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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 REPLY BRIEF

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I. REPLY TO EGP'S STATEMENT OF THE CASE

None of the facts stated in Jones' Opening Brief were contested by EGP. However, EGP's statement of the facts contains many incorrect statements.

Ms. Jones was not representing herself in this case *pro se*. (EGP brief at 3) Jones was represented by legal counsel at Jones Law Group, PLLC.

EGP incorrectly states, as it did in its complaint, that Ms. Jones is doing business as Jones Law Group, PLLC. (EGP brief at 3) There is no evidence that Jones Law Group, PLLC is anything other than a professional limited liability company. (CP 196)

EGP incorrectly states, as it did in its complaint, that Ms. Jones opened a revolving charge account referred to as the Account. (EGP brief at 3) This is incorrect for two reasons. First, Jones Law Group, PLLC opened a business line of credit, and not Jones personally. (CP 196) Second, it was a business line of credit and not a revolving charge account. (8/22/2012 RP at 8:19-21)

Moreover, CP 186 is referenced throughout the EGP's statement of facts rather than citing to any evidentiary support. CP 186 is a Motion for Summary Judgment filed in December 2011 before any parties were

served and was not the motion this court considered in its determination. It is completely improper to cite to this motion. It is further improper to cite to a Motion for evidence rather than to some declaratory evidence such as a declaration. The proper cite typically would be to a declaration but in this instance the only declaration is Mr. Fair's declaration and it is insufficient as he was only the records custodian for EGP, the successor in interest to creditor Wells Fargo, and has no personal knowledge of what occurred between the assignor Wells Fargo and Jones as to the type of account. The better evidence is the transcript, which never references the account as a revolving charge account. (CP 194-210) Moreover, the attorney for EGP admitted at the summary judgment hearing that it was a business line of credit. (8/22/12 RP 8:19-21) Jones challenges the statement that the account was a revolving charge account, it was not.

EGP incorrectly states, as it did in its complaint, that Ms. Jones borrowed money and/or purchased goods and services using the Account. (EGP brief at 5) This is incorrect. There is no evidence that Ms. Jones borrowed money or purchased goods and services, the account was only for Jones Law Group PLLC a non-party. (Jones Opening Brief at 3).

In the same sentence EGP alleges that Jones became bound by the written Customer Agreement. (EGP brief at 5) This is not true. As stated

in Jones' opening brief at page 3 there is no evidence in the record of a written customer agreement between the parties.

EGP incorrectly states, as it did in its complaint, that Ms. Jones defaulted on the Account. (EGP brief at 5-6) There is no evidence of a default by Ms. Jones, personally, the default was by non-party Jones Law Group, PLLC.

II. STRICT REPLY

A. **There is no waiver of any right to appeal the supplemental judgment for attorney's fees and costs.**

Jones preserved the right to appeal the supplemental judgment for attorney's fees. (*See* Notice of Appeal; *see also* Jones opening brief at 1 and 8) Jones argument is the same as to both of the judgments entered against her, and there is no waiver.

B. **Reply to Denial of Jones Cross Motion to Dismiss**

The trial court erred denying Jones' motion to dismiss. The only claim EGP could make against Jones personally was based upon an oral guarantee agreement, and EGP failed to timely commence its action.

1. **There is no dispute about the date EGP's possible claim against Jones accrued on November 13, 2009.**

There is no dispute that if any claim accrued upon which EGP could have brought an action, that date would be November 13, 2009, the

date of the last payment made by Jones Law Group, PLLC. Jones disputes the accrual of any cause of action for breach of a guarantee agreement, because, as argued *infra*, there is no guarantee agreement signed by Ms. Jones and no notice or demand was provided to Ms. Jones personally based upon any guarantee agreement.

2. EGP failed to timely serve any of the defendants and the statute of limitations expired.

Jones disputes that EGP effectuated service on Jones and Jones marital community. Regardless of the question of efficacy of Mr. LaPeer's declaration, there is no question that this service of process, if it indeed occurred, did not happen until January 31, 2012, more than 90 from the date the complaint was filed on October 11, 2011, and more than two years from November 13, 2009. (*Id.*)

As addressed, *infra*, since EGP failed to effect service within 90 days of the date of filing of the Complaint, the action was not commenced within two years of November 13, 2009, and EGP's claim against Jones personally expired on November 13, 2011.

3. The applicable statute of limitations on EGP's action against Jones for breach of any guarantee agreement is two years, which expired.

In this case, a two-year statute of limitations applies because (1) no separate consideration was given to Jones for her personal guarantee and

no exception under Cal. Civ. Proc. Code § 2794 applies, (2) under Cal. Civ. Proc. Code § 2793, a guarantee must be in writing and signed; and (3) EGP has provided no evidence that Jones ever signed a guarantee agreement.

