case where someone with a claim against both the Phillips Estate as consignee and a third-party consignor obtain satisfaction of his or her claim from the consignor. If that had happened, the effect, based on *Home Indemnity*, would only have been to discharge *Kennedy's* obligation to the Bank as surety, not the discharge of the Phillips Estate's obligation as the principal debtor.

The second proposition for which *Home Indemnity* stands is that "assignment of a claim from a creditor to the debtor is, in legal effect, a satisfaction and payment of that claim [and t]o the extent that a claim is thus assigned, the debt and the rights based upon it are extinguished." *Home Indem.*, 77 Wn.2d at 5 (internal citations omitted). This case did

not involve the assignment of a claim by the creditor to “the debtor” within the meaning of that statement in *Home Indemnity*, because the court there was referring not to a *surety* as “the debtor,” but rather to an *agent* for “the debtor” who was separately liable other than as a surety/guarantor:

As to the purchaser, Mr. Chamberlin, Mr. Carpenter [the debtor] was not less a debtor than was his agent, Mr. McClellan [who was not a surety for Carpenter’s obligation]. It follows that the assignment in question [by Chamberlin to Carpenter, of Chamberlin’s claim against McClellan] was an assignment to Mr. Carpenter of a claim based upon his own obligation. This had the legal effect, under the stated rule, of satisfying the obligation and precluding any claim based upon it [against Home Indemnity, McClellan’s surety].

Id. In other words, the rule for which *Home Indemnity* can be cited is that a debtor who satisfies a claim against him cannot rely on the claimant’s assignment, to him, of the claimant’s assignment of the claimant’s claim against the debtor’s *agent*.²

McChord Credit Union involved the issue of a guarantor’s liability for a deficiency judgment against the principal debtor. The principal

² For *Home Indemnity* to apply directly or even by analogy to this case, the facts of this case would need to be very different from what they are. A stranger with a claim against both the Phillips Estate and an agent for the Estate would have had to sue both, obtaining satisfaction of the claim from the Estate, discharging any liability on the agent’s part and thus any liability of a surety for the agent. It seems to CARG self-evident that the holding, or even any *dictum* in *Home Indemnity*, provides no support for the Dismissal Order and the Reconsideration Order in this case, and CARG will leave any further comment or parsing of that decision to such reply as may be warranted in light of how, if at all, the Phillips Estate attempts to argue otherwise in its brief as respondent.

debtor's father had guaranteed his son's car loan. The son defaulted; the creditor repossessed the car, conducted a public sale of the car, and obtained a deficiency judgment against both the son and the guarantor/father. The father appealed; the Supreme Court held the creditor had not complied with a UCC Article 9 provision requiring that the debtor and guarantor be sent notice of the time and place of the public sale of the car. Therefore, the court held, "the debtor, Clyde, Sr., [may] recover any loss resulting from the failure of notice by setting the loss off against any deficiency recovered by [the creditor]." *McChord Credit Union*, 61 Wn. App. at 14. Although the court referred in that sentence to Clyde, Sr. as "the debtor," it was not holding that he was legally in no different a position from Clyde, Jr., whom the court termed "the *principal* debtor [italics added]" two sentences earlier in the decision. *Id.* Having so held, however, the Supreme Court affirmed the trial court's judgment against the father/guarantor for the full deficiency judgment because the creditor had presented evidence effectively rebutting a presumption that the value of the collateral had been at least equal to the amount of the outstanding debt. *Id.* at 14-15.

Thus, the notion – advocated in the trial court by the Phillips Estate – that *McChord Credit Union* states a rule making a debtor and his guarantor one and the same is not a notion that the decision bears out. A

guarantor is a *type* of debtor, in that his or her obligation is to answer for the debt of another. See BLACK'S LAW DICTIONARY (8th ed. 2004), p. 724 (defining "guarantor of payment" as "One who guarantees payment of a negotiable instrument when it is due without the holder first seeking payment from another party"). But that does not make "guarantor" and "debtor" synonyms; no lender accepts a borrower's guarantee of his or her own debt. And, as discussed below, a guarantor has rights against a primary obligor when called upon to satisfy that obligation.

6. It is immaterial that CARG was formed and is owned by Tim Kennedy.

If the trial court accepted an argument by the Estate that the assignment to CARG is somehow invalid or can be disregarded because it was really Tim Kennedy who satisfied the Estate's debt through CARG, the court was wrong. The Estate offered no evidence based on which the court could even have considered piercing CARG's corporate veil or disregarding its separate legal existence, much less any basis on which the court could have done so as a matter of law. The record contains no evidence of fraud, illegality, or misrepresentation that supports piercing the corporate veil. *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982). Nor is there evidence of financial intermingling or failure by CARG to observe the formalities of corporate

existence. See *S.H.C. v. Sheng-Yen Lu*, 113 Wn. App. 511, 530, 54 P.3d 174 (2002), *rev. denied*, 149 Wn.2d 1011 (2003); See also *Grayson v. Nordic Constr. Co., Inc.* 92 Wn.2d 548, 553, 599 P.2d 1271 (1979).

