

2009

Kang S. Park and Marsha Park v. Gary B. Stanford : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Park v. Stanford*, No. 20091082.00 (Utah Supreme Court, 2009).
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IN THE UTAH SUPREME COURT

KANG S. PARK and MARSHA PARK,

Plaintiffs/Appellees,

vs.

GARY B. STANFORD,

Defendant/Appellant.

APPELLEES' BRIEF

Supreme Court Case No. 20091082 SC

Court of Appeals Case No. 20080574-CA

District Court Civil Case No. 050900073

Appeal from the Utah Court of Appeals, 2009 UT App 307

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FILED
UTAH APPELLATE COURTS

APR 29 2010

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-3-102(3)(a). This is an appeal from the Utah Court of Appeals.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is an action to determine the extent of Gary B. Stanford's ("Stanford") liability under his personal guarantee of a Trust Deed Note in favor of the Parks.

II. THE COURSE OF PROCEEDINGS.

This action was filed by Kang S. Park and Marsha Park ("Parks") to recover on a written guarantee of a July 1995 Trust Deed Note (R. 104, the "Note") against Dr. Gary Stanford. (R. 1-12) The guarantee was included in the Note and was for a fixed amount, \$500,000, while the Note itself was in the amount of \$645,683.27. (R. 104) Parks moved for summary judgment asking the trial court to determine that none of the payments they had received on the Note applied to Stanford's guarantee of that same Note. (R. 80-130) The trial court determined that none of the payments received by Parks on the Note reduced Stanford's \$500,000 personal guarantee. (R. 391, 781, p. 13, 14.) (The trial court also stated that because it could not yet determine, as a matter of law, that there would not be a deficiency judgment against Stanford and in favor of Security Mutual on their underlying first trust deed, that it could not yet fix the amount of Stanford's liability under his guarantee of the second trust deed obligation then owed to Parks. (R. 392. 781, p. 13.))

In a second motion for summary judgment(R. 402), the Parks asked the trial court to fix the amount of Stanford's liability on the basis that the value of the property was such that the trial court could determine as a matter of law that there would be no deficiency judgment against Stanford in favor of the holder of the first trust deed, Security Mutual Life Insurance. The trial court denied Parks' motion. (R. 781, p. 29, l. 12-20.)

In December 2007, as a result of a bankruptcy filed by Parks' borrower, Snowmass, LLC (United States Bankruptcy Court, District of Utah, Case No. 07-23458 GEC, petition attached to Appellees' brief in Court of Appeals as Exhibit 4) and a notice from Security Mutual (Exhibit 5, Appellees' brief in Court of Appeals), the Bank of Utah, as custodian of the Kang S. Park IRA, purchased the first trust deed note and first trust deed interest of Security Mutual Life in the property, and waived its right to pursue a deficiency action against Stanford on the first trust deed. (Affidavit of Kang S. Park, R. 616.) Thereafter, the Parks filed the final motion for summary judgment which led to the determination of the amount owed by Stanford pursuant to his guarantee of the second Trust Deed Note. (R. 598.)

After judgment was entered in June, 2008 (R. 759), the interest of Security Mutual which had been purchased by the Bank of Utah as Custodian for the Kang S. Park IRA, was foreclosed at a trustee's sale of the property. (Trustee's Deed, Exhibit 1 to Appellees' brief in Court of Appeals.) No deficiency action has been pursued based on the now foreclosed first trust deed, consistent with paragraph 4 of the Judgment (R. 761) which provides in part as follows:

4. IT IS FURTHER ORDERED that the plaintiffs endorse on the face of the original Note given by Snowmass, LLC to Security Mutual Life Insurance Company the following: “The right to obtain a deficiency judgment based on this Note has been waived pursuant to the judgment entered in Civil No. 050900073 in the Third District Court, Salt Lake City, State of Utah in the matter entitled *Kang S. Park and Marsha Park v. Gary B. Stanford*.” The endorsement shall be placed on the Note as reflected in Exhibit “A” attached to this judgment.

Stanford appealed the trial courts rulings, and the Utah Court of Appeals affirmed the trial court’s ruling, determining that Stanford was liable to the Parks as determined by the trial court. *Park v. Stanford*, 2009 UT App 307.

