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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 88-0128-CA

IN THE SUPREME COURT

OF THE STATE OF UTAH

HERITAGE BANK & TRUST, Plaintiff/Appellant, vs. JOHN LANDON, Defendant/Respondent.	Civil No. 860537

88-0128-CA

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE RAYMOND S. UNO PRESIDING

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT

OF THE STATE OF UTAH

HERITAGE BANK & TRUST,	)	
Plaintiff/Appellant,	)	
vs.	)	Civil No. 860537
JOHN LANDON,	)	
Defendant/Respondent.	)	

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IN THE SUPREME COURT

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JOHN LANDON,	)	
Defendant/Respondent.	)	

BRIEF OF RESPONDENT

STATEMENT SHOWING JURISDICTION AND DESCRIBING PROCEEDINGS IN THE COURT BELOW

This court has jurisdiction of this appeal pursuant to *Utah Code Ann.* § 78-2-2. This is an appeal from an order of the district court dismissing the complaint in the above-entitled matter with prejudice.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellant's brief in this matter does not contain a separate statement of issues.[1] Accordingly, the following issues are gleaned from the argument contained

[1] It appears that one page, numbered iii, may have been omitted from the copies of appellant's brief served upon respondent.

in appellant's brief:

1. Whether the statute of frauds bars plaintiff/appellant's claim against defendant/respondent.

2. Whether the trial court should have allowed plaintiff/appellant to amend its complaint.

3. Whether the trial court should have dismissed plaintiff/appellant's complaint with prejudice.

STATUTES RELIED UPON

Defendant/respondent relies on the Utah statute of frauds, *Utah Code Ann.* §§ 25-5-4(2) and 25-5-5.

STATEMENT OF THE CASE

This is an action to recover on an alleged oral guarantee of a bank loan. Plaintiff/appellant Heritage Bank & Trust (the "Bank") alleges that defendant/respondent John Landon ("Landon") orally promised to repay a loan the Bank made to Philip Rennert ("Rennert") if Rennert did not pay. The district court dismissed the action on the grounds that the complaint and the proposed amended complaint failed to state claims upon which relief could be granted, since the Bank's claims were barred by the statute of frauds.

FACTS

In June of 1984, Rennert borrowed $100,000.00 from the Bank. At the time of the loan, Landon was a member of the Bank's board of directors and served on the loan committee. Rennert executed a promissory note and trust deed on certain real property to secure the loan. The Bank also obtained an appraisal of the real property pledged as collateral for the loan.

The original complaint filed by the Bank alleged that Landon guaranteed to repay the amount loaned to Rennert if Rennert did not pay. Landon has denied promising to repay the loan if Rennert did not (Deposition of John Landon, June 27, 1986 at 33). The original complaint also alleged that Landon personally benefited from the loan made to Rennert.

When Rennert failed to repay the loan, the Bank sold the real property that had been pledged as collateral for the loan, but received only $8,930.00 as proceeds of the sale. The Bank obtained a deficiency judgment against Rennert for $149,705.30 and then filed this action against Landon.

Landon moved to dismiss the Bank's complaint on the grounds that the claim was barred by the statute of frauds. The district court ruled that, unless the Bank could produce some evidence that Landon had benefited from the loan made to Rennert, the complaint failed to state a claim upon which relief could be granted and would be dismissed. Accordingly, the district court granted the Bank 60 days in which to conduct discovery on the issue of whether Landon had benefited from the loan made to Rennert.

The Bank then took the deposition of Landon and the deposition of Rennert.

In his deposition, Landon denied personally guaranteeing the loan. Landon did admit that as a director of the Bank, and as a person serving on the loan committee, he voted in favor of the loan, provided that the loan were adequately secured and Rennert's credit checked out (Deposition of John Landon, pp. 24-25).

On August 8, 1986, the Bank took Rennert's deposition. Rennert testified that Landon was not involved in his applying for the loan (Deposition of Philip A. Rennert, p. 15), and that he did not talk with Landon about obtaining a loan (Deposition, p. 16). Rennert further testified that all of the proceeds of the loan were used to remodel his home. Rennert did not discuss the collateral for the loan with Landon (Deposition, p. 18). Rennert also testified that Landon received no benefit from the loan (Deposition, p. 29).

After taking Rennert's deposition, counsel for the Bank apparently realized that there was no evidence that Landon had benefited from the loan to Rennert. Thus, counsel sought to amend the complaint to assert additional claims against Landon. Those claims were as follows:

(1) Specific performance of the alleged oral guarantee;

(2) Detrimental reliance or estoppel;

(3) Fraud; and

(4) Negligent misrepresentation.

Landon opposed the motion to amend on the grounds that it would be futile to allow the amendment of the complaint, since even new claims set forth in the proposed amended complaint were actually claims on an alleged oral guarantee. After requesting that the Bank submit an additional memorandum in support of its motion to amend the complaint, and allowing Landon to submit a responsive memorandum, the court ruled that the motion to amend the complaint would be denied and that the original complaint would be dismissed. This appeal followed.

SUMMARY OF ARGUMENTS

I. BOTH THE COMPLAINT AND THE PROPOSED AMENDED COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED, SINCE THE BANK'S CLAIMS AGAINST LANDON ARE BARRED BY THE STATUTE OF FRAUDS.

The statute of frauds, *Utah Code Ann.* § 25-5-4(2), requires that promises to pay the debt of another be in writing in order to be enforceable. The statute of frauds, *Utah Code Ann.* § 25-5-5, also requires that representations as to the credit of a third person be in writing in order to create liability on the part of the person alleged to have made the representation. The doctrine of part performance, which in some instances creates an exception to the operation of the statute of frauds, is not applicable here, nor are there any facts to support the Bank's assertion that Landon somehow became the principal, rather than the surety, for the loan to Rennert.

Neither the complaint, nor the proposed amended complaint states a claim for breach of fiduciary duty by Landon, and neither complaint alleges facts which would amount to a breach of fiduciary duty.

The Bank also has not stated a claim against Landon for fraud or negligent misrepresentation, since the only factual allegations forming the basis for those claims are the allegations that Landon misrepresented Rennert's creditworthiness and promised to repay Rennert's loan if Rennert did not.

II. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO AMEND THE COMPLAINT.

Although Rule 15 provides for liberality in allowing amendments, the court need not allow amendment if the proposed amended complaint does not state a claim upon which relief can be granted.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING WITH PREJUDICE, SINCE THE BANK DID NOT ALLEGE FACTS WHICH, IF PROVED, WOULD ENTITLE IT TO RELIEF.

ARGUMENT

I. BOTH THE COMPLAINT AND THE PROPOSED AMENDED COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED, SINCE THE BANK'S CLAIMS AGAINST LANDON ARE BARRED BY THE STATUTE OF FRAUDS.

The Bank asserts that its claims against Landon are not barred by the statute of frauds on the basis of the following legal theories:

(A) Breach of fiduciary duty to the Bank;

(B) Partial performance on the part of the Bank;

(C) A surety became the principal;

(D) Estoppel; and

(E) Misrepresentation.

Although the Bank has attempted to distort the facts of this case to fit into one or more of these legal theories, it is clear that its claim is still one for recovery on an alleged oral guarantee and that no exception to the statute of frauds is applicable here.

A. The Bank Has Not Pled a Claim for Breach of Fiduciary Duty.

There are a number of problems with the Bank's argument that its proposed amended complaint states a claim for recovery on the basis of an alleged breach of fiduciary duty by Landon. First, the proposed amended complaint did not contain a claim for breach of fiduciary duty. As indicated previously in this brief, the proposed amended complaint contains claims for specific performance of the oral guarantee,

detrimental reliance, fraud, and negligent misrepresentation. Nowhere in the proposed amended complaint is there a claim for breach of fiduciary duty.

Second, the Bank has not asserted any authority for the proposition that, even if Landon had orally guaranteed the loan to Rennert, such an action would have constituted a breach of his fiduciary duty to the Bank. In fact, the Bank cites as one of its authorities, 37 *C. J. S. Frauds, Statute of* § 37, which contains the following language:

> Within these limitations, the statute [of frauds] applies to representations, as to the credit of a third person, made by one who occupies a fiduciary relation to the person to whom the representations are made, unless they are made in violation of such relation. (Footnotes omitted.)

Thus, the statute of frauds would apply to any representations that Landon made as to Rennert's credit unless the Bank could show that Landon had made them in violation of his fiduciary relationship to the Bank. However, the Bank has failed to allege any claim for breach of fiduciary duty in its proposed amended complaint and has failed to argue in its brief any manner in which Landon's conduct violated his fiduciary relationship with the Bank.

B. Part Performance

The Bank also attempts to rely on the doctrine of part performance to remove Landon's alleged oral guarantee from the operation of the statute of frauds. Obviously, the only performance upon which the Bank relies is the fact that it disbursed $100,000.00 to Rennert. The doctrine of part performance has been applied in appropriate cases to remove cases involving real estate contracts from the operation of the statute of frauds. See, *e.g.*, cases discussed in *Allen v. Kingdon*, 723 P.2d 394, 396 (Utah 1986).

None of the authorities cited by the Bank stand for the proposition that the making of a loan removes an alleged oral guarantee from the operation of the statute of frauds. *Strevell-Paterson Co., Inc. v. Francis*, 646 P.2d 741 (Utah 1982), involved an alleged oral release of a written guarantee. The court held that such an oral release was unenforceable as a matter of law under the statute of frauds.

Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 (1959), also cited by the Bank, involved oral contracts for the sale of real property and shares of water stock. The purchasers of the real property had possession of the property for more than 10 years, had paid more than half of the purchase price, and had used the water to which the shares entitled them. In those circumstances, the court found sufficient performance to take the contracts out of the statute of frauds.

The legal encyclopedias relied upon by the Bank also do not support its theory. For example, 37 *C.J.S. Frauds, Statute of* § 255, *Rights Arising from Part Performance* contains the following language:

> Although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover on the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with, and on the faith of, the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. This right of recovery, however, is not absolute; it is governed by the rules applicable to implied or quasi contracts generally. Plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and <u>hence it must appear that defendant has actually received or will receive some benefit from the acts of part performance</u>. (Emphasis added, footnotes omitted.)

It is clear in this case that Landon did not receive any benefit from the supposed act of part performance on the part of the Bank. The trial court allowed the Bank to conduct discovery on that issue and the Bank was unable to find any

evidence of such a benefit to Landon. As the Bank's own authority, 37 *C.J.S. Frauds, Statute of* § 255 states: "It is immaterial and insufficient to support a recovery that plaintiff has suffered a loss or has been put to expense, because the law does not imply an obligation to pay the losses and expenses incurred by the performing party."

Thus, the doctrine of part performance is simply not applicable in these circumstances.

C. Surety Became Principal.

The Bank also argues that the statute of frauds does not bar enforcement of Landon's alleged "guarantee" on the basis of an exception to the statute of frauds created by *Utah Code Ann.* § 25-5-6(2). That statute provides that a promise to answer for the obligation of another may be deemed an original obligation of the promisor and need not be in writing if the circumstances are such as to render the party who made the promise the principal debtor and the person upon whose behalf it is made, his surety. The problem with the attempt by the Bank to invoke this exception is that there are no facts in this case upon which to predicate an argument that Landon became the principal debtor and Rennert became his surety.

Sugar v. Miller, 6 Utah 2d 433, 315 P.2d 862 (1957) is the sole case cited by the Bank in support of the proposition that Landon became a principal on the debt. In that case, Sugar was an organizer and promoter of Deseret Uranium Company and Miller was the owner of a printing company. The parties had been friends for many years. Sugar requested that Miller do certain printing for his company. Before the printing was done, Miller asked Sugar if he would pay for the printing and Sugar indicated that he would. After the printing was completed and payment was not

forthcoming, Sugar repeatedly told Miller that he would pay if he had the money. Miller and Sugar then went to Sugar's bank, borrowed $2,000 and cosigned a note. The proceeds of the loan were given to Miller. When Sugar had to repay the bank, he sued Miller. Miller admitted liability on the note and counterclaimed for the printing obligation.

Affirming judgment for Miller on his counterclaim, this court indicated that the question of Sugar's liability on the printing obligation depended upon whether there was sufficient evidence that Sugar had made an original promise to pay for the printing.

> " * * * Whether a promise is original or collateral, before there is any delivery of materials or services by a creditor, may ordinarily be determined by this test: Did the parties understand that the seller was extending credit for the materials or labor on the credit of the party sought to be charged, or to him only as a guarantor of payment should another fail to pay?"

Id. at 864. In *Sugar v. Miller* the court found that the promise of Sugar was original rather than a guarantee. The court did not consider or apply *Utah Code Ann.* § 25-5-6(2).

In this case, the promise alleged was meant to be a guarantee of Rennert's payment, not an original promise to pay. Rennert signed the note and pledged his own real property as collateral. There was no connection between Landon and Rennert with respect to the use of the money. The Bank has not alleged a single fact on which the trial court could base a finding that Landon became the principal debtor.

D. Estoppel.

The Bank argues that Landon should be estopped to assert the statute of frauds as a defense to its action on the alleged oral guarantee. The Bank has not alleged any conduct by Landon, beyond the alleged oral guarantee itself, that would form the basis for an estoppel. If the Bank's argument were accepted, any representation as to the credit of another or any alleged oral guarantee would be sufficient to create an estoppel, thus rendering the relevant provisions of the statute of frauds completely meaningless.

Further, in *McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter Day Saints,* 529 P.2d 434 (Utah 1974), this Court said:

> In *Ravarino v. Price* this court explained that an estoppel will not arise simply because of a breach of promise as to future conduct or because of a disappointment of expectations of an executory agreement. An exception is recognized when a misrepresentation as to the future operates as an abandonment of an existing right of the party making the misrepresentation, *i.e.*, the promise as to future conduct must constitute a manifestation that the promissor will abandon an existing right which he possesses. (Footnote omitted.)

529 P.2d at 426. In this case, the sole basis for the purported estoppel is the representation claimed to have been made by Landon that he would personally see that Rennert's loan was repaid. There is no allegation, nor can one properly be made, that Landon abandoned some existing right.

The Bank has not cited a single case in which a court found that an oral guarantee was removed from the operation of the statute of frauds on the basis of the theory of estoppel. Instead, it relies on the very general language of legal encyclopedias, but ignores those portions of that language that do not support its theory. "It is clear, however, that an estoppel to assert the statute of frauds does not arise merely because an oral contract within the statute has been acted upon by the

promisee and not performed by the promisor." 73 *Am Jur 2d* § 567, at 206 (Footnote omitted).

E. Misrepresentation.

The third and fourth claim of the Bank's proposed amended complaint contain allegations purportedly supporting the Bank's claims for misrepresentation. Those claims refer back to the representations and statements alleged in the first and second claims. Those representations and statements are as follows: "[I]t was a good loan, that Rennert's credit was good and that the security was adequate. Defendant recommended the loan and stated, 'I will personally see that the loan is repaid.' He thereby personally guaranteed the loan" (Paragraph 4 of the proposed amended complaint). "[D]efendant stated he would protect plaintiff from loss and that if satisfactory arrangements were not made with Rennert to pay the loan prior to December 31, 1985, defendant would satisfy the obligation of Rennert" (Paragraph 21 of the proposed amended complaint). The proposed amended complaint contains no other alleged representations or statements.

It is doubtful whether the third or fourth claims of the proposed amended complaint meet the requirements of Rule 9(b) of the Utah Rules of Civil Procedure. It is even more doubtful whether those claims state claims for fraud sufficient to remove the alleged oral guarantee referred to in paragraph 4 of the proposed amended complaint from the operation of the statute of frauds. Again, the Bank has failed to cite a single case in which a theory of misrepresentation was found to create an exception to the statute of frauds in an action on an alleged oral guarantee. Again the Bank has cited only general language of legal encyclopedias, omitting those portions of the encyclopedia entry which do not support its theory. For

example, the Bank cites 72 *Am Jur 2d, Statute of Frauds* § 187 and quotes from that section, but omits certain language which immediately follows the language it quotes. That language is as follows:

> However, where, in reality, the transaction is a promise by the defendant to answer for the debt of another to whom credit is extended by the plaintiff, the court will not permit the statute to be evaded by sustaining an action for fraud and deceit based on such promise, on the theory that it was a fraudulent misrepresentation of the financial standing of such third person. In a number of jurisdictions, statutes have been enacted following the English statute which is known as "Lord Tenterden's Act," requiring representations as to the credit, etc., of a third person to be in writing to render the person making them liable to an action therefor. (Footnotes omitted.)

Utah Code Ann. § 25-5-5 is just such a statute. Thus, an allegation of an alleged representation as to the credit of Rennert by Landon does not create a claim upon which relief can be granted to the Bank.

II. THE TRIAL COURT DID NOT ERR IN DENYING THE BANK'S MOTION TO AMEND ITS COMPLAINT.

The Bank contends that the trial court erred in refusing to allow it to amend its complaint. This contention on the part of the Bank ignores the fact that the trial court reviewed the proposed amended complaint, allowed the Bank to submit a memorandum in support of its motion to amend the complaint, and considered all of the Bank's arguments with respect to the purported exceptions to the statute of frauds contained in its proposed amended complaint. The trial court then found that it would be futile to allow the Bank to amend its complaint since it still would not state a claim upon which relief could be granted.

In support of its argument that the court should have allowed it to amend the complaint, the Bank cites 3 *Moore's Federal Practice* § 15.07[2]. Again the Bank has misconstrued the language of its authority. The section cited also contains the

following language "While Rule 15(a) literally gives the plaintiff an unlimited right to amend once as of course before a responsive pleading has been served, if the court has dismissed the complaint (on a Rule 12(b) motion, for example), before an answer has been served, the plaintiff may file an amended complaint only upon leave of court. Although some courts have indicated that amendment should be allowed as of right even after dismissal, such a holding appears incorrect." *Id.* pp. 15-36, 15-38 (Footnotes omitted).

In this case, granting leave to amend would have been meaningless. The trial court did consider the Bank's proposed amended complaint and determined that it did not state a claim upon which relief could be granted. Therefore, the Bank was in no way prejudiced by the fact that leave to amend was not granted.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING WITH PREJUDICE SINCE THE BANK DID NOT ALLEGE FACTS WHICH, IF PROVED, WOULD ENTITLE IT TO RELIEF.

The only basis for the Bank's argument that the court should not have dismissed its complaint with prejudice is that the statute of frauds does not bar its claim against Landon. As indicated in the preceding sections of this brief, the statute of frauds does bar the Bank's claim against Landon even if the Bank tries to style it as something other than an action on an alleged oral guarantee. Thus, dismissal of the complaint with prejudice was proper.

CONCLUSION

It is abundantly clear that this is nothing more than an action on an alleged oral guarantee. The statute of frauds as enacted in Utah requires that guarantees of the obligations of another be writing in order to be enforceable. The statute of frauds also requires that representations as to the credit of another must be in writing in

order to create liability. In this case, the Bank premises its claim on allegations that Landon said that he would see that Rennert's loan was repaid and that Landon said that Rennert was creditworthy. These are exactly the kind of oral statements that fall within the relevant provisions of the statute of frauds and the Bank has failed to show that any exceptions to the statute are applicable to this case.

Thus, the Bank's original complaint and proposed amended complaint both failed to state claims upon which relief could be granted and the trial court acted properly in dismissing with prejudice.

DATED this 12th day of May, 1987.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed four true and correct copies of the foregoing BRIEF OF RESPONDENT to the following person, postage prepaid, this 12th day of May, 1987:

Mr. John W. Lowe
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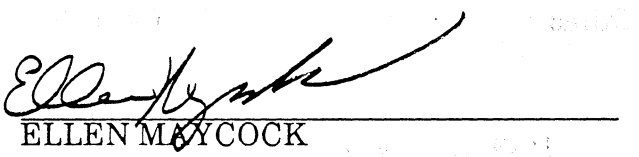
Salt Lake City, Utah 84101



ELLEN MAYCOCK