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

Utah Supreme Court

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IN THE UTAH SUPREME COURT

KANG S. PARK and MARSHA PARK

Plaintiffs/Appellees,
vs.

GARY B. STANFORD,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

20091082-SC

Court of Appeals Case No. 20080574-CA

District Court Civil Case No. 050900073

Appeal from a Judgment of the Utah Court of Appeals

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ARGUMENT

I. THE SUPREME COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION AND HOLD THAT A LENDER SHOULD GIVE CREDIT TO A GUARANTOR FOR PAYMENTS THE GUARANTOR MAKES ON A LIMITED GUARANTY

A guarantor does not need to enter into an agreement with a lender to ensure that the lender apply the guarantor's payments towards his limited personal guaranty. The Court of Appeals has adopted a rule in this State which prohibits guarantors from receiving any credit for payments they individually make to lenders pursuant to the guarantors' limited guarantees unless the lender first agrees to give the guarantor such credit. Stanford contends that this rule should be reversed and is inapplicable to cases where guarantors, not the borrowers, make payments to lenders on the limited guaranty.

The Parks defend the Court of Appeals' erroneous ruling by asserting that unless they had previously agreed to give Stanford credit toward his personal guaranty for the individual payments he made to them, the Parks were not obligated to give Stanford credit toward his limited \$500,000 guaranty for the \$750,000 payments he made. Both the Court of Appeals and the Parks are mistaken.

Stanford accepts the general rule that a third-party guarantor cannot control how a lender chooses to apply a borrower's payment unless there is a specific agreement regarding such application. See Lee v. Yano, 997 P.2d 68, 76 (Haw. Ct. App. 2000). This rule has arisen from cases where a lender has two separate loans with the same borrower only one of which is guaranteed by a third-party guarantor. See Id. The

borrower makes a single payment to the lender without specifying which loan the payment covers and the guarantor attempts to dictate to the lender that the lender apply the borrower's payment towards the loan the guarantor has guaranteed. See Id. In those cases, Stanford acknowledges that sound policy dictates that a guarantor not be allowed unilaterally to dictate how a lender applies a borrower's payment absent a previous agreement between the lender and guarantor controlling such application. However, those are not the facts of this case.

In this case, Stanford is seeking credit for payments that he, not the borrower Snowmass, made to the Parks. Accordingly, the rule that a previous agreement governing application of the guarantor's payments must exist in order to credit Stanford for his payments is inapplicable under the facts of this case. There is no need to require a prior agreement between the Parks and Stanford where Stanford is only seeking credit for his payments and not Snowmass' payments. If Stanford had demanded that the Parks give him credit towards his guaranty for Snowmass' payments, then the Court of Appeals' requirement that the Parks and Stanford have an agreement calling for such application would be appropriate. However, Stanford is not seeking credit for Snowmass' payments, and the Court of Appeals' requirement that Stanford have an agreement with the Parks to receive credit for his payments is therefore reversible error.

Monmouth Plumbing Supply Co. v. McDonald, 147 A. 627 (N.J. 1929) is the only case which the parties and the Court of Appeals cite which involves the same facts as the

instant case and which answers the question of whether a guarantor should receive credit towards his limited guaranty for payments the guarantor makes to the lender. The Court of Appeals should have followed Monmouth's holding and adopted the general rule that a guarantor should always receive credit for his payments to a lender pursuant to a limited guaranty. Pursuant to Monmouth, Stanford more than extinguished his \$500,000 guaranty by paying the Parks \$750,000.

Moreover, courts have also held that when a guarantor makes a payment to a lender, the lender is obligated to apply the guarantor's payment to the guaranteed debt. See Wilson Leasing Co. v. Seaway Pharmacal Corp., 220 N.W.2d 83 (Mich. Ct. App. 1974)(holding that the portion of payment, which guarantors made pursuant to their guarantees of two equipment leases, could not be applied to leases which were not guaranteed.) And courts have expressly rejected the requirement that a guarantor must request, and a lender subsequently agree, that the guarantor's payment be credited towards his limited guaranty.

In Coxe Bros. & Co. v. Milbrath, 92 N.W. 560 (Wis. 1902), the Wisconsin Supreme Court held that it was immaterial whether the guarantor instructed the lender to apply his payment to the guaranty, or whether the lender and guarantor agreed, at the time of making the guaranty, that all payments made on the borrower's account should be applied to the guaranty. Likewise in this case, it is immaterial whether Stanford and the Parks had an agreement as to how the Parks would apply Stanford's payments. The only

material facts are: (1) whether Stanford, as opposed to Snowmass, made payments to the Parks and, (2) what were the amounts of Stanford's payments. In this case, the undisputed facts are that Stanford paid the Parks approximately \$750,000 and the Parks should have therefore given Stanford credit for those payments.

The Parks cite a list of cases in an attempt to support the Court of Appeals' erroneous decision. Each case, however, involves a guarantor attempting to control a lender's application of a borrower's payment. See Appellees' Op. Br. at pp. 8-10. The Parks cannot cite a single case where a court has denied a guarantor credit for a payment he himself makes to a lender. Likewise, the Parks have not cited a single case, nor can they, where a court has required a prior agreement between the guarantor and lender before the lender gave the guarantor credit for the guarantor's direct payments to the lender. Instead, the Parks cite cases where courts have reiterated the general rule that a lender has the right to choose how to apply a borrower's payment hoping this Court will ignore this crucial factual distinction.

Moreover, to the extent the Court of Appeals required that Stanford and the Parks have an agreement in place whereby the Parks agreed to give Stanford credit towards his limited guaranty for his individual payments to them, the court failed to recognize the guaranty itself.

Pursuant to the guaranty, Stanford agreed to assume personal liability for a maximum amount of \$500,000 of Snowmass' debt. In return, the Parks agreed to credit

Stanford for his payments. Stanford upheld his responsibility pursuant to the guaranty. The Parks did not. The guaranty constituted an agreement between Stanford and the Parks which obligated the Parks to apply Stanford's personal payments towards his limited guaranty liability. By refusing to give Stanford credit towards his personal guaranty for the payments he made, the Parks breached the terms of the parties' agreement and deprived Stanford of the benefit of his bargained for limited personal guaranty. The Court of Appeals' decision in this case authorized the Parks' breach.

The Court of Appeals committed reversible error by refusing to give Stanford credit towards his \$500,000 guaranty for the \$750,000 in payments he made to the Parks. This error is rooted in the court's failure to recognize the critical factual difference that Stanford is seeking credit for his own payments rather than credit for Snowmass' payments. This distinction precludes the application of the rule that a guarantor must have an agreement with a lender in order to receive credit for his payments.

II. THERE WAS A GENUINE ISSUE OF MATERIAL FACT IN THIS CASE AS TO WHETHER THE PARKS KNEW THAT STANFORD WAS PAYING THEM OVER \$750,000 IN HIS CAPACITY AS SNOWMASS' PERSONAL GUARANTOR

In his Opening Brief, Stanford cited the following facts which demonstrate that, at the very least, there was a genuine issue of material fact as to whether the Parks knew that Stanford had paid them \$750,000 in his personal guarantor capacity. Stanford only paid the Parks once Snowmass failed in its obligation to pay the Parks and after receiving a written request for payment from the Parks. (R. at 160; 205-206; 211-261; 263-280.)

The Parks sent no fewer than twenty letters to Stanford and Buckway who were Snowmass' guarantors. (R. 241-261.) The Parks' letters to Stanford and Buckway demanding payment is the specific action a lender takes when the borrower has failed to make a payment. In response to the demand letters, Stanford paid the Parks using personal checks from his personal bank account rather than with Snowmass checks. (R. 270-273.) The Stanford personal checks are notice enough to the Parks that Stanford was personally making the payments to them. Stanford wrote the notation "Gary Stanford" on some of his checks to the Parks. (R. 274.) Stanford also stated that he believed the Parks were applying his personal payments towards his personal guaranty. (R. 161; 207.) Stanford stated that Mr. Park demanded Stanford pay him based on Stanford's personal guaranty. (R. 205; 211-241).¹

The Parks' only rebuttal to these facts is that Stanford was essentially the same entity as Snowmass and that the parties agreed that the Parks could send notices of default to Stanford at his personal address. Appellees' Op. Br. at pp. 14-15; 17. This argument, however, ignores the fact that Snowmass was a viable business entity with its own separate existence apart from Stanford. The Parks are asking the Court to conclude that

¹ The Parks state that the only facts Stanford presented to the Court of Appeals regarding his payments to the Parks came in his Opening Brief at paragraph 28 of Stanford's Statement of Facts. This assertion is wrong. Pages 11-13 of Stanford's Reply Brief to the Utah Court of Appeals enumerates the multiple facts which supported his contention that the Parks knew he was paying them in his guarantor capacity. (Stanford has attached these pages as Exhibit "A" in this Brief's Addendum.)

just because Stanford was Snowmass' only member, he is Snowmass' alter ego without alleging any facts to support such a finding.