III. STATEMENT OF FACTS

This matter was resolved in the trial court on summary judgment, which court determined there were no genuine issues of material fact. (R. 759.) The Court of Appeals agreed that the Trust Deed Note (which includes Stanford’s personal guaranty) was fully integrated, and that there were no material issues of fact. *Park v. Stanford*, 2009 UT App 307, ¶ 9. Stanford’s statement of facts (Appellant’s Opening Brief, pp. 5-8) fails to include a number of undisputed material facts critical to this Court’s review of the Court of Appeal’s decision, including the following:

1. The July 1995 Trust Deed Note (R. 104) was executed by Stanford and Buckway as members of Snowmass, LC, and in their individual capacity as guarantors. The Note which was for \$645,683.27, provides in part as follows:

By his signature, individually, on this Note, Gary B. Stanford agrees to unconditionally guarantee the payment of this Note, but in no event

shall Gary B. Stanford's liability (**excluding portions thereof attributable to interests and costs**) when added to any deficiency judgment which may be entered against him by virtue of his guarantee of the Security Mutual Life Insurance Co. Note (excluding interest and costs), exceed the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000). (R. 106, 2nd para., emphasis added.)

2. In 1997, an Amendment was made to the Note. In that amendment, Stanford, as the managing member of Snowmass, and personally, agreed that in the event of any default under the Note, Parks were to give notice of the default to "...Gary B. Stanford at the following address: Gary B. Stanford, M.D., 1250 East 3900 South, Ste. 310, Salt Lake City, Utah 84124." (See the Amendment, R. 330, ¶ 5.)

3. In 1998, Richard Buckway and Stanford terminated their business relationship as it related to Snowmass. Stanford became the sole member of Snowmass, LLC at that time. (Stanford affidavit, R. 201, at ¶ 40.) For many years, Stanford was the only member of Snowmass, LLC.

4. Not one of the letters that were sent by Parks to Gary Stanford make any reference to his personal guaranty. (R. 241-261) The letters were addressed to the then current managers of Snowmass requesting that payments be made. Stanford's spin of those letters in paragraphs 7, 8, 9, and 10 of his Statement of Facts has no support in the record.

5. There is no evidence that Stanford ever advised Parks at any time that any payments being made to the Parks were being made "based on Dr. Stanford's personal guarantee." The best that Stanford could say in his affidavit, presumably drafted with the

assistance of counsel, was that he “understood and intended” that the payments would apply to his guaranty. (*See* Stanford affidavit, R. 205, ¶ 33.)

6. None of the checks contained in the record make any reference to Dr. Stanford’s personal guaranty. (*See* R. 270-276.)

7. Of the six personal checks included in the record (R. 270-273), four make reference to the property, and the others make reference to the “note”. None make any reference to any guaranty.

8. There is no evidence that Stanford ever advised Parks that any payment came from his personal funds, as opposed to funds of Snowmass. Stanford does not even suggest how Parks could have determined at the time they received payments what the source of funds might have been, or why that would be significant.

9. When this action was commenced, \$569,974.80 in principal (plus late fees and interest) was still owed on the Note. (R. 416, 628.)

SUMMARY OF ARGUMENTS

Stanford fails to show any error committed by the Court of Appeals when it affirmed the district court’s grant of summary judgment in favor of Parks. Specifically, Stanford fails to show how or why the Court of Appeals erred when it determined that the general rule regarding payment applies to this case, and that, given the undisputed facts, this rule entitles Parks to summary judgment.

In addition, Stanford's argument that adoption of this general rule will somehow curb or chill lending practices in Utah is unsubstantiated and incorrect.

Last, Stanford is unable to support his assertion that the Court of Appeals erred in affirming summary judgment because genuine issues of fact were unresolved. There are no material or relevant facts in dispute in this case.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

A. Stanford Fails to Show the Court of Appeals Erred When it Applied Generally Accepted Law and Distinguished the Case Law Cited by Stanford.

