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Michael T. Bilanzich v. John Lonetti, an individual,
Eunes I. Lonetti, an individual, and JDL Holdings,
L.C., : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL T. BILANZICH,

VS.

JOHN LONETTI, an individual, EUNES
I. LONETTI, an individual, and JDL
HOLDINGS, L.C.,

Defendants/Appellees

APPELLANT’S REPLY BRIEF

Case No. 20040640-CA

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I.

INTRODUCTION

Appellees (collectively the “Lonettis”) sought to recover millions of dollars from Appellant Michael T. Bilanzich (“Bilanzich”) on his Guaranty of the Reese’s Enterprise, Inc. (“REI”) Note even though based upon John Lonnetti’s own testimony in the REI bankruptcy, the Lonettis knew and argued that the \$3.5 Million loan which was a condition precedent to Bilanzich’s liability on his Guaranty had never been fully funded. If the Lonettis had prevailed on their claim against Bilanzich, they would have been entitled to recover their attorney’s fees. Therefore, under *Utah Code Ann. §78-27-56.5* and the provisions of Bilanzich’s Guaranty, as well as the provisions of the Note, Bilanzich is entitled to recover his reasonable attorney’s fees incurred in establishing that he has no liability for payment of the REI Note. It would be fundamentally unfair and would subvert the purpose of the reciprocal attorney’s fee statute to deny Bilanzich recovery of his attorney’s fees when he would have had to pay the Lonettis’ attorney’s fees had he lost.

Further, there is no merit to the Lonettis’ claim that Bilanzich agreed to release or dismiss his claim for attorney’s fees. To the contrary, the written pleadings signed by the parties - - which the Lonettis acknowledge were prepared to effect the agreement of the parties - - clearly and unambiguously state the agreement of the parties, i.e., that Bilanzich was dismissing his Sixth and Eighth Claims for Relief in exchange for a waiver of the

Lonettis' right to appeal the partial summary judgment granted in Bilanzich's favor. The written agreement between the parties contains no provision for release or dismissal of Bilanzich's claim for attorney's fees (or any other claims for that matter).

II.

ARGUMENT

A. BILANZICH IS ENTITLED TO RECOVER UNDER THE ATTORNEYS FEE PROVISION CONTAINED IN THE GUARANTY.

The attorneys fee provision contained in the Guaranty provides:

This Guaranty includes all principal, interest, costs, expenses and attorney's fees incurred *in collection of the Note* and in realization of the security.
[Emphasis Added]

The Lonettis attempt to unreasonably restrict this language by arguing that it only made Bilanzich liable for attorney's fees incurred by the Lonettis in litigating with REI to recover on the Note. Not surprisingly, the Lonettis have been unable to cite any cases to support their argument. This attempted restriction is without merit.

Bilanzich guaranteed payment of the Note. The Lonettis' suit against Bilanzich to, in their words, "enforce the Guaranty" was a suit to collect the Note. Consequently, under the attorney's fee provision of the Guaranty, Bilanzich was liable not only for

attorney's fees incurred by the Lonettis in litigation with REI for "collection of the Note," but for attorney's fees incurred by the Lonettis in litigation with Bilanzich "for collection of the Note" if the Lonettis prevailed. Thus, under the reciprocal attorney's fee statute, *Utah Code Ann.* §78-27-56.5, Bilanzich is entitled to recover his attorney's fees under the Guaranty.¹

The Lonettis do not dispute that in *Ashland Oil, Inc. v. Cardinal Fuels, Inc.*, 872 F.2d 416 (4th Cir. 1989), the Fourth Circuit upheld a judgment for attorney's fees based on a guarantee that provided the guarantor would pay "reasonable attorney's fees incurred in collection of the note." The Lonettis have been unable to even attempt a logical or legal critique of this holding, and have been relegated to arguing that this court should ignore that decision because the Fourth Circuit's opinion did not contain further analysis or discussion of the issue. The issue did not need further analysis or discussion. The fact that suit upon a guaranty to recover the note was a suit for collection of the note was a tautology, as it is in the present case.