The fact that Stanford was Snowmass' only member does not mean that Stanford and Snowmass were legally identical. Stanford never paid the Parks using Snowmass' funds or using Snowmass' bank accounts. There is no evidence that Stanford ever disregarded Snowmass' company form to benefit himself or others. The fact that Stanford was Snowmass' lone member when he made a few payments to the Parks does not support a grant of summary judgment in the Parks' favor.

Furthermore, the fact that the parties agreed that the Parks could send Stanford notices of Snowmass' default to Stanford's home address has no bearing on the multitude of facts which suggest the Parks were demanding payment from Stanford in his individual capacity.

The Parks do not dispute that Stanford was a personal guarantor of Snowmass' loan. The Parks do not dispute that Snowmass defaulted on its payment obligations to the Parks. The Parks do not dispute that they sent Stanford notices of Snowmass' default demanding payment. The Parks do not allege that they specifically addressed Stanford as Snowmass' member as opposed to Snowmass' guarantor. The Parks do not dispute that they received checks from Stanford's personal bank account. And the Parks do not dispute Stanford's statement that he always anticipated the Parks would apply Stanford's payments towards Stanford's personal guaranty. While Stanford may not have sent letters

with his payments to the Parks asking that his payment be applied towards his guaranty, the evidence demonstrates that, at the very least, a genuine issue of material fact existed as to whether the Parks knew that Stanford was paying them in his guarantor capacity.

III. PUBLIC POLICY MANDATES THAT A LENDER BE REQUIRED TO HONOR ITS CONTRACT WITH A GUARANTOR BY GIVING THE GUARANTOR CREDIT FOR THE PAYMENTS HE MAKES TO THE LENDER

The Court of Appeals' decision in this case will have a profoundly negative effect on guarantors in this State. Denying guarantors credit for payments they make to a lender unless they have a separate agreement calling for such credit will have a chilling effect on lending practices in this State where lenders may not give credit to guarantors for payments guarantors make to a lender.

The Parks contend that reversing the Court of Appeals' decision in this case will be too burdensome on lenders because they will now have to take the time to look at checks to see who is actually making the payments. The Parks allege that lending institutions cannot be expected to look at the checks they receive to see whose account it is drawn on. Appellees' Op. Br. at pg. 16.

Stanford contends that the minimal time it takes for a private lender to look at a check and determine who the payment is from does not outweigh the harm to guarantors who are now at increased risk of being liable for amounts far in excess of their contractual obligation. Furthermore, in the case of guaranteed debts, a lender will always examine a payment it receives to determine whether the borrower or guarantor is making

the payment. Lenders do not receive payments and simply guess who the payments are from.

The Parks also argue that personal guarantors exist only to protect lenders. Appellees' Op. Br. at 16. The courts ought to balance the rights of the parties to a guaranty as well as honor the terms of the contract itself. Stanford contends that crediting guarantors for payments they make to lenders strikes the proper balance between protecting the lenders' interests as well as those of guarantors. This is not a case where Stanford is advocating a rule which allows guarantors in this State the right to dictate how lenders apply a borrower's payment.

The Parks' contention that the Parks could have denied Stanford credit for his payments to them even if they had an agreement in place highlights the problem with the Court of Appeals' decision. The Parks argue that "at a minimum [Stanford] had a legal obligation to advise Parks [*sic*] that the payments being made to them were to be credited against his guarantee, *and obtain their consent to this request.*" Appellees' Op. Br. at pg. 15 (emphasis added).

The Parks therefore argue that Stanford not only had to ask their permission to make payments to them in his guarantor capacity, but that the Parks could actually deny this request by not giving their consent. Accordingly, the Parks advocate a rule of law in this State which would allow a lender simply to refuse to apply a guarantor's payment towards his guaranty even if the guarantor asked that the payment be so applied. Taken to

its logical conclusion, a lender could choose never to give her consent to a guarantor's request that the lender apply his payment towards his guaranty and a guarantor could therefore never extinguish his limited maximum guaranty liability regardless of the amount of money he paid pursuant to the guaranty. Such a practice is not acceptable and would be unfair to guarantors.

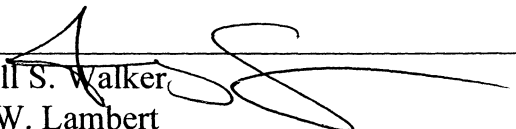
The Parks ask this Court not only to affirm a rule which is inapplicable to the facts of this case, but also to authorize a lender's right never to credit a guarantor for payments he makes pursuant to his guaranty. Policy concerns certainly disfavor such a rule and support this Court's reversal of the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, Stanford respectfully asks this Court to reverse the Court of Appeals' decision.