Stanford appeals only one portion of the Court of Appeals' opinion, specifically, Section I.C titled "Credit for Past Payments." *Park v. Stanford*, 2009 UT App 307, ¶¶ 12-14. Stanford argues that the Court of Appeals erred when it applied the general rule relating to payment applications, rather than Stanford's proposed rule based on an inapposite 1929 New Jersey decision. Stanford fails to show any error committed by the Court of Appeals.

Stanford argued to the Court of Appeals that the district court erred when it concluded that Stanford was not entitled to credit toward his personal guaranty for any of the payments received by Parks. Stanford's argument was based solely on the allegation that, "[w]hen [he] made personal payments to the Parks, he did so believing that the Parks would credit those payments toward[] his [personal] guarant[y]." Stanford's Opening Brief in the Court of Appeals, ¶ 28, p. 14; *see also* 2009 UT App. 307, ¶ 12. The Court of Appeals stated

that, “[w]hether Stanford is entitled to credit for these payments against his personal guaranty, based on his unexpressed belief that these payments would be so credited, presents an issue of first impression in Utah.” 2009 UT App. 307, ¶ 12.

In order to analyze this question, the Court of Appeals applied the general rule relating to payment in the case law cited by Parks, rather than the unique and distinguishable case law cited by Stanford. Specifically, the Court of Appeals determined:

Stanford cites *Monmouth Plumbing Supply Co. v. McDonald*, 147 A. 627 (N.J. 1929), arguing the rule in Utah should be that "when a guarantor makes a payment directly to the lender, that payment is credited against the guarantor's guaranty limit." However, as the Parks note in their brief, no court in any jurisdiction has cited *Monmouth* for any purpose, let alone for the rule that Stanford suggests. Alternatively, the Parks cite *Lee v. Yano*, 997 P.2d 68 (Haw. Ct. App. 2000), and argue that the rule stated therein regarding application of payments from a guarantor to a lender should be adopted in Utah. In *Lee*, the Hawaii Court of Appeals cited secondary sources for the proposition that,

"[a]s a general rule, a third person who is secondarily liable on a debt, such as a guarantor, surety, or indorser, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons."

Id. at 76 (quoting 60 Am. Jur. 2d *Payment* § 88 (2003)). Although *Lee* involved a slightly different factual scenario, we believe that this statement of the law is persuasive and should be adopted as Utah law. Exceptions to this rule may exist, as acknowledged by the Parks, where there is a differing contractual provision or an agreement to accept payment from a guarantor upon the express condition that it be applied toward

the guaranty amount, notwithstanding the principal debtor's continued vitality. Thus, because Stanford, as guarantor, cannot unilaterally control the way in which these payments were treated by the Parks, the relevant inquiry is whether he and the Parks had an agreement regarding acceptance of these payments and their specific application.

Id., ¶ 13. Because it was undisputed that no such agreement existed, the Court of Appeals affirmed the district court's ruling. *Id.*, ¶ 14. Indeed, there is not any evidence to confirm that Stanford ever asked that any payments be credited against his guaranty. Stanford fails to show that this analysis was erroneous.

The court in *Lee v. Yano* set forth the general rule regarding application of payments: “unless otherwise directed by the debtor, the creditor may apply the proceeds of a general payment made by the debtor to the obligation or obligations not endorsed or otherwise guaranteed by third parties.” *Lee v. Yano*, 997 P.2d 68, 75-76 (Haw. Ct. App. 2000) (quoting *Mid-Continent Supply Co. v. Atkins & Potter Drilling Corp.*, 229 F.2d 68, 69 (10th Cir.1956)). This general principal is also set forth in American Jurisprudence:

As a general rule, a third person who is secondarily liable on a debt, such as a guarantor...cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons.

