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COURT OF APPEALS
DIVISION ONE

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No. 75478-5-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

GENSCO, INC., a Washington corporation, Respondent

v.

JASON JOHNSON and TRICIA JOHNSON, husband and
wife and their marital community, APPELLANT, and
PRECISE CONSTRUCTION
GROUP, LLC., a Wyoming limited liability company

BRIEF OF RESPONDENT

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A. INTRODUCTION

Respondent is generally in agreement with Appellant's statement of issues, although the "assignments of error" in Appellant's argument are not the most succinct, and appear confusing or present compound issues. Respondent presents its slightly modified issues below. (*Johnson is a guarantor for his company and the principal Precise Construction Group, LLC which shall simply be referred to as "Precise" hereafter and in the issues below*).

1. STATEMENT OF ISSUES:

Issue 1: Is the personal guarantee of Johnson limited to the original credit amount of Precise when the account was first opened and guarantee first signed? Alternatively, does the creditor have to obtain consent from a guarantor when the principal either exceeds its credit limit or increases the same?

Issue 2: Is the guarantee of Johnson limited to purchases of Precise for its original Spokane store that existed when the account was first opened and guarantee first signed; or does it include purchases made by Precise at its other store locations opened after the original guaranty was signed?

Issue 3: Did the entering into of the Installment Note release or discharge Johnson's guaranty through novation?

Issue 4. Respondent is satisfied with the wording of Appellant.

2. STANDARD OF REVIEW:

We review the grant of summary judgment de novo, undertaking the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Summary judgment is appropriate only if the supporting materials, viewed in the light most favorable to the nonmoving party, demonstrate “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

The purpose of summary judgment is to avoid a useless trial, and when there is no genuine issue of any material fact, then summary Judgment should be granted by the trial court. LaPlante v. State, 85 Wn. 2d 154, 158 (1975).

When there is no ambiguity to a contract or an interpretation thereof, and the only dispute is the legal effect of the language of the contract, then summary judgment is proper. Garrer v. Northwest National Insurance Company 36 Wn. App. 330, 334 (1984); Hallauer v. Certain 19 Wn. App. 372, 375-376 (1978).

Inadmissibility of Certain Evidence: Generally, a summary judgment motion is supported or opposed by affidavits.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.
CR 56(e)

In lieu of an affidavit, a party may submit a Declaration under oath which:

- (a) Recites that it is certified or declared by the person to be true under penalty of perjury;*
- (b) Is subscribed by the person;*
- (c) States the date and place of its execution; and*
- (d) States that it is so certified or declared under the laws of the state of Washington.*

RCW 9A.72.085 (1) (a through d).

In opposing summary judgment, Johnson submitted as evidence (1) Declaration of Jason Johnson, CP 163 to 165; (2) Second Declaration of Jason Johnson, CP 18 to 20; and (3) Declaration of Tricia Johnson, CP 24 to 27. None of these documents met the criteria above as none were sworn to be true under the penalty of perjury and they did not state the date or place in which they were signed. In addition, the Declaration of Tricia Johnson contained purported expert legal opinion lacking foundation.

The trial court, in its oral ruling took note of the above, but did not indicate what weight, if any, was given to this deficient evidence. It is argued herein that any evidence presented by these documents is inadmissible, and as the standard of review by this appellate court is *de*

novo, then this court should similarly ignore such pleadings as not being evidentiary in nature.

Also, the attorney for Johnson filed Defendant's Memorandum and Response to Summary Judgment, CP at 28 to 92. It recites many facts not in evidence, attaches documentary evidence that lack personal knowledge and are not supported by any Declaration requirements cited above (except the transcript of the deposition of Ms. Roseboom which is acknowledge by Gensco). Counsel for Johnson repeatedly argues from "his facts" which are merely argument not otherwise supported in the record. As such, it is likewise defective as supporting evidence in this matter and also is merely a pleading that "shall not...be deemed proof of the facts alleged therein. *RCW 5.40.010*. This court should similarly treat such pleading as not being evidentiary in nature, and it is simply Appellant counsel's argument.

B. STATEMENT OF THE CASE:

The parties generally agree as to the facts, but differ on the interpretation of them. The basic facts of this case are as follows.