A belief on the court's part that CARG was a mere alter ego of Kennedy also would not validate its CR 12(b)(2) dismissal order. The alter ego theory may be applied only when the "corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest and that separateness of the corporation has ceased to exist." *Grayson*, 92 Wn.2d at 553 (quoting *Burns v. Norwesco Marine Inc.*, 13 Wn. App. 414, 418, 535 P.2d 860 (1975)). In this case, there is no evidence that the relationship between Kennedy and CARG amounted to an "alter ego" relationship.

7. It is immaterial whether assignment or subrogation analysis is applied.

There was significant briefing devoted by both parties concerning an issue of whether the Note was *assigned* to CARG or whether (if Kennedy and CARG were alter egos) CARG was *subrogated* to the Bank's rights as against the Phillips Estate, and what the ramifications of those characterizations were. CP 1031-35; CP 1114-16. The distinction is immaterial; either way, the trial court's decision should be reversed.

If the Note was *assigned* to CARG, then CARG stepped into the shoes of the Bank as creditor against the Note's payor, Phillips. "An assignee of a contract 'steps into the shoes of the assignor, and has all the rights of the assignor.'" *Puget Sound Bank*, 123 Wn.2d at 292 (quoting *Estate of Jordan v. Hartford & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993)). *See also Warren v. Nat'l. Sur. Co.*, 149 Wash. 378, 385, 271 P. 69 (1928) (upon payment of a judgment against one guaranteeing a loan, guarantor is entitled to assignment of all legal or equitable rights and interests as against the principal debtor). This is what happened when CARG acquired an assignment of the Estate's debt to the Bank. CARG stepped into the shoes of the Bank as it had every right to do.

Conversely, if the Note was "satisfied" by the Guarantor, and the Guarantor and CARG are alter egos, the alter egos are subrogated to the Bank's rights and, CARG still steps into the shoes of the Bank:

[E]quity will treat the surety as though he were an assignee of the creditor, standing in his shoes to enforce the debt against the debtor together with any collateral held as security for the debt, entitled to all priorities and immunities enjoyed by the creditor.

Nat'l Bank of Wash. v. Equity Investors, 86 Wn.2d 545, 556-557, 546 P.2d 440 (1976)(quoting L. SIMPSON, LAW OF SURETYSHIP, 206-07 (1950).

As further explained by the court in *Trust of Strand v. Wel-Co Group, Inc.*, 120 Wn. App. 828, 838, 86 P.3d 818 (2004):

When a creditor intends to look to a surety for payment, he must preserve unimpaired all his rights against the debtor. *Nat'l Bank of Wash. v. Equity Investors*, 86 Wn.2d 545, 556, 546 P.2d 440 (1976). If the creditor, without the surety's consent, impairs the surety's subrogation right to enforce the creditor's security interest, the surety is discharged. *Id.* The right of subrogation attaches, however, only after the surety has satisfied the underlying debt. Restatement [(Third) of the Law of Suretyship and Guaranty (1996)] § 27(1).

Wel-Co [the surety] had no subrogation rights here. First, Wel-Co did not pay Strand [the creditor] anything. Second, once the Browns [the principal obligors] satisfied the underlying obligation, Strand had no further recourse against them to which Wel-Co could be subrogated.

Trust of Strand, 120 Wn. App. at 838. By clear negative implication, had Wel-Co satisfied the Browns' obligation to Strand, Welco *would* have been subrogated to Strand's rights against the Browns. And the court's point that Strand, as creditor, was obliged to make sure it preserve unimpaired its own rights against the debtors, the Browns, makes sense only if Strand, by obtaining performance from Wel-Co as surety/guarantor, would leave Wel-Co, *even without a formal assignment*, standing in its shoes as the Browns' creditor. *See also Century 21 Prods. v. Glacier Sales*, 129 Wn.2d at 412 (explaining that "[t]he defense of impairment of collateral is based on equitable considerations and promotes a guarantor's right of subrogation: a guarantor has the right to step into the shoes of the creditor and sue the debtor for collateral securing the debt. If the creditor has impaired this collateral, then the guarantor is denied the

right of subrogation. By impairing the collateral, a creditor prevents a guarantor from suing the debtor to recover the collateral”).

The Estate argued to the trial court that CARG was trying to have it both ways, CP 840, but CARG’s point, which is both legally correct and supported by the authorities here cited, is that CARG is entitled to “have it” one way or the other. In either case, as either assignee or by way of subrogation, CARG is entitled to step into the Bank’s shoes against the Phillips Estate to enforce William Phillips’ unfulfilled promise to the Bank including the Seattle payment and venue provisions.

E. Request for Award of Attorney Fees for Appeal.

Pursuant to RAP 18.1(b) and the Agreement and Note, CP 33, 38, CARG requests an award of attorney fees for appeal.

V. CONCLUSION

For the reasons explained above, the trial court erred by granting the Phillips Estate’s CR 12(b)(2) motion and dismissing CARG’s complaint. This Court should vacate the Dismissal Order and the Reconsideration Order and remand to the trial court for further proceedings, including a ruling on CARG’s motion for summary judgment.

RESPECTFULLY SUBMITTED this 11th day of December,
2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 11th day of December, 2012, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be delivered in the manner indicated below to the following counsel of record:

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SENT VIA:

- Fax
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DATED this 11th day of December, 2012, at Seattle, Washington.



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