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NO. 232395 Consolidated with 227642

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CASHMERE VALLEY BANK, a Washington corporation

Respondent

v.

TERRY B. BRENDER, a single man

Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR CHELAN COUNTY NO. 03-2-00268-7

---

SUPPLEMENTAL BRIEF OF APPELLANT

---

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## I. ASSIGNMENT OF ERROR

The trial court erred in dismissing Terry Brender's counterclaims and affirmative defenses on summary judgment.

Mr. Brender submits that the statutes of limitation do not bar his counterclaims or affirmative defenses. Further, Mr. Brender submits that the Doctrine of Account Stated does not apply to this case.

## II. STATEMENT OF THE CASE

Mr. Brender has previously set out the facts of this case in his discretionary appeal regarding the applicability of the Federal Truth in Lending Act. That appeal is pending before this court. Court of Appeals No. 227642. Instead of restating the same facts here, Mr. Brender's statement of the case from that appeal is attached hereto as Appendix A.

## III. ARGUMENT

### 1. Standard of Review.

Appellate review of a summary judgment is de novo. Harbberd v. City of Kettle Falls, 120 Wn.App. 498, 507, 84 P.3d 1241 (2004). Summary judgment is proper if there is no genuine

issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, the moving party has the burden of showing there is no genuine dispute as to any material fact. Berger v. Sonneland, 144 Wn.2d 91, 102-103, 26 P.3d 257 (2001).

2. The Statutes of Limitation Do Not Bar Brender's Counterclaims.

Cashmere Valley Bank's argument that the statutes of limitation bar Mr. Brender's counterclaims is without merit.

Because it is inequitable to bar someone who has no idea he has been harmed from seeking redress, statutes of limitation have generally been tolled by the "discovery rule." Under this rule, the statute only begins to run once a party has knowledge of the "critical facts" of his injury, which are "that he has been hurt and who has inflicted the injury." United States v. Kubrick, 444 U.S. 111, 122, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

The discovery rule has been applied to truth in lending act claims, King v. California, 784 F.2d 910 (C.A.9, 1986), consumer

protection act claims, Pickett v. Holland America Line-Westours, Inc., 101 Wn. App. 901, 6 P.3d 63 (2000), rev'd on other grounds 145 Wn.2d 178, 35 P.3d 351 (2001), breach of fiduciary duty claims, Gillespie v. Seattle-First National Bank, 70 Wn. App. 150, 855 P.2d 680 (1993), fraud claims, RCW 4.16.080(4), and breach of contract claims, Architechtonics Construction Management, Inc. v. Khorram, 111 Wn. App. 725, 45 P.3d 1142 (2002).

Mr. Brender believes that the discovery rule should allow him to tell his story to the jury. The story that Mr. Brender wants to tell the jury is set out in his declaration dated April 9, 2004. (CP 78-85) A copy of that declaration is attached hereto as Appendix B.

A wrongdoer should not be able to find refuge in the statutes of limitation as a result of his success in covering up his wrongdoing. Cashmere Valley Bank has admitted that Mr. Brender did not have a reason to be suspicious of anything that it was doing. (CP 687)

It was not until sometime after May of 2002, after receiving a telephone call from Cashmere Valley Bank and being told about the federal regulators, that Mr. Brender became suspicious that something was not right. (CP 729-731)

Construing all of the facts and inferences in the light most favorable to Mr. Brender, the statutes of limitation should not be applied to bar his counterclaims against Cashmere Valley Bank. Mr. Brender should be allowed to tell his story to the jury and the jury should determine whether Mr. Brender was wronged by Cashmere Valley Bank.

3. The Statutes of Limitation Do Not Bar Brender's Affirmative Defenses.

Cashmere Valley Bank's argument that the statutes of limitation bar Mr. Brender's affirmative defenses is without merit.

