

2010

Keybank National Association v. Systems West Computer Resources, Inc., and Nancy H. Halverson : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

KEYBANK NATIONAL
ASSOCIATION,

Plaintiff/Appellee,

SYSTEMS WEST COMPUTER
RESOURCES, INC., and NANCY H.
HALVERSON,

Defendants/Appellants.

: **BRIEF OF APPELLANT**
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: Published Opinion Requested
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: Appellate Case No: 20100101
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Appeal from the Third District Court of Utah, Central Division
Honorable Paul G. Maughan
District Judge
No. 080921404

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UTAH APPELLATE COURTS

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KEYBANK NATIONAL
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Plaintiff/Appellee,

SYSTEMS WEST COMPUTER
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JURISDICTIONAL STATEMENT

This is an appeal from a summary judgment of the Third District Court that dismissed the entire action. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102.

STATEMENT OF ISSUES & STANDARD OF APPELLATE REVIEW

Standard of Review: All of the issues presented here are legal questions following the granting of a summary judgment, which this Court reviews for correctness without deference, applying the same standard that the District Court should have applied: Whether "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c); *Morra v. Grand County*, 2010 UT 21, 230 P. 3d 1022, 1026 (Utah 2010). This Court views "the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Bichler v. DEI Systems, Inc.*, 2009 UT 63, ¶ 10, 220 P.3d 1203, 1206 (Utah 2009).

Statement of Issues:

1. Whether the district court erred in granting a summary judgment dismissing the entire action where plaintiff did not move with respect to defendants' counterclaims or defenses.
2. Whether the written contract documents were ambiguous, and, if so, whether the district court erred in granting summary judgment without considering parol

evidence on the material issue of whether and under what conditions the entire loan balance was required to be paid.

3. Whether the district court erred in applying the parol evidence rule to bar defendants' counterclaims for negligent misrepresentation and breach of the implied covenant of good faith and fair dealing.

4. Whether the district court erred in determining that the bank did not breach the covenant of good faith and fair dealing.

STATEMENT OF THE CASE

This is a case about a bank providing a million dollar line of credit to a small company that both the bank and the company knew could not be paid off if the loan were called and line of credit were required to be paid off immediately. Defendants contend that the written agreements between the parties clearly prevented the bank from calling the loan in the absence of a subsequent mutual written agreement requiring immediate, full payoff, and that such an agreement was never made. If there is any ambiguity about the requirement for a written agreement in order to terminate and call the entire loan, parol evidence should have been considered, and the district court erred by not considering parol evidence. The undisputed parol evidence showed that plaintiff KeyBank and defendant Systems West agreed that, so long as the monthly payments due under the loan were paid when and as due, the principal balance of the loan could not be called and immediate repayment of the principal could not be required.

The loan was documented in the various documents discussed below. The basic structure was that there was a series of some 18 promissory notes, each of which terminated after a few months. These notes were subject to and integral with the basic, underlying Business Loan Agreement creating the line of credit, however, which prevented calling the loan unless and until either of two conditions occurred -- (1) either Systems West paid off the entire balance of the loan or (2) the parties mutually agreed in writing to terminate the loan. Neither of these two written conditions ever occurred.

Nor did Systems West ever miss a monthly payment before the bank called the loan and demanded immediate payment of the entire balance.

In violation of the bank's promise to continue to provide the line of credit, in 2008 the bank, facing regulatory and marketing pressures, called the loan (i.e., demanded immediate repayment of the entire balance of the loan). Foreseeably, Systems West was not able to repay the entire million dollar principal balance of the loan, and the bank's actions destroyed the company.

Nevertheless, the bank sued Systems West and Systems West's CEO and owner Nancy Halverson as guarantor. The defendants defended and counterclaimed, including claims and defenses of breach of the covenant of good faith and fair dealing, negligent misrepresentation, and promissory and equitable estoppel.

The bank moved for summary judgment on its contract claims, but did not move for summary judgment on any of defendants' counterclaims or defenses. To defendants'

surprise, the district court granted summary judgment even on counterclaims and defenses that were not included in the bank's summary judgment motion.

STATEMENT OF FACTS

In 2001, KeyBank salesmen approached Systems West and solicited the company to enter into a \$1 million "line of credit." Halverson Decl.¶ 3. ROA 1271. Systems West told the bank at that time, and many times thereafter, that if Systems West were going to enter into the loan, the company needed a long term line of credit, not a short-term loan that had to be repaid fully upon request or even every quarter or six months. Halverson Decl.¶ 4. ROA 1271. The pivotal Business Loan Agreement clearly provided that the bank could not demand immediate repayment of the entire balance unless the parties mutually agreed in writing that the entire balance must be paid off immediately.

Systems West told the bank, and provided financial statements that showed, that the company's cash flow would not support borrowing up to a \$1 million if the entire balance had to be repaid upon demand or even several times each year, and that Systems West would not enter into an agreement that required the immediate repayment of up to \$1 million. Halverson Decl.¶ 4. ROA 1271. Bank agents represented that the promissory notes needed to have short terms (which would mean that the entire balance would become due at the end of six or other definite number of months unless the term of the loan was extended), but that the loan was in fact a long term loan that the company could treat as a reliable long-term line of credit financing. Halverson Decl.¶ 4. ROA

1271. The bank promised that it would renew the loan continually so long as Systems West remained current on the periodic minimum payments as those payments became due. Halverson Decl. 4. ROA 1271.

The bank now claims that the term of the loan expired July 15, 2008 by the terms of the last modification agreement in June 2008 even though the parties did not mutually agree in writing that the entire balance must be paid off and even though Systems West had never missed a monthly payment.

The bank sued Systems West and Halverson alleged breach of contract and breach of the guaranty. The bank moved for summary judgment on issues that it hoped could be decided from within the four corners of what the bank called the parties' "straightforward" written agreements. The summary judgment motion ignored all of defendants' counterclaims and defenses, including claims and defenses that the bank had breached its contract with defendants, that the bank had breached the implied covenant of good faith and fair dealing, that the bank had committed the tort of negligent misrepresentation, and that the bank was estopped to assert breach under the circumstances.

The written agreements between Systems West and the bank included the following letter setting out the basic structure of the loan, the overarching Business Loan Agreement, the initial promissory note, and some 18 renewal or extension agreements

that had a bearing on the pivotal issue in the case -- namely, when and under what conditions the entire loan balance must be repaid:

1. Letter dated January 9, 2001 from KeyBank (Walker) to Systems West (Halverson). ROA 1278. This document states that the maturity date was July 31, 2001, but that the maturity date would be "annually from that point forward."

2. Promissory Note dated January 10, 2001. ROA 119. This note provides that the maturity date would be July 31, 2001 and that "Borrower will pay this loan in one payment of all outstanding principal plus all accrued interest on July 31, 2001."

3. Business Loan Agreement dated January 10, 2001. ROA 122. This agreement provides: "Borrower understands and agrees that: (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement, and (B) all such Loans shall be and remain subject to the terms and conditions of this Agreement." (Page 1, 1st paragraph.) The Business Loan Agreement further provides: "**TERM.** This Agreement shall be effective as of January 10, 2001, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until such time as the parties may agree in writing to terminate this Agreement." (Page 1, 2d paragraph.) (This Business Loan Agreement also obliged KeyBank to make further advances under certain

conditions, but advances were not an issue in this action. The primary issue was when and under what conditions advances previously made must be paid off.)

4. Eighteen "Modification and/or Change in Terms Agreements" dated between July 31, 2001 and June 27, 2008. ROA 138-161. These agreements extended the maturity dates of the promissory notes. Some of these agreements expressly stated that they were subject to "all other provisions" of the Loan Documents, including the Business Loan Agreement discussed above, which "shall remain in full force and effect." E.g., Modification and/or Extension Agreement dated July 31, 2001. ROA 138.

Before, during and after the time the Loan Documents were signed, Systems West informed the bank that the cash flow of Systems West would not support a million dollar line of credit that needed to be paid in full with short notice every few months. Halverson Decl. ¶ 4. ROA 1271. Although the company was expanding and needed cash, Systems West explained to the bank salesmen in this initial meeting, and in several other meetings during the time that the bank was lending funds to Systems West, that the loan would not work, and that the principals would not guaranty the loan, if the bank could refuse to extend the loan and could require the immediate payment of the entire loan balance even if Systems West were timely and fully making the required periodic interest payments. Bank representatives repeatedly promised that KeyBank would not call the loan, or refuse to extend the loan, or require immediate repayment of the entire principal amount of the loan, so long as Systems West made the required periodic

payments. Systems West relied upon these promises in entering into the loan agreements and in continuing to borrow from the bank, and would not have entered into the agreements or continued with the line of credit without these promises. Halverson Decl. ¶ 4, ROA 1272.

The primary document creating and defining the duties and rights of the parties reassured Systems West that the bank could not demand immediate full repayment of the entire loan without Systems West's consent. The Business Loan Agreement provided: "**TERM.** This Agreement shall be effective as of January 10, 2001, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until such time as the parties may agree in writing to terminate this Agreement."

The Loan Documents were all drafted and prepared by KeyBank. (See Halverson Decl. ¶ 8. ROA 1272.

Halverson signed the Guaranty in reliance upon KeyBank's repeated representations that the line of credit would be continually renewed and extended, until the loan was paid in full, as long as Systems West made its periodic payments under the Note when and as due, and upon the provision of the Business Loan Agreement that prevented termination of the loan until Systems West had paid the loan off or agreed in writing that the loan could be terminated. Halverson Decl. ¶ 11. ROA 1272. Over the

course of Systems West's seven year relationship with KeyBank, KeyBank in fact repeatedly renewed and extended the loan. Halverson Decl. ¶ 13 ROA 1272.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING COUNTERCLAIMS AND DEFENSES THAT WERE NOT INCLUDED IN THE BANK'S MOTION FOR SUMMARY JUDGMENT.

Perhaps because the bank thought that defendants' counterclaims and defenses raised issues that clearly could not be dealt with on summary judgment, given the genuine factual issues that discovery in the case had raised, KeyBank's motion ignored all of defendants' counterclaims and defenses. The defendants assumed that the Court would resolve the issues that the bank raised in its summary judgment motion, and that the resolution of those matters would have whatever impact the court's ruling might have upon the trial of the remaining issues not addressed by summary judgment in accordance with Utah R. Civ. P. 56(d). To defendants' surprise, the district court dismissed the entire action, including all counterclaims and defenses, without considering or analyzing any of the defenses. The only counterclaim that the court addressed was the counterclaim for breach of the implied covenant of good faith and fair dealing.

But the ignored counterclaims and defenses were material and would have prevented liability on the bank's claims. For example, defendants had counterclaimed that the bank had committed the tort of negligent representation and had asserted defenses, including that the bank's claims were barred by promissory and equitable

estoppel. In response, defendants pointed out that the bank's summary judgment motion did not address these claims or defenses. Even though KeyBank had not addressed any counterclaims in its motion, the Court, in the Amended Brief Statement of Ground for Summary Judgment ¶ 7 (ROA 1531) drafted by KeyBank's counsel dismissed all counterclaims with this sweeping statement: "Defendants' counterclaims are barred because they seek to impose duties and obligations that are inconsistent with the express terms of the Loan Documents." The district court did not even mention in its ruling, let alone consider or adjudicate, any of defendants' defenses.

Rule 56(a) provides that a "party seeking to recover upon a claim ... may ... move for summary judgment upon all or any part thereof." Rule 56 allows a party to move for summary judgment on *less* than all claims, and Rule 56(d) authorizes the district court to adjudicate *less* than all the claims addressed by the motion. But nothing in Rule 56 allows the district court to adjudicate *more* than the claims and defenses that are within the scope of movant's motion.

Summary judgment is "a drastic remedy, requiring strict compliance with the rule authorizing it. *Timm v. Dewsnap*, 211 851 P.2d 1178, 1181 (Utah 1993). The moving party determines the scope of a summary judgment motion, and may move on some claims and defenses while ignoring others. *Id.* Only those claims, issues and defenses actually or implicitly raised by the motion are deemed resolved by the motion. *Id.* Here, defendants raised the counterclaim of breach of implied covenant of good faith and fair

dealing, and agree that this claim may be deemed included in the summary judgment motion (though, as discussed below, defendants believe that the district court erred in dismissing this counterclaim). No other claims, however, were expressly or implicitly raised by the summary judgment motion, and the district court's categorical ruling dismissing counterclaims and defenses not raised should be reversed. *Id.* (holding that claims actually or implicitly resolved were properly included in a summary judgment, but that claims and issues not actually or implicitly resolved were not properly adjudicated).

II. BECAUSE THE WRITTEN AGREEMENTS EITHER SUPPORTED SYSTEMS WEST'S POSITION OR WERE AMBIGUOUS, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE BANK.

The district court found that the written agreements between the parties were fully integrated, unambiguous and supportive of the bank's position. The defendants agree that the written agreements were integrated in the sense that they prevented parol evidence unless they were ambiguous, but not in the sense that the integration clauses in any one of the three agreements prevented consideration of the other two agreements.

Each of the three written contracts or series of contracts -- the January 10, 2001 Business Loan Agreement (ROA 122), the January 10, 2001 Promissory Note (ROA 119), and the series of Modification and/or Extension Agreements (ROA 138-165) contained integration clauses. The integration clauses make inadmissible parol evidence unless the agreements are ambiguous. *E.g., City of Grantsville v. Redevelopment Agency*

of *Toole City*, 2010 UT 38 (Utah 2010). That is, even if integrated, parol evidence may be considered to determine the intent of the parties and resolve the ambiguity. *Id.*

Defendants believe that, taken together, the written agreements unambiguously prohibited the bank from terminating the loan and demanding immediate repayment of the entire balance. The Business Loan Agreement, which unambiguously remained the pivotal contract document throughout the loan relationship, prevented terminating the loan unless Systems West had paid off the entire loan or unless the parties entered into a new written agreement mutually agreeing to end the loan. ROA 122.

At worst, the agreements were ambiguous on the question of ending the loan and requiring payoff. The bank argued that the fact that the initial promissory note and the modification and/or extension agreements had definite terms somehow trumped the Business Loan Agreement prohibition against terminating the loan without mutual written consent. Such a reading would render meaningless the prohibition of the Business Loan Agreement against terminating the loan without mutual, written consent. At very worst, the district court should have found the contract to be ambiguous on this dispositive issue of terminating the loan, and should have considered parol evidence. *City of Grantsville v. Redevelopment Agency of Toole City*, 2010 UT 38 (Utah 2010).

The only parol evidence on this question was the declaration of Systems West's CEO that the agreement was that the loan could not be terminated and called so long as Systems West remained current on the monthly payments. Halverson Decl. ROA 1271.

The district court should therefore have credited the only parol evidence presented, and dismissed the bank's claims, or found that a genuine issue of material fact existed, requiring trial. The district court's error was material and should be reversed.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PAROL EVIDENCE RULE BARS EVIDENCE HERE AND THAT THE PAROL EVIDENCE RULE JUSTIFIES THE DISMISSAL OF ALL OF DEFENDANTS' COUNTERCLAIMS AND DEFENSES.

The only nod that KeyBank gave in its summary judgment motion to defendants' counterclaims (other than the implied covenant of good faith and fair dealing, which defendants raised) and defenses was the argument that the parol evidence rule bars all such counterclaims and defenses.

As discussed above, the district court should have found the written agreements to be unambiguously in defendants' favor, or should have found the contracts to be ambiguous and considered parol evidence.

KeyBank argued that *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326 (Utah 2008) holds that parol evidence is not admissible to vary or contradict the terms of an integrated agreement. This misreads *Tangren*. Integration does not destroy the rule that, even if integrated, an ambiguous contract allows parol evidence. *City of Grantsville v. Redevelopment Agency of Toole City*, 2010 UT 38 (Utah 2010).

In addition, it was error to apply the parol evidence rule to prevent the claims of breach of implied covenant of good faith and fair dealing and the tort claim of negligent misrepresentation.

IV. THE DISTRICT COURT ERRED IN DISMISSING THE COUNTERCLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The district court should not have dismissed defendants' counterclaim for breach of the covenant of good faith and fair dealing.

In Utah, "parallel obligations to perform the contract in good faith... inhere in every contractual relationship." *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996). The general rule that contracting parties must act in good faith and deal fairly also applies to agreements between borrowers and lenders. *In re Fordham*, 130 B.R. 632, 643 (Bky. D. Mass. 1991) (stating that "the holder of a note or security interest must act in good faith in the enforcement of his rights"). Moreover, Utah law states that banks not only have a duty to act in good faith, but that they have a duty to act with "honesty in fact in the conduct or transaction concerned." Utah Code Ann. § 70A-4-103(1) and § 70A-3-103(d). Since Keybank failed to act in good faith, or "honesty in fact," in enforcing the agreements, summary judgment was improper.

Under the covenant of good faith and fair dealing, "each party impliedly promises that he will not intentionally or purposefully do anything which will destroy or injure the other party's right to receive the fruits of the contract." *St. Benedict's Development Co., v. St. Benedict's Hospital*, 811 P.2d 194, 199 (Utah 1991). In order "[t]o comply with this obligation... a party's actions must be consistent with the agreed upon purpose and the justified expectations of the other party." *Id.* at 200. In order to determine the agreed

upon purpose and expectations of the parties, the Court must look to the “contract language *and* the course of dealings between and conduct of the parties.” *Id.* at 200 (emphasis in the original).

Keybank argues that the express language of the Loan Documents indicate that there were no oral agreements or promises from Keybank to the defendants to renew the Note. However, the course of dealings and conduct of the parties show otherwise. At the time that the Loan Documents were initially executed, Keybank representatives went to Systems West’s offices and solicited Systems West to open a line of credit with Keybank. Halverson Decl. 3. ROA 1271. Keybank also represented to Systems West and Ms. Halverson that if they opened a line a credit with them, Keybank would continually renew the Note and extend the maturity date so long as Systems West made its periodic payments under the Note. Halverson Decl. 4. ROA 1271. In fact, over the course of the parties’ seven year relationship, Keybank renewed and extended the Note eighteen (18) times. ROA 138-161.

It is clear from the parties’ course of dealing and conduct that Keybank in fact promised to continually renew the Note. More importantly, the defendants’ “justifiable expectation” was that Keybank would continue to renew the Note. Keybank breached the covenant of good faith and fair dealing, and denied the defendants of the “fruits of the contract” by failing to renew the Note and unilaterally deciding to call the loan due.

Therefore, the Court should reverse the dismissal of the counterclaim for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

Defendants/appellants Systems West Computer Resources and Nancy Halverson respectfully request that this Court vacate the summary judgment and order the district court to reinstate defendants' defenses and counterclaims (except the seventh counterclaim, defamation, which defendants dismissed). Defendants further request that this Court reverse the district court's ruling on plaintiffs' claim, and either dismiss the claims if this Court determines that the written agreements unambiguously prevent the termination of the loan in the absence of a mutual written agreement of termination, or ordering that the agreements are ambiguous and that parol evidence may and shall be considered to determine the intent of the parties.

ISOM LAW FIRM

David K. Isom

– and –

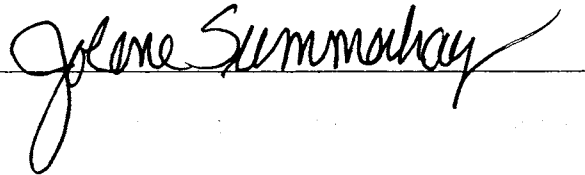
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NANCY H. HALVERSON

CERTIFICATE OF SERVICE

I hereby certify that on the 22d July, 2010, I caused two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following identified person by mailing a copy thereof, via first-class United States mail, postage prepaid, addressed as follows:

Gerald H. Suniville
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A handwritten signature in cursive script, reading "Jolene Summichay", is written over a horizontal line.

ADDENDUM

FILED DISTRICT COURT
Third Judicial District

MAR 30 2010

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY [Signature] Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

vs.

SYSTEMS WEST COMPUTER
RESOURCES, INC. and NANCY H.
HALVERSON,

Defendants.

SYSTEMS WEST COMPUTER
RESOURCES, INC. and NANCY H.
HALVERSON,

Counterclaim Plaintiffs,

vs.

KEYBANK NATIONAL ASSOCIATION,

Counterclaim Defendant.

**AMENDED BRIEF STATEMENT OF
GROUNDS
FOR GRANTING
SUMMARY JUDGMENT**

Case No. 080921404

Judge Paul G. Maughan

Pursuant to the Court's Memorandum Decision dated November 19, 2009, and as more fully set forth in Plaintiff KeyBank's Memoranda in Support of its Renewed Motion for Summary Judgment, the Court makes the following brief statement of the grounds for its decision to grant summary judgment in favor of KeyBank:

BRIEF STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On January 10, 2001, Defendant Systems West Computer Resources, Inc. ("Systems West") obtained a revolving line of credit loan from KeyBank, for which it executed a Promissory Note (the "Note"), together with a Business Loan Agreement, a Commercial Security Agreement, and a Notice of Final Agreement (collectively the "Loan Documents"), in favor of KeyBank, in the principal sum of \$1,000,000.00. All of the Loan Documents are fully integrated agreements.
2. Also on January 10, 2001, Defendant Nancy H. Halverson ("Halverson") executed a Commercial Guaranty in favor of KeyBank with respect to the Note and the obligations of Systems West under the Loan Documents.
3. After an initial term of six months, the term of the Note was successively modified and extended until the Note came due in full on July 15, 2008.
4. Systems West defaulted in its payment obligations under the Note, by failing to repay the loan as due and as demanded, and failed to cure the default.
5. Halverson likewise defaulted in her obligations under the Commercial Guaranty, and, despite demand, failed to cure the default.

6. The current amount owing to KeyBank under the Note and accompanying loan documents, as of September 29, 2009, is in the principal sum of \$978,371.98, plus accrued interest in the sum of \$77,855.30, together with continuing interest at a per diem rate of \$176.65, late charges, costs and reasonable attorneys' fees incurred in pursuing this action and collecting the amounts due.

7. The Court heretofore has entered Judgment on December 8, 2009, against Defendants Systems West and Halverson, jointly and severally, in the principal sum of \$978,371.98, plus interest in the sum of \$77,855.30, attorneys' fees in the amount of \$100,061.00, and costs in the amount of \$4,622.13, for a total judgment of \$1,160,910.41.

BRIEF STATEMENT OF LEGAL GROUNDS FOR GRANTING SUMMARY

JUDGMENT

A. SYSTEMS WEST BREACHED THE PROMISSORY NOTE AND ACCOMPANYING LOAN DOCUMENTS.

1. The elements that a plaintiff must show to recover in a case for breach of contract are: "(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." Bair v. Axiom Design, L.L.C., 10 P.3d 338, 340 (Utah 2000). In this case, the "contract terms are complete, clear, and unambiguous," and thus may be "interpreted by the judge on a motion for summary judgment." Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const. Co., 731 P.2d 483, 488 (Utah 1986).

2. Systems West breached its contractual obligations to KeyBank under the Note and accompanying Loan Documents, by, among other things, failing and refusing to pay the outstanding amounts due and owing at the maturity date of the Note.

B. HALVERSON BREACHED HER COMMERCIAL GUARANTY.

3. Halverson likewise breached her contractual obligations to KeyBank under the Commercial Guaranty, by, among other things, failing and refusing to pay the outstanding amounts due and owing at the maturity date of the Note.

C. DEFENDANTS' COUNTERCLAIMS ARE BARRED UNDER THE PAROL EVIDENCE RULE.

4. "[I]f a contract is integrated, parol evidence is admissible only to clarify ambiguous terms; it is 'not admissible to vary or contradict the clear and unambiguous terms of the contract.'" Tangren Family Trust v. Tangren, 182 P.3d 326, 330 (Utah 2008); see also Park v. Stanford, 642 Utah Adv. Rep. 22 (Utah Ct. App. 2009). "[A]n integrated agreement is 'a writing or writings constituting a final expression of one or more terms of an agreement.'" Daines v. Vincent, 190 P.3d 1269, 1275 (Utah 2008).

5. The Loan Documents entered into by and between KeyBank, as lender, Systems West, as borrower, and Halverson, as guarantor, are all clear, unambiguous, and fully integrated agreements, and therefore the introduction or consideration of parol evidence to "vary or add" to the terms of the Loan Documents is impermissible. See Tangren at 330–31.

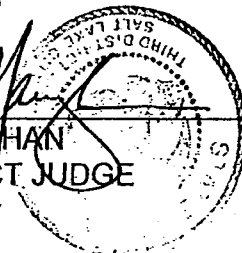
6. It is similarly impermissible to use the covenant of good faith and fair dealing to vary or contradict the express terms of the Loan Documents. See, e.g., Oakwood Vill., LLC v. Alberstons, Inc., 104 P.3d 1226, 1240 (Utah 2004). "First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante." Id. (citing Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991)). "Second, this covenant cannot create rights and duties inconsistent with express contractual terms." Id. (citing Brehany, 812 P.2d at 55; Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497, 505 (Utah 1980)). "Third, this covenant cannot compel a contractual party to exercise a contractual right to its own detriment for the purpose of benefitting another party to the contract." Id. (citing Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs., 889 P.2d 445, 457 n.13 (Utah 1994)). Finally, the Court must "not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract." Id. (citing Dalton v. Jerico Constr. Co., 642 P.2d 748, 750 (Utah 1982)).

7. Defendants' counterclaims are barred because they seek to impose duties and obligations that are inconsistent with the express terms of the Loan Documents.

DATED this 29 day of February, 2010.

BY THE COURT


PAUL G. MAUGHAN
THIRD DISTRICT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2010, I caused a true and correct copy of the foregoing **AMENDED BRIEF STATEMENT OF GROUNDS FOR GRANTING SUMMARY JUDGMENT** to be served on the following by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Matthew M. Boley
C. Ryan Christensen
PARSONS KINGHORN HARRIS
111 East Broadway, 11th Floor
Salt Lake City, UT 84111

David K. Isom
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299 South Main Street, Suite 1300
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "D. K. Isom", written over a horizontal line.

Prepared and Submitted by:
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FILED DISTRICT COURT
Third Judicial District

MAR 30 2010

SALT LAKE COUNTY

Deputy Clerk

IMAGED

Attorneys for KeyBank National Association, Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KEYBANK NATIONAL ASSOCIATION,

Plaintiff,

vs.

SYSTEMS WEST COMPUTER
RESOURCES, INC. and NANCY H.
HALVERSON,

Defendants.

SYSTEMS WEST COMPUTER
RESOURCES, INC. and NANCY H.
HALVERSON,

Counterclaim Plaintiffs,

vs.

KEYBANK NATIONAL ASSOCIATION,

Counterclaim Defendant.

AMENDED ORDER AND JUDGMENT

Case No. 080921404

Judge Paul G. Maughan

Amended Order and Judgment @J



JD31298202

pages: 4

080921404 SYSTEMS WEST COMPUTER RESOURCES, INC. AND NANCY H. HALVERSON

This matter came before the Court for hearing on November 18, 2009, in connection with the Renewed Motion for Summary Judgment against Defendants Systems West Computer Resources, Inc. ("Systems West") and Nancy H. Halverson ("Halverson") submitted by Plaintiff KeyBank National Association ("KeyBank") on October 8, 2009. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authority, and counsel's oral arguments. The Court, having reviewed and considered all the submissions of the parties, having entered its Memorandum Decision dated November 19, 2009 and its Brief Statement of Grounds for Granting Summary Judgment, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. KeyBank's Renewed Motion for Summary Judgment dated October 8, 2009, be, and it hereby is, GRANTED in its entirety.

2. Defendants' Counterclaims against KeyBank be, and they hereby are, DENIED and DISMISSED in their entirety.

3. JUDGMENT be, and it hereby is, GRANTED against Defendants Systems West Computer Resources, Inc. and Nancy H. Halverson, jointly and severally, in the principal sum of \$978,371.98, together with interest as of September 29, 2009, in the sum of \$77,855.30, together with continuing interest at a per diem rate of \$176.65, from and after September 29, 2009, costs in the amount of \$4,622.13, and reasonable attorney's fees, in the amount of \$100,061.00.

4. Defendant Systems West be, and it HEREBY is, ORDERED and DIRECTED to immediately assemble, turnover and deliver to KeyBank all of KeyBank's collateral and records relating to the same, for disposition of such collateral.

DATED this 29 ^{March 2010} day of December, 2009.

BY THE COURT


PAUL G. MAUGHAN
THIRD DISTRICT 10082

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2009, I caused a true and correct copy of the foregoing **AMENDED ORDER AND JUDGMENT** to be served on the following by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Matthew M. Boley
C. Ryan Christensen
PARSONS KINGHORN HARRIS
111 East Broadway, 11th Floor
Salt Lake City, UT 84111

David K. Issom
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299 South Main Street, Suite 1300
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'David K. Issom', written over a horizontal line.