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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ONEWEST BANK, FSB, Plaintiff and Respondent, v. DAVID LORIN, Defendant and Appellant.	B235826 (Los Angeles County Super. Ct. No. BC443612)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

McCurdy & Leibl, Michael Miretsky and Robert C. Powers for Defendant and Appellant.

Dykema Gossett, J. Kevin Snyder, Brian H. Newman and Vivian I. Kim for Plaintiff and Respondent.

This is an action brought by OneWest Bank, FSB (Bank) to enforce a commercial guaranty agreement against David Lorin. Lorin guaranteed payment of a $600,000 promissory note (Note) he executed as a principal of P.B.M. Maintenance Corp. (PBM). To avoid PBM's default, Bank's predecessor negotiated with Lorin's former business associate and co-guarantor to extend and modify the terms of the Note. PBM defaulted, and Bank filed suit to enforce the guaranty agreement.

Lorin appeals from the judgment entered after the trial court granted summary judgment in Bank's favor. He maintains the guaranty agreement is unconscionable and an unenforceable contract of adhesion because it contains an advance waiver of his right to be exonerated under Civil Code section 2819.[1] Lorin also contends there is a triable issue of fact as to whether he revoked the guaranty agreement after the first modification. We conclude the guaranty agreement is enforceable, and reject Lorin's assertion that there are triable issues of fact related to his revocation of the guaranty agreement. Accordingly, we affirm.

UNDISPUTED FACTS

1. *Guaranty Agreement*

First Federal Bank of California (First Federal) lent PBM $600,000 at the initial interest rate of 9.25 percent per annum with minimum monthly payments of interest only with all outstanding principal and unpaid accrued interest due on May 10, 2008. Lorin, secretary of PBM, and Fernando Real, president of PBM, executed and delivered to First Federal the Note and also secured the debt by a deed of trust on real property, which was duly recorded.

At the same time, Lorin executed a guaranty agreement, in which he acted as a guarantor of PBM's indebtedness under the Note. Lorin "absolutely and

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[1] Civil Code section 2819 states in pertinent part: "A surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended. . . ."

Unless otherwise stated, all further statutory references are to the Civil Code.

unconditionally" guaranteed all amounts that PBM might owe under the Note, plus any "future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts."

The guaranty agreement waived any defenses arising from any modification or change in terms of the indebtedness. It also stated that the guaranty agreement only could be revoked by written notice, and the revocation applied to new indebtedness that did not include any indebtedness incurred by PBM before the revocation.

2. *Modifications to the Terms of the Note*

As an accommodation to PBM, First Federal extended the terms of the Note on three different occasions. These extensions modified the interest rate and also changed the payment schedules. First Federal negotiated these modifications with PBM's president, not Lorin. Lorin did not sign the "changes in terms agreements."

First Federal informed Lorin about the first and second modification, but it did not notify him after the third modification.[2] Lorin was initially contacted about the first modification and orally informed the First Federal representative that he could no longer "stand as Guarantor for PBM." Upon being advised in writing of the first modification, Lorin contacted First Federal and again told a representative that he "could no longer stand as a Guarantor for PBM since [he] had no access or control over the operations of the company." When Lorin was informed of the second modification, he contacted First Federal and reiterated that he had revoked the guaranty agreement. Lorin was never told by First Federal during these conversations that he had to give written notice of revocation.

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[2] Although Bank objected to portions of Lorin's declaration, the trial court did not rule on the objections. Bank does not reassert these objections on appeal, thus we adhere to the rule that the objections were presumptively overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534-535.)

3. *PBM Defaults and Lorin Fails to Discharge PBM's Obligations*

Before maturity, Bank purchased the loan, Note, deed of trust, and guarantees from First Federal. PBM failed to make its monthly payment due on June 10, 2010, and, under the terms of the Note, Bank declared all moneys payable and due. PBM did not repay the Note. The sum owed as of March 30, 2011 was $339,790.94, with the accrual of interest based upon the terms in the third modification.

Lorin failed to discharge PBM's obligations pursuant to the terms of the guaranty agreement. Bank filed suit.

4. *Bank's Summary Judgment*

Bank filed a motion for summary judgment on its remaining breach of contract cause of action. Lorin's opposition focused on his defenses arising from the three modifications, and his oral revocation of the guaranty agreement after the first modification. The trial court stated in its minute order that Lorin did "not sufficiently meet [h]is burden" and granted Bank's motion. This appeal followed.

DISCUSSION

Lorin contends the summary judgment ruling must be reversed because the waiver of his statutory right to exoneration under section 2819 renders the guaranty agreement unconscionable and, therefore, it cannot be enforced. In the alternative, Lorin contends there are factual issues related to his revocation of the guaranty agreement, and to Bank's predecessor's waiver of the written revocation requirement that preclude summary disposition in Bank's favor. We address these arguments, finding no basis upon our de novo review to reverse the trial court's order granting summary judgment. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)[3]

[3] Although our review of summary judgment is de novo, review is limited to issues adequately raised and supported in the appellant's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Lorin moved to augment the record to include the reporter's transcript awarding Bank attorney fees following the order granting summary judgment. Lorin, however, does not raise any argument related to that issue in his brief, therefore the issue has not been adequately raised for our review.

1. *The Guaranty Agreement Containing a Waiver of Defenses is Enforceable*

Lorin contends that the guaranty agreement is an unconscionable and unenforceable contract of adhesion because it required him to waive in advance his statutory right under section 2819. Numerous cases permit advance waivers. (See, e.g., *Bloom v. Bender* (1957) 48 Cal.2d 793, 800-805; *American Security Bank v. Clarno* (1984) 151 Cal.App.3d 874, 884; *Union Bank v. Ross* (1976) 54 Cal.App.3d 290, 295-296.)

Lorin maintains, however, that the guaranty agreement containing the advance waiver of defenses is an unenforceable contract of adhesion because he lacked bargaining power to negotiate that term. He also argues that a triable issue of fact exists as whether he did or did not have any bargaining power.

An adhesion contract signifies a standardized contract, which, imposed and drafted by the party of superior bargaining power, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (*Stevenson v. Oceanic Bank* (1990) 223 Cal.App.3d 306, 318.) Adhesion contracts are enforceable according to their terms, unless a provision contained in such a contract does not fall within the reasonable expectations of the weaker or adhering party. (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1446.) Failure to pass the reasonable expectation test is treated as the equivalent of substantive unconscionability. (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1289-1290.) Substantive unconscionability focuses on the actual contract terms and whether those terms create overly harsh or one-sided results that shock the conscience. (*Id.* at pp. 1288-1289.) Unconscionability has both a procedural and substantive element, and both elements must be present for a court to invalidate a contract. (*Ibid.*)

As stated, advance waivers "do not shock the conscience," and are reasonable and enforceable in guaranty agreements. (See *Union Bank v. Ross, supra,* 54 Cal.App.3d at pp. 295-296.) We reject Lorin's contention that he was "surprised," and "did not expect . . . to waive his right to object to substantial unilateral changes in the terms of the loan." Lorin stated in his declaration that he was told before he signed the guaranty

agreement that he could not negotiate more favorable terms, and First Federal would not remove the waiver clause.[4] Thus, Lorin's signature on the guaranty agreement means the waiver clause was not a surprise, he understood its significance, and he accepted the term. Under these circumstances, there has been no showing of substantive unconscionability that would require invalidating the guaranty agreement.

We also find unpersuasive Lorin's argument that based upon the rationale in *Union Bank v. Ross*, *supra*, 54 Cal.App.3d 290, "a number of the provisions in the Guaranty must be stricken as unconscionable and adhesive." In *Union Bank v. Ross*, the court upheld a waiver clause, concluding the guaranty agreement was not an adhesion contract. (*Id*. at p. 296.) The court rejected Ross's argument of "unequal bargaining power," because he never attempted to negotiate the removal of the objectionable waiver clause. (*Ibid*.) The court also rejected the argument that Ross did not give " 'understanding consent' " to the waiver clause because, by his own admission, he failed to read the contract. (*Ibid*.) In this case, unlike *Union Bank v. Ross*, it is undisputed that Lorin understood he could not negotiate more favorable terms, and knowingly signed the guaranty agreement with the waiver clause.

Union Bank v. Ross, *supra*, 54 Cal.App.3d 290, in fact, supports Bank's position that the guaranty agreement is not an adhesion contract. (*Id.* at pp. 295-296.) After reviewing the types of adhesion contracts, the court distinguished guaranty agreements, stating, " 'the contract of guaranty, in its essential parts, is in positive form, that is, it creates a liability, it does not limit a liability of the preparer of the contract.' " (*Id*. at p. 296.) Here, the waiver of defenses in the guaranty agreement did not limit First Federal's liability. The guaranty agreement is enforceable.

This challenge to the summary judgment ruling fails.

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[4] Lorin also contends that the statements in his declaration are "probative of the meaning of the Guaranty." The meaning of the waiver clause in the guaranty agreement is clear and unambiguous, requiring no interpretation. Lorin's purported factual dispute involves his opportunity to negotiate terms, not any ambiguity in the language of the guaranty agreement.

2. *No Triable Issues Exist on Revocation of the Guaranty Agreement*

Lorin next contends that there are triable issues of fact related to whether he revoked the guaranty agreement after the first modification, and whether First Federal, Bank's predecessor, waived its right to written notice of revocation. No triable issues exist.

a. *The Guaranty Agreement Requires Written Notice*

By the terms of the guaranty agreement, Lorin's oral revocation of the guaranty agreement was ineffective. Lorin had to give written notice to revoke the guaranty agreement.

Lorin maintains, however, that he had a statutory right to revoke the guaranty agreement under section 2815.[5] Section 2815 states "[a] continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce." Section 2815 does not alter the terms of the guaranty agreement that required written notice of revocation. Thus, Lorin's reliance on *Southern Cal. First Nat. Bank v. Olsen* (1974) 41 Cal.App.3d 234, 240-241, is misplaced. In that case, the guaranty agreement required written notice of revocation, and the guarantors were relieved of liability as to any indebtedness arising from future transactions after the bank received written notice of revocation of the guaranty. (*Id*. at p. 241.) Here, there is no dispute that the guaranty agreement required written notice of revocation, and Lorin did not revoke in writing.

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[5] Under the terms of the guaranty agreement, Lorin agreed to a continuing guaranty, "under which guarantor agrees to guarantee the full and punctual payment, performance and satisfaction of the indebtedness of borrower to lender, now existing or hereafter arising or acquired, on an open and continuing basis. Accordingly, any payments made on the indebtedness will not discharge or diminish guarantor's obligations and liability under this guaranty for any remaining and succeeding indebtedness even when all or part of the outstanding indebtedness may be a zero balance from time to time." (Capitalization omitted.)

b. *Bank is Not Estopped from Requiring Written Notice*

Lorin contends that there is a triable issue of fact related to Bank's waiver of the written notice requirement, and if so, his revocation of the guaranty agreement would permit him to assert his exoneration rights. The guaranty agreement states that the lender "shall not be deemed to have waived any rights" unless "such waiver is given in writing and signed by [l]ender." There is no written waiver in the record permitting Lorin to orally revoke the guaranty agreement.[6]

Lorin next relies on equitable principles, arguing Bank is estopped from requiring written revocation because he was not told by a representative of Bank's predecessor that he had to revoke the guaranty agreement in writing. He also believed his oral revocation had been accepted because he did not execute any of the "change in terms agreements."

" 'The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct.' (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245 . . .) 'The required elements for an equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury.' (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785 . . . ; see

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[6] Lorin also cites *Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, apparently for the proposition that he is relieved of his liability under the guaranty agreement because First Federal had a duty to discuss with Lorin any risks related to PBM's financial condition before it modified the terms of the Note, and First Federal had a duty to advise Lorin that his obligation under the guaranty agreement would continue unless he gave written notice of revocation. *Sumitomo* is inapplicable because the record does not show that Lorin raised this as a defense, and Lorin waived his defenses under the terms of the guaranty agreement. Moreover, the duty in *Sumitomo* is based on facts known by the creditor and unknown to the surety. (*Id*. at pp. 92-94.) First Federal owed no duty to inform Lorin of known facts regarding the financial condition of his own company, or the terms of the guaranty agreement that he executed.

Wolitarksy v. Blue Cross of California (1997) 53 Cal.App.4th 338, 345 . . . .)" (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1567.)

Equitable estoppel does not apply as a matter of law. In this case, it is undisputed that Lorin was not "ignorant of the true state of facts." Lorin read and signed the guaranty agreement. He acknowledged "having read all the provisions of this guaranty." (Capitalization omitted.) The guaranty agreement specifically and unambiguously required written notice of revocation.

This challenge to the summary judgment ruling also fails.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.