60 Am.Jur. 2d, *Payment* §88. This principle has been extensively relied upon by courts throughout the country. *See Gayer v. Gayer*, 952 P.2d 1030, 1033-34 (Or. 1998) (“in the absence of directions from the debtor, the creditor has the right to apply a payment upon the secured or unsecured account, as he sees fit”); *Mid-Continent Supply Co. v. Atkins & Potter*

Drilling Corp., 229 F.2d 68, 69 (10th Cir. 1956) (“In the absence of a controlling statute providing otherwise, it is the general rule that where a creditor holds different obligations of a debtor...unless otherwise directed by the debtor, the creditor may apply the proceeds of a general payment made by the debtor to the obligation or obligations not endorsed or otherwise guaranteed by the third parties”); *U.S. v. Thompson & Georgeson, Inc.*, 346 F.2d 865, 870 (9th Cir. 1965) (in absence of manifested intention regarding payments, “the payment is applied in the way most favorable to the creditor”); *Valley Nat. Bank of Phoenix v. Shumway*, 163 P.2d 676, 679 (Ariz. 1945) (where debtor “gives no direction at the time of payment, the creditor has the right to make the application as he sees fit”); *Industrial Invest. Corp. v. Rocca*, 596 P.2d 100, 105 (Idaho 1979) (“As a general rule, in the absence of a contrary agreement, where a debtor owes several debts to a creditor, only some of which are guaranteed, the guarantor is not entitled to control the payments and apply them to the guaranteed debts, and if payment is made without any designation by the debtor as to where it is to be applied, the creditor may apply it to either the guaranteed or nonguaranteed debts, except he cannot apply such payment to a debt which is not due to the exclusion of a guaranteed debt which is due”); *Wyandotte Coal & Lime Co. v. Wyandotte Pav. & Constr. Co.*, 154 P.1012, 1014 (Kansas 1916) (“Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor or the creditor need apply the payment in the manner most beneficial to such persons”); *Standard Accident Ins. Co. v.*

Copper Hills Motor Hotels, Inc., 424 P.2d 154, 156 (Ariz. 1967) (“Neither sureties nor guarantors have the right to control the application which either the debtor or creditor makes of the payment.”).

Under this general rule, absent some clear contractual language, a subsequent agreement, or specific instructions by the guarantor, the creditor is entitled to apply payments received in the manner most beneficial to the creditor. *See Lee v. Yano*, 997 P.2d at 75-76 (citing, et alia, *Mid-Continent Supply Co.*, 229 F.2d at 69); *Gayer*, 952 P.2d at 1033; *U.S. v. Thompson & Georgeson, Inc.*, 346 F.2d at 870; *Weston Group Inc. v. A.B. Hirschfeld Press, Inc.*, 845 P.2d 1162, 1166 (Colo. 1993) (“...when a creditor has received collateral covering the entire debt, and a personal guaranty on part of it, there is a presumption, in the absence of circumstances showing the contrary, that the personal guaranty is additional protection for the creditor. In such circumstances, the creditor may apply any proceeds to that part of the debt not covered by the personal guaranty, and thus hold the guarantor to his contract.”). Where the parties contracted to create a guarantee for a particular amount of liability, this analysis ensures that the creditor receives the “security it had bargained for.” *Southern Bank & Trust Co.*, 356 S.E.2d 410, 411 (S.C. App. 1987) (holding that proceeds from foreclosure sale were to be subtracted from the total amount owed by the debtor, “not from the contractual limit on the guaranty”); *Woodruff v. Exchange Nat’l Bank of Tampa*, 392 So.2d 285, 286 (Fla. App. 1981) (same).

Stanford does not argue that the Court of Appeals erred when it determined that there were no facts to support the existence of such an agreement, or that Stanford furnished such instructions to Parks. Instead, Stanford argues that the general rule does not apply to this case because Stanford as guarantor, rather than as debtor, made all payments at issue. See Appellant's Brief, pp. 16-17. Stanford then argues that because this is the case, the rulings in *Monmouth Plumbing Supply v. McDonald*, 147 A. 627 (N.J. 1929) and *St. Paul Fire & Marine Co. v. Dakota Electric Supply Co.*, 309 F.2d 22 (8th Cir. 1962) require reversal. This argument is flawed for a number of reasons.

