

2009

Kang S. Park v. Gary B. Stanford : Brief of Appellant

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 OPENING BRIEF

2009/082-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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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(a).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the Court of Appeals erred in denying Stanford credit towards his \$500,000 limited guaranty, and a discharge of his guaranty obligation, for the \$750,000 in personal payments he made to the Parks pursuant to his guaranty where courts have uniformly held that a guarantor should receive credit for payments he personally makes to a lender.

On certiorari, this Court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous. In the context of a summary judgment motion, which presents a question of law, this Court employs a correctness standard and views the facts and all reasonable inferences drawn therefrom in the light most favorable to Stanford as the non-moving party. Dowling v. Bullen, 2004 UT 50, ¶ 7, 94 P.3d 915.

Stanford preserved this issue for appeal below during briefing and a hearing before the trial court. (R. 155; 159; 168-171; R. 781 Hearings Tran. at 1-4; 9-11; 25-26.)¹

¹ Citation conventions in this brief are as follows: "R." is the abbreviated reference to the record on appeal, "Ex." refers to an exhibit included in this brief's addendum, and "Op." refers to the Court of Appeals' opinion in this case.

2. Whether the Court of Appeals erred in holding there were no disputed issues of fact as to whether Stanford had directed that his payments to the Parks be applied towards his \$500,000 limited guaranty where the evidence demonstrates that the Parks demanded that Stanford pay them pursuant to his guaranty once Snowmass defaulted, where Stanford paid the Parks over \$750,000 of his personal funds, where Stanford alerted the Parks that he was paying them in his capacity as guarantor and not as Snowmass, where Stanford paid the Parks with a cashier's or personal check, and where none of Stanford's payments to the Parks came from a Snowmass bank account.

On certiorari, this Court adopts the same standard of review used by the Court of Appeals: questions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous. In the context of a summary judgment motion, which presents a question of law, this Court employs a correctness standard and views the facts and all reasonable inferences drawn therefrom in the light most favorable to Stanford as the non-moving party. Dowling, 2004 UT 50.

Stanford preserved this issue for appeal below during briefing and a hearing before the trial court. (R. 155; 159; 168-171; R. 781 Hearings Tran. at 1-4; 9-11; 25-26.)

CONSTITUTIONAL OR STATUTORY PROVISIONS

No Constitutional or statutory provisions are dispositive for purposes of resolving the questions presented on appeal.

STATEMENT OF THE CASE

I. Nature of the Case

This case presents an issue of first impression for this Court: should a guarantor be denied credit for payments he personally makes to a lender under a limited guaranty. In this case, Stanford gave a maximum guaranty of \$500,000 on a corporate borrower's debt. When the borrower, Snowmass Corporation, failed to fulfill its obligation, the Parks demanded payments from Stanford as guarantor and Stanford paid the Parks over \$750,000 of his own funds to honor his limited guaranty. Notwithstanding Stanford's payments were in excess of his personal guaranty, and which payments should have discharged his personal guaranty, the Parks sought, and received, a judgment against Stanford for an additional amount in excess of one-million dollars. In total, Stanford has paid, or has become obligated to pay, approximately \$1.75 million on a \$500,000 guaranty, an amount which the Court of Appeals upheld.

II. Course of Proceedings

The Parks initiated this case by filing a Complaint against Stanford seeking to recover \$500,000 plus interest pursuant to Stanford's guaranty. The Parks pursued this claim against Stanford even though Stanford had already paid them over \$750,000, despite having guaranteed a maximum of \$500,000 of Snowmass' debt.

Soon after filing their Complaint, the Parks moved for partial summary judgment seeking a determination that: (1) Stanford was liable to them based upon his guaranty, and

(2) Stanford was not entitled to offset over \$750,000 in personal payments against that guaranty.

The Parks filed a second motion for summary judgment seeking a final judgment against Stanford based on his guaranty. Stanford opposed the Parks' motions claiming that genuine issues of material fact existed as to whether his personal payments to the Parks should be credited towards his personal guaranty. Hearings on the Parks' summary judgment motions were held before Judge Quinn of the Third Judicial District Court on March 13, 2006 and April 29, 2008.

III. Disposition Below

At the March 13, 2006 hearing, Judge Quinn concluded as a matter of law that none of Stanford's payments could be applied towards his \$500,000 guaranty. Judge Quinn stated that since there was no evidence that Stanford had directed the Parks to apply his personal payments towards his guaranty, he was not entitled to an offset of those payments as matter of law. The court issued an order reflecting this ruling. (A copy of this order is included in this brief's addendum as Exhibit "A.")

At the April 29, 2008 hearing, Judge Quinn granted the Parks' motion for summary judgment and entered judgment against Stanford in the total amount of \$1,009,872.35 despite the fact that Stanford had previously paid over \$750,000 of his personal funds to the Parks. (A copy of the Judgment is included in this brief's addendum as Exhibit "B.") The judgment was comprised of \$500,000 in principal, \$508,463.91 in

interest on the principal amount, and \$1,408.44 in costs. Stanford filed a notice of appeal on July 2, 2008.

On October 29, 2009, the Utah Court of Appeals issued an opinion affirming the trial court's ruling that Stanford was not entitled to credit payments he made to the Parks against his limited personal guaranty. (A copy of the Court of Appeals' opinion is included in this brief's addendum as Exhibit "C.")

In its ruling, the court held that a guarantor cannot be given credit for payments he makes to a lender unless the parties had previously agreed how the guarantor's payment should be applied. In support of this new rule, the Court of Appeals adopted Lee v. Yano, 997 P.2d 68 (Haw. Ct. App. 2000), a case which presented entirely different facts from the present case. In its decision, the court also rejected the rule set forth in analogous cases that a guarantor should receive credit towards his guaranty for payments he makes directly to the lender.

Finally, the Court of Appeals held as matter of law that there was no evidence in the record that Stanford and the Parks had an agreement in place as to how the Parks were to apply Stanford's payments.

