2003

Sony Electronics, Inc., a Delaware corporation v. Visual Technology Inc., a Utah corporation, Erland Reber, an individual, and Sharlene Reber, an individual : Brief of Appellee

Utah Court of Appeals

David E. Leta; Kimberly Neville; Snell and Wilmer; Attorneys for Appellant.
Elizabeth M. Peck; Attorneys for Appellees.

Rear

IN THE UTAH COURT OF APPEALS

SONY ELECTRONICS, INC., a Delaware corporation, Plaintiff/Appellant, vs. **VISUAL TECHNOLOGY, INC.**, a Utah corporation, ERLAND REBER, an individual, and SHARLENE REBER, an individual, Defendants/Appellees.	Case No. 20030883-CA District Ct. No. 020903207

APPELLEES' ADDENDUM

On Appeal from Judgment of Dismissal made by the Third District Court for Salt Lake County, Judge Leslie A. Lewis Presiding.

David A. Leta (1937)
Kimberly Neville (9067)
SNELL & WILMER
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone (801) 257-1900
Attorneys for Appellant
Sony Electronics, Inc.

Elizabeth M. Peck (6304)
LAW OFFICE OF ELIZABETH M. PECK
350 South 400 East, Ste. 101A
Salt Lake City, Utah 84111
Telephone (801) 521-6737
Attorney for Appellees Erland Reber and Sharlene Reber

CONTENTS:

IN THE UTAH COURT OF APPEALS

SONY ELECTRONICS, INC., a Delaware corporation, Plaintiff/Appellant, vs. **VISUAL TECHNOLOGY, INC.**, a Utah corporation, ERLAND REBER, an individual, and SHARLENE REBER, an individual, Defendants/Appellees.	Case No. 20030883-CA District Ct. No. 020903207

APPELLEES' ADDENDUM

On Appeal from Judgment of Dismissal made by the Third District Court for Salt Lake County, Judge Leslie A. Lewis Presiding.

David A. Leta (1937)
Kimberly Neville (9067)
SNELL & WILMER
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone (801) 257-1900
Attorneys for Appellant
Sony Electronics, Inc.

Elizabeth M. Peck (6304)
LAW OFFICE OF ELIZABETH M. PECK
350 South 400 East, Ste. 101A
Salt Lake City, Utah 84111
Telephone (801) 521-6737
Attorney for Appellees Erland Reber and Sharlene Reber

CONTENTS:

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2004, I caused to be mailed, by first class mail, postage prepaid, a true and correct copy of the foregoing APPELLEE'S ADDENDUM to the following:

David Leta
Kimberly Havlik
SNELL & WILMER
15 West So. Temple, Ste. 1200
Gateway Tower West
Salt Lake City, UT 84101-1004

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SONY ELECTRONICS, INC., a Delaware corporation,	:	**MEMORANDUM DECISION**
Plaintiff,	:	**CASE NO. 020903207**
vs.	:	
VISUAL TECHNOLOGY, INC., a Utah corporation, ERLAND REBER, an individual, and SHARLENE REBER, an individual,	:	
Defendants.	:	

This matter came before the Court for hearing on November 6, 2002, in connection with the defendants' Motion to Dismiss. At the conclusion of the hearing, the Court indicated that it would take the matter under advisement to further consider the arguments, the relevant case law and statutes and the written submissions of the parties. Since taking the Motion under advisement, the Court has had an opportunity to consider or reconsider the law, all relevant pleadings, facts and the oral arguments in this case. Now being fully advised, the Court enters the following Memorandum Decision.

LEGAL ANALYSIS

The defendants have filed their Motion to Dismiss, contending that they are not liable to the plaintiff under their 1986

Guaranty, because the debt at issue was incurred by an entirely different entity than the entity whose payment they did guaranty. The plaintiff focuses on the fact that the guarantee was not revoked and continues to be in effect regardless of the changes (in terms of name or officers involved) to Visual Technology, Inc.

At the outset, the Court notes that there was some issue about whether the Court would treat the defendants' Motion as one for summary judgment. The Court reiterates its initial decision to not convert the defendants' Motion. Therefore, the only materials that the Court referred to in making its decision are the Complaint and the documents attached thereto. Having reviewed the factual allegations of the Complaint and the accompanying documents, the Court determines that there are no facts under which the plaintiff can seek to hold the Reber defendants liable under the Guaranty for debts incurred by an entity which is entirely different than the one they guaranteed payment from.