In Seattle First National Bank, N.A. v. Siebol, 64 Wash.App. 401, 407, 824 P.2d 1252 (1992), the court stated:

The Siebols also raised the bank's alleged breach of an oral promise as an affirmative defense. Statutes of limitation never run against defenses arising out of the transactions sued upon. *Allis-Chalmers Corp. v. North Bonneville*, 113 Wash.2d 108, 112, 775 P.2d 953 (1989). One such defense, recoupment, is not barred by the statute of limitation so long as the main action itself is timely. 51 Am.Jur.2d *Limitation of Actions* § 77, at 656 (1970). The defense goes to the justice of the plaintiff's claim, and although no affirmative judgment can be had, recoupment is available as a defense even when barred as an affirmative cause of action. 20 Am.jur.2d

*Counterclaim, Recoupment, and Setoff*  
§§ 10 and 11, at 235-36 (1965).

In Buty v. Goldfinch, 74 Wash. 532, 541, 133 P. 1057

(1913), the court stated:

In *Robinson v. Glass*, 94 Ind. 211, 216, Judge Elliott, speaking to the question of a defense invoked against a mortgage alleging fraud in its execution, said: 'In the argument on the assignment of cross errors, it is contended that, as the mortgage was executed more than six years before the suit was instituted and the defense of fraud interposed, the rights of the appellants are barred by the statute of limitations. This position is untenable. Actions are barred, but defenses are not. A person who is sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defense interposed. We speak now of pure defenses, and not as to matters which may be relied upon as forming a foundation for a counterclaim or cross-complaint.'

The statutes of limitation have no application to affirmative defenses. Mr. Brender should be allowed to tell his story to the jury and the jury should determine whether Mr. Brender was wronged by Cashmere Valley Bank.

4. The Doctrine of Account Stated Does Not Apply.

The trial court stated:

The remaining “affirmative defenses” asserted by defendant are: (1) fraud or misrepresentation, (2) breach of the covenant of good faith and fair dealing, and (3) breach of contract. With regard to these issues, the court concludes that defendant can assert these defenses as to any alleged conduct by plaintiff vis-à-vis the 2001 loan, but not with regard to the 1993 and 1996 loans. The court’s reasoning is that the court has essentially granted summary judgment in plaintiff’s favor on the two earlier loans based in part on the doctrine of accounts stated. It would be incongruous to then allow defendant to assert a defense to an issue that the court has already substantively resolved. In this regard, the court distinguishes the holding in Siebol regarding affirmative defenses and the statute of limitation.

(CP 43)

The trial court’s reliance on Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist., 124 Wash 2d 312, 877 P.2d 1283 (1994) to support its decision is misplaced. (CP 34) This case is different and does not involve an “open account.” See Rustlewood Association v. Mason County, 96 Wn. App. 788, 797-800, 981 P.2d

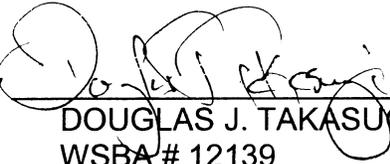
7 (1999). The contract doctrine of "account stated" is inapplicable to the facts of this case.

#### IV. CONCLUSION

The trial court erred in dismissing Terry Brender's counterclaims and affirmative defenses on summary judgment.

RESPECTFULLY SUBMITTED this 16th day of June, 2004.

JEFFERS, DANIELSON, SONN  
& AYLWARD, P.S.

By   
DOUGLAS J. TAKASUGI  
WSBA # 12139  
Attorneys for Appellant Brender

## APPENDIX A

## **I. ASSIGNMENT OF ERROR**

The trial court erred in granting Cashmere Valley Bank's Motion for Summary Judgment and denying Terry Brender's Motion for Summary Judgment on the issue of whether the Federal Truth in Lending Act applies to the facts of this case.

Mr. Brender submits that the Federal Truth in Lending Act does apply to his loan with Cashmere Valley Bank since the primary purpose of the loan was personal.