IV. Statement of Facts

A. Stanford's Involvement in the Parks' Real Estate Transaction

1. On April 1, 1994, Gary B. Stanford ("Stanford") and Richard Buckway ("Buckway") entered into a real estate purchase contract ("REPC") with Kang and

Marsha Park (the “Parks”) to purchase a commercial real estate property (the “Property”).
(R. 210.)

2. As part of the REPC, Stanford and Buckway agreed to assume the Parks’ obligation on a Security Mutual Life Insurance Company Deed of Trust debt (“Security Mutual Note”) which encumbered the Property. (Op. at ¶ 2.)

3. In October of 1994, the parties agreed that Snowmass, LC (“Snowmass”) would replace Stanford and Buckway as the purchaser of the Property. (R. 202.)

4. The Parks’ attorney prepared a Trust Deed Note dated July 1, 1995, which limited Stanford’s personal guaranty liability to \$500,000 exclusive of interest and costs.
(R. 4.)

B. Stanford’s Personal Payments to the Parks Pursuant to his Guaranty

5. After taking possession of the Property, Snowmass began making payments to the Parks pursuant to the REPC. (R. 202.)

6. In 1994 and 1995 Snowmass missed several of its payments. (R. 159; 203-205.)

7. When Snowmass failed to make these payments, Mr. Park contacted Stanford directly to demand payment based on Stanford’s personal guaranty. (R. 205; 211-261.)

8. Mr. Park sent twenty letters to Stanford requesting that Stanford personally make Snowmass' payment to the Parks pursuant to Stanford's personal guaranty. (R. 241-261.)

9. Park's letters are not addressed or directed to Snowmass, but rather to Stanford and Buckway in their capacity as personal guarantors of Snowmass' debt. (R. 241-261.)

10. In response to Park's letters, and to honor his personal guaranty, Stanford made payments to the Parks in excess of \$750,000. These payments were made to fulfill the Parks' obligation under the Security Mutual Note, Snowmass' obligation under the Security Mutual Note, Snowmass' payment obligation under the 1995 Trust Deed, and Stanford's guaranty of the July Trust Deed. (R. 160; 206; 263-280.)

11. When Stanford sent payments to the Parks in response to their demand, he did so using personal checks from his personal checking account rather than checks drawn on Snowmass' checking account. (R. 270-273.)

12. On some of the checks he sent to the Parks, Stanford wrote the notation "Gary Stanford" to signal that the payments were from him personally and not Snowmass. (R. 274.)

13. At times Stanford would transfer his own funds into Snowmass' bank account so that Snowmass could make its payment to the Parks. (R. 159.)

14. None of the payments Stanford made to the Parks came from Snowmass' funds, but rather all of them came from Stanford's personal funds in accordance with his guaranty.

15. Stanford believed that his personal payments to the Parks would be credited towards his guaranty. (R. 161; 207.)

16. Had Stanford known that the Parks were not crediting his personal payments towards his guaranty, Stanford would not have paid the Parks over \$750,000 of his own money. (R. 161; 207.)

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in holding that Stanford was not entitled to credit the \$750,000 in payments he made to the Parks and a discharge of his \$500,000 guaranty unless there was an express agreement providing for such credit. Stanford contends that this ruling should be reversed for three reasons.

First, as courts in numerous analogous cases have done, Utah should adopt a rule which grants guarantors credit for payments they make to lenders pursuant to their guarantees. Second, the court denied Stanford credit for his payments to the Parks based on its adoption of a rule set forth in a case where the question was whether a third-party guarantor could control a lender's application of a borrower's payment, as opposed to the facts of this case where Stanford is seeking credit for payments he personally made to the Parks. And third, by denying guarantors credit for payments they make to lenders, the

court has adopted a rule which will have a chilling effect on lending practices within this State by prejudicing guarantors.

The Court of Appeals also erred by ruling that there was no genuine issue of material fact as to whether there was an agreement between the Parks and Stanford which required that Stanford's \$750,000 in payments be applied towards his \$500,000 limited guaranty. The record is replete with facts which show that the Parks demanded payment from Stanford in his personal guarantor capacity, that Stanford paid the Parks in his personal guarantor capacity, and that the Parks knew that Stanford was paying them as a personal guarantor and not as Snowmass. These facts should have precluded the Court of Appeals' ruling that Stanford was not entitled to credit for the payments he made to the Parks as a matter of law.

ARGUMENT

I. STANFORD, LIKE OTHER GUARANTORS, SHOULD RECEIVE CREDIT FOR PAYMENTS THEY MAKE TO A LENDER PURSUANT TO THEIR LIMITED GUARANTY

The Court of Appeals should have adopted a rule of law in this State which requires a lender to give a guarantor credit towards his personal guaranty for payments the guarantor, and not the primary borrower, makes to the lender. In denying Stanford credit and a discharge for the payments he made to the Parks, the Court of Appeals relied on the general rule that a guarantor cannot control the application of a borrower's payment to a

lender unless there is an agreement regarding such application. This ruling is erroneous in three respects.

First, the court should have adopted the rule announced in analogous cases that a guarantor should receive credit for his payments to a lender. Second, the court's holding relies on a rule which is inapplicable to the present case. And third, the court's ruling will have a profoundly prejudicial effect on lending practices within this State.

A. The Court Of Appeals Should Have Adopted The Rule That A Guarantor Should Receive Credit For Payments He Makes To A Lender Pursuant To His Guaranty

In cases where a guarantor, and not the borrower, makes a payment to a lender, courts have consistently given the guarantor credit for his payments. In such cases, the courts' inquiry is not on whether the guarantor and lender have an agreement as to how the guarantor's payments will be applied. Rather, the courts' inquiry is on whether the guarantor made the payment to the lender and whether the lender knew it was receiving payments from the guarantor. In denying Stanford credit for his payments to the Parks, the Court of Appeals disregarded these cases without any substantive analysis or discussion.

