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Creditor Victory in Collection Against California Guarantor

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r. Eves owned a house in Mill Valley (Marin County), an affluent neighborhood just an hour north of San Francisco, as well as a house in Como, Italy. Eves personally guaranteed a loan of $3.1M to a junior lienholder AGI West Linn of Appian ("AGI") on a development deal. The deal did not pan out and the senior foreclosed, leaving AGI a sold-out junior lienholder. Accordingly AGI sued on the guaranty.

The guaranty had a carve out and excluded the guarantor's house in Italy, his house in Mill Valley, his cars, and other property owned by his family trust(s). In 2011, Eves sold his house in Italy and kept the proceeds in a separate account.

In the litigation, AGI sought a pre-judgment remedy – a writ of attachment.[1] Eves opposed the writ from attaching to any of the proceeds from the sale of the house in Italy on the grounds that the house was excluded so the money from the sale was automatically excluded as well.

As creditors know, it is a high standard to prevail on a writ of attachment hearing. The creditor has to prove the validity of its debt[2], and it has to be an amount certain[3] arising out of the debtor's trade of business.[4]

Who won? The creditor did.

This case was one of first impression California, finding that the creditor can attach to the proceeds of the sale of property even if the property itself was excluded from guaranty. [*Series AGI West Linn of Appian Group of Investors DE LLC v. Robert Eves* (June 14, 2013).]

A guaranty is a form of surety, whereby the guarantor "promises to answer for the debt ... of another."[5] A guaranty is a form of contract and subject to the usual rules governing contract interpretation.[6] That means that the court looks to the basic rules of contract interpretation starting with the words in the contract and then the intent of the parties.

Here, the contract stated in Paragraph 13:

"Limitation of Recovery. [¶] Notwithstanding the foregoing, the personal Guaranty of Eves may only be collected from assets not expressly excluded, as provided in the Asset Exclusion Schedule for Eves is attached hereto as Schedule 1; provided such

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limitation shall be inapplicable in the event Eves or any affiliate of Eves supplements or enhances in any material manner any Excluded Asset but only to the extent of such supplement or enhancement."

Then, the Asset Exclusion Schedule expressly listed the Italy house. However, it did not list the "proceeds" of the sale of any of those assets.

Accordingly, the court concluded that since Para. 13 made it clear that everything was attachable unless it was specifically excluded. To infer that the "proceeds" should also have been excluded would be impermissibly adding a term to the contract that did not previously exist.

Additionally, the court looked at context from within this document and saw that the parties had dealt with "proceeds" in other provisions, such as the insurance proceeds. Accordingly, given the sophistication of the parties, the complexity of the contract, the trial court and the Court of Appeals concluded that since the debtor had failed to include the sales proceeds in the Asset Exclusion List, it was fair game for the creditors.

Takeaway

The borrower tried to rely on a commercial code section to show that the proceeds from the sale should have been automatically exempt. The court rejected that application of the code section. This decision is a clear message from the courts that the guarantee itself is just a contract, and while courts can interpret terms, it will not add additional terms. Parties should take the time to negotiate all the aspects of the deal and any carve-outs. While this circumstance appears to be an oversight or sloppy drafting, it is exactly the type of omission that can happen when parties rush a deal. ▲

Julia Wei publishes commentary on issues such as lien priority, judgment collection and receiverships and more on her California Real Estate and Lending Law blog: *http://dirtblawg.com.*

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Endnotes

1 It is basically an emergency remedy that allows the creditor (usually the plaintiff) to collect the proceeds before there is even a judgment. This is to prevent the debtor from dissipating the assets or otherwise committing waste.

2 California Code Civ. Proc., §§ 481.190, 484.090, subd. (a)(2).

3 CCP§483.010, subd. (a).

4 CCP§481.010, subd. (c).

5 Civ. Code, § 2787.

6 Civ. Code, § 2837; Rest.3d Suretyship and Guaranty, § 14, p. 69.

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