On October 18, 2011, Respondent (hereafter "Gensco") and Precise Construction Group, LLC., (hereafter "PRECISE"), entered into a credit contract whereby plaintiff was to supply construction materials to PRECISE. (PRECISE was a general contractor and Gensco is a supplier HVAC equipment and materials). Appellant Johnson was an owner and

managing member of PRECISE, and he signed a continuing, unconditional personal guaranty (hereafter “guaranty”) of “any and all indebtedness” of PRECISE to Gensco. Johnson was also the “accounts payable contact” and his partner Don Rock was the “purchasing contact.” For all facts in this paragraph above, see CP at 180, 181 and 184 to 186. (This appeal only concerns the liability of Johnson on his personal guaranty and not the liability of PRECISE as judgment was entered against PRECISE for the full amount of all claimed indebtedness).

In 2011, at the time of the credit agreement with PRECISE, its store location was in Spokane, Washington. From 2012 to 2013, PRECISE purchased or opened additional stores in Kennewick and Yakima, and made purchases from Gensco for those locations as seen on the billing statements. CP at 187 to 196. All invoicing for the materials for all locations was sent to Spokane. *Id.* It is agreed that all stores were owned by the same entity, PRECISE, and no new or other entity was involved.

As purchases by PRECISE substantially increased, especially with the addition of store locations, the credit limit extended to PRECISE increased and was split between locations. CP at 51 to 53 and 66 to 69. No new credit application or guaranty was sought for these increased purchases, and such documentation for PRECISE and **its** account already

existed in Gensco's files. CP 68 to 69. Instead, such increases in credit were handled with a phone call. **Id.** and CP at 51 to 53 and 67 to 72.

It should be noted that Johnson argues in its facts that the failure to get new credit agreements above was some sort of lapse by Gensco, when it was intentional, as Gensco believed new agreements were unnecessary as the existing documents sufficed. That is a legal question for this court, and not a negative fact as allegedly argued by Johnson.

On March 4, 2014, Johnson rescinded his personal guaranty. At the time, PRECISE owed substantial amounts for purchases made prior to the above rescission of the guaranty. CP at 181 and CP at 225. The judgment entered against Johnson was only for these pre-rescission invoices. The parties agree that Johnson can only be liable for purchases made prior to the rescission of the guaranty and not for purchases made subsequent to that rescission.

PRECISE made additional purchases on credit after the guarantee rescission, but Gensco does not seek to hold JOHNSON liable on these purchases. Payment by PRECISE on this account became increasingly past due and as of September 2, 2014, there were still outstanding invoices due from PRECISE in the principal amount of \$118,100.25, (of which \$34,285.42 pre-dated the rescission of the guaranty). For the facts in this paragraph see, CP at pages 181 and 182.

To resolve the lack of payment on the account, on August 25, 2014, Plaintiff and PRECISE negotiated a payment plan to pay all outstanding invoices, giving PRECISE an extension of time for such payments over the course of many months. This payment plan was memorialized in an “Installment Note” dated September 2, 2014. It is this Installment Note (hereafter “Note”) that created issues for this lawsuit. CP at 182.

PRECISE made sporadic payments on the Note in the total amount of \$10,300.00, and then defaulted on the Note. These payments were applied to the amortized note payments as \$4877.75 accrued interest and \$6003.60 principal, and of course, all further payment ceased, and the lawsuit was commenced against PRECISE and Johnson. CP at 183.

At the trial court, judgment was entered against PRECISE for all amounts claimed due. A summary judgment motion was filed against Johnson for the guaranteed amount of the invoices (i.e. pre-rescission invoices); and upon final hearing of the motion, the trial court granted summary judgment in favor of Gensco and against Johnson in the total amount of \$49,325.56, which included principal, interest, costs and attorney fees. Johnson appeals that summary judgment order. This is the Order that is the subject of appeal. CP 1 to 3.

Johnson does state alleged facts in its brief to which Gensco does take issue with as these facts appear nowhere in the record, and are specifically contradicted by the record, and therefore are not facts, but argument. Those misstatements of fact shall be addressed in the Argument section below as the need arises, but the most pertinent of which are briefly detailed here.

1. Johnson states at Page 7 of Appellant's brief that the original credit application was reviewed, prior to Johnson signing the guaranty. There is nothing in the record supporting this claim. Instead the credit application and guaranty were executed the same time, and approved later. CP at 184 to 186.