DATED this 4th day of June, 2010.

WOODBURY & KESLER, P.C.

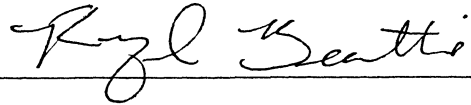


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CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of June, 2010, I mailed two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** postage prepaid, by First-Class U.S. Mail to the following:

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ADDENDUM

Exhibit A: Excerpt from Stanford's Reply Brief to the Utah Court of Appeals

would at times transfer his own personal funds into Snowmass' bank account so that Snowmass could make its monthly payment to the Parks. (R. 159.) Accordingly, Stanford should have received credit for those payments which Snowmass made using Stanford's money.

The Parks' theory that there is no "equitable exception" to justify giving Stanford credit for the payments he made to the Parks fails where Stanford made payments to the Parks in his capacity as guarantor and where Stanford was also the source of funds which Snowmass used to pay the Parks.

2. *Stanford has alleged that the Parks knew the payments they received came from him in his capacity as guarantor*

The Parks knew the payments they received from Stanford were based on his status as guarantor of Snowmass. The law is clear that when a lender knows the source of funds she receives is from a guarantor, the lender must give the guarantor credit for such payments. See United States v. Franchi Bros. Construction Corp., 378 F.2d 134, 139 (2d Cir. 1967)(stating that when a creditor knows the surety is the source of funds it receives from a debtor, the creditor must apply those funds to the guaranteed debt); Ash Grove Lime & Portland Cement Co. v. Moran Construction Co., 296 N.W. 761 (Neb. 1941) (holding that a lender must apply a debtor's payment to guaranteed debt if the lender knows that the guarantor is the source of those funds.) In this case, the facts demonstrate

the Parks knew that Stanford was the source of over \$750,000.00 in payments to them, and therefore the Parks should have given Stanford credit for those payments.

Snowmass was often delinquent with its monthly payments to the Parks. (R. 1.) Once Snowmass was behind on its payments, Mr. Park would contact Stanford requesting that he honor his guarantee and make the payments on behalf of Snowmass. (R. 205; 241-261.) The record contains twenty separate letters that Mr. Park wrote to Snowmass' guarantors, Stanford and Buckway, demanding immediate payments. (R. 241-261.) In each of those letters, Mr. Park addressed Stanford and Buckway who were the guarantors of the loan rather than Snowmass who was the obligor. (R. 241-261.)

While it is true that Mr. Park did not specifically address Stanford and Buckway as "guarantors" in his letters, the only conceivable reason he would address his letters to them personally, rather than to Snowmass, was to demand payment from them individually because they were the guarantors. The Parks' letters to Stanford and Buckway demanding payment is exactly the type of action one takes when an obligor has failed to make a payment, the creditor demands payment from the guarantors.

Furthermore, when Stanford sent payments to the Parks he often did so using his personal checks, rather than checks drawn on Snowmass' bank account. (R. 270-273.) A few of the checks Stanford sent were cashier's checks which included the notation "Gary Stanford" on the check. (R. 274.) One of the cashier's checks made payable to Mr. Park had the notation "Snowmass Highland/ Dr. Stanford." (R. 275.) And one check just had the notation "Snowmass" on it. (R. 276.) These checks, none of which was drawn on a

Snowmass account, weakens any argument the Parks have made that they had no idea that over \$750,000.00 in payments came from Stanford as a guarantor.

The fact that Mr. Park sent Stanford and Buckway a letter each time Snowmass was delinquent with its payment is evidence that the Parks were demanding payment from Stanford as a guarantor. The fact that Stanford sent money to the Parks using his own personal checks rather than Snowmass checks is evidence that the Parks knew Stanford was paying them as a guarantor. Stanford has also alleged that Mr. Park demanded that Stanford pay him based on Stanford's personal guarantee. (R. 205; 211-241.) The cumulative effect of these facts is that the Parks knew the payments they received from Stanford came from him in his capacity as an individual guarantor, not on behalf of Snowmass.

Where this Court must view "the facts and all reasonable inferences in the light most favorable" to Stanford, there is at the very least a genuine issue of material fact regarding whether the Parks did in fact know that Stanford was paying them as Snowmass' guarantor. See Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600. Given this genuine issue of fact, this Court may remand this case to the District Court with instructions to resolve this issue.

II. STANFORD'S GUARANTEE AMOUNT IN THE JULY TRUST DEED IS AMBIGUOUS

The District Court erred by awarding the Parks a judgment against Stanford which included \$500,000.00 in principal and \$508,463.91 in interest on that principal amount.