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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GARY BLUMSACK, as Trustee, etc., Plaintiff and Appellant, v. MICHAEL AUGUSTINE, as Trustee, etc., Defendant and Respondent.	B292949 (Los Angeles County Super. Ct. No. BC544508)

APPEAL from a judgment of the Superior Court for Los Angeles County, Monica Bachner, Judge. Affirmed.

Michael P. Rubin & Associates and Michael P. Rubin for Plaintiff and Appellant.

Gutman Law, John Juenger and Alan S. Gutman for Defendant and Respondent.

Plaintiff Gary Blumsack, trustee of the Jacqueline Harry Trust (the JH Trust) appeals from a judgment in favor of defendant Michael Augustine, trustee of the Jojazak Irrevocable Trust[1] (the Jojazak Trust) following a bench trial on stipulated issues, facts, and exhibits. The issues at trial concerned a document, entitled "NOTICE OF DEBT ACKNOWLEDGMENT," in which the trustee of the Jojazak Trust (1) acknowledged a debt owed to the JH Trust by Daniel Wernicki; (2) acknowledged that the Jojazak Trust was responsible for carrying out the collection of that debt; (3) stated that the JH Trust shall fully cooperate in the Jojazak Trust's collection attempts; and (4) stated that the Jojazak Trust would cover the loss if its collection attempts were not successful. The trial court found that the document created a conditional obligation on the part of the Jojazak Trust and that no breach occurred because the condition had not been satisfied. The court rejected the JH Trust's arguments that the condition was void because it was impossible to fulfill and that the Jojazak Trust had a direct, unconditional, obligation to pay the debt owed to the JH Trust. Finding substantial evidence supports the trial court's findings, we affirm the judgment.

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[1] The Jojazak Trust was sued erroneously as "The Jojazak Irrevocable Children's Trust."

BACKGROUND

The JH Trust was formed by Gary Blumsack. The initial trustees were Gary's brother, William Blumsack, and Zachary Schneiderman.[2] Zachary was the son of Gary's friend, Gerald Schneiderman.

Gerald was a real estate promoter, developer, and manager. The properties that Gerald invested in and/or developed typically were owned by single purpose entities (usually limited liability partnerships, i.e., LLPs) and were operated by the general partner of the LLPs. The general partner for many of the LLPs was Creative Environments of Hollywood, Inc. (CEH). The JH Trust invested approximately $957,000 in LLPs managed by CEH.

Manuel Meza was the president of CEH; he also owned Edgemore Properties, Inc. (Edgemore). Edgemore employed Daniel Wernicki, "a real estate agent and sometime investor."

In September 2006, Avalon Equities, Inc. (Avalon), a company affiliated with Wernicki, purchased a single-family residence in Los Feliz, with plans to renovate and sell the property. Avalon took out a $1.4 million loan secured by a first deed of trust on the property. A few days later, Avalon borrowed $380,000, secured by a second deed of trust on the property, from the Jojazak Trust.[3] In March 2007, Avalon

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[2] Because this case involves multiple members of the Blumsack and Schneiderman families, we will refer to them by their first names. We mean no disrespect.

[3] The Jojazak Trust was formed in 1984 for the benefit of Gerald's children, Joshua, James, and Zachary Schneiderman.

deeded the property to Wernicki. At that time, both the first and second loans were in default and facing foreclosure.

In May 2007, as part of a plan in which the JH Trust would purchase 50 percent of the equity in the Los Feliz property from Wernicki, the JH Trust agreed to invest $165,000 in the form of a 1031 exchange, using the proceeds from the sale of another property it had owned. The JH Trust caused $165,000 to be deposited into West Escrow, which had been appointed to handle the 1031 exchange. After the funds were deposited into escrow, Wernicki sent an email to West Escrow, copying Zachary and Gary, instructing the escrow company to transfer the funds directly to the Jojazak Trust.[4]

In January 2008, Zachary became owner of the Los Feliz property by virtue of a trustee's deed. In May 2008, the first trust deed against the property (securing the original $1.4 million loan) was in default once again. Gary and William, as trustee of the JH Trust, agreed to lend Zachary $100,000 on the condition that Zachary execute a guaranty. That guaranty, entitled "NOTICE OF DEBT ACKNOWLEDGMENT," was in the form of a letter to Gary, as trustor of the JH Trust, from Capital Asset Management Associates, Inc. (Capital Asset), trustee of the Jojazak Trust; it was signed by Zachary as Secretary of Capital Asset and dated May 7, 2008. It stated: "Our company hereby acknowledges that the present balance owed to the

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[4] At the time of this email, Zachary no longer was a co-trustee of the JH Trust; he had resigned in 2004. However, he was Secretary of Capital Asset Management Associates, Inc., which was the trustee of the Jojazak Trust at the time of the transaction.

Jacqueline Harry Trust, by Daniel Wernicki is in the amount of One Hundred Sixty Five Thousand Dollars and 00/100 ($165,000.00). [¶] We further acknowledge that we are responsible for carrying out the collection of this money and that the Jacqueline Harry Trust shall fully cooperate in this matter. Should we not be successful, Jojazak will ultimately cover the loss."

In March 2010, attorney Wiley Ramey, acting at the direction of the trustee for the Jojazak Trust, filed a lawsuit (the collection case or lawsuit) on behalf of the JH Trust against Wernicki, Edgemore (alleged to be a dba of Manuel Meza), and Avalon for fraud, breach of the covenant of good faith and fair dealing, professional negligence, and breach of fiduciary duty. The lawsuit sought to recover the $165,000 debt and other related damages. In April 2011, Michael Rubin (the attorney for the trustee of the JH Trust in this case) substituted into the collection case in place of Ramey. Although Ramey signed the substitution of attorney, there was no written request to or written consent by the trustee of the Jojazak Trust to the substitution of attorney.

In July 2011, Rubin filed a second amended complaint on behalf of the JH Trust. That amended complaint alleged causes of action for breach of contract, negligence, fraud, and breach of fiduciary duty against Wernicki, and two negligence claims against Meza. Like the original complaint, the second amended complaint sought to recover the $165,000 debt, plus related damages. In January 2012, the collection case was settled for $15,000, and William, as trustee of the JH Trust, executed a settlement agreement and general release that released

Manuel Meza dba Edgemore Properties, as well as his employees, former employees, agents, and others (which includes Wernicki) from any claims or demands arising from or related to the lawsuit. There is no writing from the trustee of the Jojazak Trust, or anyone else acting on behalf of the trustee or the trust, that approves, consents to, acknowledges, or refers to the settlement of the JH Trust claims against Wernicki.

In October 2013, William, as trustee of the JH Trust, called Michael Augustine, the trustee of the Jojazak Trust, demanding that the Jojazak Trust pay $165,000 to the JH Trust. Augustine's attorney responded that any monetary obligation the Jojazak Trust may have had to the JH Trust was fully satisfied, and therefore the Jojazak Trust would not make any payments to the JH Trust.

William, as trustee of the JH Trust, filed the instant lawsuit shortly after receiving Augustine's attorney's response. In the operative second amended complaint, William alleged claims against Augustine, as trustee of the Jojazak Trust, and Zachary for breach of contract and fraud. The parties waived jury trial and agreed to have the case (which was limited to the breach of contract cause of action) determined by the trial court based upon stipulated facts and exhibits. By the time of trial, Gary had replaced William as trustee of the JH Trust.

At trial, Gary argued that the Notice of Debt Acknowledgment was not a conditional guaranty. Instead, he argued the debt actually was a first party obligation of the Jojazak Trust because the $165,000 that the JH Trust deposited with West Escrow went directly to the Jojazak Trust. Thus, the language in the guaranty regarding the

Jojazak Trust seeking to collect the debt from Wernicki was "illusory, superfluous, and ultimately meaningless," and should be disregarded.

Augustine, on the other hand, argued that the court did not have the power to ignore the language of the Notice of Debt Acknowledgment, which by its clear language was a conditional guaranty of collectability. In any event, Augustine asserted the evidence showed that the $165,000 the JH Trust paid was for the benefit of the owner of the Los Feliz property, Wernicki, to pay his creditor, the Jojazak Trust, on a loan that was in default. Thus, the $165,000 was a debt owed by Wernicki to JH Trust, which the Jojazak Trust agreed to collect with the full cooperation of the JH Trust, and to cover the loss if its collection efforts were unsuccessful. Augustine argued that the condition set forth in the guaranty—that the Jojazak Trust must cover the debt if it is unsuccessful in its attempt to pursue collection, with the JH Trust's full cooperation—was not satisfied because, although the Jojazak Trust commenced collection efforts, the JH Trust took over those efforts without the Jojazak Trust's approval, consent, ratification, or waiver, and settled the collection lawsuit and released the obligor without the Jojazak's consent or approval.

The trial court found in favor of Augustine. In its written statement of decision, the court found that the Notice of Debt Acknowledgment was a contract in which the Jojazak Trust's obligation to "cover the loss" did not arise unless the Jojazak Trust's efforts to collect the debt from Wernicki, with the JH Trust's full cooperation, were unsuccessful. It found that the Jojazak Trust's obligation did not arise because the JH Trust substituted its own counsel into the

collection lawsuit and settled it; therefore, the JH Trust failed to fully cooperate with the Jojazak Trust's collection efforts. The court rejected Gary's argument that the condition of pursuing Wernicki for the debt was impossible, and therefore any duty to satisfy the condition was excused; the court noted that Gary failed to present any evidence to show the condition was impossible or impracticable to perform. Finally, the court rejected Gary's assertion that the Jojazak Trust was a direct obligor to the JH Trust, noting that the law upon which Gary relied for this argument did not apply to the facts of this case.

Judgment was entered in favor of Augustine, from which Gary timely filed a notice of appeal.

DISCUSSION

Gary argues on appeal that the trial court erred in finding the Notice of Debt Acknowledgment (hereafter, the contract) was not enforceable against the Jojazak Trust. He contends the contract was enforceable because (1) any condition precedent has been satisfied; (2) any condition precedent was waived, excused, and/or impossible to fulfill; and (3) it was not a guaranty, but was instead a first party obligation under Civil Code section 2794, et seq. None of his contentions has merit.

A. *Standard of Review*

Gary argues that the de novo standard of review applies to all issues in this appeal because the trial court rendered its decision based upon stipulated facts. Augustine argues that even though the case was

tried on stipulated facts, the substantial evidence standard of review applies because those stipulated facts left the ultimate factual question—whether the condition in the contract had been satisfied—for resolution by the court. Augustine is correct.

"Contractual and statutory interpretations are questions of law reviewed de novo. [Citations.] So, too, are questions of law submitted on stipulated facts. [Citation.] But if stipulated facts leave an ultimate question of fact open for resolution, the substantial evidence rule applies." (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 347.) Under the substantial evidence standard of review, """"the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the [trial court's factual] determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion."""" (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 683-684 (*Perez*).)

B. *The Condition Was Not Satisfied*

Gary argues the condition in the contract was satisfied because the Jojazak Trust was not successful in "carrying out the collection of [the $165,000 debt]," inasmuch as it never recovered the money from Wernicki. He argues the trial court erred in finding that the JH Trust

did not fully cooperate in the Jojazak Trust's collection efforts on the ground that it substituted its own counsel in the collection lawsuit and settled the matter. He contends the substitution of counsel "was done with the consent of [the] Jojazak [Trust], as it was agreed by its attorney, Ramey." Thus, he contends the Jojazak Trust "consented to whatever subsequently occurred in that action under the direction of [the JH Trust's attorney]." As such, he argues, "[t]he only logical conclusion" is that the JH Trust fully cooperated with the Jojazak Trust's efforts to collect the debt and therefore the contractual condition was satisfied.

While Gary's inferences from the stipulated facts may be plausible, they are not the only possible inferences. Based upon the stipulated facts that there was no written request to or consent by the trustee of the Jojazak Trust to the substitution of attorney, or any writing from anyone associated with the Jojazak Trust approving or consenting to the settlement of the collection lawsuit and release of claims against Wernicki, an equally plausible inference is that the Jojazak Trust did not consent to or approve the substitution or the settlement and release. That inference supports the trial court's conclusion that the JH Trust did not fully cooperate and therefore the contractual condition was not satisfied. Under the substantial evidence standard of review, we cannot disturb the trial court's finding. (*Perez*, *supra*, 188 Cal.App.4th at pp. 683-684 ["a reviewing court is without power to substitute its deductions for those of the trial court".])

C. *The Condition Was Not Excused, Waived, or Impossible to Fulfill*

Gary contends the condition in the contract was excused because it "forms no essential part of the [contract], because there was no need or ability to recover the 'debt' from Wernicki," and therefore the condition was excused. However, he points to no evidence to support his assertion that the condition was not an essential part of the contract. Instead, he simply repeats his assertion that the Jojazak Trust authorized the JH Trust to take over the collection lawsuit—an assertion that is contrary to the finding of the trial court, which was supported by substantial evidence. Thus, his contention fails. (*Perez*, *supra*, 188 Cal.App.4th at pp. 683-684.)

Gary's contention that the Jojazak Trust waived the condition fares no better. Once again, he bases his contention on his assertion that the Jojazak Trust "voluntarily delegated the responsibility of collecting the 'debt' by agreeing to have JH Trust's attorney, Michael Rubin, pursue the [collection] action." We are bound by the trial court's finding to the contrary. (*Perez*, *supra*, 188 Cal.App.4th at pp. 683-684.)

Finally, Gary contends it was impossible to fulfill the condition of collecting the debt from Wernicki because there never was a debt owed to JH Trust by Wernicki. As discussed in section D., *post*, Gary is mistaken.

D. *The Debt Was Not an Original Obligation of the Jojazak Trust*

Gary argues that the $165,000 debt was not a debt owed by Wernicki, but was an original obligation of the Jojazak Trust because Wernicki did not receive the funds; they went to the Jojazak Trust

instead. He contends that under section Civil Code section 2794, "where a guarantor receives the property or a direct benefit, [the debt] should be 'deemed an original obligation of the promisor.'" His contention is based upon a faulty factual premise.

Gary is correct that the Jojazak Trust ultimately received the $165,000 that the JH Trust deposited into the escrow account. But the undisputed evidence is that the JH Trust deposited those funds into the escrow account for the benefit of Wernicki, and it was Wernicki who then ordered the escrow agent to pay that money to the Jojazak Trust, with whom Wernicki had a loan that was in default. Thus, the Jojazak Trust received the funds *from Wernicki*, to pay a debt that Wernicki owed to it. Therefore, Civil Code section 2794 does not apply here to make the debt an original obligation of the Jojazak Trust.

DISPOSITION

The judgment is affirmed. Augustine shall recover his costs on appeal.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J. CURREY, J.