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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| M & Y MANAGEMENT, INC.,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EILEL NAMVAR, et al.,<br><br>Defendants and Appellants. | B229655<br><br>(Los Angeles County<br>Super. Ct. No. BC414297) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Law Office of David Alan Cooper and David Alan Cooper for Defendants and Appellants.

Kaplan, Kenegos & Kadin, Jerry Kaplan and David Scott Kadin for Plaintiff and Respondent.

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## *INTRODUCTION*

After a bench trial, the trial court found the defendant liable for the breach of a $5 million loan guaranty. The defendant appeals, claiming his oral guaranty was barred by the statute of frauds. We affirm.

## *FACTUAL AND PROCEDURAL SUMMARY*

In May 2009, M & Y Management, Inc. filed a complaint (amended in August 2010) against Eilel Namvar for breaches of personal guarantees of loans made to Namco Capital Group, Inc. (Namco), and Namvar answered. The parties conducted discovery and proceeded to a bench trial. M & Y's complaint was also amended to substitute Namvar's son Homayoun as a defendant in his capacity as conservator of the estate and person of his father Eilel as of December 2009. Namvar later added the defense of incapacity to its answer.

According to testimony, as of November 2004, the Namvar family was a highly respected family in the Persian Jewish community known for private money lending and philanthropy. Eilel Namvar was known as the head of the family and had been in the money lending and real estate business for 40 years and was "very renowned" and "trusted." Moosa Hanasab and Eilel Namvar had known each other for 35 years, since before they both moved to this country from Iran. Moosa's rug shop was near Eilel's home in Tehran, and Eilel had lent Moosa money in Iran, and Moosa repaid him. No papers were exchanged; they just relied on each other's word.

One Saturday after synagogue, Moosa Hanasab was driving with his son Robert and offered Eilel a ride. Eilel said to Moosa, "Why don't you bring your money to us? We pay higher interest rates than anybody else. [W]e are stronger than any bank out there. You should take advantage of the opportunity of giving us money." Moosa had refinanced a number of properties and had a lot of cash.

In November 2004, Robert and Moosa Hanasab met with Eilel Namvar and his son Ezri at the Namco offices on Wilshire Boulevard. Eilel and Ezri both had offices

close to one another on the 14th floor. The four discussed lending $5 million to Namco with the understanding that Ezri and Eilel would be guaranteeing the money. Moosa was comfortable with them because he had known Eilel for many years, and people were lending money to Eilel and to Ezri and the entire family. Moosa saw them as "one unit," an "extension of one another." At one point, Ezri offered to provide Moosa with a trust deed, but Moosa said, "I have known Eilel for many, many years, and as long as Eilel Namvar is going to guarantee my money, he's better than a trust deed. I don't need a trust deed." Moosa would never have lent the money without Eilel's guarantee. The four would meet three or four times per year at Eilel's office to discuss their business together.

In around September 2005, Eilel and Ezri asked for another $5 million. Eilel's guaranty was a "principal condition." The loan was to have been a "temporary loan." Moosa made it very clear the additional money being advanced would be for a short period of time as he intended to use both the original money and the new money being advanced to purchase some real estate.[1] Had Eilel not guaranteed it, "there would be no money." Eilel specifically guaranteed the second $5 million. He said (in Farsi but as translated), "I stand by my son. When you give money to us, I will do everything in my power to pay you back until the day I die. We have never taken money from anybody and not paid it back. And we trust and value this relationship dearly and your money is safe with us." Eilel and Ezri did not want to receive notice all of a sudden that $10 million was due with two or four weeks' notice; they requested that the maximum increment that M & Y could ask to be repaid would be $5 million and then it would have to be another 30 days before they would be asked to repay another $5 million. The note was discussed but not prepared that date because of certain nuances. The second note

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[1] Moosa originally started in the wholesale jewelry business and later started investing in commercial real estate, primarily in the Jewelry District of downtown Los Angeles as well.

(with signatures on the guaranty signature lines for Eilel and Ezri) was later faxed back to M & Y, and M & Y then wired the funds.

The four—Eilel and Ezri (on the Namco side) and Moosa and Robert (of M & Y) continued to meet about three or four times each year at Eilel's office.

In September 2006, when $10 million still remained outstanding, and M & Y had asked for some of the money back, Eilel agreed to an increase in the interest rate. Both Eilel and Ezri asked at the time, "If you want the money, don't ask us for the $10 million at once." Eilel always repeated his guarantees, time and again, through to 2008. Later, in October 2007, the four discussed a further increase in the interest rate. Eilel agreed to it, and continued to say, "If you have more money, bring it in. And if you want the money that you already have with us, give us notice and you can get it back." He always said, "I guarantee 100 percent. . . ." Eilel never voiced any objection to the increases in the interest rate or the amounts outstanding; to the contrary, he asked for longer periods of time.