Moreover, Jones, personally, is not the customer. In fact, EGP does not dispute that the account at issue is a “business line” between EGP and Jones Law Group, PLLC, and did not involve a consumer credit card account. (8/22/2012 RP at 8:19-21) Thus, the only claim that could be asserted against Jones personally would be based upon an alleged guarantee.

The evidence in this case establishes that no written and signed guarantee agreement exists between EGP and Jones personally, and EGP’s continued reliance upon Cal. Code Civ. Proc. § 337 is misplaced. The four-year statute of limitations for actions based upon an open consumer credit card account with a natural person as defined by Cal. Civ. Code §1747.02 does not apply in this case. Under all accounts this was a business line and not a consumer credit card.

In addition, there is no evidence that EGP provided any notice of claim to Jones based upon any personal guarantee. Thus, even if it is undisputed that the claim accrued on November 13, 2009, EGP was

required to commence its action, including service of process, within two years. EGP missed that statute of limitations.

EGP filed its action against Jones personally on October 11, 2011, but admits that it did not serve anyone until January 31, 2012, more than 90 days from the date of the filing of the complaint. Therefore, EGP did not meet the requirements of RCW 4.16.170, and the action was deemed not to have been commenced within the two year statute of limitations. And, absent meeting that requirement, the statute of limitations ran and the trial court was without authority to enter judgment against Jones personally. Both the judgment in principal and the judgment for attorney's fees and costs must be reversed.

The issue before the Court in *State Bd. of Equalization v. Balboa, Ins. Co.* was the surety's position that a certificate of lien must name the surety as well as the taxpayer. The Court took the position that this would effectively change the agreement between the State and Balboa and make limitations upon its agreed obligation. It was undisputed that Balboa executed a surety bond was not at issue; this was alleged within the State's complaint. *See Balboa*, 89 Cal.App. 3d 499, at 501, 155 Cal.Rptr. 205 (1978) Thus, the issue of whether the guaranty agreement met the requirements of Cal. Civ. Code § 2794 was not at issue. *Balboa* relies in

part upon *Bloom v. Bender*, in which, again, the defendant executed a guarantee agreement, and this fact was stipulated. *Bloom v. Bender*, 48 Cal.2d 793, 795, 313 P.3d 568 (1957) These cases simply do not apply to EGP's claims against Jones.

EGP's reliance upon *Cf. Consolidated*, in its attempt to establish the existence of a written contract, is also misplaced. Plaintiff has cited *Consolidated Irr. Dist. v. Superior Court*, 205 Cal.App. 4th 697, 140 Cal.Rptr. 3d 622 (2012) for two propositions. First, that EGP's claims are based upon a revolving charge account, or a *consumer credit account*, and therefore subject to a four year statute of limitations. Second, because the claims are based upon an instrument in writing that includes a written transcript of Well Fargo's audio recording an application for a business line and therefore it constitutes a written guarantee of the business line.

Consolidated Irr. Dist. v. Superior Court specifically addressed an audio recording of a public agency hearing that involved an order issued in a proceeding brought under the California Environmental Quality Act (CEQA). Specifically, the plaintiff in *Consolidated* sought to establish that the audio recording of a public agency hearing could be included within an agency's record of proceedings, even though transcripts themselves did not exist. The City of Selma, a real party in interest, maintained that the

inclusion of transcripts was baseless because the evidence was that no transcript of the meetings existed. The *Consolidated* court adopted the ordinary meaning of “transcript” under Cal. Pub. Res. Code § 21167.6(e)(4), under which a transcript may include a verbatim account of what was said at a proceeding in which the words are recorded in a visual, not auditory format. In making its analysis, the *Consolidated* court distinguished that “the term ‘written’ is contrasted with the term ‘oral,’ such as oral or written testimony and oral or written contracts.” *Consolidated Irr.* at 717 (*emphasis added*). The Court analyzed the term “written” as it may be applied in various instances, and determined that the term “written” is ambiguous and that ambiguity, in consideration of CEQA, must be resolved in a way “that best effectuates the purpose of the law.” *Consolidated Irr.* at 717, citing *Hasson v. Mercy American River Hospital*, 31 Cal.4th 709, 715, Cal.Rptr. 32 623, 74 P.3d 726 (2003). In *Consolidated*, the court specifically determined that a broad interpretation of “written materials,” one that includes audio recordings of meetings for which there is no transcript, best promoted CEQA’s purposes of accountability and informed self-government. *Consolidated Irr.* at 717. The reason for this was that (1) the grounds for noncompliance with CEQA presented orally were relevant to application of the doctrine of

issue exhaustion; (2) if minutes were to omit the fact that an issue was raised, and the transcript was not part of the record of proceedings, a plaintiff might be unable to show an issue was exhausted; and (3) who made oral objections at a meeting could be relevant. *Consolidated Irr* at 717-18

This matter does not involve a public agency action or facts similar to those in *Consolidated*. Instead it involves whether the existence of a private written, or even oral, contract for a business line of credit can be established by the transcript of an oral proceeding qualifies as a written guarantee or as a consumer credit card such that EGP's claims can be brought pursuant to Cal. Civ. Proc. § 337. In this instance, the manner in which the purpose of law is best effectuated does not include giving the transcribed audio recording the same deference as a matter involving the public agency hearing such as *Consolidated Irrigation* nor is it proper to consider it a written contract for the purposes of the statute of limitations.