2. At Page 8 of Appellant's brief, Johnson refers to the other accounts for additional stores as "separate or individual" accounts and were later "modified." Again, there is no evidence in the record for this claim. The only evidence came from Gensco and recited that these were always "sub-accounts" for PRECISE's main account, and were "tied together" in the accounting system, and were always considered sub-accounts. CP 74 to 79. Johnson has repeatedly called these "different accounts" to somehow better his argument that Gensco is extending the guaranty to new or random accounts.

3. At Page 9 of Appellant's brief, Johnson states that when the installment note was executed, the account for PRECISE was closed with a "00.00 balance." Again, this fact appears nowhere in the record, but is often used by Johnson to further his claim that the note somehow paid the account, and thus released him from his guaranty, and is misleading. The only evidence was the account was closed leaving a balance due of \$116,100.25. CP at 182. "Closed" does not mean the balance was reduced to zero and it still remains at a principal \$116,100.25 with all the past due invoices, and is essentially frozen in time. CP at 108. At no time did Gensco state that the installment note paid the invoices, but only that the repayment plan was the plan for how the outstanding invoices would get paid. CP at 108.

C. SUMMARY OF ARGUMENT

Johnson, at both the trial court level and now the appellate level, ignores fundamental case law and legal authority. That is you must first read the express, written terms of the guaranty to see if the language thereof resolves the issues raised. It does. Failing to acknowledge that language or re-labeling the issues changes nothing for the Johnson.

Johnson argues that Gensco seeks to broaden or modify the express terms or scope of the guaranty. To the contrary, Gensco simply seeks to have this court enforce the original guaranty, based on the original

language thereof, and the original consent/agreements of Johnson given therein. Rather than Gensco trying to broaden the language of the guaranty, Johnson's arguments attempt to place limitations on the scope of the guaranty when such limitations are not stated in the express terms of an unambiguous, unlimited, continuing and unconditional personal guaranty. Johnson never addresses nor refutes the clear language of the guaranty, but simply desires this court to ignore it. Both parties, including Johnson, are bound by the terms of the original guaranty.

Johnson also argues that the guaranty was being extended to new accounts etc., and that the trial court extended it to such amounts. That was never Gensco's argument, and nowhere did the trial court make that decision. It is believed the trial court agreed with Gensco's argument on the matter, in that the ORIGINAL guaranty language already included all disputed amounts, without extending the guaranty at all.

D. ARGUMENT

1. Issue 1:

Is the personal guarantee of Johnson limited to the original credit amount of Precise when the account was first opened and guarantee first signed? Alternatively, does the creditor have to obtain consent from a

**guarantor when the principal either exceeds its credit
limit or increases the same?**

The original credit application listed a “desired credit limit” of \$10,000.00. Over the course of dealing, and largely due to PRECISE opening new store locations, the purchase amount history and credit limit of PRECISE increased to over of \$100,000.00 over several years. Johnson desires to now limit his guaranty to the original credit amount of \$10,000.00.

The guarantee in this case is clearly an “unconditional” and “continuing” guarantee. (See CP at 186 (paragraph 2.A. and 2.B)). Much of the below case law regarding the legal construction of guaranty language applies to other issues in this case; yet it is placed here in full as this is our starting point.

An **unconditional** guarantee, being unconditional by its terms, amounts in law to an absolute guaranty and constitutes an unconditional promise to pay on default of the principal obligor. National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 917; 506 P.2d 20 (1973), citing Sherman, Clay & Co. v. Turner, 164 Wash. 257, 2 P.2d 688 (1931) and Amick v. Baugh, 66 Wn.2d 298, 402 P.2d 342 (1965). “A guaranty of the payment of an obligation, without words of limitation or condition, is

construed as an absolute or unconditional guaranty." *Id.* at 918, quoting 24 Am. Jur. 885, § 16.

An unconditional guaranty is one whereby the guarantor agrees to pay or perform a contract upon default of the principal **without limitation**. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform. Century 21 Products, Inc., v. Glacier Sales, 129 Wn.2d 406, 414; 918 P.2d 168 (1996) (citing Joe Heaston Tractor & Implement Co. v. Securities Acceptance Corp., 243 F.2d 196, 199 (10th Cir. 1957).

The National Bank court found that the written guaranty contained no conditions either subsequent or precedent to its taking effect nor did it place any qualifications upon the imposition of liability. It contained no conditions operating to relieve the new guarantors of liability except that the borrowers pay the note according to its terms and conditions. Upon the default of the principal debtor or obligor, the duty of the guarantor to pay became absolute. *Id.*

Furthermore, an absolute and unconditional guaranty should be enforceable according to its terms. The courts are to enforce it as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent. *Id.* at 919 (emphasis added, string citations omitted).