Specifically, as the defendants' counsel clearly articulated during oral argument, this case does not involve a change in the financial structure or organization of Debtor that is the subject of the Guaranty, but rather a new debtor altogether, one that was not covered by the Guaranty in the first place. What we have here are two parallel corporations who happen to share the same name. The first, the corporation whose obligations the Rebers guaranteed,

is no longer in existence. The second is a wholly different corporation which was formerly known as Dunston-Hill.

The documents attached to the plaintiff's Complaint evidence that the plaintiff entered into a Reseller Agreement with the new debtor, Visual Technology, Inc. (II) on August 1, 2001. The address for this new debtor differs from the Debtor referenced in the Guaranty. From that point, it appears that the plaintiff dealt with the signatory to that Agreement, Mr. Jackson, and mailed correspondence to the new address. (See letter dated January 10, 2002, from Mr. Cheng to Mr. Jackson). These facts demonstrate that this case is clearly distinguishable from Mule-Hide Prods. Co. v. White, 438 Utah Adv.Rep. 5 (Utah App. 2002), which the plaintiff strongly relies on. The guarantor in Mule-Hide had not revoked her guarantee when the company that was the subject of her guarantee placed an order from Mule-Hide, which order was subsequently delivered and accepted. The facts in this case demonstrate that it was not the company that the Rebers guaranteed that had ordered and received products from the plaintiff, the debt for which is the subject of this action. Rather, it was the Visual Technology, Inc. (II), located at Bearcat Drive, whose president was Mr. Jackson, that ordered the products pursuant to an entirely new Agreement that the Rebers were not even parties to. Under the facts alleged in the Complaint and in light of the documents

attached to the Complaint, there is no plausible way that the Rebers can be held liable under the Guaranty. Accordingly, the Court grants the Rebers' Motion to Dismiss.

Counsel for the Rebers is to prepare an Order consistent with this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 7th day of January, 2003.

LESLIE A. LEWIS
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 7 day of January, 2003:

David Leta
Kimberly Havlik
Attorneys for Plaintiff
15 W. South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

Elizabeth M. Peck
Attorney for Defendant
350 South 400 East, Suite 101A
Salt Lake City, Utah 84111

M Swapp

206

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SONY ELECTRONICS, INC., a Delaware corporation,	:	COURT'S RULING
Plaintiff,	:	CASE NO. 020903207
vs.	:	
VISUAL TECHNOLOGY, INC., a Utah corporation, ERLAND REBER, an individual, and SHARLENE REBER, an individual,	:	
Defendants.	:	

The Court has before it the Reply Memorandum filed by the plaintiff in support of its Objection to Proposed Order on Motion to Dismiss. The prior Court's Ruling, dated April 22, 2003, gave the plaintiff an opportunity to reply to the defendants' contention that they have a legal basis for seeking attorney's fees, raised for the first time in an opposition to Sony's Objection. Having now reviewed the Objection, the defendants' Response and the recently filed Reply, the Court determines that the Rebers are entitled to attorney's fees under the Guaranty.

First, the Court addresses Sony's argument that the defendants are not entitled to recover attorney's fees under the Guaranty because they successfully argued that the Guaranty is unenforceable in this case. To reiterate, this Court's decision was that the

defendants could not be held liable under the Guaranty, under these specific set of facts. Sony is extrapolating this decision to the illogical conclusion that the entire Guaranty (including the attorney's fees provision) is no longer enforceable. Clearly, all of the parties acknowledged that the Guaranty was enforceable because the Rebers had failed to properly revoke it. In fact, the Guaranty remains operative and could again impose guaranty duties upon the Rebers if the entity whose performance was guaranteed began to accrue debts from Sony. Despite the fact that the Guaranty remains enforceable, the Court found that the Rebers were still not liable under the Guaranty for debts accrued by an unrelated entity. Therefore, contrary to Sony's assertions, the defendants did not (and could not) have "sought a ruling that no cause of action can ever exist [under the Guaranty], under any set of facts." Instead, the ruling was limited to the set of facts before the Court.

Having found that the Guaranty remains operative, the Court also concludes that the attorney's fee provision in the Guaranty together with the reciprocal fee statute (Utah Code Annotated §78-27-56.5) provide the defendants with an avenue for seeking attorney's fees. Sony is correct that this statute establishes a discretionary standard for awarding fees. However, the Court is not persuaded by Sony's argument that the defendants' alleged

failure to comply with certain notice provisions in the Guaranty is a reasonable basis to deny attorney's fees altogether. While it is true that the defendants did not formally revoke their Guaranty, the documents attached to Sony's Complaint evidence its awareness that it was dealing with a new entity under a separate Reseller Agreement. Therefore, the failure to revoke is not the type of egregious conduct that would warrant this Court declining to award attorney's fees in spite of a clear contractual and statutory basis for awarding such fees. Accordingly, the Court denies Sony's Objection. The defendants are to re-submit their proposed Order, with the inclusion of attorney's fees.

This Court's Ruling will stand as the Order of the Court, denying Sony's Objection.

Dated this 13th day of June, 2003.

LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 17 day of June, 2003:

David Leta
Kimberly Havlik
Attorneys for Plaintiff
15 W. South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

Elizabeth M. Peck
Attorney for Defendant
350 South 400 East, Suite 101A
Salt Lake City, Utah 84111

M Snake

Tab C

ELIZABETH M. PECK (6304)
350 So. 400 East, Ste. 101A
Salt Lake City, UT 84111
tel. (801) 521-6737
fax (801) 359-2811

Attorney for Defendants
Erland and Sharlene Reber

IN THE THIRD DISTRICT COURT, DIV. I

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SONY ELECTRONICS, INC., a Delaware corporation, Plaintiff, vs. VISUAL TECHNOLOGY, INC., a Utah corporation, ERLAND REBER, an individual, and SHARLENE REBER, an individual, Defendants.	**ORDER ON MOTION TO DISMISS** Case No. 020903207 Judge Leslie A. Lewis

Defendants Erland and Sharlene Reber's Motion to Dismiss Plaintiff's Complaint against them came on for hearing before the Court, Honorable Leslie A. Lewis presiding, on November 6, 2002. Present and appearing with and on behalf of the Rebers was their counsel Elizabeth M. Peck, and present and appearing for Plaintiff Sony Electronics, Inc. was its counsel of record, David E. Leta and Kimberly A. Havlik of Snell & Wilmer. Following oral argument from counsel, this Court took the matter under advisement to consider further the arguments and written submissions of the parties, relevant case law and statutes, all relevant pleadings, facts and the oral arguments in this case. Having been fully advised and good cause appearing therefor, this Court entered its Memorandum Decision on

January 7, 2003 from which it makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

At the hearing, the issue of whether this Court would treat the Rebers' Motion to Dismiss as one for summary judgment was raised. This Court reiterates its decision not to convert the Motion to Dismiss to a summary judgment motion as no new matters outside the pleading were raised by the Motion, and as such, the Court considered only the Complaint and the documents attached to it in making this decision.

Findings of Fact:

1. The Complaint alleges, *inter alia*, that the Rebers were liable to Plaintiff for certain debts incurred by the above named co-defendant Visual Technology, Inc. under a Guaranty Agreement executed by the Rebers in favor of Plaintiff in 1989 (the "Guaranty").

2. The Rebers filed their Motion to Dismiss pursuant to *Utah Rules of Civil Procedure* 12(b)(6), contending that they are not liable to Plaintiff under the Guaranty because the debt forming the basis for Plaintiff's Complaint was incurred by a wholly separate entity than the entity whose debts were the subject of the Guaranty.

3. The relief requested by the Rebers' Motion to Dismiss, and supporting Memorandum was for both a dismissal of Plaintiff's Complaint against them and for the award their reasonable attorney's fees and costs.

4. In opposing the Rebers' Motion, Plaintiffs focus on the fact that the Rebers did not revoke the Guaranty and it therefore continues in effect regardless of changes to Visual Technology in terms of its officers and name.

5. In this case, there are two parallel corporations who share the same name.

6. This first corporation, Visual Technology (I) no longer exists. It is the corporation whose debts the Rebers guaranteed.