The Court of Appeals first minimized the facts and legal issue presented in Monmouth Plumbing Supply Co. v. McDonald, 147 A. 627 (N.J. 1929). In Monmouth, the issue was whether a guarantor had satisfied his limited guaranty obligation when he made personal payments to the lender in an amount exceeding his limited guaranty. The

Monmouth court concluded that where the guarantor had made payments directly to the lender, the lender was required to offset those payments against the guarantor's guaranty. Id. at 628. The fact that the guarantor made the payment was the critical inquiry in the court's analysis, and not whether the guarantor and lender had an agreement controlling application of the guarantor's payment. Monmouth was the only case presented by either party which presents similar facts and legal issues to this case.

As in Monmouth, Stanford guaranteed a borrower's (Snowmass) debt to a lender (the Parks). (R. 4.) As in Monmouth, Stanford's guaranty was limited to a fixed amount of \$500,000. (Id.) As in Monmouth, Snowmass was unable to make the payments to the Parks. (R. 205; 211-261.) As in Monmouth, the Parks requested that Stanford make Snowmass' payment as its guarantor. (Id.) As in Monmouth, Stanford made payments to the Parks on behalf of Snowmass with his own money in order to honor his personal guaranty. (R. 160; 206; 263-280.) As in Monmouth, the amount Stanford paid to the Parks exceeded his guaranty maximum of \$500,000 where he paid them in excess of \$750,000. (Id.) And as in Monmouth, the Parks brought an action against Stanford for a debt which Stanford has already paid.

Stanford contends that Monmouth provides the proper analysis for deciding this case. As set forth above, the facts are nearly identical to those of this case where the issue is whether Stanford extinguished his \$500,000 limited guaranty obligation by paying the Parks \$750,000 of his own funds. As in Monmouth, the controlling fact in this case is

that Stanford, not Snowmass, made the payments to the Parks and therefore Stanford should receive credit for those payments and a discharge of his debt. The Court of Appeals' requirement there be an agreement in place between the Parks and Stanford is irrelevant in light of the fact that Stanford, as a personal guarantor of Snowmass, made the payments to the Parks. Monmouth provides the most helpful analysis for this case and pursuant to Monmouth, the Court of Appeals should have given Stanford credit for his \$750,000 payments to the Parks.²

Moreover, the Court of Appeals' newly adopted rule that an agreement must exist between the parties before a guarantor can receive credit for his payments to a lender is contrary to the general rule stated in other significantly analogous cases.

In St. Paul Fire & Marine Inc. Co. v. Dakota Elec. Supply Co., 309 F.2d 22 (8th Cir. 1962), the Eight Circuit reiterated the general rule that a borrower may direct how his payment is applied if he communicates that intent before or at the time of payment. Id. at 25. The court noted that if the borrower fails to so indicate, the lender may apply the payment however she wants. Id. Judge Blackmun, writing for the Eight Circuit, noted

² The Court of Appeals dismissed Monmouth without any consideration or analysis. The court's reason for this was that "no court in any jurisdiction has cited Monmouth for any purpose, let alone for the rule that Stanford suggests." (Op. at ¶ 13.) While it is true that Monmouth has not been cited by other courts, it has also not been overturned within its own jurisdiction or called into question in any other jurisdiction. The fact that no court has cited Monmouth is not a sufficient basis for ignoring its clear applicability to the present case.

that an exception to these general rules applies where the guarantor himself makes a payment to the lender. Id.

The St. Paul court emphasized that when a guarantor makes payments to a lender on behalf of a borrower, that fact is the equitable circumstance which justifies an exception from the general rules governing the application of payments. Rather than focusing on whether the parties had an agreement as to how the guarantor's payments would be applied, the court focused on whether it was the guarantor who made the payments, and if so, whether the lender knew the payment it received came from the guarantor. Id.³

The Court of Appeals' requirement that Stanford and the Parks have an agreement controlling how parties should apply Stanford's payments is erroneous in light of both Monmouth and St. Paul. As Judge Blackmun wrote, the guarantor receives credit for his payment to the lender if the lender knows the payments came from the guarantor. As set forth *infra* in section II, the record is replete with evidence that the Parks knew that the payments Stanford made were from Stanford and not from Snowmass. Accordingly, the Court of Appeals erred in not only requiring that an agreement be in place for Stanford to

³ The Court of Appeals' analysis of St. Paul was limited to a footnote wherein the court stated that St. Paul is inapplicable because it has "different facts than in this case." (Op. at ¶ 8, n.3.) The court did not consider Lee to be unpersuasive based on its admitted "different factual scenario." (Id. at ¶ 13.)

receive credit for his payments, but in also ignoring the evidence that the Parks knew Stanford was personally making payments as a guarantor.

Both Monmouth and St. Paul set forth the rule the Court of Appeals should have adopted in this case. Like this case, those cases involve guarantors seeking credit for payments they themselves made, rather than trying to control how a lender applied a borrower's payment. Pursuant to Monmouth, once Stanford paid the Parks \$500,000, his guaranty liability was extinguished. And pursuant to St. Paul, the Parks should have credited Stanford for his payments when the evidence demonstrates that the Parks knew Stanford made the \$750,000 of payments as Snowmass' guarantor.⁴ The Court of Appeals' errors should therefore be reversed.

B. The Court Of Appeals Has Adopted A Rule In This State Governing A Guarantor's Payments Which Is Based On A Case Where, Unlike This Case, The Issue Was Whether A Guarantor Could Control A Lender's Application Of A Third-Party Borrower's Payment

The Court of Appeals erred in deciding this issue of first impression by basing its opinion on Lee v. Yano, 997 P.2d 68 (Haw. Ct. App. 2000). In adopting Lee, the court stated that it believed that "the rule stated therein regarding application of payments from

⁴ See also Hyland Elec. Supply Co. 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.)

a guarantor to a lender should be adopted in Utah.” (Op. at ¶ 13.) The problem with adopting this rule is that Lee did not involve the question of how a lender should apply a guarantor’s payment. Rather, the issue was whether a guarantor could control how a lender applied a third-party borrower’s payment. The Court of Appeals’ oversight of this critical factual difference tainted its holding.

In Lee, an ex-husband had two separate debts with the plaintiff and gave a promissory note guaranteed by Francis Yano (“Yano”), who promised to pay the plaintiff on one of those debts. Id. at 70. The ex-husband eventually failed in his obligations and the plaintiff brought an action seeking payment from Yano as guarantor. Id. at 71-72. Yano contended that the plaintiff should have applied her ex-husband’s payments to the debt which Yano had guaranteed rather than the other debt which he had not guaranteed. Id. at 70.

On appeal, the Hawaii Court of Appeals noted that in the case of a debtor and creditor “[i]t is elementary that in the absence of agreement, and in the absence of direction from the borrower, the creditor may apply payments [from the borrower] to any obligation he holds. Equally clear, if there be no provision to the contrary, the debtor may designate the application of payment and the creditor must comply with such direction.” Id. quoting Reconstruction Finance Corp. v. McCormick, 102 F.2d 305, 315 (1939).

Using this language, the Hawaii court held that since there was no evidence of any specific agreement covering the application of payments on the ex-husband’s debts or

evidence that the ex-husband instructed the plaintiff to apply his payments to the part of his debt guaranteed by Yano, the Plaintiff was authorized to apply her ex-husband's payments in any manner she wished, even to Yano's detriment. Id. at 149-150. The court then stated that general rule that "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." Id. at 150.⁵

The Court of Appeals' reliance on Lee is misplaced. Lee's rule is appropriate in cases where a borrower makes a payment to a lender and a guarantor requires that the lender apply the borrower's payment to the guarantor's guaranteed debt. Lee is not instructive, however, in cases such as this one where a guarantor is seeking credit for payments he himself makes to a lender. If Stanford was trying to control the Parks' application of payments which Snowmass made then the Lee ruling would be appropriate. However, those are not the facts of this case.⁶

⁵ The Lee court cites the Tenth Circuit's decision in Mid-Continent Supply Co. v. Atkins & Potter Drilling Corp., 229 F.2d 68 (10th Cir. 1956), wherein the court stated the general rule that where a creditor holds different obligations of a debtor, some of which are guaranteed by third-parties, unless otherwise directed by the debtor, the creditor may apply the proceeds of a payment *made by the debtor* to the obligation or obligations not guaranteed. 229 F.2d at 76 (emphasis added).

Like Lee, Mid-Continent Supply Co. is inapposite to this case where Stanford is not seeking to direct application of payments Snowmass made towards his guaranty, but rather, Stanford is seeking credit for payments he himself made as guarantor.

⁶ The Court of Appeals noted that Lee "involved a slightly different factual scenario," yet failed to recognize the implications of those factual differences. (Op. at ¶

By adopting Lee as the rule of law in Utah, the Court of Appeals has set a legal precedent which does not address the facts of the cases it purports to resolve. While Stanford does not dispute the correctness and reasoning behind the Lee rule, Stanford does dispute its application to the present case. If allowed to stand, the Court of Appeals' decision is useless in future cases involving a guarantor seeking credit for payments he makes directly to a lender because Lee is not premised on a guarantor making the payment. The Court of Appeals has established a precedent which prejudices all guarantors. Accordingly, the Court of Appeals' decision should be reversed.

C. The Court Of Appeals' Adoption Of The Lee Rule Will Have A Chilling Effect On Lending Practices Within This State

The Court of Appeals should also be reversed where its decision will have severe lending policy implications. The Court of Appeals' decision denies a guarantor any credit for payments it makes pursuant to the guaranty unless the guarantor either inserts language into the guaranty specifying that his payments will be applied towards his guaranty or tells the lender each time he makes a payment that he wants it credited towards his guaranty. Both of these requirements will have a chilling effect on lending practices because guarantors will be weary of guaranteeing loans.

These new requirements saddle guarantors with the responsibility of ensuring that their payments are credited to their guaranty. Stanford contends, however, that such

requirements are illogical. Guarantors enter into guarantees assuming that their payments will be applied towards their guarantees. And no guarantor makes personal payments to the lender believing the lender will not credit the payment towards his guaranty. If the Court of Appeals' ruling stands, guarantors in this State now have no assurance that their payments will be credited towards their guaranty amount. Moreover, lenders may now refuse to credit a guarantor's payments by simply alleging that the guarantor never told them he was making the payment pursuant to his guaranty.

There should be no other way to interpret a guaranty than the guarantor should receive credit against his guaranty for his personal payments. The Court of Appeals' ruling opens the door to sharp lending practices which may cause guarantors to lose millions of dollars in payments they reasonably expect the lender to apply to their guaranty. Stanford contends that such a result would not only be inequitable, but would also dissuade individuals from ever guaranteeing a loan, thereby preventing lenders from making loans. These policy reasons demand that the Court of Appeals' decision be reversed.

II. GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED THE COURT OF APPEALS' HOLDING THAT THE PARKS AND STANFORD DID NOT HAVE AN AGREEMENT REGARDING STANFORD'S PAYMENTS

The Court of Appeals erred in both adopting and applying Lee. As set forth above, the court should not have relied on Lee in deciding this case. However, even if Lee was the appropriate rule of law in this case, the facts of this case did not support a grant of

summary judgment on the question of whether the Parks should have applied Stanford's payment to his guaranty.

In the context of summary judgment, this Court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Dowling, 2004 UT 50, ¶ 6. The Court of Appeals justified its ruling by stating that "even assuming that Stanford intended that these payments be credited towards his guaranty, there is no record evidence that he and the Parks had agreed to do so." (Op. at ¶ 14.) That is simply not the case. Pursuant to the relevant standard of review, the Court of Appeals' decision should be reversed.

In this case, the facts show that the Parks knew that Stanford was the source of over \$750,000.00 in payments to them, or at the very least, the facts demonstrate a genuine issue of material fact as to this issue. The record is replete with evidence that the Parks knew that Stanford was paying them in his guarantor capacity and not as Snowmass. Once Snowmass was delinquent with its monthly payments to the Parks, Mr. Park contacted Stanford to request that he honor his guaranty and make the payments on behalf of Snowmass. (R. 1; 205; 241-261.)

Additionally, the record contains twenty separate letters that Mr. Park wrote to Snowmass' guarantors, Stanford and Buckway, demanding immediate payment. (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 Mr. Park did not specifically address Stanford and Buckway as “guarantors” in his letters, at least part of the reason he addressed his letters to them personally, rather than to Snowmass, was to demand payment from them individually by virtue of being guarantors. The Parks’ letters to Stanford and Buckway demanding payment is exactly the type of action one takes when the primary borrower 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 just one check 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 Stanford was paying them in any other capacity than as Snowmass’ 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. The Parks never received any payment from Stanford drawn on a Snowmass account. Stanford has also alleged that Mr. Park demanded that

Stanford pay him based on Stanford's personal guaranty. (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, and not on behalf of Snowmass.

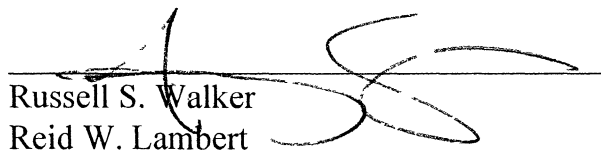
Moreover, as detailed above, the proper analysis was whether the Parks knew the payments Stanford was making were in his individual capacity and not as Snowmass. Therefore, a genuine issue of material fact existed as to whether the Parks knew Stanford was making payments to them in his personal capacity as guarantor and the Court of Appeals' holding otherwise should be reversed.

CONCLUSION

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

DATED this 6th day of April, 2010.

WOODBURY & KESLER, P.C.


Russell S. Walker
Reid W. Lambert
Anthony M. Grover
Attorneys for Defendant/Appellant

ADDENDUM

Exhibit A: October 29, 2009, Utah Court of Appeals Opinion

Exhibit B: June 5, 2006, Order

Exhibit C: June 3, 2008, Judgment

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2010, I mailed two true and correct copies of the foregoing **APPELLANT'S OPENING BRIEF** postage prepaid, by First-Class U.S. Mail to the following:

Keith W. Meade
COHNE, RAPPAPORT & SEGAL, P.C.
272 East 200 South, Suite 700
Salt Lake City, UT 84111



EXHIBIT “A”

FILED DISTRICT COURT
Third Judicial District

Keith W Meade (Bar No 2218)
COHNE, RAPPAPORT & SEGAL, P C
257 East 200 South, Suite 700
Salt Lake City, UT 84111
Telephone (801) 532-2666
Attorney for Plaintiffs

JUN - 5 2006

SALT LAKE COUNTY

By Wtl
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

KANG S PARK and MARSHA PARK, Plaintiff, vs GARY B STANFORD, Defendant	ORDER Civil No 050900073 Judge Anthony B Quinn
---	---

This matter came before the Court on Monday, March 13, 2006, at 9 00 a m The plaintiff was represented by counsel Keith W Meade The defendant was represented by counsel M Darin Hammond

The Court, having considered the pleadings filed in connection with the plaintiffs' Motion for Summary Judgment, including all of the affidavits filed by the defendant, and having considered the discussion of counsel, and otherwise being advised in the matter, and for the additional reasons articulated by the Court during the course of the hearing,

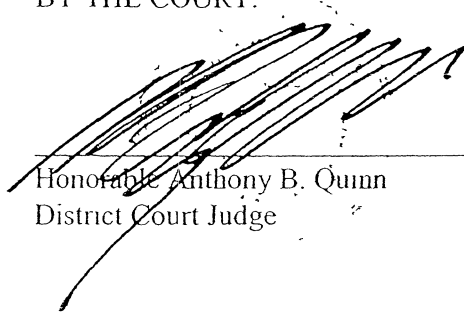
ORDERS AS FOLLOWS

1. The Court determines, as a matter of law, that none of the payments made to date by Gary Stanford or Snowmass can be applied so as to reduce the \$500,000 00 personal guaranty from Stanford to the plaintiffs

2. The Court believes, at present, that it cannot determine as a matter of law that there would not be a deficiency judgment in favor of Security Mutual should Snowmass, LLC default on its obligation to Security Mutual, and for that reason, the Court denies the balance of the plaintiffs' Motion for Summary Judgment, which requested a determination of the principal amount which remains owing on the defendant's personal guaranty.

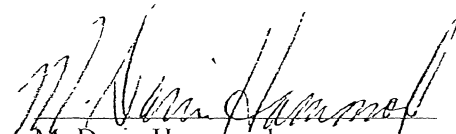
DATED this 5th day of March, 2006.

BY THE COURT:



Honorable Anthony B. Quinn
District Court Judge

APPROVED AS TO FORM AND CONTENT :



M. Darin Hammond
Smith Knowles
Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed,
postage fully prepaid, on the 28 day of March, 2006, to the following:

M. Darin Hammond
SMITH KNOWLES
4723 Harrison Blvd., Suite 200
Ogden, UT 84403

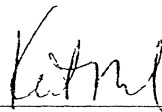


EXHIBIT “B”

FILED DISTRICT COURT
Third Judicial District

JUN - 3 2008

By SALT LAKE COUNTY
Deputy Clerk

Keith W. Meade (Bar No. 2218)
COHNE, RAPPAPORT & SEGAL, P.C.
257 East 200 South, Suite 700
Salt Lake City, UT 84111
Telephone: (801) 532-2666
Facsimile: (801) 355-1813
keith@crslaw.com
Attorneys for Plaintiff

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 06/05/08

MAGEL

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

KANG S. PARK and MARSHA PARK, Plaintiff, vs. GARY B. STANFORD, Defendant.	JUDGMENT Civil No. 050900073 Judge: Anthony B. Quinn
---	---

This matter came before the Court for hearing on Tuesday, April 29, 2008. The plaintiffs were represented by counsel, Keith W. Meade, of Cohne, Rappaport & Segal. The defendant was represented by counsel, M. Darin Hammond, of Smith Knowles.

The Court, having considered the pleadings filed by the parties, as well as pleadings previously filed in this matter, as well as the argument of counsel, and having determined that there are no genuine issues of material fact based upon the pleadings previously filed and filed in connection with this motion,



ORDERS, ADJUDGES AND DECREES as follows

1. The plaintiffs be and hereby are awarded judgment against the defendant, Gary B Stanford in the following amounts:

- a \$500,000 00 principal,
- b \$285,401 98 in accrued interest on principal through January 31, 2008,
- c \$190,722 95 in accrued interest on delinquent payments through January 31, 2008, and
- d \$5,842 98 in accrued interest on late fees, said amount taking into consideration the \$5,000 00 reduction set forth in the plaintiffs' January 3, 2007 Memorandum, and
- e \$14,169 00 in additional accrued interest on principal through April 30, 2008; and
- f \$12,627 00 in additional accrued interest on delinquent payment through April 30, 2008

The total of the foregoing is \$1,008,463 91, together with judgment at the default rate provided in the Note of 15% per annum, plus costs of collection

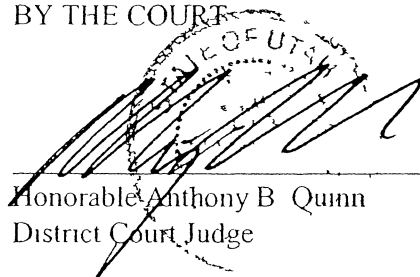
2. In addition, the plaintiffs have submitted a Memorandum of Costs, and the plaintiffs are further awarded those costs in the amount of \$1,408 44

3 The TOTAL JUDGMENT is \$1,009,872.35 plus interest at the default rate of 15% per annum as provided for in the guaranteed note and writ of collection, all until paid

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

DATED this 3rd day of May, 2008

BY THE COURT


Honorable Anthony B. Quinn
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **JUDGMENT** was mailed, postage fully prepaid, on the 3rd day of May, 2008, to the following

M. Darin Hammond
SMITH KNOWLES
4723 Harrison Blvd., Suite 200
Ogden, UT 84403

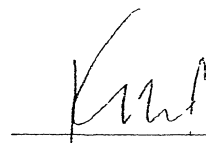


EXHIBIT “C”

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Kang S. Park and Marsha Park,)	OPINION
)	(For Official Publication)
Plaintiffs and Appellees,)	Case No. 20080574-CA
)	
v.)	F I L E D
)	(October 29, 2009)
Gary B. Stanford,)	
)	
Defendant and Appellant.)	2009 UT App 307

Third District, Salt Lake Department, 050900073
The Honorable Anthony B. Quinn

Attorneys: Russell S. Walker, Reid W. Lambert, and Anthony M.
Grover, Salt Lake City, for Appellant
Keith W. Meade and Bradley M. Strassberg, Salt Lake
City, for Appellees

Before Judges Greenwood, Davis, and Thorne.

GREENWOOD, Presiding Judge:

¶1 Appellant Gary B. Stanford appeals the trial court's grant of summary judgment in favor of Appellees Kang S. and Marsha Park. In particular, Stanford argues that summary judgment was inappropriate because the amount of his liability on the guaranty was ambiguous and because the trial court erred in determining that he was not entitled to credit toward his personal guaranty for payments he made prior to this action. Stanford also argues that even if summary judgment was appropriately granted, we should remand for the trial court to reduce the judgment entered against him in light of Utah Code section 57-1-32. We affirm.

BACKGROUND

¶2 The Parks owned commercial real estate in Ogden, Utah (the Property) that, as of March 1994, was encumbered by a trust deed securing an obligation of Kang S. Park to Security Mutual Life Insurance Company with a balance owed of approximately \$266,484.40 (the Security Mutual Note). In April 1994, Stanford and Richard Buckway entered into a real estate purchase contract

with the Parks (the REPC) whereby they agreed to pay \$1,000,000 to the Parks to purchase the Property.¹ In conjunction with the REPC, Stanford personally guaranteed "the payment of \$500,000 plus interest." He also assumed liability on the Security Mutual Note. After execution of the REPC, the parties continued to negotiate terms for the sale of the Property, ultimately resulting in a trust deed and note executed July 1995, (the 1995 Trust Deed Note), between the Parks as lenders and Snowmass, LC - a Utah limited liability company of which Stanford was a member-as Borrower. Snowmass also assumed liability on the Security Mutual Note. In the 1995 Trust Deed Note, Stanford again personally guaranteed partial payment:

Stanford agrees to unconditionally guarantee the payment of th[e 1995 Trust Deed N]ote, but in no event shall . . . Stanford's liability (excluding portions thereof attributable to interest and costs) when added to any deficiency judgment which may be entered against him by virtue of his guaranty of the Security Mutual [Note] (excluding interest and costs), exceed the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000).

¶3 In 1997, the parties amended the 1995 Trust Deed Note to provide that any notices of default could be sent directly to Stanford. When Snowmass missed several payments, the Parks sent Stanford requests for payment. These payments were ultimately made. After Snowmass further "defaulted in a number of material respects, including the failure to make payments under the [1995 Trust Deed] Note," the Parks filed suit against Stanford seeking specific performance of his personal guaranty.

¶4 The trial court held three separate hearings--March 2006, February 2007, and April 2008--in an attempt to resolve the Parks' various motions for summary judgment. At the beginning of the March 2006 hearing, the trial court noted that after reading the parties' memoranda, it was uncomfortable granting summary judgment because (1) Stanford's guaranty in the 1995 Trust Deed Note was "ambiguous, especially as it relates to how the Security Mutual [N]ote is handled," and (2) it appeared that there may be questions of fact regarding "whether or not Mr. Stanford should have credit for sums that were paid prior to th[e] time where demands were made directly to him as opposed to [Snowmass]."

¹Stanford bought the Property with his business partner at that time, Richard Buckway. However, Buckway is not a party to this appeal and, for the reader's convenience, has been omitted from this opinion except where necessary for clarity.

After further argument by both parties, the trial court granted partial summary judgment in favor of the Parks, deciding that whether Stanford was entitled to credit for past payments is purely a question of law and that Stanford was not entitled to credit for these payments because he failed to notify the Parks that he intended them to be credited against his personal guaranty. The trial court refused to grant full summary judgment, however, due to issues involving the Security Mutual Note. The trial court ultimately granted the Parks' request for full summary judgment at the April 2008 hearing because Bank of Utah, as custodian for the Kang S. Park IRA, had purchased all of Security Mutual's interests under the Security Mutual Note and agreed to waive any deficiency judgment thereunder to which they might otherwise be entitled. As a result, Stanford had no potential liability on the Security Mutual Note.² Because the amount owing under the 1995 Trust Deed Note was undisputedly in excess of \$500,000, the trial court entered judgment in favor of the Parks for \$500,000 in principal plus interest, fees, and costs, totaling \$1,009,872.35. Stanford appeals.

ANALYSIS

I. Summary Judgment

¶5 The thrust of Stanford's appeal is that the trial court erred in granting summary judgment because either the court made legal errors or there existed material factual disputes precluding summary judgment. Summary judgment is appropriately granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). "[A] motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract [at issue] and there is a factual issue as to what the parties intended." Peterson v. Sunrider Corp., 2002 UT 43, ¶ 14, 48 P.3d 918 (internal quotation marks omitted). We "review[] a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and view[] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted).

²The Judgment ordered the Parks to endorse the Security Mutual Note as follows: "The right to obtain a deficiency judgment based on this Note has been waived pursuant to the judgment entered" in this case.

A. Integration

¶6 Stanford contends that the trial court incorrectly concluded that the 1995 Trust Deed Note is fully integrated, arguing that several documents evidencing the parties' negotiations should be included in interpreting Stanford's personal guaranty. Specifically, Stanford argues that these documents demonstrate that the parties intended to limit the amount of his guaranty to a maximum of \$500,000 inclusive of interest, fees, and costs. Because parol evidence is not allowed to interpret an integrated, unambiguous agreement, the first step in deciding whether to consider extrinsic evidence is determining whether the 1995 Trust Deed Note is integrated. See Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 11, 182 P.3d 326.

To determine whether a writing is an integration, a court must determine whether the parties adopted the writing as the final and complete expression of their bargain. Importantly, . . . when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties.

Id. ¶ 12 (citations and internal quotation marks omitted). In Tangren Family Trust v. Tangren, 2008 UT 20, 182 P.3d 326, the supreme court reiterated that "[w]hether a contract is integrated is a question of fact reviewed for clear error." Id. ¶ 10. Notwithstanding that standard of review, the Tangren court noted that extrinsic evidence would be allowed on the issue of integration, despite "a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality." Id. ¶ 15. The Tangren court further disavowed prior cases that may have allowed extrinsic evidence outside the enumerated types of allegations, holding that "we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause." Id. ¶ 16.

¶7 Before the trial court, the Parks argued that the 1995 Trust Deed Note was fully integrated, particularly in light of the following clause:

This [1995 Trust Deed] Note has been issued pursuant to and is secured by that certain Deed [entered contemporaneously with the 1995 Trust Deed Note] between Borrower and Lender

(the "Security Instruments"). Such Security Instruments and all other instruments evidencing or securing the indebtedness hereunder are hereby made part of this Note and are deemed incorporated herein in full.

Stanford's argument, in part, is that prior writings and negotiations between the parties should be admitted to determine the extent of Stanford's guaranty. Under Tangren, this type of extrinsic evidence is not admissible where the agreement appears on its face to be integrated.

¶8 Stanford further argues, however, that the 1995 Trust Deed Note was not fully integrated, but instead, by its express terms, the 1995 Trust Deed Note "incorporated" all the documents previously entered into between the parties, including a series of letters sent by the Parks' attorney prior to execution of the 1995 Trust Deed Note. Stanford further contends that these letters render his guaranty liability amount ambiguous because, in contrast to the 1995 Trust Deed Note, the letters appear to cap Stanford's guaranty liability at \$500,000 inclusive of interest, fees, and costs. Stanford also appears to argue that the prior letters constitute "other instruments evidencing or securing the indebtedness hereunder," as stated in the 1995 Trust Deed Note.

¶9 While the trial court did not explicitly find that the 1995 Trust Deed Note was integrated, it implicitly did so. The 1995 Trust Deed Note--and the "other instruments evidencing or securing the indebtedness [t]hereunder"--"appears to be a complete and certain agreement," see id. ¶ 12, between the Parks and Stanford regarding Stanford's personal liability. Accordingly, we "conclusively presume[] . . . that [it] contains the whole of the agreement between the parties." See id. Furthermore, the prior letters are not instruments securing the debt as is the contemporaneous trust deed. At best, they reflect negotiations culminating in and replaced by the 1995 Trust Deed Note and address the same types of terms as those ultimately included in the 1995 Trust Deed Note. Having determined that the trial court did not err in finding the 1995 Trust Deed Note to be integrated, our discussion turns to a correctness review of the trial court's interpretation of the 1995 Trust Deed Note.