Meanwhile, a **continuing** guaranty contemplates a future course of dealing covering a series of transactions over an indefinite period of time, and is not limited to a single transaction. See, Cessna Finance Corp. v. Meyer, 575 P.2d 1048, 1051 (Utah Sup. Ct. 1978); Rucker v. Republic Supply Co., 415 P.2d 951, 953 (Oklahoma Sup. Ct. 1966) (also citing 24 Am. Jur. Guaranty, Sec. 63 and 38 C.J.S. Guaranty, Sec. 53); and Commerical Credit Corporation v. Chisholm Bros. Farm Equipment Co., 96 Idaho 194, 196, 525 P.2d 976, 978 (Idaho Sup.Ct. 1974).

Courts have construed such guarantees as follows: “[a] contract of guaranty, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor.” Sauter v. Houston Cas. Co., 168 Wn. App. 348, 356, 276 P.3d 358 (2012) (quoting Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 707, 952 P.2d 590 (1998)). A guaranty “**is independent**” of the debt, “and the responsibilities which are imposed by the...guaranty differ from those...created by the contract to which the guaranty is collateral.” Wilson Court Ltd. P'ship, 134 Wn.2d at 707 (quoting Robey v. Walton Lumber Co., 17 Wn.2d 242, 255, 135 P.2d 95 (1943) (emphasis added)).

“A written guarantee of payment of the principal's indebtedness ... [is] governed by its own terms.” McAllister v. Pier 67, Inc., 1 Wn. App.

978, 983, 465 P.2d 678 (1970). Finally, “where a guarantor freely and voluntarily guarantees the payment of another, and a creditor relies to its detriment on this guaranty, the law generally requires the guaranty to be enforced.” In re Spokane Concrete Prods., Inc., 126 Wn.2d 269, 278, 892 P.2d 98 (1995).

The starting point for this issue is looking at the language of the guaranty itself. The guaranty itself does not have any such limitations, either to credit limits or amounts, or store locations or accounts. Instead, it is an unlimited, unconditional and continuing guaranty and it recites that:

THE GUARANTOR(S) UNCONDITIONALLY GUARANTEES...EVERY INDEBTEDNESS OR OBLIGATION THE APLICANT HAS TO GENSCO, INC. OF ANY KIND WHATSOEVER.” This guaranty covers all existing and future indebtedness of APPLICANT to GENSCO, INC.... (emphasis original).
CP at 186.

The above language could not be more clear and concise. The “applicant” stated in the guaranty is Precise Construction Group, LLC. PRECISE made all the purchases for any and all of its stores, and judgment was entered against PRECISE for the total amount of ALL indebtedness to Gensco. The guaranty of Johnson, as written, extended “unconditionally” to every indebtedness or obligation PRECISE had to Gensco, of “any kind whatsoever” and being a continuing guarantee it expressly included future indebtedness. The guarantee contemplated an

on-going, future relationship where purchase amounts and the expansion of PRECISE's general contracting business might occur (as any business would hope to occur).

These express terms do not limit the guaranty by amount or any other limitation. The court should enforce this guaranty as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent. (See, National Bank, supra at 919).

Because Gensco relied to its detriment on this guaranty, the law generally requires the guaranty to be enforced." In re Spokane Concrete Prods., supra. This unambiguous, guarantee in our case should be "governed by its own terms." McAllister v. Pier 67, Inc., supra.

Johnson was a managing member and part owner of PRECISE. He also became the main contact person between PRECISE and Gensco. CP at 71. He was always the "Accounts Payable Contact" for PRECISE and would be fully aware of all purchases made by PRECISE. CP at 184.

Thus, Johnson was fully aware of the purchase amounts and the increasing size of the debt, and used these facts when he rescinded his guarantee. His stated reason for rescinding was "...*that the size of **Precise Construction Group L.L.C.** has outgrown any one individual or individuals financial means.*" (emphasis added). CP at 225. It further

implored Gensco to continue to sell supplies to Precise at the increased level, so they could operate at “*full capacity*.” *Id.* Johnson has relied on this email as proof of his rescission, yet tries to ignore these statements.