First, there is no evidence of record to support the allegation that any payment made to Parks was made by Stanford as a guarantor to be applied to his guarantee. Indeed, this assertion simply begs the question, how can it be determined that any particular payment was made in his capacity as guarantor? The case law set forth above provides the answer to this question: Only when there exists an agreement or instructions to so apply a particular payment. The Court of Appeals ruled that there were no facts of record to support such an arrangement:

However, even assuming that Stanford intended that these payments be credited toward his guaranty, there is no record evidence that he and the Parks had agreed to do so. In fact, the undisputed facts of record belie such an assertion, most notably: (1) in 1997 the parties amended the 1995 Trust Deed Note so as to allow notices of default to be sent to Stanford's personal attention; (2) from 1998 on, Stanford was the sole member of Snowmass; (3) although payments were made, some allegedly with money from Stanford's personal account, the Parks had no knowledge that Stanford intended these payments

to be directed toward his personal guaranty; and (4) there was no agreement by the Parks to apply the payments to Stanford's guaranty. Consequently, we affirm the trial court's determination that Stanford is not entitled to credit toward his personal guaranty for these payments.

2009 UT App. 307, ¶ 16. Stanford provides no explanation or analysis as to why this determination is incorrect.

In addition, Stanford sets forth no reason why the Court of Appeals should have applied the holding of *Monmouth Plumbing Supply v. McDonald*, supra, or *St. Paul Fire & Marine Co. v. Dakota Electric Supply Co.*, 309 F.2d 22 (8th cir. 1962) rather than the general rule set forth above, and cannot explain why the analysis provided in those cases would have made any difference in the outcome of the Court of Appeals' determination.

As discussed by the Court of Appeals, *Monmouth* has never been favorably cited by any court in this country. 2009 UT App 307, ¶ 13. Moreover, it presents a unique set of facts not helpful in this case. In *Monmouth*, a father agreed to guarantee a line of credit for his son up to a fixed amount. Subsequently, the son utilized virtually all of the agreed amount on the line of credit, which amount was paid by his father in response to the supplier's specific demand. After the father made the payment, the son made additional purchases on the line of credit, but did not pay. The father/guarantor refused demands that he pay any additional amounts. 147 A. at 627. Creditor sued the guarantor, and the claim was dismissed. The dismissal was affirmed on the basis that guarantor's payment of the debt extinguished any future liability by the guarantor for further advances. *Id.* at 628.

Monmouth has no application here, factually or otherwise. There is no assertion here, and certainly no facts of record to show, that the amount of the loan to Snowmass was increased, as occurred in *Monmouth*. There are no facts to show (contrary to Stanford's unsupported assertion) that any demand was made upon Stanford in his capacity as a guarantor, or that he ever advised Parks that he viewed payments as being made by him personally in response to his obligation as a guarantor. In *Monmouth*, the claim by the creditor was that the guarantee was a continuing guarantee, and could continue to apply to new purchases even after the father had paid the maximum guarantee amount in response to the creditors demand. Here, the creditor (Parks) had no reason to know or believe that the payments being made were to be applied to the guarantee, because Stanford never asked or directed that they be applied to the guarantee. The *Monmouth* case is thus not only remote, but inapposite.

Similarly, Stanford fails to show why the Court of Appeals erred when it distinguished *St. Paul Fire & Marine Co. v. Dakota Elec. Supply. Co.*, supra. *St. Paul Fire* involves the Miller Act and sets forth the same general rule discussed in *Lee* and relied upon by the Court of Appeals. In that case, the court recognized the general rule ("If the debtor fails so to indicate, the payment is applied as the creditor, within a reasonable time, determines", 309 F.2d at 25), but held that the particular facts allowed for application of an *equitable exception* to the general rule, due to the particular knowledge and control of the creditor who had taken over control of the debtor through a voting trust. *Id.* at 30. Stanford made no attempt below

to show why this or any other equitable exception should apply here. Accordingly, this case does not support a conclusion that the Court of Appeals erred in some fashion.