## **II. STATEMENT OF THE CASE**

This case involves an action by Cashmere Valley Bank (hereinafter "CVB") against Terry Brender (hereinafter "Brender") seeking judgment for money due on a Promissory Note, foreclosure of a Deed of Trust, and to recover personal property. (CP 513-534) Brender has asserted counterclaims and affirmative defenses as follows: (1) violations of the Federal Truth in Lending Act; (2) violations of the Washington State Consumer Protection Act; (3) fraud and/or misrepresentation; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract. (CP 505-512)

In May 1993, Brender sought a loan from CVB. Brender's personal banker at CVB was Jim Geary (hereinafter "Geary"). (CP 486-488)

The only reason Brender had to borrow money was because of his divorce. (CP 272-274)

Brender went to CVB to borrow about \$150,000.00 to settle his divorce. (CP 272-274) Geary and CVB knew that this was the purpose of the loan. (CP 61-65, 272-274, 396-398)

At the time that Brender went to CVB to borrow money to settle his divorce, he had an existing unsecured loan with CVB of about \$203,000.00. (CP 396-398)

When CVB loaned Brender the money to settle his divorce, CVB consolidated it with Brender's pre-existing unsecured loan. The only money received by Brender from the loan was the approximately \$150,000.00 that he used to settle his divorce. (CP 61-65, 396-398, and 406-408)

Brender was told by Geary that he would have to make sixty (60) quarterly payments of \$7,500.00 on the loan and that the loan would be paid off in fifteen (15) years. (CP 408-413)

The Note that Brender signed on May 6, 1993, was for \$358,095.70. The Note called for quarterly payments of \$7,500.00

and was to pay off in fifteen (15) years. (CP 486-488) As security for the Note, Brender had to give CVB a Deed of Trust on his home, orchard and mill. (CP 207) CVB has failed to produce the Note signed by Brender. Geary says he has searched CVB's files but cannot find it. He could not recall if it was given back to Brender or thrown in the waste basket. (CP 410-413)

Sometime after the loan was made to Brender, Geary discovered that he had made a mistake in amortizing the loan. (CP 414) Geary did not give written notice of the problem to Brender. In fact, Geary did not even tell anyone at CVB about the problem. (CP 419) To cover up the mistake, Geary created another Note, increasing the quarterly payments to \$7,840.67 and forging Brender's signature on the Note. Brender was unaware of the existence of this Note. (CP 231-232 and 511)

In September 1993, when Brender went to CVB to make his first quarterly payment of \$7,500.00, Geary told Brender that he needed to pay a little bit more because of interest. Geary had Brender write CVB a check for \$7,840.67. (CP 415)

In October 1993, while Brender was in the bank on an unrelated matter, Geary had him come back to his office. Behind closed doors and without any prior notice, Geary insisted that

Brender sign additional documents that Geary had prepared regarding Brender's loan. Geary told Brender "You will sign." "You have to sign." "You are going to sign." Geary even went so far as to tell Brender that he would get fired if Brender did not sign the documents. Geary did not give Brender the opportunity to take the documents home and to review them. What Geary had Brender sign was a new Note that called for eleven (11) quarterly payments of \$10,694.44 with a balloon payment due on June 6, 1996. This new Note was dated back to the original loan date of May 6, 1993. (CP 434-439, 451-452, 462-464, and 512)

The backdated Note has been renewed twice, on June 26, 1996, and on November 30, 2001, with modified quarterly payments, differing maturity dates, and other modifications to the terms, all without prior notice to Brender and without providing him with any federally required disclosure or rescission statements. (CP 505-512)

Because Brender trusted Geary, he signed what he was told to sign. Brender would ask Geary "Should I be reading this?" Geary's response to Brender was "No, it's the same loan." Copies were never given to Brender. (CP 486-488) Brender always

believed that the total of all of the payments under his loan would be \$450,000.00. (CP 272-274)

CVB admits that it did not provide Brender with any federal disclosures or rescission statements. CVB's position is that it had no obligation to do so. (CP 499-504)

The trial court on summary judgment found that the Federal Truth in Lending Act did not apply to the facts of this case. (CP 18-28)

Brender filed his Motion for Discretionary Review on the issue of whether the Federal Truth in Lending Act applies to the facts of this case and the motion was granted by Commissioner Slak on April 16, 2004.