Gensco is not trying to broaden its scope of the guaranty. Instead, PRECISE made purchases and increased the debt itself under the stewardship of Johnson. The guaranty’s scope remains a guaranty of all indebtedness, existing and future, of Precise. It is Johnson who now wants to change the clear language of the guaranty by inserting a limitation that never existed. Any limitation of liability “was for the guarantors (Johnson) to do if they (he) so desired” by inserting language into the guaranty. Cessna Finance Corp., *supra* at 1051. This court should not read into the guaranty terms and conditions on which it is completely silent. (See, National Bank, *supra* at 919).

No factual dispute exists. There is no ambiguity to the guaranty or interpretation thereof The only dispute is the legal effect of its language which is a question for this court, and summary judgment was proper. See, Garrer v. Northwest National and Hallauer v. Certain, *supra* at page 6.

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2. Issue 2:

Is the guarantee of Johnson limited to purchases of Precise for its original Spokane store that existed when the account was first opened and guarantee first signed; or does it include purchases made by Precise at other store locations opened after the original guaranty was signed?

Again, the guaranty has no such language limiting it in any way, whether by store or account. The case law cited in Issue 1 above regarding unconditional and continuing guarantees applies to this issue as well, and will not be repeated in full here.

Again, our starting point is the language of the original guaranty itself. It again states clearly in bold, all capital letters:

THE GUARANTOR(S) UNCONDITIONALLY GUARANTEES...EVERY INDEBTEDNESS OR OBLIGATION THE APLICANT HAS TO GENSCO, INC. OF ANY KIND WHATSOEVER.” This guaranty covers all existing and future indebtedness of APPLICANT to GENSCO, INC.... (emphasis original).
CP page 186.

There is no dispute that there is but one entity involved with all purchases, that is Precise Construction Group, LLC. PRECISE owned all stores. Judgment has already been entered against PRECISE for all indebtedness of all stores. Further, the guaranty, without limitation, clearly

recites the guaranty is for every indebtedness of PRECISE, and not limited to any particular store location. The above guaranty language contemplated an on-going business relationship with “future” purchases and other debt or obligations “of any kind whatsoever,” that may or may not exist at the time of the guaranty. Again, the guaranty is “unconditional,” and yet Johnson seeks to now place conditions on this guaranty, and he uses a myriad of arguments.

Johnson suggests the guaranty was limited to an account number 44301. This is impossible because the guarantee was signed **prior to** that account number being created. It has been explained that a credit application and guaranty was submitted by PRECISE, and if approved, the credit account is thereafter created. CP at 50. The credit application and the guaranty have no account number stated on them. CP page 184 to 186.

When PRECISE opened new stores, Gensco’s accounting system assigned “sub-account” numbers to each. Johnson makes a big deal over whether these were sub-accounts or new accounts etc. The only evidence on this is from Gensco stating these to be sub-accounts of PRECISE. Yet, regardless of which store made the purchase or which account number applied to each store, all purchases were made by PRECISE, and Johnson guaranteed all debt of PRECISE. It does not matter if these were sub-accounts or new accounts or companion accounts, as it is all

“indebtedness” of PRECISE subject to the terms of the guaranty. Johnson’s reference to each store as new accounts is merely argument without merit, and not fact.

Further, the credit application is not the guaranty. You cannot limit an independent guaranty contract to information in an entirely different document, whether limiting to an address, email address, person, store, account or any desired credit limit or any other statement in the credit application. If that was what Johnson intended, then it was for Johnson to insert appropriate limitations in the guaranty itself if he so desired”. See, Cessna Finance Corp., *supra*.

Gensco relied upon this guaranty as written; i.e. a clear, unambiguous, unconditional guarantee of “ALL” indebtedness, and authorized purchases based on this reliance. Contrary to Johnson’s argument, Gensco is not extending the guarantee unilaterally as the guaranty already extends to all indebtedness of PRECISE, and of any kind, then existing or in the future, such as expanding to other stores.

Johnson next references the Statute of Frauds for the first time in his brief. Issues or errors raised for the first time on appeal should not be heard. RAP 2.5. Nevertheless, the statute of frauds has no bearing on this case because Gensco is not trying to “modify” any written language or write any new agreements as argued by Johnson. Gensco has always

relied on the original guaranty language which is in writing and does satisfy the statute of frauds.

