

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 43619-1

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COURT OF APPEALS
DIVISION II
2012 OCT -2 PM 1:27
STATE OF WASHINGTON
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FIRST CITIZENS BANK & TRUST COMPANY,

Respondent,

vs.

CORNERSTONE HOMES & DEVELOPMENT LLC, a Washington
corporation; and its Guarantor DANIEL L. ALLISON and JEANNE
ALLISON, individually and the marital community thereof,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT

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Introduction

There are three important, undisputed facts in the present case supporting the judgment entered against the Allisons: (1) the loans in question were all commercial, (2) the Allisons are not the borrowers, and (3) the Allisons did not own the real property used to secure the loans. Because the loans in this case were commercial, much of the Allisons' arguments about the anti-deficiency provisions in the Deed of Trust Act are inapplicable. RCW 61.24.100(1); 61.24.100(3)(c). Because the Allisons were the guarantors of the loans rather than the borrowers, their obligations are collateral to, and independent from, the obligations of the borrower. *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943). Finally, because the Allisons were not owners of the real property secured by the deeds of trust, it cannot be said that their guaranty was "secured by" the deeds of trust, because the Allisons had no interest to pledge.

Issue Pertaining to Assignments of Error

Is a commercial guaranty enforceable following non-judicial deed of trust foreclosures where the guaranty is made by a third party who was not an owner of the real property securing the obligation?

Statement of the Case

First Citizens Bank & Trust Company is a chartered commercial bank doing business in Pierce County, Washington. CP 1, 252. First Citizens purchased, and is assignee, of the loans and assets of Venture Bank. CP 1-2, 252. Among the Venture Bank assets purchased by First

Citizens were several loans taken out by Cornerstone Homes & Development, LLC between 2006 and 2007. CP 1-2, 252-253

Cornerstone Homes & Development, LLC took out multiple construction loans from Venture Bank. CP 1-90. The subject of this action is the Allison's' guaranty of five such loans to Cornerstone. *Id.* Cornerstone signed three construction deeds of trust that attached to real property owned by Cornerstone. CP 21-29, 48-56, 71-79. The first deed of trust secured the payment of \$5,906,160.00. CP 2, 22. The second deed of trust secured the payment of \$928,000.00. CP 4, 49. The third deed of trust secured the payment of \$443,960.00. CP 7, 72.

On December 10, 2003, Daniel Allison signed a Commercial Guaranty, in which he guaranteed all indebtedness of Cornerstone, "... now existing or hereinafter incurred or created, including, without limitation, all loans, advances, interest, costs, debts...." CP 31. The guaranty was offered by Mr. Allison, and was not given at the bank's request. CP 31. Mr. Allison agreed that the waivers contained in the guaranty were made with his knowledge, and that the waivers were reasonable. CP 32. Mr. Allison did not have an ownership interest in the properties that were pledged as collateral for the loans. CP 21-29, 48-56, 71-79.

Cornerstone stopped making payments on the loans. CP 3 (¶ 3.5), 6 (¶ 4.6), 8 (¶ 5.4), 85, 87, 88. Non-judicial deed of trust foreclosure sales of the property secured by the construction deeds of trust were held on October 2, 2009, and November 20, 2009. CP 58-64,

81-83; CP 35-37. The Allisons, as guarantors, were provided copies of the Notice of Default, Notice of Trustee's Sale, Notice of Foreclosure, and Notice to Guarantors as provided for in RCW 61.24.042. CP 4 (¶ 3.5), 6 (¶ 3.6), 8 (¶ 5.4), 85, 87, 88. Following the foreclosure sales, a deficiency remained in the principal amount of \$4,240,424.11. CP 255. This action was then commenced within a year of the sales against the Allisons, as guarantors, to collect the deficiency. CP 1-83.

Because the parties do not dispute the facts or the amounts owing, they agreed to submit this matter to the trial court as a motion for a judgment on the pleadings. CP 208-212. The issue presented to the trial court was whether a guarantor of a commercial loan is liable for a deficiency following a non-judicial deed of trust foreclosure. CP 211; *See also* CP 105-115.

Argument

1. The trial court's judgment should be affirmed because there is no dispute that the Allisons guaranteed the commercial loans to Cornerstone, that Cornerstone defaulted, that the Allisons received proper notice a deficiency would be pursued, and there is no dispute as to the amount of the deficiency.

At all times relevant to this case, deficiency judgments have been permitted in the context of commercial loans. RCW 61.24.100. In particular, such actions against guarantors are permitted if the guarantor is given proper notice. RCW 61.24.100(3)(c). The Allisons admit that Cornerstone defaulted in its obligation to First Citizens, that they guaranteed the debt of Cornerstone in writing, that the debt was for commercial purposes, that they received the statutory notices to

guarantors required under RCW 61.24.042, and that this action was commenced within one year of the last non-judicial foreclosure. Brief of Appellants Allison, p. 4. The Allisons also do not dispute the amount of the deficiency. *Id.* at 10. The only issue raised on appeal by the Allisons is whether the exception to deficiency judgments stated in RCW 61.24.100(10) applies to them. *Id.* at 10-22. The exception does not apply to them, because the Allisons' guaranty was not secured by the deeds of trust foreclosed upon.

The Allisons argue that their guaranty was secured by the foreclosed deeds of trust because there was language in the deeds of trust that they secure performance of obligations in all "related documents," including the guaranty. The trial court properly rejected this argument because (1) there is no language in the guaranty saying that it is secured, (2) the Allisons did not own the property secured by the deeds of trust and therefore could not pledge those properties as collateral for the guaranty, and (3) it would make the language of the statute and guaranty meaningless.

1.1 Applying the rules of statutory construction and contract interpretation, the general rule permitting deficiency judgments against commercial guarantors should be applied, the exception to this rule advanced by the Allisons should be strictly construed and not applied to the facts of this case, and the guaranty should be applied as written.

The Allisons argue that in deciding this case the court should apply various rules of interpretation to the statute, and rules of construction to the contracts of the parties. First Citizen agrees that

these rules of interpretation and construction are applicable, but disagrees about how they are applied in the context of this case. First, the Allisons argue that the deed of trust statute should be strictly construed in favor of borrowers, citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007). This is a correct statement of the rule, but the Allisons are not borrowers, nor owners of the property given as security for the loans. They were guarantors, and their promise is independent from that of the borrower. *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943); *Sauter ex rel. Sauter v. Houston Cas. Co.*, 168 Wn. App. 348, 356, 276 P.3d 358 (2012) (a guarantor cannot guarantee its own promise).

Next, the Allisons argue that courts narrowly construe exceptions to statutory provisions, while trying to give intent to the underlying general provisions of the statute. *City of Union Gap v. Washington State Dept. of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008). Again, this is a correct statement of the rule. But the Allisons argue that the right of a lender to collect a deficiency against a guarantor is the exception to the statute. It is not. RCW 61.24.100(3)(c). For example, RCW 61.24.100(9) provides that parties can agree by contract to bar deficiencies in the context of commercial loans. If the bar on deficiencies were the default rule for commercial loans, there would be no reason for this statutory exception.

The general rule is that deficiencies against guarantors in the commercial context are permitted. RCW 61.24.100(3)(c). The provision

upon which the Allisons rely, RCW 61.24.100(10), providing that deficiencies are not permitted if the obligation was secured by the deed of trust, is the exception to the rule. Therefore it is this provision that should be strictly construed.

In interpreting a statute, courts should not assume parts of the statute are inoperative or superfluous. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) *quoting* 2A C. Sands, Statutory Construction § 46.06, at 63 (4th ed. 1973). Courts construe statutes to, “effect their purpose and avoid unlikely or absurd results.” *Thompson v. Hanson*, 167 Wn.2d 414, 426, 219 P.3d 659, as amended (Mar. 26, 2010), *reconsideration denied* (Mar. 29, 2010), *republished as modified* at 168 Wn.2d 738, 239 P.3d 537 (2009). If the meaning of a statute is plain, “then the court must give effect to that plain meaning as an expression of legislative intent.” *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d at 909 (citations omitted). If the words of a statute are plain and unambiguous, the statute must be applied as written. *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 536, 119 P.3d 884 (2005).

Next, the Allisons argue that the intent of the parties is the touchstone of contract interpretation, and that the court should look for the parties’ intent in the language of the contract, the circumstances of the contract formation and performance, and the reasonableness of the parties’ interpretations. *Tanner Elect. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Durand v. HIMC*

Corp., 151 Wn. App. 818, 829-830, 214 P.3d 189 (2009). Again, First Citizens agrees that this is the law, but submits that application of this law to the facts of the case supports the trial court's judgment. Further, in determining the intent of the parties, Washington courts apply the objective manifestation test, rather than relying on parties' unexpressed subjective intent. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

Finally, the Allisons argue the guaranty should be construed against First Citizens because the guaranty was an adhesion contract. Brief of Appellants Allison, at 17. As the Allisons correctly point out, whether a contract is an adhesion contract depends on factors such as whether the contract was on a preprinted form, whether it was offered on a "take it or leave it" basis, and whether there was equality of bargaining power between the parties. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 883-884, 224 P.3d 818 (2009). The only evidence before the court related to whether the guaranty was an adhesion contract is the guaranty itself. If the Allisons' argument that the guaranty was an adhesion contract is accepted, then all guaranties would be adhesion contracts. The court has to look deeper than the guaranty itself to determine if it is an adhesion contract.

There was no evidence presented to the trial court to support a conclusion that the agreements were presented on a take it or leave it basis, nor evidence of the relative bargaining power of the parties. Allison did not assert a claim or defense that he did not freely choose to

execute the guaranty in order to induce the lender to make commercial loans totaling more than seven million dollars to him. In fact, Allison repeatedly pled in his answer to the complaint that the “Guaranty speaks for itself.” CP 85 (§ 9), 87 (§ 18), 88 (§ 26). It is undisputed that Allison freely signed the guaranty, acknowledging that he read and understood it, and that he had the opportunity to be advised by his attorney with respect to the guaranty. CP 32. Further, the guaranty was given in advance of the loans to the borrower, and could have been revoked by Allison in writing prior to the loans having been made. CP 31-33. Under the circumstances there is no basis to find that the guaranty was an adhesion contract.

1.2 The trial court correctly found that the commercial guaranty was enforceable against the Allisons because the guaranty does not say that it was secured, the Allisons did not own the land given as security for the notes and deeds of trust and therefore they could not give the land as security for the guaranty, and the Allisons’ arguments are contrary to their objective intent as set forth in the plain language of the guaranty.

Applying the rules of interpretation and construction to the facts of the present case, the trial court’s judgment should be upheld. The Allisons only argument against entry of the judgment in this case is that the guaranty was secured by the deeds of trust that were foreclosed. This argument is not supported by the plain language of the guaranty. There is no language in the guaranty saying that it is secured by anything, much less the foreclosed deeds of trust. CP 31-33. This is in contrast, for example, to the language in the promissory notes, that “... this Note is secured by a Deed of Trust dated March 7, 2009 for

property commonly known as” CP 12. Keeping in mind that the touchstone of contract interpretation is the intent of the parties as expressed in the language of the contract (among other things), there is no evidence from the guaranty that the parties intended the guaranty to be secured. *Tanner Elect. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 552, 546 P.2d 440 (1976) (“Sureties are bound by what they say rather than by what they secretly intend.”); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 829-830, 214 P.3d 189 (2009).

Further, according to the law of guaranty, the borrower is not a party to the guaranty, and the guarantor is not a party to the principal obligation. *Robey v. Walton Lumber Co.*, 17 Wn.2d at 255; *Sauter ex rel. Sauter v. Houston Cas. Co.*, 168 Wn. App. at 356. Because the Allison’s liability arises from the guaranty, which is separate and independent from the notes and deeds of trust, the Allison’s reliance on language in the notes and deeds of trust – to which the Allison’s were not parties – is misplaced. *Id.* The only document Mr. Allison signed in his individual capacity was the guaranty. Because the guaranty did not say that it was secured by anything, the Allison’s argument that the guaranty was secured by the foreclosed deeds of trust, therefore barring a deficiency judgment under RCW 61.24.100(10), is not supported by the law or the facts of the case.

Even if the court did find that there was sufficient language in the guaranty to raise a question about whether it was secured, it could not actually be secured because the Allisons did not own the land that was pledged as security. A deed of trust is created when a property owner conveys property in trust to a trustee to secure performance of an obligation of the grantor or another to the beneficiary. *See* RCW 61.24.020. In the present case, the land that was given as security for the notes was owned by Cornerstone. CP 3 (§ 3.3), 5 (§ 4.4), 7 (§ 5.2), 21-29, 48-56, 71-79. Because Mr. Allison did not own the land, he could not give the land as security for his obligations as guarantor. RCW 61.24.020; RCW 64.04.010 (conveyance of interest in land to by deed); RCW 64.04.020 (deed to be signed by party who is to be bound). Because the Allisons did not own the property given as security, and did not sign the deeds of trust, their obligations under the guaranty are not secured by the deeds of trust. Therefore, the exception provided in RCW 61.24.100(10) does not apply.

Finally, to adopt the Allisons' argument that the foreclosures extinguished their obligation under the guaranty given the facts of this case would make the language of the guaranty and deed of trust statute superfluous. Contrary to the assertion of the Allisons', First Citizens is not claiming that the Allisons waived any protections of the deed of trust statute. Instead, First Citizens' position is that the anti-deficiency exception to guarantor liability simply does not apply in the first place. This conclusion is supported by the waiver language in the guaranty.

As argued above, because there is no language in the guaranty that it is secured, and because the Allisons had no legal ability to grant a security interest in land they did not own, the exception contained in RCW 61.24.100(10) is inapplicable. Although the Allisons may be right that there may be public policy reasons why RCW 61.24.100(10) cannot be waived, that is not what First Citizens is arguing. Rather, the waiver language in the guaranty simply confirms that the parties had no intent that any anti-deficiency statute would apply in the first place.

In a case such as this where the parties submitted no testimony or evidence outside the plain language of the documents, the court must rely on the plain language of the guaranty to determine the parties' intent. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d at 699; *Tanner Elect. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 829-830, 214 P.3d 189 (2009). The Allisons are bound by what Mr. Allison said in the guaranty, not by what he may have secretly intended. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d at 699; *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 552, 546 P.2d 440 (1976). Allison agreed to, "... absolutely and unconditionally guaranty..." the obligations of Cornerstone. CP 31. He went on to agree that he would not assert any defense based upon, "... any 'one action' or 'anti-deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for a deficiency, against Guarantor...." CP 32.

Allison now argues that he did not intend this. But he has submitted no evidence to support the argument that he did not intend what he clearly said. In interpreting the statute and construing the contract, one of the court's goals is to avoid absurd and unlikely results. *Thompson v. Hanson*, 167 Wn.2d 414, 426, 219 P.3d 659, as amended (Mar. 26, 2010), *reconsideration denied* (Mar. 29, 2010), *republished as modified at* 168 Wn.2d 738, 239 P.3d 537 (2009). Similarly, the purpose of RCW 61.24.100 is not to provide, "an unjustified, unwarranted windfall to the debtor — a windfall completely without merit in logic or equity in principle." *Donovick v. Seattle-First National Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). Although dealing with a different factual situation, the court's point in *Donovick* was that the court must also factor in equitable principles when deciding whether or not a deficiency will be permitted.

In the present case we are not dealing with a consumer or homeowner. This case involves over seven million dollars in commercial loans taken out by a real estate developer. A third party to that transaction, Mr. Allison, agreed to guaranty those loans. It would be unjust, and contrary to the representations he made to the bank as to his intent, to permit the Mr. Allison to now avoid his guaranty by asserting he meant to be protected by the anti-deficiency exception, after expressly agreeing he did not intend for that provision to apply.

2. First Citizens should be awarded attorney fees and costs on appeal as permitted by the guaranty.

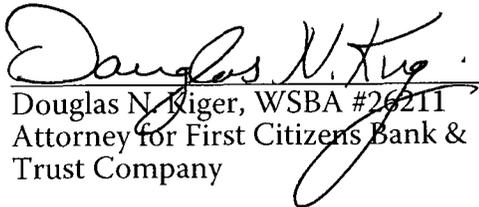
First Citizens requests an award of attorney fees and costs on appeal as permitted by RAP 18.1. The guaranty contains an attorney fee clause, and attorney fees were awarded to First Citizens at the trial court level. CP 32, 204-205. First Citizens requests that it be permitted to submit a cost and fee bill to this court following appeal as permitted by RAP 18.1(d).

Conclusion

The trial court decision entering judgment against the Allisons should be affirmed. The guaranteed loans were commercial in nature, therefore a deficiency judgment was permitted. The exception to commercial deficiency judgments argued by the Allisons does not apply because the guaranty does not say it was a secured obligation, the Allisons did not own the land they claim was given as security for the guaranty, and the plain language of the guaranty said the parties did not intend for any anti-deficiency provisions to apply to the guaranty. First Citizens requests an award of attorney fees and costs on appeal as permitted by the guaranty.

Respectfully submitted this 1 day of October, 2012.

BLADO KIGER BOLAN, P.S.


Douglas N. Kiger, WSBA #26211
Attorney for First Citizens Bank &
Trust Company

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of October, 2012, she placed with ABC Legal Messengers, Inc. an original of the preceding Brief of Respondent, and this Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to the following parties and their counsel of record:

Attorney for Appellants, Cornerstone Homes & Development, LLC, a Washington Corporation; and its Guarantor Daniel L. Allison and Jeanne Allison, individually and the marital community thereof, by ABC Legal Messengers, Inc.:

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DATED this 1st day of October, 2012, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.

A handwritten signature in cursive script, appearing to read "Heather Alderson", written over a horizontal line.

Heather Alderson