¹ The Lonettis imply in their brief that some special rule applies to the interpretation of a contract for attorney's fees that requires an "unambiguous and clear reference to recovery of fees by the prevailing party as a result of some triggering mechanism contained within the terms of the contract at issue." [Lonetti Brief at 11] In truth, attorney's fee provisions are construed under the same rules as any other contractual provision, as the cases cited by the Lonettis demonstrate. *See Wardley Corp. v. Welsh*, 962 P.2d 86, 92 (Utah App. 1998).

The cases cited by the Lonettis to attempt to support their argument regarding the interpretation of the Guaranty involved significantly different attorney's fee provisions than contained in the Bilanzich Guaranty, are not of assistance in interpreting the attorney's fee provision in the Guaranty (or the Note) and do not cast any doubt upon Bilanzich's right to recover attorney's fees. For example, in *Carr v. Enoch Smith Co.*, 781 P.2d 1292, 1296 (Utah App. 1989), cited by the Lonettis, the attorney's fee clause provided that a party failing to perform the agreement "agrees to pay all expenses of *enforcing this agreement*, or of any right arising out of the breach thereof, including a reasonable attorney's fee." [Emphasis Added] The court held that the defendant was not entitled to attorney's fees because he only defended and did not seek enforcement of the agreement. The court noted that the defendant would have been entitled to attorney's fees under a typical prevailing party provision. The court did not consider the effect of the reciprocal attorney's fee statute because the contract was entered into before the statute became effective.

The Lonettis' newfound argument that the Guaranty does not contain an attorney's fee provision with respect to the Lonettis' suit against Bilanzich is belied by the fact that the Lonettis sought an award of attorney's fees in both their complaint against Bilanzich and in their answer to Bilanzich's complaint. [R. 2501 & 85] The Lonettis argue that the fact they sought attorney's fees under the language of the Guaranty is irrelevant because

the fact that one party has prayed for attorney's fees does not change the contractual language. [Lonetti Brief at 13] However, where the parties place their own construction on a contract and so perform, a court can consider this persuasive evidence of the parties' true intentions and the contract should be enforced in accordance with the manner in which the parties have construed it. *Zeese v. Estate of Siegel*, 534 P.2d 85, 90 (Utah 1975). Moreover, under Rule 11, U.R.C.P., the Lonettis could only seek attorney's fees if they had a good faith, reasonable basis for seeking those fees. Clearly, the Lonettis' change of position on attorney's fees springs from the fact that Bilanzich successfully defended against their claim.

B. BILANZICH IS ALSO ENTITLED TO RECOVER ATTORNEY'S FEES BY VIRTUE OF THE ATTORNEY'S FEE PROVISION CONTAINED IN THE NOTE.

Even if it were (incorrectly) assumed for purposes of argument that Bilanzich is not entitled to recover under the attorney's fee provision contained in the Guaranty, that fact would not assist the Lonettis because the modification to the Note itself contained an attorney's fee provision.

The Lonettis argue that Bilanzich cannot avail himself of this provision because Bilanzich was not a party to the Note and cite cases that one who is not a party to an agreement is not entitled to the benefit of the attorney's fee provision contained in the

agreement. Bilanzich has no quarrel with the general proposition that only parties to an agreement which provides for attorney's fees are entitled to recover attorney's fees under that agreement. The Lonettis ignore the fact, however, that Bilanzich guaranteed payment of all of REI's obligations contained in the Note. Bilanzich's obligations were, therefore, governed by the terms of the Note in addition to the terms of the Guaranty. One of those obligations contained in the Note was the obligation to pay attorney's fees incurred by the Lonettis in successfully collecting on the Note:

If any action is instituted with respect to this Agreement or supporting documents, the prevailing party shall be entitled to an award of attorney's fees and costs to be paid by the other party. [R. 2442]