Johnson next argues that Gensco should have obtained a new credit application and new guarantee with each store opened by PRECISE. There is no legal reason nor authority for that proposition. All accounts and all stores were owned by the same entity, PRECISE, whom already had a credit agreement and personal guaranty with Gensco. As the then credit manager stated, further guarantees for each store were not needed because “there was already a personal guaranty on file.” CP at 69. Appellant implies some nefarious act by Gensco for not requiring multiple credit applications and multiple guarantees for each store location when in fact no further documentation was legally necessary for a single entity already bound by contract.

Additionally, contrary to Johnson’s argument, no new “consent” from Johnson is needed to guarantee what he already agreed to guarantee; i.e. “all indebtedness” of PRECISE. Johnson concedes the wording of the unconditional guarantee as being “explicit,” yet continues to argue that PRECISE’s purchasing of product for additional stores constitutes a “modification” to the guaranty. *Appellant Brief at page 18 to 19*. It does not. Johnson is fond of alluding to these stores as “new accounts” or “new lines of credit,” but there is no evidence of such and is merely

argumentative. There has always been but the one credit customer known as PRECISE, and the only evidence is that all such accounts were sub-accounts of PRECISE. The account statement for PRECISE had its main account number, 44301, on top of the statemnt. CP page 87.

In summary, the guaranty did not limit purchases by PRECISE by store, account number or otherwise. Johnson guaranteed all future indebtedness, of any kind without limitation. The guaranty obviously contemplates possible future, new indebtedness of some “kind” and Johnson completely ignores this language and never addresses this issue. This court should not read into the guaranty terms and conditions on which it is completely silent. (See, National Bank, supra at 919). Instead the legal effect of the guaranty language is to be decided by this court and summary judgment was appropriate.

3. Issues 3.

Did the entering into of the Installment Note release or discharge Johnson’s guaranty through novation?

This originally was the primary issue of Johnson, and yet the most odd. Gensco takes no issue with the case law as cited by Johnson describing what constitutes a novation. It is agreed that a novation is essentially a new agreement to substitute an obligation and release the guarantor. The problem is there is no evidence and no facts cited as to any

new agreement or “mutual assent” to release Johnson from his guaranty in exchange for the Installment Note. There is no allegation of any statements by Gensco alluding to such an agreement. Johnson’s argument is based solely upon the act of obtaining the Note without his consent.

At the risk of sounding boring, we again must first look to the language of the guarantee itself. It recites:

In consideration of GENSCO, INC. extending credit to APPLICANT, the guarantor(s) **agrees** as follows.

C. CONDITIONS. If GENSCO, INC., for any reason, **should elect to extend the APPLICANT additional time to pay its obligations.....OR ACCEPT ON ACCOUNT ANY NOTES or other consideration for the payment of the indebtedness;** such concessions extended by GENSCO, INC. **WILL NOT IN ANY WAY RELIEVE THE GUARANTOR(s) from its obligations under this Guaranty....**(emphasis added).
CP at 186.

Generally, certain actions by a creditor can have the potential of discharging a guarantor if done without the consent of the guarantor. This can happen for numerous reasons such as extending the time for payment, entering into a note, releasing collateral, or releasing a co-guarantor. The extension of time for payment, without the consent of the surety can operate to discharge the surety. Old National Bank v. Seattle Smashers, 36 Wn. App. 688, 691 (1984); Columbia Bank v. New Cascadia Corp. 37 Wn. App. 737, 739 (1984); and both cases citing Lincoln v. Transamerica Inv. Corp., 89 Wn. 2d 571, 574 (1978). Conversely, a guarantor is not

discharged if he consents to the extension. Old National Bank at 691; and Columbia Bank at 739.

The court in both Old National Bank and Columbia Bank looked to the language of the original guaranty to determine any issue of consent or discharge under the facts of their cases. In both cases, the original guaranty language was specifically found to have granted consent to an extension for payment or changes of other terms, and therefore the guarantor was NOT discharged from the debt. Old National Bank at 691 to 692; and Columbia Bank at 739. Essentially consent to these future actions is given in the original guaranty. Old National Bank at 691 to 692; and Columbia Bank at 739 to 740. Or as the Columbia Bank court put it, the consent given in the guaranty releases the creditor from the obligation of seeking the guarantor's consent later. Columbia Bank at 739.

As in Old National Bank and Columbia Bank, the guaranty language itself expressly has Johnson consenting in advance to extensions of time of payment AND more specifically, the entering into of any “**notes**” which is exactly what occurred in this case. Johnson did consent to the entering into of the Installment and did agree such act would **not** release him from his guarantee. No new consent at the time of the Note was necessary.