Stanford also reargues the assertion that certain payments should have been credited to his guarantee because Appellees knew that these payments came from Stanford, and were to be so applied. See Appellant's Brief, p. 19. Stanford argued before the Court of Appeals that summary judgment was improper because, "when a lender knows the source of its payment is the guarantor, the lender must apply that payment to the guarantor's guaranteed debt." Stanford's Opening Brief in the Court of Appeals, p. 27. Even if this argument was legally sound, as previously discussed, it is without any factual support. Indeed, as recognized by the Court of Appeals (§ 14), Stanford's claim that Parks knew the source of the funds is in distinct contrast to the actual evidence of record, to wit, that Parks had no knowledge of the same; that as of 1998, Stanford was the *sole member* of Snowmass, the primary debtor (R. 207, § 40); and that the 1997 Amendment to the Trust deed required notices of default to be sent to Stanford's personal attention (R. 330). There is simply no evidence that Parks knew payments came from Stanford, as guarantor, as opposed to Stanford as a member of Snowmass, the debtor. Stanford refers in a footnote (p.14) to *Hyland Elec. Supply Co. v. Franchi Bros. Construction*, 378 F.2d 134 (CA 2 1967) and *Ash Grove Lime v. Moran Construction*, 296 N.W. 761 (Neb. 1941). In *Hyland Electric* and *Ash Grove*, the supplier knew the funds it was receiving had come from a third party surety, and had been paid on a specific project. In each case, the court determined that the creditor was

equitably obligated to apply the funds to invoices on the that project. These cases are distinguishable for an additional reason. In each case, the surety had no interest in the obligor, only in the obligation. The only reason the surety's funds would have been delivered to the creditor was because of the surety's guaranty. In this case, where Stanford had become the sole member of the obligor (Snowmass) the equities which were considered by the *Ash Grove* and *Hyland* courts have no application.

In this case, Stanford did not personally guarantee the entire debt of Snowmass, but only a portion of the debt. If Stanford "believed" that payments were to be credited against his guaranteed portion of the debt, and if it was critical to his decision to continue funding Snowmass, at a minimum he had a legal obligation to advise Parks that the payments being made were to be credited against his guarantee, and obtain their consent to this request. *See Lee v. Yano*, 997 P.2d 68, at 76; *Weston Group Inc. v. A.B. Hirschfeld Press, Inc.*, 845 P. 2d 1162, 1167 (Colo. 1993). What Stanford may have "understood or intended" should be accorded no weight in light of the undisputed fact that he never conveyed his understanding or intent to Parks. There is no evidence that Stanford ever made such a request. And even if he had, there is no evidence that Parks assented to it. Stanford never advised or requested of Parks that any of the payments being made on the Note be credited against the guaranteed portion of the debt. None of the letters from Park to Stanford make any reference to the guarantee. (R. 241-261.) Thus, contrary to Stanford's unsupported assertion that "[t]he record is replete with evidence that Parks knew that Stanford was paying them in his

guarantor capacity and not as Snowmass,” Appellant’s Brief, p. 19, there is no such evidence of record.

Accordingly, Stanford fails to set forth any reason to overturn the Court of Appeals’ decision.

B. Stanford’s Argument That the Court of Appeals Adoption and Application of the General Rule Will “Chill” Lending Practices is Unsupported and Incorrect.

Stanford offers no empirical evidence in support of his assertion that the decision of the Court of Appeals will chill lending in Utah. (Appellant’s Brief, p. 17-18). Stanford could have asked Parks to agree to apply any one or all of the payments after a certain point in time to his guaranty. There is no evidence he ever attempted to do this. This requirement is not onerous. More importantly, the request gives the lender the opportunity to consider and act on the alternatives then available to it. It is as reasonable to conclude that lenders might be deterred from making loans by a contrary ruling, i.e., that they need to examine each check to see if there are any peculiar notations on it or to determine its source. Lending institutions that receive literally thousands of payments each day simply cannot be expected to look at the checks they receive in payment of loans to see whose account it is drawn on, and then determine, without any request from the payor, how that payment ought to be applied. That would appear to be the reason for the general rule described above.

Personal guarantors exist to protect lenders. Without them, many loans would not occur. What Stanford is really asking the court to condone is his use of Snowmass as a foil.

Stanford was for many years the sole member of Snowmass. The message from the Court of Appeals to guarantors is simple: in order to have payments applied to a guarantee as opposed to the interest and principal of the loan as specified in the loan documents (See R. 104, third paragraph of the Note), there needs to be, at a minimum, notice to the lender and agreement by the lender. If a lender is left to guess how payments should be applied, at its own peril, guarantees would be rendered of little value, and any contrary rule may actually chill lending practices.

II. THERE WERE AND ARE NO GENUINE ISSUES OF MATERIAL FACT.

Stanford argues that there were genuine issues of material fact which precluded summary judgment. (Appellant's Brief, p. 18-21). This argument is ostensibly based on a) letters sent by Parks to Stanford, b) the checks used to make the payments, and c) a request that the trier of fact read Parks' mind, or that Parks be required to read Stanford's mind. The argument, however, ignores the facts and ignores the law.

In 1997, the parties amended the Note to require that notices of non-payment be addressed and sent personally to "Dr. Gary B. Stanford" at his business address. In fact, Parks complied with the Addendum, and sent the notices as required. As conceded by Stanford (Brief, p. 20), not one of these letters makes any reference to any guaranty. Similarly, not one of the checks that Stanford points to (R. 270-276) makes any reference to any guaranty. Likewise, there is no evidence that Stanford ever requested that Parks apply any payment to

his guaranty, or in any manner different from the application set forth in the Note itself. Even Dr. Stanford's ledgers (R. 263-269) do not make any reference to the guaranty.

What Stanford is really asking this Court to do is to determine that in the total absence of any request from the guarantor, that Parks were legally obligated to assume that payments on a loan were to be applied in the manner least advantageous to them, i.e., to the guaranty.

Stanford argues that the facts of the case require this Court to reverse the Court of Appeals decision under summary judgment standards. More particularly, Stanford asserts that Parks in some way knew that Stanford intended that all payments would be applied to Stanford's guaranty. Appellant's Brief, pp. 19-21. In support of this assertion, Stanford again mentions the letters described above, mentions the fact that Parks contacted him personally after default had occurred, and notes that at least one of the checks to Parks had a notation on it, "Gary Stanford".¹ *Id.*, pp. 19-20.

Before the Court of Appeals, the *only* fact asserted on this issue by Stanford was at paragraph 28 of Stanford's "Statement of Facts," Stanford's Opening Brief in the Court of Appeals, p. 14, which asserts "[w]hen [Stanford] made personal payments to [Appellees], he did so believing that [Parks] would credit those payments towards his \$500,000 guarantee." The fact that Parks' demands for payment were directed to Stanford is merely reflective of the requirements of the 1997 Amendment (R.330, ¶ 5) that demands for payment on the note be

¹ The check at R.274 is an official bank check. It does not give any information about the source of the funds and makes no reference to the guaranty.

directed to him. In fact, there was no evidence that Stanford ever advised Parks that any payments were related to his guaranty or ever requested that payments be credited to his guaranty, or that Parks ever agreed that any payments would be treated as applying to Stanford's guaranty.

Absent a genuine issue of material fact, "the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment." *Busch Corp. v. State Farm Fire & Casualty Co.*, 743 P.2d 1217, 1219 (Utah 1987). "[B]are contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment." *Massey v. Utah Power & Light*, 609 P.2d 937, 938 (Utah 1980).

There is no record evidence of an agreement by Parks to apply any payments received to Stanford's guarantee, and the record citations provided by Stanford do not support his assertion. The Court of Appeals correctly observed that Stanford's assertions were belied by the undisputed facts of record, *see* 2009 UT App 307, ¶ 14, and properly affirmed the trial court's grant of summary judgment.

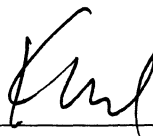
In short, there is no fact supportive of Stanford's assertion that Parks knew or agreed that any payments made to them were from Stanford's personal funds or that such payments were to be applied to his guarantee. Stanford's argument that a genuine issue of material fact existed on any point is without support in the record, and Stanford fails to set forth any reason to disturb the Court of Appeals' decision.

CONCLUSION

Parks respectfully request that this Court affirm the decision by the Court of Appeals. Stanford has set forth no error committed by the Court of Appeals, and its decision should stand.

DATED this 27 day of April, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief were mailed, postage fully prepaid, on the 29 day of April, 2010, to the following:

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