### **III. ARGUMENT**

#### **1. Standard of Review.**

Appellate review of a summary judgment is de novo. Harbberd v. City of Kettle Falls, 120 Wn.App. 498, 507, 84 P.3d 1241 (2004). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Viewing all facts and reasonable inferences in the light most favorable to the nonmoving

## APPENDIX B

FILED 

APR 09 2004

SIRI A. WOODS  
CHELAN COUNTY CLERK

CERTIFICATE OF TRANSMITTAL  
I declare under penalty of perjury under  
the laws of the state of Washington that  
on the 9<sup>th</sup> day of April, 2004.  
I sent a copy of the document to which  
this is affixed to the attorneys of record  
for all parties via messenger service, facsimile,  
or by U.S. Mail, postage prepaid.

Shawndelle Surber  
At Wenatchee, Washington.

1	IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON	
2	COUNTY OF CHELAN	
3	CASHMERE VALLEY BANK, a	) NO. 03-2-00268-7
4	Washington corporation,	)
5	Plaintiff,	) REPLY DECLARATION OF TERRY
6	vs.	) BRENDER
7	TERRY B. BRENDER, a single man,	)
8	Defendant.	)
9	I, Terry Brender, declare and state as follows:	
10	1. I am the above named defendant. I make this declaration based	
11	upon my personal knowledge.	
12	2. I have reviewed the declaration of Jim Geary dated March 30,	
13	2004.	
14	3. After reading Mr. Geary's declaration, I still don't understand what	
15	happened to me.	
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1           4.     I went to Mr. Geary in 1993 to see if I could borrow money to settle  
2 my divorce. I went to Cashmere Valley Bank for a personal loan not a business  
3 loan.

4           Q     Okay. You made a loan to Mr. Brender in  
5           1993; is that correct?

6           A     **Yes.**

7           Q     Okay. You recall when you started talking to  
8           Mr. Brender about this loan?

9           A     **Not exactly, but I would speculate early –  
10           very early in 1993.**

11          Q     Okay. And what were the reasons that Mr.  
12          Brender came to see you about this loan?

13          A     **He was about to settle a divorce.**

14          Deposition of Jim Geary, page 15, lines 10-19.

15                 5.     My loan with Cashmere Valley Bank was to be paid off in 15 years.

16                 I was to make 60 quarterly payments of \$7,500.

17                 Q     Okay. So you didn't talk about it would be --  
18                 the loan would be paid off in 15 years and  
19                 you'd have to make quarterly payments, 60 of  
20                 them?

21                 A     **Yes.**

22                 Q     That's what you talked about?

23                 A     **Yes.**

24                 Q     Okay. And did you also talk about the payment  
25                 -- quarterly payment would be \$7,500?

26                 A     **I believe we did.**

27                 Q     Okay. And wasn't it clear from those  
28                 discussions and didn't Mr. Brender tell you  
29                 that's probably the most he could pay is 7,500  
30                 a quarter?

31                 A     **I don't recall that.**

32                 Q     Okay. So if Mr. Brender testifies that he  
33                 specifically told you that \$7,500 was the most  
34                 he could pay on this deal, you wouldn't deny it?

35                 A     **No.**

1 Q Okay. Mr. Brender will testify that he signed a  
2 note that said his pay – quarterly payments  
3 were going to be \$7,500, just like you and he  
4 agreed. Would that be correct?  
5 A Yes.  
6 Q Okay. Where is that note?  
7 A I do not know.  
8 Q Mr. Brender will testify that that was \$7,500  
9 payments – the note provided for \$7,500  
10 quarterly payments paid off in 15 years with an  
11 interest rate of 8 1/2 percent; would that be  
12 correct?  
13 A Yes, that sounds right.

8 Deposition of Jim Geary, page 28, lines 9-25, page 29, lines 1-12.

9 Q Mr. Geary, are you confused?  
10 A I think I understand.  
11 Q Okay. You're a pretty smart guy. And so far I  
12 think you've been as honest as you can be;  
13 would that be correct:  
14 A Yes.  
15 Q All right. And if you're confused or don't  
16 understand a question of mine, you just stop  
17 me and I'll rephrase it. Okay?  
18 A Okay.  
19 Q All right. There was an original note, was there  
20 not, that now is not in Cashmere Valley Bank's  
21 file?  
A Yes.  
Q And it was for quarterly payments of \$7,500?  
A Yes.  
Q And the interest rate was 8-1/2 percent?  
A I believe it was 8-1/2, yes.  
Q And the understanding between you and Mr.  
Brender was that that note would be paid off in  
15 years? He'd have 15 years to pay back the  
money to Cashmere Valley Bank?  
A Yes.  
Q And so Mr. Brender – and you said you would  
not dispute it if Mr. Brender said that he told  
you specifically that \$7,500 a quarter was all

1 he could afford, you don't deny that?  
2 **A I don't recall that, but I can't deny it either**  
3 **then.**  
4 **Q Okay. And we all agree that that note has –**  
5 **somehow Cashmere Valley Bank does not**  
6 **have possession of that note any longer?**  
7 **A Correct.**

8 Deposition of Jim Geary, page 31, lines 8-25, page 32, lines 1-13.

9 6. Cashmere Valley Bank loaned me money to settle my divorce. I  
10 was told that the loan would cost me \$450,000, that I would have to make 60  
11 quarterly payments of \$7,500 and that my loan would be paid off in 15 years. I  
12 believe that Cashmere Valley Bank illegally changed my loan.

13 **Q Why was the original note that called for**  
14 **\$7,500 quarterly payments changed?**

15 **A At that time I believe the amortization was**  
16 **wrong. It wouldn't amortize on that amount**  
17 **– that payment amount.**

18 **Q What do you mean it wouldn't amortize?**

19 **A It wouldn't provide for any principal**  
20 **reductions.**

21 **Q Well, if I take \$7,500 quarterly – right – and**  
then multiply that by 60 payments, that's, I  
think, \$450,000, right?

**A (Nods.)**

**Q So he was going to pay \$450,000 over the life**  
of this loan?

**A (Nods.)**

**Q What was wrong with that?**

**A That is kind of the missing link that I do not**  
know.

**Q What do you mean that's the missing link that**  
you don't know?

**A Well, what I recall – we're going back over**  
ten years now – when Terry made the first  
quarterly payment, it didn't cover interest –

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**or it didn't cover all the interest. And I believe that I amortized the loan incorrectly.**

Deposition of Jim Geary, page 33, lines 2-24.

**Q** Did the bank ever send anything in writing to Mr. Brender about this problem?

**A** **No.**

**Q** Who did you tell this problem to at the bank? Who did you report it to?

**A** **You know, I don't recall if I did.**

**Q** Well, I mean, this kind of mistake, wouldn't you have to report it to your supervisor?

**A** **It was my responsibility to fix it. That's what I did.**

Deposition of Jim Geary, page 39, lines 3-11.

**Q** And how did you decide to fix this problem?

**A** **I believe I created a new note with a different amortization and tested that.**

Deposition of Jim Geary, page 40, lines 3-5.

7. I know that Jim Geary had me sign a lot of documents after May 1993. However, every time I would ask if this was the same loan and every time I would be assured that it was the same loan. Because of this, I was told that I did not have to read all of the documents and I did not read them. This is true for the promissory note dated November 30, 2001.

8. The statements that I received from Cashmere Valley Bank made no sense to me. The numbers always changed. However, I repeatedly asked Mr. Geary if this was still the same loan. He always assured me that it was. He told me that I could ignore the statements and just pay what he told me to pay.

1 That is what I did and that is why my payments were never the same. The court  
2 can see this from looking at the payments that I made.

3 9. From September of 1993, the date my first quarterly payment was  
4 to be made, until September of 2002, I paid Cashmere Valley Bank \$359,885.08.  
5 I paid this in nine years. I was supposed to have 15 years to pay \$450,000. I  
6 don't believe that there is any way that I could owe Cashmere Valley Bank  
7 \$247,340.30 as indicated on the promissory note dated November 30, 2001.

8 10. I want Mr. Geary to have to explain to a jury how the promissory  
9 note dated November 30, 2001, is the same loan, the one that was supposed to  
10 cost me \$450,000 and be paid off in 15 years.

11 11. Mr. Geary can manipulate the figures all he wants but the quarterly  
12 payment of \$7,966.96 that was due on July 26, 2000, clearly shows that  
13 \$5,945.11 of my payment was going to principal and \$2,021.85 of my payment  
14 was going to interest. What this means, if one does the math, is that the balance  
15 owing on the promissory note dated June 26, 1996, was approximately \$87,000  
16 as of July 26, 2000. Mr. Geary's argument to the contrary is flawed because I  
17 was not late making the April 2000 payment. The court can review my payments  
18 and the court will see that prior to April 2000, that I had paid \$135,842.09 on the  
19 promissory note. Prior to the April 2000 payment, there should have been 14  
20 payments of \$7,966.96 or a total of \$111,537.44 paid on the promissory note.

21

1 The fact of the matter is that I had paid more on the promissory note than I was  
2 required. Again, I just paid when and what Mr. Geary told me to pay.

3 12. Although I believe that the court has made mistakes in this case,  
4 especially with respect to its ruling on the Federal Truth and Lending Act, I  
5 believe that the court was correct when it wrote the following in its letter decision  
6 dated October 28, 2003:

7 Plaintiff next contends that defendant's remaining  
8 complaints – for breach of contract, breach of the  
9 covenant of good faith and fair dealing, fraud and  
10 misrepresentation – must be dismissed because  
11 defendant cannot show that he has been damaged by  
12 plaintiff's actions. Plaintiff reasons that because  
13 defendant was able to pay extra amounts towards the  
14 principal balance, there was no harm caused by the  
15 requirement of increased payments. Defendant, in  
16 turn, asserts that he understood that he would be  
17 required to pay a maximum of \$450,000 to retire the  
18 1993 loan and would never have taken the loan out  
19 had he known his total obligation would eventually  
20 exceed \$700,000. In this regard, the court must  
21 agree with defendant. There exists a genuine issue  
of material fact as to whether plaintiff was damaged  
by the alleged change in loan terms and resulting  
higher payments, thereby precluding summary  
judgment on this basis.

...  
[T]he analysis of the 2001 loan differs. With regard to  
that transaction, defendant raised his concerns in his  
answer filed April 18, 2003, only 18 months after the  
transaction and well within the statutes of limitation for  
fraud and misrepresentation, breach of contract, and  
breach of the covenant of good faith and fair dealing.  
Further, he stopped making payments as of  
approximately September 2002, so that he cannot be

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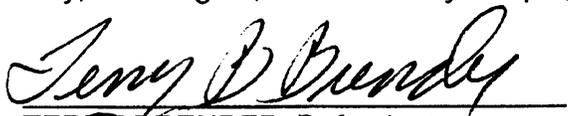
deemed to have acquiesced in plaintiff's accounting through payment. Thus, defendant's remaining claims with regard to the 2001 loan are not precluded.

13. In summary, I will end this declaration by again going back to the beginning. What happened to my loan that was going to cost me \$450,000? What happened to my 60 quarterly payments of \$7,500? What happened to my loan that was going to be paid off in 15 years? Mr. Geary always told me that I was paying on the same loan. I paid when and what he told me to pay. He told me that if I made bigger payments that I would pay off my loan faster. If Mr. Geary was telling me the truth, then how did I end up with the promissory note dated November 30, 2001? Under the promissory note dated November 30, 2001, I begin with \$247,340.30, I make 14 quarterly payments of \$5,796.07, and on August 15, 2005, I will still owe \$250,505.69, which is more than what I began with. I do not believe that Mr. Geary can convince a jury that this is the same loan that I began with.

15. I am respectfully requesting that the court deny Cashmere Valley Bank's Second Motion for Summary Judgment. The court was right the first time.

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

Signed at Wenatchee, Chelan County, Washington, on the 9th day of April, 2004.

  
TERRY BRENDER, Defendant