As Johnson consented to the Installment note in the guaranty, then the novation argument becomes moot. Obviously, if you consent to remain bound by the guaranty when a Note is executed, then the execution of that note cannot be the basis of discharge from the guaranty for lack of that very consent. There is no issue of fact as to any other agreement at the time of the note, as no such evidence exists, and novation does not apply.

The language in the guarantee addressing this exact issue really ends this argument. Johnson never addresses this language. As no factual issue exists, the court can interpret the legal effect of this language and the granting summary judgment was appropriate. We really do not need to belabor this issue further, but Johnson argues more points on this matter.

Johnson in several places in its trial court pleadings and its Appellant's Brief on this issue states that the promissory note "paid" the account in full, leaving a "\$0.00 balance," and further states the parties do not dispute this statement. See Appellant's brief at page 23. Quite to the contrary, Gensco has always disputed that statement as it is not only untrue, but it is not based upon any evidence and is made without any citation to the Clerk's Papers

This statement has been fondly repeated by Appellant as this "payment" of the invoices or a "\$00.000 balance" simply fits into their narrative argument. Nowhere does Gensco state the note paid the account

in full and nowhere does Gensco state the balance was zero. The only evidence regarding the account after the Note was signed came from a Certifications of James Albert and clearly show the opposite to be true. CP at 182 and 108.

Based upon the above true and only facts, Johnson whole argument on this point is wrong and is not supported by any evidence. However, it should not matter in the instance case, as yet again, we can look to the language of the guaranty to resolve this issue. The Guaranty recites:

If GENSCO, INC., for any reason, should elect to.....**ACCEPT ON ACCOUNT ANY NOTES** or other consideration for the **PAYMENT** of the indebtedness; such concessions extended by GENSCO, INC. **WILL NOT IN ANY WAY RELIEVE THE GUARANTOR(s)** from its obligations under this Guaranty. (emphasis added).

CP at 186.

Therefore, even if the Note “paid” the account in full, the guarantee specifically states that such “payment” shall not release Johnson. In summary, Johnson consented to this entire arrangement by signing the guarantee and remains liable thereon. Again, as no factual issue exists, the court can interpret the legal effect of this guaranty language, and summary judgment was appropriate

4. Issue 4:

When payments were customarily applied by a creditor to oldest invoices first, does that course of business

**modify the payment terms in the credit agreement
allowing the creditor to apply payments at its own
discretion?**

While the PRECISE account was active and current, Gensco applied payments to the oldest invoices first (consequently the oldest invoices were guaranteed by Johnson and were being paid first for his benefit). This method of applying payments obviously helps all parties in assuring the account was kept current, rather than allowing older invoices to lapse into default.

After the Installment Note was entered into, the open account statement was no longer used, and the note amortization was created. Those Note payments of \$10,300.00 were applied to \$4877.75 accrued interest first, and then to \$6003.60 principal, and this \$6003.60 principal was NOT credited to the oldest invoices guaranteed by Johnson.

Given the default nature of the account, this method of applying payments was intentionally done by Gensco “*in order to preserve Plaintiff’s security/guaranty for payment against JOHNSON*”...for the guaranteed invoice amount. CP at 183. It was admittedly done in Gensco’s own self-interest.

It is the general rule that where no direction on how to apply payments is given, then the creditor “**may apply payments as he sees fit.**”

Warren v. Washington Trust Bank, 92 Wn. 2d 381, at 384 (1979). The court will not apply payment more favorably to the surety unless the surety “can demonstrate a special equity which makes his interests more amenable to protection than those of the creditor...” Warren, *supra* at 385. However, even before the court undertakes this analysis, when there is an agreement with the creditor and debtor, payments “must be applied in accordance with the terms of the agreement.” *Id.*

Therefore yet again, we must first look at the terms of the agreement. Paragraph 3.e. of the credit agreement recites that

GENSCO, INC. may apply payments at its own discretion unless remittance instructions or remittance information as to how funds are to be applied is provided.” CP at 186.

Clearly, given no other direction, under the terms of the agreement and the case law cited, Gensco may apply payments it receives in its own discretion. Prior to the default, they applied it to oldest invoices first, which benefitted all parties as it kept the account current. However, after default, they applied payment to unsecured/unguaranteed invoices first, for obvious reasons. By the terms of this agreement, accrued interest certainly may be paid first, and Gensco has no duty to apply the principal portion of the payments to Johnson’s guaranteed invoices. There is no evidence that either Precise or Johnson provided any different instructions.