This provision - - as well as the other provisions of the Note - - were effectively a part of Bilanzich's Guaranty. The Lonettis instituted action against Bilanzich with respect to the Note. Had they prevailed, they would have been entitled to recover fees incurred in litigating with Bilanzich to collect the Note. Bilanzich was the prevailing party. Accordingly, Bilanzich is entitled to recover attorney's fees against the Lonettis under the Note. Bilanzich is also entitled to recover attorney's fees under the reciprocal attorney's fee statute, §78-27-56.5 because the Lonettis' suit against Bilanzich was a suit based upon an agreement which allowed one party to recover fees within the meaning of the statute.²

² The Lonettis argue for the first time on appeal that in any event the modification to the Note was governed by Nevada law and that Nevada does not have a reciprocal attorney's fee statute. [Lonetti Brief at 14-15] Because this argument was not raised in the

The Lonettis want the court to ignore *Connecticut Nat'l Bank v. Foley*, 560 A.2d 475 (Conn. App. 1989), cited by Bilanzich, which is directly on point. In *Foley*, the guarantor agreed to pay “any other charges, fees or expenses owed by the borrower under the loan agreement.” *Id.* at 478 n.2. The note obligated the borrower to pay “reasonable attorney’s fees incurred in collection of all or part of his note.” *Id.* at 478. The court determined that because the borrower was obligated to pay any attorney’s fees incurred in collecting the note, including attorney’s fees incurred in collecting on the guarantee of the note, the guarantor was likewise obligated to pay such attorney’s fees.

The Lonettis are unable to challenge the *Foley* court’s reasoning, but can only argue that the opinion should be ignored because the court said the issue required “little discussion,” and did not engage in a lengthy analysis. Again, the issue did not require lengthy analysis, as is perhaps best demonstrated by the Lonettis’ inability to substantively criticize the holding. The Lonettis also argue that the *Foley* decision “is not enough to displace the rules governing recovery of attorney’s fees under a contract pursuant to Utah law.” [Lonetti Brief at 12] However, the same rules applicable to

district court, it cannot be raised for the first time on appeal. *See Ellis v. Swensen*, 2000 UT 101, ¶30, 16 P.3d 1233; *Warburton v. Virginia Beach Sav. & Loan Assoc.*, 899 P.2d 797, 782 n.5 (Utah App. 1995). Moreover, the modification only provided that Nevada law would “govern *the construction and interpretation* of this Agreement.” [See Appellees’ Brief, Add. A ¶4] [Emphasis Added] The modification did not provide that Nevada law would govern *the substantive rights* of the parties under the Note and modification.

attorney's fees in Utah applied in *Foley* and the Lonettis do not suggest what Utah rules would have to be "displaced".

The Lonettis rely on *Anglin v. Contracting Fabrication Machining, Inc.*, 2001 UT App. 341, 37 P.3d 267, to attempt to support their argument that because Bilanzich was not a party to the Note, he cannot rely on its attorney's fee provision. The situation in *Anglin* was far different. In *Anglin*, suit was brought on a promissory note which contained an attorney's fee provision. The plaintiff obtained a pre-judgment writ of garnishment on Custom Steel Fabrication which company was successful in dissolving the writ of garnishment. The court held the garnishee was not entitled to attorney's fees because it was not a party to the promissory note and, therefore, the reciprocal attorney's fee statute did not apply. Unlike Bilanzich in the case at bar, the garnishee's rights and obligations were completely unrelated to the promissory note.

Bilanzich is entitled to recover attorney's fees under the attorney's fee provision contained in the Guaranty. Even if he were not so entitled, he is entitled to recover under the attorney's fee provision contained in the Note both as the prevailing party and under §78-27-56.5.

