

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AMANDA GRIFFITH,)
)
 Plaintiff,)
)
 v.)
)
 ISL DEVELOPMENT, LLC AND)
 STEVEN STEWART, INDIVIDUALLY,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 Case No. 2016-CP-10-5773

ORDER

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This matter was tried on August 29, 2018 in the Court of Common Pleas, Non-Jury term, in Charleston County, South Carolina. Pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the following Findings of Fact and Conclusions of Law are provided as the Order of this court in favor of the Plaintiff. During the trial, Amanda Griffith (“Griffith”) testified as the Plaintiff, and the Defendant Steven Stewart (“Stewart”) testified in his individual capacity and in his capacity as a member of Defendant ISL Development, LLC (“ISL”). The parties agreed that the law of the State of California applied to the substantive issues, and that South Carolina law applied as to the procedural issues, including the applicable Statute of Limitations. The parties consented to the trial exhibits submitted, which were entered into evidence without objection.

This court finds that the Plaintiff satisfied her burden of proof, resulting in the following:

I. FINDINGS OF FACT:

The following findings of fact are based upon the trial testimony, which was carefully evaluated as to credibility of the witnesses and testimony, and as to the weight of the evidence and exhibits which were entered into evidence without objection by the parties.

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A. Plaintiff loaned \$200,000.00 to Defendant ISL Development, LLC, which was deposited into the ISL bank account on December 28, 2012. ISL executed a Promissory Note on December 27, 2012 (the "Note"), which provided that "[i]nterest only shall be payable monthly in arrears as follows: (a) February 1, 2013 and continuing on the first (1st) day of each calendar month thereafter until the Maturity Date, Maker shall make monthly interest-only payments based on a rate of twelve percent (12%) per annum. (b) If not sooner paid, the entire outstanding principal balance of this Note, together with accrued and unpaid interest and any other amounts due under this Note shall be due and payable on March 31, 2013 (the 'Maturity Date')."

B. In the email exchange dated January 16, 2013, Defendant personally guaranteed repayment of the Note to Plaintiff.

C. Consistent with that agreement, Plaintiff did not demand repayment of the Note on March 31, 2013, and Stewart testified that he actually received substantial personal benefit from the continued use of the loaned funds beyond March 31, 2013, as he was personally paid a salary from ISL beyond that date. Further, Defendant ISL paid interest to the Henderson Family Trust, which was administered by Defendant Stewart's wife and had invested in the ISL Project. Additionally, after the agreement on January 16, 2013, and continuing after March 31, 2013, Defendants Stewart and ISL confirmed the terms of the January 16, 2013, agreement in that Plaintiff received interest payments from ISL in the amount of \$2,000 per month, which were sent to Plaintiff by Defendant Stewart.

D. Defendant ISL paid interest to Plaintiff in the amount of \$2,000.00 per month for February, March, April, May, June, July, and August of 2013, although those checks were paid sporadically with some payments made in arrears. The total monthly interest payments made by ISL to Plaintiff pursuant to the Note amounted to \$14,000.00.

E. The final interest payment to Plaintiff was by an ISL check signed by Stewart dated November 5, 2013, in the amount of \$6,000, which was presumably intended to pay the September, October, and November 2013 monthly interest payments. Stewart requested that Plaintiff delay cashing that check until it was verified that funds were available. Plaintiff delayed accordingly, and when she attempted to cash that check in January 2014, it was returned for Non-Sufficient Funds. Plaintiff received no further checks or other funds from Stewart or ISL after that.

F. There was no evidence that any money in ISL's bank account was earmarked or allocated for payment to creditors or others based on its source. The check and deposit records in evidence indicate that money was routinely added and deducted by deposits and checks out of ISL's accounts without regard to the source of those funds on deposit in that ISL bank account.

G. The Defendant Stewart, a member of ISL Development, LLC ("ISL"), admitted in his trial testimony that ISL was in default of the Promissory Note to Plaintiff dated December 27, 2012, which Note was admitted into evidence without objection.

H. When asked at trial whether, at any time between January 16, 2013, and the time that the final interest payment check bounced in January 2014, he had communicated to Plaintiff that he did not intend to honor his commitment to personally guarantee the repayment of the Note to Plaintiff, Defendant Stewart testified "No, I didn't."

I. On October 27, 2016, Plaintiff brought this lawsuit against Stewart and ISL in order to collect the debt in the amount of \$200,000 principal plus accrued interest and reasonable attorney fees for collection from the Defendants. At the time of filing, Stewart was a resident of Charleston County, South Carolina, and the Defendants did not challenge the court's jurisdiction over this matter.

II. CONCLUSIONS OF LAW:

This court finds that this lawsuit was brought within the applicable three-year Statute of Limitations in accordance with South Carolina law and that, in the alternative, this lawsuit was also brought within the applicable Statute of Limitations recognized for this action under California law. Further, this court finds that pursuant to California law and alternatively under South Carolina law, the use of the loaned funds by ISL and the substantial personal benefit which Stewart admitted to receiving from those loaned funds beyond March 31, 2013, represented sufficient consideration actually received by Stewart in exchange for his agreement to personally guarantee repayment of the Note to Plaintiff.

A. The evidence at trial established, the parties acknowledged at trial, and this court finds that the Note contained a choice of law provision, and the chosen forum was California law. The parties further acknowledged at trial and the court finds that while the choice of law provides that California substantive law applies, South Carolina law applies as to procedural aspects of this case, including the applicable three-year statute of limitations.

B. This court finds that Griffith's claims are not barred by South Carolina's three-year statute of limitations, and that in the alternative, her claims were not barred by the applicable Statute of Limitations under California law. Defendant Stewart admitted at trial that the final interest payment he signed and sent to Griffith was by check written from ISL's bank account on November 5, 2013. This court finds that Stewart's testimony established that he requested that Griffith not attempt to cash or deposit that check until January 2014. When she did so, the check was returned due to Non-Sufficient Funds in the account. Plaintiff then brought the instant lawsuit on October 27, 2016, within three years of the last interest payment presented by Stewart. South

Carolina Code § 15-3-530 provides that “an action upon a contract, obligation, or liability, express or implied” must be brought within three years of notice of that claim.

C. This court finds that there was sufficient consideration to support Stewart’s agreement to personally guarantee of the repayment of the Note to Plaintiff under California law and, in the alternative, under South Carolina law. As to the substantive law of California as to the enforcement of the Promissory Note and personal guarantee by Defendant Stewart, in *Steiner v. Thexton*, 48 Cal. 4th 411, 226 P.3d 359, 106 Cal. Rptr.3d 252 (Cal. 2010), the Supreme Court of California addressed the question of what constituted sufficient consideration in relation to the personal guarantee agreed by Plaintiff and Stewart:

In sum, in determining here whether sufficient consideration rendered the option to purchase the 10-acre parcel irrevocable, we consider whether Steiner conferred or agreed to confer a benefit, or suffered or agreed to suffer prejudice that was bargained for in exchange for the option.

The lower courts concluded no such consideration supported the option. They reasoned no money was paid for the grant of the option nor did the work performed and expenses incurred by plaintiffs in pursuit of a parcel split benefit Thexton. Citing *O’Connell v. Lampe*, 206 Cal. 282, 285, 274 P. 336 (1929), and *Drullinger v. Erskine*, 71 Cal.App.2d 492, 495, 163 P.2d 48 (1945), the lower courts explained that the “adequacy of consideration” must be measured at the time an agreement was entered into. The lower courts concluded that, at the time Steiner and Thexton struck their bargain, the promise to seek the parcel split was unenforceable because the escape clause gave plaintiffs the power to terminate the transaction at any time for any reason. Thus, the lower courts held, Steiner’s promise was illusory and did not constitute valid consideration. The courts found it immaterial that plaintiffs had begun to perform, because plaintiffs were under no actual obligation to do so. To the contrary, we conclude as a matter of law that plaintiffs’ part performance of the bargained-for promise to seek a parcel split created sufficient consideration to render the option irrevocable.

It is true that Steiner’s promise to undertake the burden and expense of seeking a parcel split may have been illusory at the time the agreement was entered into, given the language of the escape clause. However, there can be no dispute that plaintiffs subsequently undertook substantial steps toward obtaining the parcel split and incurred significant expenses doing so. Among other things, plaintiffs paid for the required civil engineering and surveying for the parcel and spent a number of months applying to the county planning department for a tentative parcel map, proceeding with the final hearing of the parcel

review committee, and obtaining approval of the tentative map. On this record, the only possible conclusion is that Steiner both conferred a bargained-for benefit on Thexton and suffered bargained-for prejudice unaffected by his power to cancel, making up for the initially illusory nature of his promise.

... Accordingly, plaintiffs' part performance cured the illusory nature of their promise.

Thexton, 226 P.3d 359 at 366-67.

D. This court finds that, based upon the evidence presented at trial, there was sufficient consideration exchanged by the parties to support the January 16, 2013, emails between Plaintiff and Stewart as an enforceable agreement between those parties. The Plaintiff's agreement to extend the due date of the Note was supported by Stewart's promise and acceptance of the personal guarantee of repayment of the Note to Plaintiff, and Stewart received sufficient consideration to support his personal guarantee of repayment to Plaintiff in that both Stewart and ISL received actual use and substantial benefit of the borrowed funds beyond the Note's original repayment date of March 31, 2013. Cal. Civ. Code § 1605.

E. This court finds that the Plaintiff's promise to extend the repayment terms of the Note was not illusory, although *Thexton, supra*, 226 P.3d at 366-67, provides that even if such a promise were deemed illusory, "[P]laintiffs' part performance cured the illusory nature of [her] promise." The testimony and evidence presented at trial established that the repayment terms of the Promissory Note were actually extended beyond the March 31, 2013, date, and Stewart admitted in his testimony that the extension of that repayment term and his use of the funds beyond March 31, 2013, were a substantial personal benefit to him. Accordingly, the consideration supporting this loan modification was Griffith's extension of that repayment date, and she actually suffered harm as a result. This personal guarantee obligation is, therefore, enforceable against Defendant Stewart under California law and, in the alternative, under South Carolina law.

F. This court finds that the personal guarantee agreement by Defendant Stewart satisfies the requirements of the Statute of Frauds under California law and, in the alternative, under South Carolina law. The loan modification and personal guarantee are not barred by the California Statute of Frauds, because that statute actually excludes the type of transaction at issue in this lawsuit, specifically, the loan modification and personal guarantee made by Stewart:

Cal. Civ. Code § 1624. Statute of frauds (emphasis added):

(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) *A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.*

.....

Cal. Civ. Code § 2794. Original obligations not requiring a writing (emphasis added):

A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

.....

(4) *Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;*

.....

In *Farr & Stone Ins. Brokers, Inc. v. Lopez*, 61 Cal.App.3d 618 (Cal. App. 1976), Lopez owned a business named Apex, and as Apex's insurance brokers, Farr & Stone paid some of the premiums for insurance coverage when Apex failed to make such payments. Farr & Stone then demanded that Lopez make payments, or the insurance would be cancelled.

The arguments made by Lopez are almost identical to those made by Stewart in challenging his personal guarantee. The following evidence established that Lopez personally guaranteed payment of those premiums if Apex did not pay:

Stone testified that Lopez promised if Apex could not pay the premiums he would pay them out of his own checkbook and that Farr & Stone relied on Lopez's promise in not cancelling the insurance policies. Michael Poland and Carolyn Lopez testified that Lopez said he would personally take care of the premiums. Lopez testified that he said Apex would try to make the payments.

Id. at 621.

Next, Lopez, just as Stewart did in the present case, denied that he made such a promise, but the California appellate court summarily dismissed that contention:

Lopez contends this evidence fails to support the finding that he promised Farr & Stone he would pay the insurance premium obligation of Apex. In making this contention Lopez ignores a cardinal rule of appellate review: the appellate court will not reweigh conflicting evidence before the trier of fact. Whatever other witnesses might have testified, Lawrence Stone testified that Lopez promised to pay Apex's premiums out of his own checkbook. That testimony is not inherently improbable or unworthy of belief and therefore constitutes substantial evidence to support the trial court's finding. (*Protopappas v. Protopappas*, 213 Cal.App.2d 659, 28 Cal.Rptr. 884 (1963)).

Lopez, 61 Cal.App.3d at 621.

The similarities to the case at bar continue as Lopez, just as Stewart did in the present case, argued that the California Statute of Frauds barred enforcement of his personal guarantee. The promisee, just as Griffith does in the present case, argued that his personal guarantee was covered under an exception to the requirement of a writing under the statute of frauds:

Lopez contends the statute of frauds bars enforcement of his oral promise. Farr & Stone relies on an exception to the statute in Civil Code section 2794: 'A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: . . . (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person . . .'

Id.

Next, Lopez claimed, just as Stewart argued initially in the present case, that the statute of frauds exception did not apply because Lopez did not personally receive any direct pecuniary benefit. In the present case, Stewart admitted during his trial testimony that he in fact did receive

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substantial personal benefit from the use of the funds loaned by Griffith after the original repayment deadline expired.

Lopez argues this exception does not apply because there was no consideration beneficial to him in this case because he received nothing of immediate and direct pecuniary benefit. (See *Michael Distrib. Co. v. Tobin*, 225 Cal.App.2d 655, 665, 37 Cal.Rptr. 518.)

Lopez, 61 Cal.App.3d at 621.

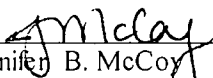
Finally, on the statute of repose issue, the California Court of Appeals held that the statute of repose exception applied, and the absence of a writing did not bar the enforcement of Lopez's personal guarantee. That court held that Farr & Stone, like Griffith, suffered harm in consideration by foregoing benefits in reliance on the personal guarantee:

The statute of frauds does not apply. The forbearance of Farr & Stone to cancel Apex's insurance policies was a detriment to Farr & Stone, which passed up the opportunity to obtain rebates on prepaid premiums, and a benefit to Lopez's children, who had a promised ownership interest in Apex. Lopez, of course, had a direct and personal concern in the welfare of his children and their economic venture.

Id. at 621-22. See also, S.C. Code § 26-6-10 *et seq.* and § 32-3-10 *et seq.*

For the foregoing reasons and based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Plaintiff has met her burden of proof in this matter. A hearing as to the damages shall be held at a date and time to be determined by the court and parties as soon as possible.

IT IS SO ORDERED.



Jennifer B. McCoy
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

December 10, 2018