Despite the above case law and contract language, Johnson argues otherwise. His argument is based on the “course of performance” argument.

First of all, this argument is again misplaced. Johnson relies on RCW 62A.2-202 regarding a “course of performance” suggesting payments made after the September 2, 2014 repayment plan must be applied to oldest invoices first, and not otherwise. Its full text is (italics/bold added for emphasis):

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein ***may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:***

(a) By course of performance, course of dealing, or usage of trade (RCW 62A.1-303); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The above statute allows course of performance or course of dealing evidence to “explain” a written term, not contradict it. Johnson’s argument here directly contradicts the terms of the agreement, when such terms are not ambiguous. As Johnson himself recites that such evidence of a course of conduct “must be held to be a practical construction of the

meaning of the contract....” *Appellant’s brief at page 26, citing Bellingham Securities v. Bellingham Coal Mines, 13 Wn.2d 370, 381 (1942); or to “guide the court in supplying an omitted term.” Appellant’s brief at page 26, citing Puget Sound Financial L.L.C. vs. Unisearch, Inc., 146 Wn.2d 428, 438 (2002).*

In our case, there is no ambiguity to be clarified or “meaning” to be determined. As stated in the Bellingham Securities case, “*It is only in those cases where the writing fails to provide the answer to a question of meaning that the courts may look elsewhere for aid in construction. Where the terms are plain and unambiguous, the meaning of the contract is to be deduced from its language.*” Bellingham Securities v. Bellingham Coal Mines, supra at 384 (citing 17 C.J.S. 695) (emphasis added).

The contract between the parties in our case is clear and unambiguous as it recites that “...GENSCO, INC. may apply payments at its own discretion....” This is clear and there is no need to look “elsewhere for aid to construction.” *Id.* When there is an agreement with the creditor and debtor, payments “must be applied in accordance with the terms of the agreement.” Warren v. Washington Trust Bank, 92 Wn. 2d 381, at 384 (1979).

There is no factual dispute as to how the payments were applied, and no facts suggesting specific payment instructions were given. Again,

the above reading and interpretation of the contract is up to the court to decide and summary judgment was appropriate.

In the event the court decides otherwise, this issue only applies to \$6003.60 in principal note payments, and not to the entire judgment amount. CP at page 183. Thus, Gensco is still entitled to summary judgment for the balance of the judgment amount.

E. CONCLUSION: This case has always involved really only one issue. Does the original language of the guarantee, without any alteration or modification, and without any added limitations, extend to the debt for which judgment was entered against Johnson. The trial court believed it did, and respondent asks this court to make the same decision.

F. ATTORNEY FEES: Gensco requests an award of its attorney fees and costs incurred in this appeal. Such award is based on the contract between the parties containing terms allowing such an award in the credit contract and personal guaranty that is the subject of this dispute. CP 185 and 186.

Respectfully Submitted and Dated this 21st day of October, 2016.



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G. Supplemental Index to Clerk Papers.

On October 3, 2016, respondent's Counsel filed a request with the Snohomish County Superior Court to submit one additional Clerk Paper to the Appellate Court. That paper was entitled "Third Certification of James Albert in Support of Summary Judgment." As of the date of this brief, the Superior Court Clerk has not yet submitted that paper apparently due to a backlog of requests. I contacted the clerk who informed me that the page identification for the document should be 6 pages beginning at page 223. I have cited this Clerk paper in the above brief, but not having seen the official filing with the Appellate Court, I believe my citation to the CP page numbers is correct, but it could be off by a page.

H. Certification of Mailing

CERTIFICATION

I hereby certify under the penalty of perjury and the laws of the State of Washington the foregoing is true and correct.

I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above action and competent to testify as to the matters contained in this certification.

On the 21st day of October, 2016, the undersigned attorney for Plaintiff placed true copies of the following:

1. BRIEF OF RESPONDENT;

regarding the above-referenced matter, affixed proper postage stamps for regular mail to said envelopes, sealed the same and placed them in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Edmonds, County of Snohomish, State of Washington to the following:

John Pierce
Attorney at Law
505 West Riverside Avenue, Suite 518
Spokane, Washington 99201

Signed in Edmonds Washington this 21st day of October, 2016.



WILLIAM H. CHARBONNEAU

2016 OCT 24 PM 12:13
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON