1990

American Savings & Loan Association v. C. John Gibson : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN SAVINGS & LOAN ASSOCIATION, a Federal Association,	:	
Plaintiff and Appellee,	:	Case No. 900264
-vs-	:	Priority 16
C. JOHN GIBSON, LEWIS E. YOUNG and BONNEVILLE INDUSTRIES, INC., a Nevada corporation,	:	
Defendant and Appellant.	:	

BRIEF OF APPELLEE

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Industries, Inc.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953 as amended), which is from a final Partial Summary Judgment entered by the Third Judicial District Court in and for Salt Lake County.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether American's cause of action against Bonneville for enforcement of a written guaranty agreement executed by Bonneville is subject to the statute of limitations for a deficiency action.

2. Whether Bonneville may assert the "one-action rule", codified in Utah Code Ann. § 78-37-1, as a defense where the mixed collateral loan obligation was secured by personal property and a guaranty agreement in addition to a deed of trust on real property.

3. Whether the Guaranty Agreement, which expressly states that, upon default of the primary obligors, American need not first exhaust any other collateral or security or remedy before pursuing Bonneville is an absolute guaranty.

4. Whether Bonneville may assert defenses which it expressly waived *in the Guaranty Agreement*.

   A. Whether the alleged discharge of the primary obligors because of American's failure to exhaust all remedies discharges Bonneville where the Guaranty Agreement expressly waives any requirement of exhaustion.

   B. Whether a separate operating loan transaction between the primary obligors and American primarily secured by

collateral different from that pledged under the initial loan transaction can be construed to be a material modification of the Guaranty Agreement.

C. Whether a separate operating loan transaction, primarily secured by different collateral and to which Bonneville was not a party, can be construed to be a novation of the Guaranty Agreement.

STATEMENT OF THE CASE

Respondent American Savings & Loan Association (hereinafter "American") filed an action on or about April 26, 1989, in the Third Judicial District Court in and for Salt Lake County, State of Utah, naming C. John Gibson, Lewis E. Young and Appellant Bonneville Industries, Inc. (hereinafter "Bonneville") as defendants. (R. 2-42.) American's cause of action against Bonneville sought to enforce the terms of a written guaranty agreement executed by Bonneville on October 28, 1983. (R. 3-5.)

Following service of the Complaint, Bonneville filed an Answer and discovery proceeded. (R. 46-52.) On November 29, 1989, American filed a Motion for Summary Judgment against Bonneville. (R. 58-74.) Bonneville subsequently filed a cross Motion for Summary Judgment against American. (R. 75-133.) On April 23, 1990, after hearing oral argument on both motions, the trial court, the Honorable Kenneth Rigtrup presiding, entered an Order granting American's Motion for Summary Judgment against Bonneville as to the

issue of Bonneville's liability on the guaranty, but reserving the issue of the amount of damages for subsequent determination. The trial court also denied Bonneville's Motion for Summary Judgment against American. (R. 216-218.) In its ruling, the trial court expressly found as follows:

> The one-action rule found at Utah Code Ann. § 78-37-1 does not apply to the enforcement by plaintiff of defendant Bonneville Industries, Inc.'s Guaranty in this case, the performance of defendants' obligations having been secured by a deed of trust on real property, an unconditional and absolute guaranty agreement and a perfected security interest in personal property. (R. 217.)

STATEMENT OF FACTS

On or about October 28, 1983, American made a loan to Gibson Cryogenics, Inc. ("Gibson Cryogenics") and C. John Gibson, individually. (R. 71.) The original principal amount of the loan was $1,100,000.00 and the loan monies were used to finance the purchase of the real property from which C. John Gibson and Gibson Cryogenics conducted business. (R. 175.) The seller of the real property was Bonneville, and $510,000.00 of the loan proceeds were paid directly to Bonneville, while $572,547.38 of the loan proceeds were paid to First Security Bank of Utah to pay off Bonneville's loan. (R. 175.) The loan was partially secured by a Deed of Trust on the improved real property, the proceeds thereof and the rents derived therefrom, and was further partially secured by a perfected security interest in personal property which included various

pieces of equipment. (R. 71.) In addition, the described loan ("the mixed collateral loan") was guaranteed by Bonneville pursuant to a written Guaranty Agreement dated October 28, 1983, a copy of which is attached hereto as Addendum "A". (R. 71.)

Gibson Cryogenics and C. John Gibson eventually defaulted under the terms of the loan by failing to make payments when due. In 1986, Gibson Cryogenics filed a petition in bankruptcy. American moved for relief from the automatic stay in the bankruptcy case, and its motion was granted on March 16, 1988. (R. 71.) On August 8, 1988, a foreclosure sale was had on the real property which partially secured the loan obligation, and American was subsequently able to realize the sum of $283,000.00 from the sale of the real property. (R. 72.) The personal property collateral which was a significant part of the security for the mixed collateral loan was also sold, and the sum of $225,000.00 was realized. All monies received from the sale of the real property and personal property were applied to and reduced the mixed collateral loan obligation guaranteed by Bonneville. However, a deficiency remains owing on the loan obligation guaranteed by Bonneville after liquidation of all of the security, both realty and personalty, and application of the proceeds to the indebtedness. (R. 72-73.) Moreover, although Bonneville made inquiry as to whether American would sell the Promissory Note and Deed of Trust to it, and American indicated its willingness to sell, at no time has American received an offer to purchase from Bonneville.

In addition to the described 1983 mixed collateral loan, in January of 1985, American made a revolving operating loan to Gibson Cryogenics and C. John Gibson in the original principal amount of $400,000.00. This revolving operating loan was secured primarily by accounts receivable generated by Gibson Cryogenics. (R. 175.) Most of the payments received by American were direct payments from Gibson Cryogenics customers to American and as the revolving loan was paid down, Gibson Cryogenics was permitted to reborrow the funds for continuing operating costs. (R. 175.) Although the 1985 revolving operating loan, primarily secured by accounts receivable, was secondarily secured by the real property which also secured the 1983 mixed collateral loan, no payments received by American on the mixed collateral loan were credited to the revolving operating loan. Moreover, no payments received on the revolving operating loan were applied on the mixed collateral loan, nor could they be, because the mixed collateral loan was not secured by receivables generated by Gibson Cryogenics and the loan documentation did not permit American to apply account receivable monies to the 1983 obligation. (R. 175-176.)

SUMMARY OF ARGUMENTS

American properly brought an action against Bonneville seeking to enforce a written guaranty executed by Bonneville which guaranteed payment of a mixed collateral loan. American's claim against Bonneville is not barred by the statute of limitations

applicable to deficiency actions, nor did American's election to foreclose on the real and personal property pledged as collateral for the loan, thereby reducing the amount for which Bonneville was liable, in any way discharge Bonneville's obligations as guarantor. Moreover, since the relevant loan was secured by both realty and personalty, the "one-action rule" is not applicable.

The Guaranty Agreement executed by Bonneville is an absolute and unconditional guaranty, and is enforceable according to its express terms. The defense of discharge of the primary obligtors, which was waived by Bonneville in the guaranty, is therefore not now available to Bonneville even if there were a factual basis for it. In addition, there is no basis for Bonneville's allegations that a separate loan transaction between American and the primary obligors constituted a material modification of the guaranty, or resulted in a novation. Finally, there are no genuine issues of material fact which would have precluded entry of summary judgment in favor of American on the legal issue of Bonneville's liability as guarantor.

ARGUMENT

The standard for appellate review of a trial court's entry of summary judgment as a matter of law is that of correctness, and no particular deference is afforded to the trial court's view of the law. Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382 (Utah 1989). Similarly, the standard for appellate review of the

unambiguous language of a written agreement is also a correctness standard. Bettinger v. Bettinger, 793 P.2d 389 (Utah App. 1990). Applying the correctness standard to the trial court's determination under the undisputed material facts of, and law applicable to, this case, it is clear that the trial court properly entered summary judgment in favor of American.

I.

AMERICAN'S CAUSE OF ACTION AGAINST BONNEVILLE IS NOT A DEFICIENCY ACTION AND ONLY SEEKS TO ENFORCE THE WRITTEN GUARANTY AGREEMENT EXECUTED BY BONNEVILLE.

Bonneville incorrectly characterizes American's cause of action against Bonneville as an action for a deficiency arising after foreclosure. Bonneville then argues that American's action is barred because Utah Code Ann. § 57-1-32 (1953 as amended) provides a three-month limitation period within which a deficiency action must be brought. (Appellant's Brief at 14-16.) Bonneville's argument is without merit. Section 57-1-32 relates to collection of a deficiency against a mortgagor after extrajudicial sale of real property pledged as collateral. Bonneville is a guarantor, not the mortgagor, and did not pledge the real property as security for its obligation as a guarantor. Therefore, American's claim against Bonneville is not barred by § 57-1-32.

Courts in other jurisdictions have found that a guaranty is an unsecured liability separate and distinct from a mortgage. In

First Security Bank of Idaho, N.A. v. Gaige, 765 P.2d 683 (Idaho 1988), the Court held that Idaho's anti-deficiency statute did not protect a guarantor from liability. Similarly, in Riverside National Bank v. Manolakis, 613 P.2d 438 (Okla. 1980), the Court ruled that the obligation of a guaranty is independent and separately enforceable, so that a guarantor is not automatically discharged by a creditor's failure to seek a deficiency. See also Mandan Security Bank v. Heinzohn, 320 N.W.2d 494 (N.D. 1982) (North Dakota anti-deficiency statute did not apply to the guarantors, since the guaranty was a separate liability); Victory Highway Village, Inc. v. Weaver, 480 F. Supp. 71 (D. Minn. 1979) (guaranties were absolute and unconditional and provided a wholly distinct cause of action against the guarantor, entirely separate from a deficiency action against the mortgagor).

In addition, the language of the Guaranty Agreement at issue specifically provides that, although American had no obligation to do so, if it chose to proceed with foreclosure pursuant to the terms of the Deed of Trust, it would "not be required to prosecute or institute proceedings to recover any deficiency as a condition of payment hereunder or endorsement hereof." ¶ 4. Since American had no obligation to file a deficiency action against C. John Gibson and Gibson Cryogenics as a prerequisite to seeking recovery on the guaranty from Bonneville, it would require this Court to violate the clear terms of the guaranty to find that American's claim against Bonneville is somehow barred by the deficiency

statute of limitations. American's claim against Bonneville is not, nor could it be, a deficiency claim, but rather seeks enforcement of the express terms of the separate written Guaranty Agreement executed by Bonneville.

Bonneville also argues that American has discharged C. John Gibson and Gibson Cryogenics by failing to seek a deficiency judgment against them and has therefore released Bonneville from its obligations under the Guaranty Agreement. (Appellant's Brief at 16-19.) Again, Bonneville ignores the plain and undisputed language of the guaranty and tortures the facts.[1] American could not have filed a deficiency action against Gibson Cryogenics because of the stay imposed by its bankruptcy filing. But even assuming, arguendo, that American could have pursued a deficiency against C. John Gibson and Gibson Cryogenics and was obligated to do so, it is clear that no such obligation would run to Bonneville. The express terms of the written guaranty provide as follows:

> [N]o act or omission of any kind by Beneficiary [American] shall affect or impair this Guaranty, and Beneficiary shall have no duties to the Guarantor [Bonneville]. ¶ 10.

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[1] Bonneville also erroneously relies on Nevada Bank of Commerce v. Esquire Real Estate, 468 P.2d 22 (Nev. 1970) and on McGill v. Idaho Bank and Trust, 632 P.2d 683 (Idaho 1981) in support of its position. The first case discusses only novation, and the second case holds that where a guarantor contractually waives the defense of release of the principal debtor, as did the Bonneville, the guarantor will remain liable even though the defense of release might otherwise have been available.

Thus, American's determination not to, or inability to, pursue a deficiency action against C. John Gibson and Gibson Cryogenics in no way affects enforcement of the Guaranty Agreement against Bonneville.

II.

THE "ONE-ACTION RULE" DOES NOT PREVENT ENFORCEMENT OF A GUARANTY ACCORDING TO ITS TERMS.

The "one-action rule", set forth in Utah Code Ann. § 78-37-1 (1953 as amended), by its terms applies only to debts or rights "secured solely by mortgage upon real estate." It is undisputed that the obligation guaranteed by Bonneville, the mixed collateral loan, was secured by a trust deed on real estate, rents and proceeds, certain other valuable personal property and the Guaranty Agreement at issue. As the trial court correctly found, the mixed collateral loan guaranteed by Bonneville was not secured solely by a mortgage upon real estate and the one-action rule accordingly does not apply.

This Court has previously held that the one-action rule applies only to actions between mortgagors and mortgagees and does not extend to third parties. Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc., 323 P.2d 266 (Utah 1958). Furthermore, the written Guaranty Agreement executed by Bonneville is not a debt secured by real property at all, but rather is a separate, unsecured obligation. Even in the State of California, where a

strong anti-deficiency sentiment prevails, courts have held that *the one-action rule does not prevent a direct action against a true* guarantor. United Cal. Bank v. Maltzman, 44 Cal. App. 3d 41, 118 Cal. Rptr. 299 (Cal. App. 1974). Bonneville's arguments relating to the one-action rule thus fail to recognize the fact that the "one-action rule" applies neither to the mixed collateral loan nor to the separate Guaranty Agreement.

III.

THE WRITTEN GUARANTY AGREEMENT EXECUTED BY BONNEVILLE ON OCTOBER 28, 1983 IS AN ABSOLUTE AND UNCONDITIONAL GUARANTY.

The trial court correctly found that the Guaranty Agreement at issue is "an unconditional and absolute guaranty agreement." In the case of Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982), this Court articulated the difference between an absolute guaranty of payment and a mere guaranty of collection:

> [A] guarantee of payment is absolute, and the guaranteed party need not fix its losses by pursuing its remedies against the debt or the security before proceeding directly against the guarantor. (Emphasis in original, cites omitted.)
>
> In contrast, a guarantee of collection is conditional only, the guarantor's liability being dependent upon the creditor's first exhausting its remedies against the debtor and any security before resorting to action against the guarantor. (Emphasis in original, cites omitted.)

Id. at 743. See also Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105 (Utah App. 1987).

The written guaranty executed by Bonneville expressly provides that Bonneville "[u]nconditionally and absolutely guarantees the due and punctual payment of the principal of the Note, the interest thereon and any other monies due or which may become due thereon. . . ." ¶ 1. The Guaranty Agreement further states that it may be enforced by American without the necessity of "first resorting to or exhausting any other security or collateral or without first having recourse to the Note or any of the property covered by the Deed of Trust or other document or instrument securing the Note. . .". ¶ 4. The guaranty finally specifically provides that the guarantor's obligations thereunder "shall be absolute and primary and shall be complete and binding upon this Guaranty being executed by it and subject to no condition precedent or otherwise." ¶ 11. Under Utah law then, the Guaranty Agreement at issue is an absolute guaranty of payment since it is in no way conditional.

Despite the express language of the guaranty and the applicable Utah law, Bonneville argues that by electing to foreclose on the real and personal property, American treated the guaranty as a "collateral guaranty". (Appellant's Brief at 22.) The language of the Guaranty Agreement itself is dispositive, however, in that the terms of paragraph 4 of the guaranty expressly provide that American's determination to foreclose and mitigate its losses in no

way affects Bonneville's liability as an absolute guarantor. Moreover, this Court has previously held that a guarantor's "independent obligation" under an absolute guaranty is not affected by the creditor's actions in pursuance of the debtor:

> The fact that the creditor obtained a judgment against the debtor but failed to allege execution on that judgment or exhaustion of his remedies against the debtor or the security does not alter the nature of the guarantor's independent obligation as a guarantor.

Strevell-Paterson at 744.

It is thus clear that Bonneville's guaranty is absolute and that American was not required to first liquidate the available collateral prior to seeking enforcement of the guaranty, although American in fact did so to Bonneville's benefit and reduced the amount recoverable from Bonneville under the guaranty by the amount of monies received from the sale of the real and personal property collateral.

IV.

THE GUARANTY AGREEMENT IS ENFORCEABLE ACCORDING TO ITS EXPRESS TERMS.

Under Utah law, the specific terms of a guaranty are enforceable. For example, express waivers in a guaranty are enforceable against the guarantor. In Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105 (Utah App. 1987), the Utah Court of Appeals stated that a guarantor may waive its right to claim relief based upon an impairment of collateral. Id. at 109.

Similarly, in Continental Bank & Trust Co. v. Utah Security Mortgage, Inc., 701 P.2d 1095 (Utah 1985), this Court upheld a waiver in a guaranty which read, "[T]he liability of the Guarantor(s) shall not be affected, released or exonerated by release or surrender of any security held for payment of any debts hereinbefore mentioned . . .". In Westinghouse Credit Corp. v. Hydroswift Corp., 528 P.2d 156 (Utah 1974), this Court also upheld the express terms of an absolute guaranty and ruled that the guarantor was liable, despite its claim that the creditor's failure to repossess and sell the collateral operated as a release of its guaranty.

In the case at bar, Bonneville seeks to now assert several defenses which it previously and expressly waived at the time it executed the Guaranty Agreement in 1983; namely, release of the primary obligors, material modification and novation.

A. The alleged discharge of C. John Gibson and Gibson Cryogenics is irrelevant to Bonneville's liability as guarantor.

The terms of the Guaranty Agreement specifically and unequivocally provide that Bonneville's liability is not conditioned upon any action taken by American against the principal obligors, but rather attaches at the time C. John Gibson and Gibson Cryogenics default on the loan obligation guaranteed. In paragraph 1 of the Guaranty Agreement, Bonneville "unconditionally and absolutely guarantees the due and punctual payment" of the loan obligation; in

paragraph 2, Bonneville agrees to remain liable until C. John Gibson and Gibson Cryogenics fully perform their obligations under the loan agreements, "notwithstanding any act, omission or thing which might otherwise operate as a legal discharge of the guarantor"; in paragraph 4 Bonneville agrees that the guaranty can be enforced by American without resorting first to the security or collateral, but if American determines to proceed with foreclosure, it shall not be required to prosecute or institute proceedings to recover a deficiency as a condition of payment under or endorsement of the guaranty; in paragraph 10 Bonneville agrees that no act or omission of any kind by American shall affect or impair the guaranty and that American shall have no duties to Bonneville; in paragraph 11 Bonneville agrees that its obligations as guarantor are absolute and are complete and binding upon execution of the guaranty and "subject to no conditions precedent or otherwise"; and, finally, in paragraph 15 Bonneville agrees that the obligations undertaken in the guaranty are continuing and irrevocable until the mixed collateral loan and related charges have been satisfied.

In light of the unambiguous written terms of the Guaranty Agreement, Bonneville's attempts to now raise various affirmative defenses alleging that it has been released from its expressly undertaken guaranty obligations lack merit. Even if such defenses were supported by the facts, which they are not, no action

undertaken by American has in any way resulted in the release of Bonneville.

B. <u>The subsequent revolving operating loan of 1985 was not a material modification of the Guaranty Agreement</u>.

Bonneville also alleges that because the 1985 revolving operating loan was secondarily secured by the real property which partially secured the 1983 mixed collateral loan, a greater financial risk was placed upon Bonneville than was originally contemplated, resulting in a material modification of the Guaranty Agreement. (Appellant's Brief at 19-20.) Once again, the express and undisputed language of the guaranty provides otherwise. Paragraph 12 of the agreement states that the terms of the guaranty may not be changed or modified in any way except by a writing executed by American, and it is clear that the 1985 revolving operating loan was not, nor was it intended to be, a modification of the mixed collateral loan. In addition, Bonneville substantially mischaracterizes the facts in order to make its argument appear plausible. In truth, the revolving operating loan of 1985 was a completely separate loan transaction only marginally related to the loan obligation which Bonneville guaranteed. The revolving loan was secured primarily by accounts receivable and no payments received on the revolving operating loan were applied on the 1983 mixed collateral loan, or vice versa. At all times American treated the loans separately. Thus, the $3 million referred to by

Bonneville in its brief as being monies which should have been applied to the 1983 mixed collateral loan was in fact payments received on the revolving operating loan which, under the relevant loan documents, could not have been applied to the 1983 mixed collateral loan.

The case relied on by Bonneville, Carrier Brokers, Inc. v. Spanish Trail, 751 P.2d 258 (Utah App. 1988), is clearly distinguishable from the case at bar. Specifically, the guaranty at issue therein was a conditional guaranty which provided that the creditor would first pursue the collateral, Coca-Cola, prior to pursuing the guarantor. On those facts, the Utah Court of Appeals appropriately held that the guarantor was not liable where the monies guaranteed were in fact used to purchase fish, not Coca-Cola, since that was not the parties' bargain. Conversely, here the language of the Guaranty Agreement provides that Bonneville consents to "any and all substitutions, exchanges or releases of all or any part of the collateral therefore . . .". ¶ 2. Moreover, all that occurred by American taking the real property as secondary security for the 1985 revolving operating loan was that a lien was created against the real property junior to that imposed by the 1983 Deed of Trust, so that the security for the 1983 mixed collateral loan was unaffected. There was thus no material modification of the Guaranty Agreement.

C. The subsequent revolving loan agreement did not result in a novation.

Under Utah law, for a novation to occur, there must be:

> (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one. (Cites omitted.)

Horman v. Gordon, 740 P.2d 1346, 1352-53 (Utah App. 1987).[2] Under this standard, it is clear that there is no novation as between American and C. John Gibson and Gibson Cryogenics or as between American and Bonneville. The subsequent revolving operating loan was a distinct transaction, with separate security given, which in no way was intended to or operated to extinguish any of the obligations undertaken by C. John Gibson and Gibson Cryogenics under the initial mixed collateral loan. More significantly, there was no subsequent agreement between American and Bonneville, the contracting parties under the guaranty. As there was no novation as between American and the primary obligors, or between American and Bonneville, clearly then Bonneville has not been released from its obligations under the Guaranty Agreement.

Bonneville alleges that the "novation" is evidenced by the fact that American would not sell the Promissory Note and Deed of

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[2] The alleged case authority relating to novations cited by Appellant in its brief, Crested Butte Silver Mine, Inc. v. Candelaria Metals, Inc., 740 P.2d 1304 (Utah 1987) does not involve or discuss the issue of a novation at all, but rather discusses the legal doctrines of rescission and accord and satisfaction. Accordingly, it is of no relevance to Appellant's argument regarding novation.

Trust to Bonneville. (Appellant's Brief at 21-22.) Not only is that allegation irrelevant, but the record also demonstrates that American at no time received an offer from Bonneville to purchase the Promissory Note and Deed of Trust, although a preliminary inquiry was made by Bonneville and responded to affirmatively by American. There is thus no factual basis for Bonneville's novation argument.

V.

THERE ARE NO MATERIAL FACTS IN DISPUTE.

Summary judgment is properly granted if there are no genuine issues of material fact in dispute and if the moving party is entitled to judgment as a matter of law.

The material facts in this case are uncontroverted. Bonneville executed the guaranty. The guaranty is absolute and unconditional. Under the undisputable terms of the Guaranty Agreement, American had no duty or obligation to pursue the real and personal property pledged as collateral for the mixed collateral loan. Without having an obligation to do so, American, nonetheless, obtained relief from the bankruptcy stay and did foreclose the real and personal property security. American then properly credited the proceeds therefrom against the balance owing on the mixed collateral loan. The mixed collateral loan was not a loan secured solely by a mortgage on real property.

There is no factual basis for Bonneville's assertions that a novation occurred, or that there was a material alteration of the original contract. Mere allegations do not suffice to create a question of fact. In addition, the other so-called disputed facts alleged to exist by Bonneville -- that representations were made in the loan commitment which would result in no liability to Bonneville and that American did not properly apply payments and credits which served to release Bonneville -- are not factual issues at all as those questions are clearly answered by reference to the express unambiguous written terms of the relevant documents relating to the loan transactions. In particular, the loan commitment was superseded by the terms of the Deed of Trust, Promissory Note and Guaranty Agreement. And, the mixed collateral loan documents and the revolving operating loan documents clearly do not allow for application of payments and credits as urged by Bonneville.

Having correctly found no genuine issues of material fact on the issue of Bonneville's liability to American, the trial court applied the appropriate law, found that the "one-action rule" did not apply and granted summary judgment for American against Bonneville on the issue of liability and denied Bonneville's cross Motion for Summary Judgment.

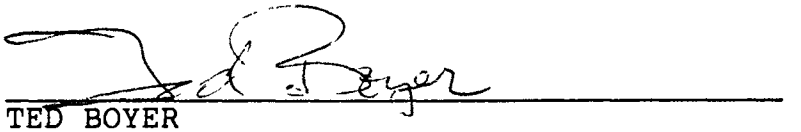
CONCLUSION

For the reasons set forth herein, the trial court's entry of summary judgment in favor of American and against Bonneville on the

issue of Bonneville's liability under the terms of the Guaranty Agreement should be affirmed.

Respectfully submitted this 15th day of April, 1991.

CLYDE, PRATT & SNOW



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CERTIFICATE OF SERVICE

I hereby certify that I caused four (4) true and correct copies of the foregoing Brief of Respondent to be mailed, postage prepaid, to the following this 15th day of April, 1991:

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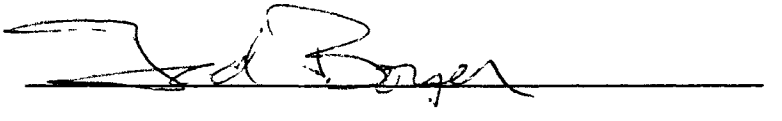

ADDENDUM "A"

GUARANTY AGREEMENT

This Guaranty, made this 28th day of October, 1983, by Bonneville Industries, Inc., a Nevada corporation, ("Guarantor") and Lewis E. Young, individually, ("Additional Guarantor"), to and for the benefit of American Savings and Loan Association, a Utah corporation, ("Beneficiary").

WITNESSETH:

WHEREAS, Gibson Cryogenics, Inc., a Utah corporation, with C. John Gibson, individually and as President and Lewis E. Young as Secretary/Treasurer, ("Debtor") has/have applied to the Beneficiary for a mortgage loan in the amount of One Million One Hundred Thousand and NO/100 Dollars ($1,100,000.00), to be evidenced by its Promissory Note, ("Note"), in that amount dated the 28th day of October, 1983, secured by a Deed of Trust with Security Agreement and Assignment of Rents, ("Deed of Trust"), bearing the same date as the Note; and

WHEREAS, the Beneficiary is unwilling to make said loan unless Guarantor guarantees the payment of principal and interest, and any other charges provided for in the Note, Deed of Trust and any other document or instrument securing the Note, and the performance by the Debtor of all the covenants on its part to be performed and observed pursuant to the provisions thereof; and

WHEREAS, Guarantor desires to give such guaranty to Beneficiary in order to induce Beneficiary to make said loan;

NOW, THEREFORE, in consideration of the aforesaid premises, for the purpose of inducing Beneficiary to make the aforementioned mortgage loan to Debtor, and other good and valuable consideration, Guarantor hereby;

1. Unconditionally and absolutely guarantees the due and punctual payment of the principal of the Note, the interest thereon and any other monies due or which may become due thereon, and the due and punctual performance and observance by the Debtor of all the other terms, covenants and conditions of the Note, Deed of Trust and any other document or instrument securing the Note, whether according to the present terms thereof, at an earlier or accelerated date or dates as provided therein, or pursuant to any extension of time or to any change or changes in the terms, covenants, and conditions thereof now or at any time hereafter made or granted.

2. Waives diligence, presentment, protest, notice of dishonor, demand for payment, extension of time of payment, notice of acceptance of this Guaranty, nonpayment at maturity and indulgences and notices of every kind, and consents to any and all forbearances and extensions of the time of payment of the Note, Deed of Trust or any other document or instrument securing the Note, and to any and all changes in the terms, covenants and conditions thereof hereafter made or granted and to any and all substitutions, exchanges or relesses of all or any part of the collateral therefore; it being the intention hereof that Guarantor shall remain liable as principal until the full amount of the principal of the Note, Deed of Trust and any other document or instrument securing the Note, with interest and any other sums due or to become due thereon, shall have been fully paid and the terms, covenants and conditions shall have been fully performed and observed by Debtor, notwithstanding any act, omission or thing which might otherwise operate as a legal discharge of the Guarantor.

3. Agrees that he shall have no right of subrogation whatsoever with respect to the aforesaid indebtedness, or to any monies due and unpaid thereon or any collateral securing the same; unless and until Beneficiary shall have received payment in full of all sums at any time secured by the Deed of Trust or any other document or instrument securing the Note.

4. Agrees that this Guaranty may be enforced by Beneficiary without first resorting to or exhausting any other security or collateral or without first having recourse to the Note or any of the property covered by the Deed of Trust or other document or instrument securing the Note through foreclosure

proceedings, trustee's sale or otherwise; provided, however, that nothing herein contained shall prevent Beneficiary from suing on the Note or foreclosing upon or initiating a trustee's sale under the Deed of Trust or other document or instrument securing the Note or from exercising any other rights thereunder; and, if such foreclosure, sale or other remedy is availed of only the net proceeds therefrom, after deduction of all charges and expenses of every kind and nature whatsoever, shall be applied in reduction of the amount due on the Note, Deed of Trust and any other document or instrument securing the Note, and Beneficiary shall not be required to prosecute or institute proceedings to recover any deficiency as a condition of payment hereunder or endorsement hereof. At any sale of the security or collateral for the indebtedness or any part thereof, whether by foreclosure or otherwise, Beneficiary may at its discretion purchase all or any part of such collateral so sold or offered for sale for its own account and may apply against the amount bid therefor the balance due it pursuant to the terms of the Note or Deed of Trust or any other document or instrument securing the Note.

5. Agrees that in the event this Guaranty is placed in the hands of an attorney for enforcement, the Guarantor will reimburse the Beneficiary for all expenses incurred, including reasonable attorney's fees, with or without litigation having been filed, and if filed, including any attorney's fees in any trial or appellate court.

6. Agrees that this Guaranty shall inure to the benefit of and may be enforced by Beneficiary, and any subsequent holder and/or Beneficiary of the Note and Deed of Trust and any other document or instrument securing the Note and shall be binding upon and enforceable against the Guarantor and the Guarantor's legal representatives, heirs, successors or assigns.