In August 2008, M & Y learned that Ezri was having greater financial problems than he had informed them and would not be able to honor his obligations. Eilel continued to assure Robert and Moosa that "he was going to pay us back every single penny." Eilel assured there was nothing to worry about, all that they needed was time, they were experts in real estate, had seen worse times before, and "they just needed our help and support to work through the current crisis." Eilel said Moosa and Robert could "come take title to my home right now, I will give you my home, I will give you every possession that I have, all I need is a bed to sleep in, and my priority in life is to pay you and your family your money."

In late December 2008, eight creditors (not including M & Y) forced Namco and Ezri into involuntary bankruptcy. Eilel never followed through.

After reviewing Eilel's medical records, a neuropsychiatrist specializing in cognitive function (Annette Swain, Ph.D.) opined that Eilel had reasonable cognitive

abilities and was able to conduct business and to appreciate his decisions until fall of 2008.

Shortly before trial it was learned that the signature on the line above Eilel's typed name on the September 2005 note was not Eilel's. The parties entered into a stipulation as to the following facts: (1) The cursive writing above Eilel Namvar's printed name on the September 15, 2005 Promissory Note (Exhibit 2) was not physically written by Eilel Namvar; (2) The cursive signature above Eilel Namvar's name on the November 22, 2004 Promissory Note (Exhibit 1) was physically written by Eilel Namvar; (3) the cursive signatures on those (24) checks shown with Exhibit 5 (checks drawn on Namco Capital Group, Inc. account, (several in the amount of $31,250, several for $62,500 and other amounts) from October 2005 through January 2008) were physically written by Eilel Namvar; and (4) the cursive signatures within Exhibit 9 (passport, tax return, pages from written agreements) were physically written by Eilel Namvar.

In its statement of decision, the trial court found as follows: In November 2004, M & Y Management, Inc.'s assignee, Western Jewelry Mart, loaned $5 million to Namco. On November 22, 2004, Namco executed a promissory note (the First Note) that was guaranteed by both Ezri Namvar and Eilel Namvar in writing and personally signed by Eilel Namvar (the First Guaranty). The due date on the First Note was November 22, 2005, but there was a failure of payment when due on the First Note. "*There was* [*also*] *a breach of the First Guaranty by . . . Eilel who failed and refused to pay the monies due under the First Note and First Guaranty when due in November 2005*." (Italics added.) The damage from this breach would have been $5 million except that $5 million was repaid in March 2007.

The trial court found: In September 2005, M & Y loaned $5 million to Namco. Namco executed a promissory note in the principal sum of $10 million dated September 15, 2005 (the Second Note) which was signed by Ezri Namvar on behalf of Namco and was guaranteed by Ezri Namvar; someone other than Eilel Namvar actually signed the

guaranty blank over Ezri Namver's typewritten name on the Second Note. The Second Note would have been due on September 15, 2006. M & Y demanded full payment under the Second Note and did all that was required of it, but Eilel Namvar did not make payment under the Second Note.

The trial court determined Eilel Namvar had the capacity to contract with M & Y and to enter into the guaranties at issue (on the First Note and Second Note) as well as the subsequent modifications as of October 2007 (based on facts recounted in the statement of decision).

The First Note was paid in full when $5 million was paid in March 2007 (though due in September 2005); and interest had been paid and was current, leaving a $5 million balance. Although M & Y did not tender the First Note, the parties treated it as paid off. Eilel Namvar's obligation is on the Second Note.

There was consideration flowing to Eilel Namvar based on the following facts: M & Y incurred a detriment in lending $5 million and Eilel received a benefit of having M & Y do what Eilel Namvar wanted to do to the extent of these very large loans. Consideration is the detriment to a party and a benefit to another party.

There was no estoppel, waiver, intentional or deceptive conduct, failure of consideration or unclean hands on M & Y's part.

The First Note is no longer in effect. The language that it cannot be amended or modified without a writing is either incomprehensible or inapplicable and in any case, there was a substitution and payoff in March 2007.

The trial court found: Eilel Namvar is not exonerated from his obligation to guarantee the Second Note and he is estopped to claim exoneration and deny his liability on the Second Note. He took the position he was the guarantor, he stated that he was the guarantor, *he participated without protest in the negotiations that resulted in the modification or purported modification of the Second Note which led to an extension and alteration of the interest provision,* all without pretext and while asserting he was the

guarantor and affirming and ratifying that he was. *This was a bargained-for modification because of the inability of the principal debtor to make payment*. M & Y relied on that by not immediately resorting to legal remedies and demanding the return of the then-due, owing and unpaid money and by, in effect, agreeing to what amounted to an extension of credit based on different interest provisions, having obtained M & Y's reliance to M & Y's detriment.

Furthermore, the trial court stated, Eilel Namvar ratified his signature on the guarantee of the Second Note by a number of means, including stating in substance that he approved of the signing and understood that he was bound by the signature.

Moreover, the trial court determined, it was Eilel Namvar's dominant leading purpose, and indeed his only purpose, of guaranteeing the obligation and being involved so as to require M & Y to make the loan.

The court's decision is based on estoppel in pais, i.e., a party is prohibited from taking the position inducing other parties to rely on his taking that position and then later taking an inconsistent or contrary position to the detriment of the relying parties, as well as ratification.

Under *Farr & Stone Ins. Brokers, Inc. v. Lopez* (1976) 61 Cal.App.3d 618, 622 (*Farr & Stone*), and Civil Code sections 1624 and 2794, a guaranty need not be in writing if the purported guarantor's dominant leading purpose is to have the party seeking to enforce the guaranty take action.

In the trial court's view, the doctrine of amanuensis does not apply as there was no evidence Eilel Namvar gave instructions for someone else to sign on his signature line.

Judgment was entered in favor of M & Y Management, Inc. and against Eilel Namvar and Homayoun Namvar, solely in the latter's capacity as conservator of the person and estate of Eilel Namvar and solely as to the estate's assets, in the principal sum of $5 million plus interest at the legal rate of 10 percent per annum from September 16,

2006, through the date of judgment, which amounts to $1,958,333, plus costs and attorneys' fees.

Eilel Namvar and Homayoun Namvar appeal.

***DISCUSSION***

According to the Namvars (Eilel and Homayoun), the 2005 oral guarantee was unenforceable due to a failure of separate consideration to Eilel Namvar. In the Namvars' view, Eilel Namvar was not shown to have any economic interest in Namco or to have derived any non-pecuniary benefit from Namco's receipt of loans; evidence that he signed checks at Namco offices was not enough, and finding that he orally guaranteed the loan to "support and facilitate the transaction Ezri Namvar was engaging in," is "insufficient consideration to support an oral guarantee." We disagree.

In *Farr & Stone, supra,* 61 Cal.App.3d 618, cited by the trial court in its statement of decision, the defendant (Lopez), just like Eilel Namvar in this case, contended the statute of frauds barred enforcement of his oral promise. (*Id.* at p. 621.) Viewing the evidence in the light most favorable to the judgment as required, the *Farr & Stone* court noted the following facts: From 1969 to 1973 Farr & Stone provided insurance to Apex Auto Products Company. In 1973 Apex fell behind in making its premium payments. Farr & Stone advanced about $6,100 to insurance carriers on Apex's behalf. (*Id.* at p. 620.)

In January 1974, Lopez's children assumed management on the promise they would share in the ownership of the company. "*To help his children*, Lopez agreed to assist Apex with its financial problems." (*Farr & Stone, supra,* 61 Cal.App.3d at p. 620, italics added.) Lopez had testified, "'If we got the company out of a mess, then everybody would benefit.'" (*Ibid.*) Apex sent a letter to its creditors including Farr & Stone, stating Lopez's children were new Apex officers and Lopez was "elected chairman of the board." Two months later, Lopez and his daughter met with representatives of Farr & Stone to discuss Apex's obligations. Farr & Stone explained

quick agreement was required because it could obtain substantial rebates on prepaid premiums it had advanced on Apex's behalf. It was agreed Apex would pay $500 monthly on past due premiums and pay all future premiums when due. According to Stone's testimony, Lopez promised if Apex could not pay the premiums, he would pay them out of his own checkbook, and Farr & Stone relied on Lopez's promise in not cancelling the insurance policies. (*Id*. at pp. 620-621.)

Apex then made one $200 payment. In July 1974 Lopez sent a letter on Apex stationery addressed "to whom it may concern," stating he and his children were not associated with Apex as officer, shareholder, employee, agent, representative or in any capacity and were not responsible for any debts, obligations or accounts payable. (*Farr & Stone, supra,* 61 Cal.App.3d at p. 621.) The *Farr & Stone* court determined that, regardless of what Lopez himself might have claimed, testimony that Lopez had promised to pay Apex's premiums out of his own checkbook supported the finding he had promised to pay the insurance premium obligation of Apex, and the appellate court will not reweigh conflicting evidence. (*Ibid.*)

As for Lopez's contention the statute of frauds barred enforcement of his oral promise, Farr & Stone (like M & Y in this case) relied on an exception to the statute in Civil Code section 2794 which provides: "'A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: . . . . (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person . . . ." (*Farr & Stone, supra,* 61 Cal.App.3d at p. 621.) Just like the defendant (Lopez), Namvar says the exception does not apply because there was no consideration beneficial to him in this case because he received nothing of immediate and direct pecuniary benefit. (*Ibid.*) For the reasons explained in *Farr & Stone v. Lopez, supra,* 61 Cal.App.3d 618, we disagree.

In *Farr & Stone, supra,* 61 Cal.App.3d 618, the court concluded the "forbearance of Farr & Stone to cancel Apex's insurance policies was a detriment to Farr & Stone, which passed up the opportunity to obtain rebates on prepaid premiums, and a benefit to Lopez's *children,* who had a promised ownership interest in Apex. Lopez, of course, had a direct and personal concern in the welfare of his children and their economic venture. Moreover, his own business reputation was at stake since he assumed the title of 'elected chairman of the board' and undertook to save the failing company. 'It is well settled that whenever the leading and main object of the promisor is not to become surety or guarantor of another but to subserve some purpose or interest of his own, the promise is not within the statute [of frauds] even though performance of the promise may pay the debt or discharge the obligation of another.' (*Merritt v. J.A. Stafford Co.* [(1968)] 68 Cal.2d 619, 628 [68 Cal.Rptr. 447, 440 P.2d 927].)

"The consideration required for Civil Code section 2794, subdivision (4), usually is, but need not be, pecuniary. In *Schumm v. Berg* [(1951)] 37 Cal.2d 174, 187-188 [231 P.2d 39, 21 A.L.R.2d 1051], for example, part of the consideration was an agreement to name a child after the promisor. The Supreme Court in *Schumm* noted that the important question is whether the promise is only an assumption of another's liability or a new and primary obligation of the promisor. The evidence supports the trial court's finding that Lopez undertook a new and primary obligation in return for the continued support of Farr & Stone." (*Farr & Stone, supra,* 61 Cal.App.3d at pp. 621-622; italics added.)

As the trial court found, the *Farr & Stone* case is particularly analogous to the facts presented here. According to the Namvars, the case is distinguishable because Lopez referred to himself as the "elected chairman of the board" of the company in which his children were promised an ownership interest such that his own business reputation was at stake. Just as in *Farr & Stone, supra,* 61 Cal.App.3d 618, however, the record supports the trial court's determination that Eilel Namvar guaranteed the obligation due on the note to help his son Ezri and his failing business (Namco) and further, M & Y

relied to its detriment in forebearing on its right to demand payment of the outstanding loan amounts. Moreover, *Eilel himself* was in breach of his *own* obligation on the First Note and Guaranty (which was documented in a signed writing) and by seeking more money by way of the Second Note and Guaranty and more time for payment, he was necessarily benefitting himself financially as well inasmuch as *he* did not have to repay his obligation on the First Guaranty despite the fact that payment was overdue as *he too* got the benefit of M & Y's forbearance on the First Note *and Guaranty*.

We find no error in the trial court's determination that the statute of frauds does not bar enforcement of Eilel Namvar's guarantee. (*Farr & Stone, supra,* 61 Cal.App.3d at pp. 621-622; and see *Schumm v. Berg, supra,* 37 Cal.2d 174, 187-188 ["'The important question, running through all cases dealing with the code subdivision just quoted, is whether the promises made are in fact assumptions of another's liability, or the primary obligation of the promisor himself. In the former case, the promise is within the statute and must be in writing, but in the latter case the promise is valid, though verbal. The precise language used in making the promise is important, as a slight change in phraseology may have the effect of changing a promise, intended to be conditional and collateral, into an independent and original undertaking.'"]; *Davis v. Patrick* (1891) 141 U.S. 479, 488 ["whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise"]; see also *Regus v. Schartkoff* (1957) 156 Cal. App. 2d 382, 391 ["The promise alleged was made on 'a fresh consideration beneficial to the promisor'"; in agreeing to refrain from suing, plaintiff suffered a detriment as a result of the guarantor's promise.].)

## *DISPOSITION*

The judgment is affirmed. M & Y Management is entitled to its costs of appeal.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**