**C. THE FACT THAT THE DISTRICT COURT RULED THAT THE
GUARANTY WAS UNENFORCEABLE BECAUSE THE CONDITION
PRECEDENT TO LIABILITY HAD NOT OCCURRED DOES NOT DEFEAT
BILANZICH'S RIGHT TO RECOVER ATTORNEY'S FEES.**

The Lonettis argue that the district court ruled that the Guaranty was a nullity which deprived Bilanzich of any right to recover attorney's fees under the Guaranty. [Lonetti Brief at 15] This argument is incorrect.

Bilanzich did not argue that the Guaranty had not been validly formed by the parties and the district court did not hold that the Guaranty was void *ab initio*. Instead, Bilanzich argued that he was not liable under the Guaranty that had been validly entered into because a condition precedent to his liability - - REI obtaining a \$3.5 Million construction loan - - had never occurred.

The effect of the non-occurrence of a condition precedent is explained in §225 Restatement (Second) of Contracts as follows:

- (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
- (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

In other words, the non-occurrence of a condition precedent as in the present case does not void the contract, but simply excuses a party's obligation to perform under the contract. This court has recognized that the effect of a failure of a condition precedent is

to relieve a party of an obligation to perform. *See Kinsman v. Kinsman*, 748 P.2d 210, 213 (Utah App. 1988); *Downtown Athletic Club v. Horman*, 740 P.2d 275, 281 (Utah App. 1987).

The Lonettis tell the court that *BLT Investment Co. v. Snow*, 586 P.2d 456 (Utah 1978) is the “seminal and controlling case on this issue”. [Lonetti Brief at 15] *BLT* is not controlling. In *BLT*, the sellers successfully argued that no contract had been formed because the parties had not agreed to the terms of an escrow agreement to protect the sellers and, therefore, specific performance could not be obtained by the buyer. The trial court granted rescission based on breach of fiduciary duty. The Supreme Court held that because the sellers had “disaffirmed in its entirety” the contract, they could not recover attorney’s fees, reasoning that the sellers could not “void the contract and, at the same time, claim the benefits of the provision for attorney’s fees.” *Id.* at 458. In the present case, Bilanzich did not claim that the Guaranty agreement had not been formed, Bilanzich did not disaffirm the Guaranty in its entirety and the court did not rescind and void the Guaranty. Equally important, *BLT* was decided before the reciprocal attorney’s fee statute was enacted, and therefore did not consider the effect of the statute on the issue.³

³ Lonetti argues that *Chase v. Scott*, 2001 UT App. 404, 38 P.3d 1001, “makes clear that *BLT* has survived the enactment of 78-27-56.5, and is the current state of law in Utah on this issue.” [Lonetti Brief at 16] However, in *Chase v. Scott*, the attorney’s fee provision only provided for attorney’s fees in “litigation . . . to enforce” the contract. This court ruled that the defendant who successfully defended an action for rescission of

Moreover, even if the district court's decision in the case at bar had the effect of rescinding or voiding the Guaranty (which it did not), Bilanzich should still be entitled to recover his attorney's fees under §78-27-56.5. The Lonettis wholly ignore the substantial body of case law decided in other states permitting recovery of attorney's fees in such circumstances that was cited in Bilanzich's opening brief [pp. 14-16], and do not even attempt to distinguish or criticize these cases or to cite any contrary cases.

In *Anglin v. Contracting Fabrication Machining, Inc.*, 2001 UT App. 341 at ¶11, this court recognized that the purpose of §78-27-56.5 was to “creat[e] a level playing field for all parties to a promissory note.” Bilanzich clearly prevailed “in a civil action based upon any promissory note, written contract or other writing executed after April 28, 1986, where the provisions of the promissory note, written contract or other writing allow at

the contract was entitled to recover attorney's fees under that provision, adopting the reasoning of the Eighth Circuit in *First Colony Life Insurance Co. v. Berube*, 130 F.3d 827 (8th Cir. 1997) that a successful defense of an action to rescind came within an attorney's fee provision granting attorney's fees for enforcement of the contract. This court in *dicta* noted that its ruling was consistent with *BLT* “limiting awards under this type of contractual provision [i.e., providing for attorney's fees for enforcement of the contract] to only those parties who successfully defend against rescission and, thus, enforce the contract and that the holding was also consistent with §78-27-56.5 because either party that successfully defended against rescission would be entitled to recover fees under the Contract.” This court did not analyze the continued vitality of *BLT* in view of §78-27-56.5. Further, because the party seeking to rescind in *Chase v. Scott* was unsuccessful, this court had no occasion to rule on the issue of whether a party successfully seeking to rescind would be entitled to recover attorney's fees under the reciprocal attorney's fee statute.

least one party to recover attorney's fees" as required by the statute. Had the Lonettis successfully sued Bilanzich to collect on the Note, they would have been entitled to recover their attorney's fees. The Lonettis have not and cannot explain how denying Bilanzich his attorney's fees creates a level playing field. It would not. Such a result would be fundamentally unfair and at odds with the purpose and intent of the statute. The Lonettis should not be given a free shot at going after Bilanzich for millions of dollars, including their attorney's fees.

**D. THERE IS NO EVIDENCE THAT BILANZICH AGREED TO
RELEASE HIS CLAIM FOR ATTORNEY'S FEES.**

The final argument the Lonettis raise is that Bilanzich's motion for attorney's fees is supposedly barred by a settlement agreement between the Lonettis and Bilanzich. The Lonettis argue that their counsel *understood* that under the settlement agreement the Lonettis would have no liability for attorney's fees incurred by Bilanzich even though such a provision was never discussed or agreed to by counsel or contained in the written pleadings that the Lonettis concede were prepared to document the agreement. The Lonettis' argument is without merit, and should be rejected. The parties did not execute a settlement agreement, did not mutually release all claims against each other, and there is

no evidence that the Lonettis bargained for or paid any consideration for a release of all claims or for the release of Bilanzich's claim for attorney's fees.

The Lonettis argue that a settlement agreement is not required to be in writing. However, an agreement to pay attorney's fees is required to be in writing. *See Wardley Corp. v. Welsh*, 962 P.2d 86, 92 (Utah App. 1998). Thus, any agreement to release an obligation to pay attorney's fees is required to be in writing. *See Strevell-Paterson Co., Inc. v. Francis*, 646 P.2d 741, 741 (Utah 1982). Even more fundamentally, the agreement in the case at bar was in writing, as conceded by the Lonettis.

In his January 15, 2004 letter which the Lonettis rely upon, Bilanzich's attorney, Jefferson W. Gross, stated to Lonettis' counsel that:

. . . Mr. Bilanzich will proceed on one of two alternative routes:

1. If John Lonetti, Eunes Lonetti and JDL Holdings, L.C., waive their right to appeal Judge Shumate's Order Granting Partial Summary Judgment, Mr. Bilanzich will dismiss his claim for rescission with prejudice; or
2. Mr. Bilanzich will continue to pursue his claim for rescission against your clients. [R. 2460-2461. *See Appellees Brief, Add. D*]

There is not one word in Mr. Gross's letter about waiving any right to recover attorney's fees based upon Bilanzich's successful defense that he was not liable for payment of the Note under his Guaranty.

On February 12, 2004, the Lonettis signed a "JOINT MOTION AND STIPULATION FOR DISMISSAL OF PLAINTIFF'S SIXTH AND EIGHTH CLAIMS

FOR RELIEF AGAINST DEFENDANTS JOHN LONETTI, EUNES LONETTI AND JDL HOLDINGS, L.L.C.” by which the parties:

[j]ointly move[d] for, and stipulate[d] to, the dismissal of Plaintiff’s Sixth Claim for Relief (for rescission) and Eighth Claim for Relief (for unjust enrichment) (as set forth in Plaintiff’s Second Amended Complaint) against John Lonetti, Eunes Lonetti and JDL Holdings, L.L.C., *with prejudice*. [R. 2409-11]

Pursuant to that motion and stipulation, on March 10, 2004, the court entered an “ORDER OF DISMISSAL WITH PREJUDICE OF PLAINTIFF’S SIXTH AND EIGHTH CLAIMS FOR RELIEF AGAINST DEFENDANTS JOHN LONETTI, EUNES LONETTI AND JDL HOLDINGS, L.L.C.” that was approved as to form by the Lonettis’ counsel by which the court dismissed Bilanzich Sixth and Eighth Claims for Relief with prejudice. [R. 2421-23]

The joint motion and stipulation did not contain any provision for release or dismissal of Bilanzich’s attorney’s fees incurred with respect to the claims on which the court had already ruled in Bilanzich’s favor and the court’s order contained no such release or dismissal.

On March 10, 2004, the court also entered its “JUDGMENT RESOLVING CLAIMS AND DEFENSES BETWEEN MICHAEL T. BILANZICH AND DEFENDANTS JOHN LONETTI, EUNES LONETTI AND JDL HOLDINGS, L.L.C.” by which the court entered judgment that Bilanzich was not liable on the Note because the

condition precedent to his liability on the Guaranty had not occurred and that the claims of JDL Holdings in its complaint against Bilanzich to recover the amount due on the Note pursuant to the Guaranty were dismissed with prejudice. [R. 2424-26] Again, there was no dismissal of Bilanzich's claim for attorney's fees under the Guaranty and Note. The Lonettis did not object to the form of the judgment or contend at the time that Bilanzich's claim for attorney's fees should be dismissed.

The only "evidence" that the Lonettis cite in their brief for their argument that the settlement released any attorney's fee claim is the affidavits of their attorneys, Terry L. Wade and Bryan J. Pattison. The affidavits do not contain admissible evidence and are insufficient to prove any agreement in addition to or inconsistent with the parties' written agreement contained in the pleadings and order recited above.

Mr. Wade states in his affidavit [R. 2455-57] that (a) Mr. Gross offered to dismiss Bilanzich's remaining causes of action against Lonetti if Lonetti would refrain from filing an appeal; (b) that Mr. Wade made "the fact clear" to Mr. Gross that the Lonettis would not waive their right to appeal unless they were confident that the Lonettis would not face further claims by anyone; (c) that Mr. Gross never mentioned any claim to recover attorney's fees from the Lonettis; and (d) that thereafter Mr. Gross prepared the pleadings to effect the settlement. Mr. Pattison merely states in his affidavit [R. 2446-47] that his "understanding" of the dismissal of the litigation was that the Lonettis would have no

further liability to Bilanzich. Of course, the subjective, uncommunicated understanding and intent of the Lonetti attorneys that the settlement would release any claim that Bilanzich had for recovery of attorney's fees is simply irrelevant under the objective theory of contracts. *See Jaramillo v. Farmers Ins. Group*, 669 P.2d 1231, 1233 (Utah 1983).

Importantly, neither Mr. Wade nor Mr. Pattison claim that Mr. Gross agreed to waive any right to recover attorney's fees on the claims that had already been decided in Bilanzich's favor or that there was even any discussion of attorney's fees or any mutual release of all claims.

The pleadings that Mr. Wade acknowledges Mr. Gross prepared "to effect the settlement" contained no release or dismissal of Bilanzich's claim for attorney's fees. Because those documents were admittedly intended to effect the settlement, those documents constituted an integration. *See, e.g., Novell, Inc. v. The Canopy Group, Inc.*, 2004 UT. App. 162 at ¶14, 92 P.3d 768; *Bailey-Allen Co., Inc. v. Kurzett*, 945 P.2d 180, 191 (Utah App. 1997). Therefore, extrinsic evidence concerning what the Lonettis' attorneys now say they understood and intended was inadmissible to vary, add to or contradict the provisions of the pleadings memorializing the settlement. *Id.*⁴

⁴ In similar circumstances, federal courts in civil rights cases have held that even settlement agreements that waive all claims do not waive a claim for attorney's fees unless the agreements expressly waive attorney's fees and that extrinsic evidence of the

Moreover, even if the understanding and intent of the Lonettis' attorneys could be considered in determining the agreement reached by the parties, the affidavits were far too conclusory and general to constitute admissible evidence. *See, e.g., Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (“... the plaintiff’s statements in her affidavit are largely conclusory in form, did not state with specificity what words were spoken by defendant (as opposed to her own conclusions), and therefore would not be admissible in evidence”); *Massey v. Utah Power & Light*, 609 P.2d 937, 938 (Utah 1980); *Brown v. Wanlass*, 2001 UT. App. 30 at ¶7, 18 P.3d 1137, 1139; *Robertson v. Utah Fuel Company*, 889 P.2d 1382, 1388 (Utah App. 1995) (“‘unsubstantiated opinions and conclusions’ are insufficient to defeat a motion for summary judgment.”). In this regard, conclusory testimony that an oral agreement existed without specific facts establishing the making and terms of the claimed agreement is insufficient to establish such an agreement. *See, e.g., Shank v. Hague*, 192 F.3d 674, 681-682 (7th Cir. 1999) (self-serving conclusory affidavit without factual support was insufficient to establish the existence of an oral contract); *Abacus Real Estate Finance Co. v. P.A.R. Construction and Maintenance*

course of negotiations or the expectations of the parties is irrelevant. *See Torres v. Metropolitan Life Insurance Company*, 189 F.3d 331, 334 (3rd Cir. 1991); *Wakefield v. Mathews*, 852 F.2d 482, 484 (9th Cir. 1988). The case against an implied waiver of attorney’s fees is even stronger in the case at bar where there was no settlement agreement and no waiver or release of all claims, but only an agreement to dismiss two specific claims.

Corp., 496 N.Y.S.2d 237, 238 (1985) (affidavits filed in opposition to summary judgment motion that did not state in detail when, where and by whom the alleged oral agreement was made, but merely stated in conclusory fashion that an agreement was made were insufficient); *Century Center, Ltd. v. Davis*, 473 N.Y.S.2d 492, 494 (1984).

Finally, the Lonettis cite *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995) that “[s]ettlement agreements are governed by the rules applied to general contract actions” and that “[u]nder the principles of basic contract law, a contract is not formed unless there is a meeting of the minds.” Even if it were incorrectly assumed for purposes of argument that the Lonettis are correct that no meeting of the minds on settlement was reached, that would not assist the Lonettis. If no settlement was reached, then Bilanzich retained his right to recover attorney’s fees pursuant to the Guaranty and Note.

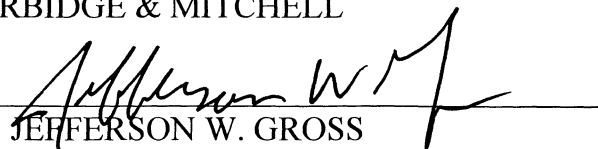
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court’s order denying Bilanzich’s motion for attorney’s fees should be reversed and the case remanded with instructions that Bilanzich is entitled to an award of his reasonable attorney’s fees in an amount to be determined by the district court.

DATED this 17th day of May, 2005.

BURBIDGE & MITCHELL

By

A handwritten signature in black ink, appearing to read "Jefferson W. Gross", is written over a horizontal line.

JEFFERSON W. GROSS

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANT'S REPLY BRIEF** was mailed to the following:

Terry L. Wade
Bryan J. Pattison
DURHAM JONES & PINEGAR
192 East 200 North, Third Floor
St. George, Utah 84771-0400

Dated this the 17 day of May, 2005.

A handwritten signature in cursive script, reading "Jan Shiner", is written over a horizontal line.

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