7. The second corporation, Visual Technology (II), is a wholly separate corporation which was formerly known as Dunston-Hill.

8. The documents attached to the Complaint evidence that Plaintiff entered into a Reseller Agreement with the new debtor Visual Technology (II) on August 1, 2001. The address for the new debtor is different from the address of the debtor, Visual Technology (I), referenced in the Guaranty.

9. From the date of the Reseller Agreement on August 1, 2001, it appears that Plaintiff's correspondence to Visual Technology was mailed to the new address and that Plaintiff dealt with the signatory to the Reseller Agreement, Mr. Bruce Jackson. (*See* letter dated 1/10/2002 from Mr. Cheng to Mr. Jackson.)

10. This case does not involve a change in the financial structure or organization of the debtor which is the subject of the Guaranty, Visual Technology (I). It involves a new debtor altogether, Visual Technology (II), which was not covered by the Guaranty in the first place.

Conclusions of Law:

11. Based upon the factual allegations of the Complaint and the accompanying documents, the Court determines that there are no facts under which Plaintiff can attempt to hold the Rebers liable under the Guaranty for debts incurred by Visual Technology (II), an entity which is wholly different from Visual Technology (I), the company for which the Rebers guaranteed payment.

12. In opposing the Motion to Dismiss, Plaintiff strongly relies upon Mule-Hide Prods. Co. v. White, 438 Utah Adv. Rep. 5 (Utah App. 2002). In Mule-Hide, the guarantor had not revoked her guaranty when the company, which was the subject of her guaranty, placed an order from Mule-Hide,

290

which order was subsequently delivered and accepted.

13. The facts of this case, and as set forth above, demonstrate that this case is clearly distinguishable from Mule-Hide. The company whose debts the Rebers guaranteed was not the same company which in fact ordered and received products from Plaintiff, the debt for which products is the subject of this action. It was Visual Technology (II), located at Bearcat Drive and whose president was Mr. Bruce Jackson, that ordered the products from Plaintiff pursuant to an entirely new Agreement as to which the Rebers were not even a party.

14. Under the facts alleged in the Complaint and in light of the documents attached to the Complaint, there is no plausible way that the Rebers can be held liable under the Guaranty.

Accordingly, this Court GRANTS the Rebers' Motion to Dismiss and ORDERS that the relief therein be granted, to wit, that the Complaint against them be dismissed and that they be awarded their reasonable attorney's fees of $8,124.00 as has been established by the Affidavit of Elizabeth M. Peck Regarding Attorney's Fees dated July 8, 2003.

DATED this 25th day of Sept, 2003.

BY THE COURT:

Leslie A Lewis
Third District Court Judge
State of Utah

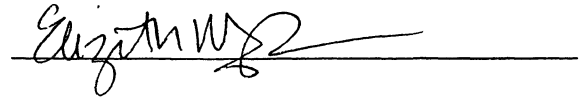
Approved as to Form:
SNELL & WILMER

David Leta
Kimberly Havlik
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2003, I caused to be mailed, by first class mail, postage prepaid, a true and correct copy of the foregoing proposed ORDER ON MOTION TO DISMISS to the following:

David Leta
Kimberly Havlik
SNELL & WILMER
15 W. South Temple, Ste. 1200
Salt Lake City, Utah 84101-1004



292

Tab D

Rule 12. Defenses and objections.

(a) *When presented.* Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application on of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) *Waiver of defenses.* A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) *Pleading after denial of a motion.* The filing of a responsive

pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) *Security for costs of a nonresident plaintiff.* When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) *Effect of failure to file undertaking.* If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

(Amended effective September 4, 1985; April 1, 1990; amended effective November 1, 2000.)

[Previous Document in Book] [Next Document in Book]

Tab E

Rule 52. Findings by the court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) *Waiver of findings of fact and conclusions of law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended effective January 1, 1987.)

Tab F

25-5-4. Certain agreements void unless written and signed.

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2)(a) As used in Subsections (1)(f) and this Subsection (2):

(i)(A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means:

(A) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b)(i) Except as provided in Subsection (2)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (2)(b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

(i) the debtor is provided with a written copy of the terms of the agreement;

(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Tab G

[Previous Document in Book] [Next Document in Book]

78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

[Previous Document in Book] [Next Document in Book]