B. Ambiguity and the Parties' Intent

¶10 Once a court has determined that a contract is fully integrated, it may not rely on parol evidence in making its initial decision of whether the contract is facially ambiguous. See id. ¶ 11. "A contractual term or provision is ambiguous 'if it is capable of more than one reasonable interpretation because

of uncertain meanings of terms, missing terms, or other facial deficiencies.'" Daines v. Vincent, 2008 UT 51, ¶ 25, 190 P.3d 1269 (quoting WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 20, 54 P.3d 1139). If the contract is facially unambiguous, we are bound to determine the parties' intent solely "from the plain meaning of the contractual language." Flores v. Earnshaw, 2009 UT App 90, ¶ 8, 209 P.3d 428 (internal quotation marks omitted). Furthermore, when reviewing a trial court's interpretation of a contract, "we defer to the trial court on questions of fact but not on questions of law.'" Id. ¶ 7 (quoting Peterson v. Sunrider Corp., 2002 UT 43, ¶ 14, 48 P.3d 918). And finally, "[w]hether a contractual term or provision is ambiguous on its face is a question of law," to be reviewed for correctness. Id. (citing Daines, 2008 UT 51, ¶ 25).

¶11 Stanford's contention regarding ambiguity in the 1995 Trust Deed Note focuses on integration and the parties' prior negotiations and letters: Stanford makes no extensive argument that the language within the four corners of the 1995 Trust Deed Note renders his personal guaranty amount ambiguous. The guaranty provision in the 1995 Trust Deed Note clearly states that Stanford's liability will be \$500,000 exclusive of interest, fees, and costs. Because none of the terms in the guaranty provision are "capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies," see Daines, 2008 UT 51, ¶ 25 (internal quotation marks omitted), we conclude that the guaranty provision in the 1995 Trust Deed Note is unambiguous as a matter of law. Summary judgment on this issue was therefore proper. Furthermore, because there is no dispute that the amount owed under the 1995 Trust Deed Note exceeded \$500,000, we determine that Stanford's personal liability was correctly calculated at \$500,000 plus interest, fees, and costs, for a total of \$1,009,872.35.

C. Credit for Past Payments

¶12 Stanford also argues that the trial court erred as a matter of law in concluding that he was not entitled to credit toward his personal guaranty for payments he made prior to the filing of this action. Stanford asserts 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]." Implicit in this argument is the notion that Stanford made these payments in his capacity as a guarantor, as opposed to in his capacity as Snowmass's sole member. Whether 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.

¶13 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.

¶14 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.³ Consequently, we affirm the trial court's determination that Stanford is not entitled to credit toward his personal guaranty for these payments.

II. Utah Code section 57-1-32

¶15 Stanford argues that even if we affirm the trial court's grant of summary judgment, Utah Code section 57-1-32 requires that we remand this case to the trial court so that it may offset the fair market value of the Property against the judgment. Stanford did not preserve this argument below, but argues that we should nevertheless review it due to exceptional circumstances. See State v. Holgate, 2000 UT 74, ¶¶ 11-12, 10 P.3d 346 (reaffirming that "the exceptional circumstances exception is ill-defined and applies primarily to rare procedural anomalies" (internal quotation marks omitted)). The exceptional circumstances to which Stanford refers include that the facts implicating section 57-1-32 did not arise until after the judgment in this case was entered. Thus, in order to evaluate whether exceptional circumstances exist to justify our review of this unpreserved argument, we must first determine whether section 57-1-32 applies to the facts of this case.

¶16 Section 57-1-32 states, in pertinent part,

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before

³Stanford cites St. Paul Fire & Marine Insurance Co. v. Dakota Electric Supply Co., 309 F.2d 22, 25 (8th Cir. 1962), and Central Blacktop Co. v. Town of Cicero, 519 N.E.2d 972, 976 (Ill. App. Ct. 1988), arguing that "when a lender accepts a payment from a guarantor, and knows that the payment has come from the guarantor, the lender is required to apply that payment toward[] the guarantor's debt." (Emphasis added.) These cases are distinguishable because both were brought to recover under construction-related payment bonds and have different facts than in this case.

rendering judgment, the court shall find the fair market value of the property at the date of the sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.

Utah Code Ann. § 57-1-32 (Supp. 2008) (emphases added).

¶17 We conclude that section 57-1-32 is not applicable. The Property was subject to two trust deeds: the first was to secure the Security Mutual Note, the second is the subject of this lawsuit and secures the 1995 Trust Deed Note. Although Stanford was a guarantor of both trust deed notes, this action involved only the 1995 Trust Deed Note. Eventually, Bank of Utah succeeded Security Mutual on the Security Mutual deed and conducted a foreclosure sale. Because that foreclosure was on the first trust deed, not the second trust deed involved in this case, section 57-1-32 is not implicated. That section places limitations on a deficiency action after a trust deed sale. See id. Bank of Utah and the Parks waived any right to seek a deficiency judgment against Stanford related to the foreclosed Security Mutual deed, so Stanford is precluded from invoking section 57-1-32's protections and certainly cannot do so in this action involving a different obligation. We accordingly conclude that there are not exceptional circumstances sufficient to justify our review of this otherwise unpreserved argument. See Holgate, 2000 UT 74, ¶ 11.

CONCLUSION

¶18 We find no clear error in the trial court's implicit finding that the 1995 Trust Deed Note was integrated with respect to Stanford's personal guaranty. We also determine that the guaranty provision in the 1995 Trust Deed Note is unambiguous as a matter of law and, therefore, consideration of parol evidence is improper. We further conclude that Stanford is not entitled to credit against his personal guaranty for payments made to the Parks prior to this action because there is no evidence that the Parks agreed to such an arrangement and he cannot otherwise control the application of these payments. As a result, the trial court appropriately granted summary judgment for the Parks. Finally, exceptional circumstances do not exist sufficient to

justify our review of Stanford's argument regarding application of Utah Code section 57-1-32. Affirmed.

Pamela T. Greenwood,
Presiding Judge

¶19 WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge