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Court of Appeals
Division I
State of Washington

No. 74535-2-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID EBENAL and BONITA EBENAL, husband and wife; and
their marital community, Appellants

v.

ELLEN B. KLYCE, a single individual; and THOMAS C.
DASHIELL, a single individual, Respondents

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Superior Court granted summary judgment to Respondents based on a misreading of the California statute of frauds and related case law, which apply to loans made for the purchase of real property, not to secured loans in general. Respondents make the same error in their brief, where they fail to address that dispositive difference. On *de novo* review of this pure legal issue, this Court should reverse.

II. REPLY AS TO STATEMENT OF THE CASE

Notably, Respondents still do not contest the facts established by the Appellants. There is no dispute that Mr. Dashiell and Mr. Ebanal orally agreed to forbear enforcement of the Notes. Respondents instead try to re-cast their agreement as an unwritten “settlement” or even as a mere “settlement discussion,” but there is no evidence in the record that the parties intended to settle the case, rather that they agreed to forbear enforcement of the note for a time. Respondents may not deploy inapplicable statutes and rules to evade that agreement.

III. ARGUMENT

A. Respondents’ Agreement was Not within the Statute of Frauds.

California follows “the policy of restricting the application of the statute of frauds exclusively to those situations which are precisely covered by its language.” *White Lighting Co. v. Wolfson*, 68 Cal. 2d 336,

346, 438 P.2d 345, 351, 66 Cal. Rptr. 697, 703 (1968). Therefore, “[u]nless the statute clearly requires an agreement or authority to be in writing the statute is not to be applied.” *Ripani v. Liberty Loan Corp.*, 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272, 277 (Cal. Ct. App. 1979). Here, the statute clearly does not apply.

Respondents mischaracterize the California Statute of Frauds as “requir[ing] that notes and the deeds of trust securing them be in writing.” Resp. Br. at 7 (citing Cal. Civ. Code § 1624(a)(3)). The subsection they cite says nothing of the sort. Section 1643(a)(3) expressly applies only to leases and to agreements “for the **sale** of real property, or of an interest therein.” Cal. Civ. Code § 1624(a)(3) (emphasis added). There is no real property sale agreement at issue here, so that statute does not apply. The *Secrest* case, which rested on Section 1624(a)(3), therefore also does not apply. *Secrest v. Security National Mortgage Loan Trust*, 167 Cal. App. 4th 544, 552-53 (2008) (applying Cal. Civ. Code § 1624(a)(3).)

Some confusion could have been created by a different statute providing that mortgages generally cannot be “created, renewed, or extended” orally, but the *Secrest* Court expressly distinguished the forbearance agreement before it from that statute, because “a forbearance agreement does not ‘create, renew, or extend a deed of trust.’” *Id.* at 553 (quoting and distinguishing Cal. Civ. Code § 2922.) Section 2922 does

not extend to a “modification” of a mortgage, such as a forbearance. *Id.* Thus, it does not apply to the contract in this case either. The statute that applies is Cal. Civ. Code § 1698: “a contract in writing may be modified by an oral agreement supported by new consideration,” unless it is within “[t]he statute of frauds (**Section 1624**).” Cal. Civ. Code § 1698(c) (emphasis added). As discussed above, the Deeds of Trust may have been within Section 2922, but they are manifestly not within Section 1624, and therefore they are not within the exception to Section 1698. Under the plain language of Section 1698, the Notes could be and were orally modified.

B. Appellants’ Evidence is Admissible and there was No Settlement Agreement.

Respondents cannot evade their oral agreement by taking advantage of Washington’s court rules either. The trial court considered Appellants’ evidence, implicitly rejecting Respondents’ ER 408 argument and determining the evidence was admissible. The trial court was correct, because, as noted above and explained in Appellants’ opening brief, the agreement was not intended to settle the case, and it was an agreement, not mere negotiation. Similarly, Civil Rule 2A does not apply: the parties did not make any agreement “in respect to the proceedings,” CR 2A. More importantly, the “purport” of the agreement was not “disputed,” only its

enforceability under California law, so the Rule 2A writing requirement was not triggered. CR 2A.

C. Appellants' Other Defenses are Not on Appeal.

Respondents' remarks as to waiver and estoppel are not properly before this Court, because the trial court did not rule on Appellants' waiver and estoppel defenses and no error was assigned with respect to those defenses.

IV. CONCLUSION

For the reasons set forth herein and in Appellants' opening brief, the decision of the trial court should be vacated and the case remanded for further fact development and trial.

Dated this 13th day of July, 2016.

Respectfully submitted,

/s/ Emanuel Jacobowitz

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On July 13, 2016, I served or caused to be served a copy of the foregoing document on counsel of record for Respondents by e-mail as agreed at the following address:

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DATED this 13th day of July, 2016.

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