Here, the transcript offers nothing to establish the existence of a contract for a consumer credit card, as defined by Cal. Civ. Code §1747.02, between Plaintiff and Defendants Jones, or even between Plaintiff and Jones Law Group, PLLC. The transcript states no terms of a contract between Wells Fargo at the Defendants, and the Court should

reject EGP's position that a written contract is established based upon the transcript.

EGP's reliance upon *Resurgence Financial, LLC v. Chambers* is also misplaced. *Resurgence*, 173 Cal.App. 4th Supp. 1, 7, 92 Cal.Rptr.3d 844 (2009). In *Resurgence*, an individual person, Chambers, entered into a credit card agreement with First USA Bank, which in turn assigned the account to Resurgence financial. Again, Chambers, an individual, fits the definition of a "cardholder" under Cal. Civ. Code § 1747.02, which provides:

[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.

Thus, while *Resurgence* may confirm that the statute of limitations for bringing an action based upon a consumer credit card open account is four years, it is inapposite to EGP's claim against Jones. In this case, EGP did not obtain a judgment against Jones individually based upon a consumer credit card open account but rather based upon an oral guarantee agreement. This is a critical distinction because Jones is not the cardholder

personally, or in any consumer sense, but rather only a guarantor, and a guarantor of a business obligation, and only an oral guarantor.

Contrary to Washington law, Jones Law Group, PLLC is not a natural person as defined by Cal. Civ. Code § 1747.02. 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). Indeed, EGP did not bring its action against Jones Law Group, PLLC; rather EGP only brought its action against Marianne K. Jones personally, who was not the principal holder of the account.

The main discussion of this case is about the choice of law, which it was determined was California law. At page 8, the *Resurgence* court stated, “Courts generally enforce parties’ agreements for a shorter limitations period than otherwise provided by statute, provided it is reasonable. ‘Reasonable’ in this context means the shortened period nevertheless provides sufficient time to effectively pursue judicial remedy.” *Resurgence*, 173 Cal.App. 4th Supp. 1, 7, 92 Cal.Rptr.3d 844 (2009), *citing* Cal. Code Civ. Proc. § 337. In *Resurgence*, the court applied California law, which shortened the statute of limitations on this type of

action (an action on open contract) to a period of three years instead of four.

Here, EGP had the opportunity to clearly establish the statute of limitations by requiring a signed written guarantee agreement and it did not do so. *See e.g. Barnes v. Hartman*, 246 Cal.App.2d 215, 222, 54 Cal.Rptr. 514 (1966)(The plaintiff never signed an instrument or document guaranteeing the repayment of a loan as required by § 2793.) Under §2793, EGP could have ensured its rights to proceed against Ms. Jones personally based upon a claim for breach of personal guarantee by simply obtaining Ms. Jones' signature on a guarantee agreement; it did not do this. Absent EGP meeting this obligation, there is no written guarantee to enforce, and at best if the court determines that a guarantee agreement does exist it can be nothing more than an oral contract to which a two-year statute of limitations applies.

The only claim that EGP could possibly assert against Marianne K. Jones personally would be based upon the oral guarantee agreement. However, as previously stated, EGP failed to obtain the requisite signature on any guarantee agreement to cause it to be a written agreement and therefore subject to a longer statute of limitations, and EGP's reliance upon an oral transcript is misplaced.

Since a two-year statute of limitations applies, then EGP failed to commence an action against either Jones Law Group, PLLC (based upon an oral contract in principal) or against Marianne Jones (based upon an oral guaranty agreement) within the statute of limitations, and the trial court was without authority to enter judgment against Ms. Jones and her marital community. Their judgment must be reversed.

C. Attorney's Fees

EGP is not entitled to an award of attorney's fees, and Jones should be awarded their attorney's fees on appeal upon reversal of the judgments.

III. CONCLUSION

As requested by Jones in their opening brief, 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 15th day of May, 2013.

JONES LAW GROUP, PLLC

/s/ Marianne K. Jones

MARIANNE K. JONES, WSBA #21034

Attorneys for Appellant Jones

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I hereby certify that I served Appellant's Reply Brief on the attorney for the respondent:

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/s/ Marianne K. Jones
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