

No. 1-12-0024

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

P.B. RAM REDDY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	07 CH 4926
)	
RAKESH THAKKAR,)	Honorable
)	Bill Taylor,
Defendant-Appellee.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held:* The Statute of Frauds bars a lender from recovering from a debtor's surety on an oral guaranty of repayment, unless the surety's main purpose in promising repayment was to advance the surety's own interests, and new consideration supports the guaranty contract. A shareholder's interest in the success of a closely-held corporation does not take an oral guaranty out of the Statute of Frauds.

¶ 2 P.B. Ram Reddy (Ram) sued Rakesh Thakkar for breach of an oral guaranty that he would repay a loan Ram made to Kama Sutra Incorporated (KSI). After a bench trial, the trial court found

that Ram failed to prove that Thakkar guaranteed repayment of the loan. On appeal, we hold that the Statute of Frauds (740 ILCS 80/1 (West 2010)) bars Ram from recovering on the alleged oral guaranty.

¶ 3

BACKGROUND

¶ 4 Thakkar, Ram, and Ram's son, Srinivas Reddy (Srinivas), together formed KSI in May 1997. Ram contributed \$20,000 in exchange for 40% of the shares of KSI, Srinivas paid \$16,250 for 32.5% of the shares, and Thakkar paid \$13,750 for the remaining 27.5% of KSI shares. They chose Srinivas as president, Thakkar as vice-president, and Ram as KSI's sole director.

¶ 5 In May 1997, Ram transferred \$280,000 into an escrow account for KSI, to help KSI purchase property it sought to use as a nightclub. In June 1997, KSI obtained a bank loan of \$300,000. The bank required all three shareholders to guaranty the loan. In a separate written agreement, the three shareholders agreed that each would guaranty a share of the bank loan in proportion to the shareholder's interest in KSI's equity.

¶ 6 In July 1997, Ram sought a written promise that KSI would repay the \$280,000 he loaned it in May. All three shareholders signed a promissory note certifying that KSI owed Ram \$280,000, and KSI agreed to repay the loan with interest of 7% per year accumulating from May 6, 1997.

¶ 7 KSI opened the nightclub in August 1997 and closed it in February 2000. KSI repaid the bank loan and its other creditors, but it never repaid Ram's loan. The Secretary of State formally dissolved KSI in 2002.

¶ 8 In February 2007, Ram sued Thakkar, seeking repayment of \$77,000 of the amount Ram loaned to KSI, plus 7% interest since July 1997. Ram claimed that in July 1997, Thakkar orally

agreed to guaranty repayment of 27.5% of Ram's loan to KSI. Ram appended to his complaint three checks totaling more than \$1,000. The checks, on Thakkar's account, dated October 2005, December 2005, and February 2006, named Ram as payee. Ram alleged that with those checks, Thakkar started repaying the loan as he had promised, but he stopped making the payments altogether in 2006.

¶ 9 Thakkar moved to dismiss the complaint, arguing that the Statute of Frauds required a signed, written agreement for Thakkar's alleged promise to pay part of KSI's debt. The trial court found that disputed issues of fact required trial.

¶ 10 At trial, Thakkar testified that he never guaranteed repayment of the \$280,000 loan. He gave Ram \$1,000 because Srinivas told Thakkar that Ram needed the cash desperately. Late in 1997, Thakkar left a well-paid job with an accounting firm to work full time for KSI, earning \$35,000 per year. KSI bumped Thakkar's salary to \$60,000 per year for the last few months it operated.

¶ 11 Srinivas testified that Ram won a lawsuit in 2004 that made him a millionaire, and Srinivas never told Thakkar that Ram needed money. Srinivas reminded Thakkar that Thakkar needed to repay the part of the \$280,000 loan that Thakkar orally guaranteed. Thakkar never denied that he had guaranteed that part of the debt. Srinivas admitted that Ram never asked Srinivas to repay his part of the \$280,000 loan, and he never repaid any part of that loan.

¶ 12 Ram testified that he discussed repayment with Thakkar several times, and Thakkar agreed to repay the \$77,000 with interest when he could. Ram presented a sheet showing his calculation of the amount Thakkar would need to pay each month to retire the debt. The court accepted into evidence several letters Ram wrote to Thakkar about the debt, although Thakkar swore he never received the letters.

¶ 13 Thakkar moved for a judgment at the close of Ram's case. The trial court said:

"After listening to the testimony and the witnesses on the stand and judging their credibility, while I think that the Defendant obviously committed perjury on the stand in terms of some of his answers ***, I still do not have enough evidence to show that [the parties had] an agreement for payback ***.

The \$280,000 loan was given to KSI, and there was no proof that there was a guarantee even though there were three payments made. The Court cannot determine whether the three payments were made under a guarantee or just a moral obligation to pay."

The court entered judgment in favor of Thakkar. Ram now appeals.

¶ 14 ANALYSIS

¶ 15 The trial court held that Ram failed to prove that Thakkar guaranteed the loan. We review the judgment, based on the court's assessment of the credibility of the witnesses, only to determine whether the court's finding is against the manifest weight of the evidence. See *Barnes v. Michalski*, 399 Ill. App. 3d 254, 263-64 (2010). But we may affirm the trial court's ruling on any basis for which we find adequate support in the record. *In re Application of County Treasurer*, 185 Ill. 2d 428, 436 (1998). We choose to address the issue of whether the Statute of Frauds precludes recovery under the facts of this case. The statute of frauds issue presents a question of law subject to *de novo* review. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503 (2000).

¶ 16 The Statute of Frauds provides that courts will not enforce a promise to pay the debt of

another, unless the parties wrote out the promise, and the promisor signed the writing. 740 ILCS 80/1 (West 2010); *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567 (2007). Our supreme court explained:

"The plain object of the statute is to require higher and more certain evidence to charge a party, where he does not receive the substantial benefit of the transaction, and where another is primarily liable to pay the debt or discharge the duty; and thereby to afford greater security against the setting up of fraudulent demands, where the party sought to be charged is another than the real debtor, and whose debt or duty, on performance of the alleged contract by such third person, would be discharged." *Eddy v. Roberts*, 17 Ill. 504, 506 (1856).

When the real debtor proves insolvent, the creditor who has had some interaction with a third party may try to "torture mere words of encouragement and confidence into an absolute promise" to pay the debt if the real debtor does not. *Davis v. Patrick*, 141 U.S. 479, 487-88 (1891). But the Statute of Frauds does not apply when the surety's main purpose in guaranteeing the payment is to advance his own pecuniary or business interest, rather than the interest of the primary debtor. *Rosewood*, 226 Ill. 2d at 572.

¶ 17 The Restatement of Security clarifies the "main purpose" exception with the following illustration:

"D contracts with S to build a house for S. C contracts with D to furnish materials for the purpose. D, in violation of his contract with

C fails to pay C for some of the materials furnished. C justifiably refuses to furnish further materials. S orally promises C, that if C will continue to furnish D with materials that C had previously agreed to furnish, S will pay the price not only for the materials already furnished but also for the remaining materials if D fails to do so. S's promise is enforceable." Restatement of the Law, Security, § 93 (1941).

Because S directly benefits from completion of his house, which the subcontractor C helps the general contractor D to build, courts will enforce S's oral promise to guaranty payment to C for its work.

¶ 18 The Statute of Frauds applies to any promise to pay the debt of another, unless the surety and the creditor make an original and independent agreement, supported by new consideration, for the guaranty. *Greenberger, Krauss & Tenenbaum v. Catalfo*, 293 Ill. App. 3d 88, 94 (1997). The court should consider all the circumstances of the transaction to determine whether the parties have made an enforceable independent agreement or an unenforceable collateral agreement. *Swartzberg v. Dresner*, 107 Ill. App. 3d 318, 324 (1982).

¶ 19 While the parties here dispute some facts, they agree that Ram loaned KSI \$280,000 on May 6, 1997, and in July 1997, all three shareholders signed a note promising that KSI would pay the money back to Ram with 7% interest. The written note includes no personal guaranty of repayment. KSI used the money to purchase the nightclub and supplies to start the operation of the nightclub. Thakkar left his job to start working full time for KSI at less pay than he earned at his prior job. KSI

did not repay the debt. After KSI dissolved, Thakkar paid Ram \$1,000 over the course of several months in 2005 and 2006. Ram swore that Thakkar orally guaranteed repayment of his share of the debt, which amounted to \$77,000 (27.5% of \$280,000). Thakkar testified that he never promised any such payment.

¶ 20 Ram claims that Thakkar's personal interest in the loan takes the guaranty out of the Statute of Frauds. According to Ram, KSI needed the loan to purchase the nightclub, and without the nightclub, KSI would have no business, so that Thakkar would not have earned his income, and he would have lost his investment in KSI.

¶ 21 We find this case somewhat similar to *Brown & Shinitzky Chartered v. Dentinger*, 118 Ill. App. 3d 517 (1983). In that case, a partnership needed a lawyer to help guide the partnership through bankruptcy proceedings. One partner orally agreed to guaranty the partnership's payment of its legal fees. When the partnership failed to pay legal fees, the law firm sued to enforce the oral guaranty. The court held that the Statute of Frauds barred recovery on the complaint. The exception for guarantees whose main purpose is to advance the guarantor's interests did not apply because the partnership benefitted directly from the lawyer's work, and the partner benefitted only indirectly, through his participation in the partnership. *Brown & Shinitzky*, 118 Ill. App. 3d at 520.

¶ 22 Here, KSI benefitted directly from Ram's loan to KSI, and Thakkar benefitted only indirectly, through his ownership of 27.5% of the shares of KSI. Moreover, Thakkar received no consideration for the oral guaranty. Ram gave the loan to KSI in May 1997 without any guaranty, and he offered no further consideration in exchange for the oral guaranty he swore Thakkar gave him in July 1997.

¶ 23 Therefore, following *Brown & Shinitzky*, and in accord with the requirement of new

consideration to take an oral guaranty out of the Statute of Frauds (see *Greenberg*, 293 Ill. App. 3d at 94), we hold that the Statute of Frauds bars Ram from recovering on Thakkar's alleged oral guaranty of partial repayment of Ram's loan to KSI.

¶ 24

CONCLUSION

¶ 25 Because the Statute of Frauds bars Ram from recovering on the alleged oral guaranty, we affirm the judgment entered in favor of Thakkar.

¶ 26 Affirmed.