7. Agrees that the indebtedness of Debtor to Beneficiary, covered by this Guaranty shall be and the same hereby is declared to be prior to any claim that Guarantor may now have or hereafter acquire against Debtor, whether or not Debtor becomes insolvent, and Guarantor shall and does expressly subordinate any such claim Guarantor may have against Debtor, upon any account whatsoever, to any claim that Beneficiary has against Debtor based upon the indebtedness covered by this Guaranty. In the event of insolvency and consequent liquidation of the assets of Debtor, through bankruptcy, by an assignment for the benefit of creditors, by voluntary liquidation, or otherwise, the assets of Debtor applicable to the payment of the claims of both Beneficiary and Guarantor shall be paid to Beneficiary and shall be first applied by Beneficiary to all claims which it may have or acquire against Debtor or any assignee or trustee in bankruptcy of Debtor; provided that such assignment shall be effective only for the purpose of assuring the Beneficiary full payment of all indebtedness of Debtor to Beneficiary covered by this Guaranty.

8. Agrees that assignment by Beneficiary of all or part of the indebtedness covered by this Guaranty shall transfer to the assignee all benefits of this Guaranty as to the portion of such indebtedness assigned. This Guaranty shall remain in effect in favor of the Beneficiary as to the portion of such indebtedness not assigned. Guarantor further agrees that if payment is made by Debtor on the debt guaranteed hereby and thereafter Beneficiary is forced to remit the amount of that payment to the Debtor trustee in bankruptcy or similar person under any federal or state bankruptcy law or law for the relief of debtor, the Debtor debt shall be considered unpaid for the purpose of enforcement of this Guaranty.

9. Agrees that notice by Beneficiary of the acceptance of this Guaranty is hereby waived, and that this Guaranty may be assigned to any holder of the Note, Deed of Trust and any other document or instrument securing the Note.

10. Agrees that no act or omission of any kind by Beneficiary shall affect or impair this Guaranty, and Beneficiary shall have no duties to the Guarantor.

11. Agrees that their obligations hereunder shall be absolute and primary and shall be complete and binding upon this Guaranty being executed by it and subject to no conditions precedent or otherwise.

GUARANTY

12. Agrees that the terms of this Guaranty may not be changed or modified in any way except by a writing executed by the holder or Beneficiary of the Note, Deed of Trust, and any other document or instrument securing the Note.

13. Agrees that this Guaranty shall be specifically enforceable by the holder or Beneficiary of the Note, Deed of Trust and any other document or instrument securing the Note, in the event of a sale or transfer of the collateral covered by the Deed of Trust or other document or instrument securing the Note, or any part of such collateral, which sale is an event of default under the Deed of Trust or other document or instrument securing the Note, even though such holder does not accelerate, in whole or in part, the indebtedness so secured, and even though there is no right in such holder to accelerate the indebtedness so secured, in whole or in part.

14. Agrees this Guaranty contains the full agreement of the Guarantor and is not subject to any oral conditions.

15. Agrees that the obligations hereunder shall be continuing and irrevocable until said mortgage loan and all charges provided for in the Note, Deed of Trust or other document or instrument securing the Note have been completely satisfied and paid in full.

Each of the undersigned Guarantor and Additional Guarantor hereby consents to and submits himself to the jurisdiction of the State of Utah and agrees that the Beneficiary under the aforementioned Note shall be entitled to a judgement and decree and enforcement by the courts of the State of Utah for any amount which may be adjudged to be paid to the Beneficiary by any such court of the state, including, but not limited to, attorney's fees, interest and reasonable costs. Further, the Secretary of State for the State of Utah and his successors in the office shall be the agent for service of process on the undersigned Guarantor and Additional Guarantor within the State of Utah with respect to any such suit.

Copies of any legal process affecting the undersigned shall be forwarded to:

Bonneville Industries, Inc. 2893 Sunrise Boulevard Suite #212 Rancho Cordova, California 95670	Lewis E. Young c/o Gibson Cryogenics, Inc. 9501 West 900 South, P.O. Box 2388 Ogden, Utah

Notwithstanding anything to the contrary written above, the undersigned Additional Guarantor hereby unconditionally and absolutely guarantees the performance of Bonneville Industries, Inc., a Nevada corporation, according to and upon the same terms as contained in this Guaranty Agreement. It is specifically understood by all parties to this agreement that Guarantor guarantees said performance of Debtor and the Additional Guarantor guarantees the performance of Guarantor only.

IN WITNESS WHEREOF, Guarantor and Additional Guarantor have executed this instrument the day and year first above mentioned.

GUARANTOR:

BONNEVILLE INDUSTRIES, INC.,
a Nevada corporation

Cary L. Young, President

Cristy Ley Young, Secretary

ADDITIONAL GUARANTOR:

Lewis E Young, individually