

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (3d) 150737

Order filed October 3, 2017

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

CACH, LLC,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois.
	)	
v.	)	Appeal No. 3-15-0737
	)	Circuit No. 14-LM-741; 14-SC-1317;
	)	14-SC-1318
	)	
	)	
PAUL PRIBAZ,	)	Honorable
	)	Katherine Gorman-Hubler,
Defendant-Appellant.	)	Judge, presiding.
	)	

---

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Wright and Carter concurred in the judgment.

---

**ORDER**

¶ 1 *Held:* The Statute of Frauds bars a lender's assignee from recovering on an alleged surety promise where a preponderance of the evidence failed to establish that the alleged surety gave an oral promise to pay certain debts, the main purpose in promising repayment was to advance the surety's own interests, and new consideration supported the promise of surety. An owner/shareholder's partial social security number on an internal document prepared by the original creditor was insufficient to overcome the requirement that a promise to pay the debt of another be in writing and supported by new consideration.

¶ 2 This appeal arises from three actions for damages initiated by CACH, LLC. (CACH), a credit card debt purchaser, alleging that the defendant, Paul Pribaz (Pribaz) was liable in surety for debts arising from credit card purchases made on accounts issued to Vicious Circle, Inc., an Illinois corporation, and Istria Café, LLC., a Nevada limited liability company. Following a consolidated bench trial, the trial court entered judgment for CACH on each claim. Pribaz filed a motion to reconsider, which the trial court denied. Pribaz then appealed. We reverse and remand for entry of judgment for the defendant on each complaint.

¶ 3 BACKGROUND

¶ 4 Evidence presented at trial established that CACH acquired an interest in three credit accounts; two issued to Vicious Circle, Inc., and a third issued to Istria Café, LLC. The evidence further established that Pribaz was a shareholder in Vicious Circle, Inc., an officer (president) of Vicious Circle, Inc., and the manager of Istria Café, LLC. The accounts were sold by the original creditor to CACH. At the time CACH purchased the debt, it received from the original creditor copies of certain monthly statements on each account. The statements listed an account number, current balance due, and the name of the debtor entity. The statements did not provide any information on specific purchases made on the card. CACH also received a document entitled "Bill of Sale and Assignment of Loans" relating to each account. The document, produced internally by the original creditor, identified Pribaz as a "guarantor" of the account and referenced the last four digits of Pribaz's social security number. The account statements and the Bill of Sale documents were entered into evidence over Pribaz's hearsay and foundation objections. Additionally, CACH presented an "Affidavit of Debt" purportedly completed by an account manager servicing the original account in which the affiant, from personal knowledge,

stated that Pribaz was listed as "obligor officer" for Istria Café, LLC. The affidavit was admitted into evidence over hearsay and foundation objections.

¶ 5 CACH also presented at trial the testimony of Victoria Mason, its records custodian, who testified that, in her opinion, the presence of the last four digits of Pribaz's social security number on the documents provided to CACH by the original creditor indicated that he must have agreed to guarantee the underlying debt. Mason based her opinion on her understanding that the original creditor recorded the social security number of personal guarantors. Mason's testimony was allowed over Pribaz's hearsay and foundational objections. Pribaz testified that he did not agree to guarantee the debts of Vicious Circle, Inc. and Istra Café, LLC.

¶ 6 The trial court found that CACH had established by a preponderance of the evidence that Pribaz had entered into a contract of surety to guarantee the debts of both business entities. The entered judgment in each of the three actions against Pribaz and in favor of CACH.

¶ 7 Pribaz appealed. We reverse the judgment of the trial court and remand the matter for the entry of a judgment consistent with this order.

¶ 8 ANALYSIS

¶ 9 The trial court held that Pribaz was a guarantor of the accounts purchased by CACH from the original creditors. At issue is whether the Statute of Frauds (740 ILCS 80/1 (West 2014)) precludes recovery from Pribaz as surety on the debts incurred by the two business entities. Whether a trial court has properly applied the Statute of Frauds presents a question of law subject to *de novo* review. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503 (2000). Whether facts exist which would take a matter outside the purview of the Statute of Frauds is a question to be determined by the trier of fact. *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 575 (2007).

¶ 10

The Statute of Frauds provides, in pertinent part, as follows:

"No action shall be brought \* \* \* whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person \* \* \* unless the promise or agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (2014).

The requirement of a written agreement to enforce a guarantee is due to the "temptation for a promise, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise." *Id.* at 568 (quoting *Davis v. Patrick*, 141 U.S. 479, 487-88 (1891)). 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 agreement to guarantee the original debt must be in writing, unless it can be shown by a preponderance of the evidence that the surety's main purpose in guaranteeing the original debt is to advance his own pecuniary or business interest, rather than the interest of the primary debtor. *Rosewood*, 226 Ill. 2d at 572. Even when a guaranty of surety arises, it must be unequivocal and construed strictly in favor of the alleged guarantor. *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶ 16. Moreover, a court must consider all the circumstances of the transaction to determine whether the parties have made "an enforceable independent agreement or an unenforceable collateral agreement." *Swatzberg v. Dresner*, 107 Ill. App. 3d 318, 324 (1982).

¶ 11 In the instant matter, CACH conceded that there was no written agreement by Pribaz to assume the debts of the two business entities that incurred the original debt. CACH nevertheless maintains that pursuant to the main purpose rule, the Statute of Frauds does not bar recovery from Pribaz. Under the main purpose rule, when the "main purpose" or "leading object" of the promisor is to "subserve or advance [his] own pecuniary or business interests" the statute does not apply. *Rosewood*, 226 Ill. 2d at 572. In order for CACH to prevail, therefore, a preponderance of the evidence must show that Pribaz guaranteed the original debt for his own pecuniary or business interest, rather than the interest of Vicious Circle, Inc. and Istria Café, LLC.

¶ 12 Here, the record contains no evidence to establish that Pribaz made an oral promise to pay the debts of the two business entities. There is no testimony to establish that Pribaz made such an oral promise, nor did Pribaz admit to such a statement. CACH acknowledges this lack of evidence of an oral promise, but suggests that evidence existed from which it could be inferred that Pribaz orally promised to guarantee the debts at issue. The only evidence that CACH put forth to support its contention that Pribaz made an enforceable oral agreement to pay the original debts was: 1) he was an officer or manager of both business entities; 2) he "logged in" and filled out the online applications for the credit accounts at issue; 3) he was an authorized user on each account; 4) as a shareholder/owner of the limited liability entities, he must have personally benefited from the credit extended to them by the original creditor; and 5) his social security number, or at least the last four digits, were known to the creditor when it prepared the documents assigning the original debt to CACH. The trial court agreed that an inference could be made from these facts that Pribaz must have made an oral promise to pay the debts of these entities and entered judgment for CACH.

¶ 13 The trial court's findings of fact, and the judgment based upon those factual findings, will be overturned on appeal only if they are against the manifest weight of the evidence. *Rosewood*, 226 Ill. 2d at 575 (the "main purpose" or "leading object" of a promise is a question of fact); *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002) (a trial court's findings made after a bench trial will not be reversed on appeal unless they are against the manifest weight of the evidence). A factual finding is against the manifest weight of the evidence where the opposite conclusion is clearly apparent or if the finding itself is unreasonable, arbitrary, or not based upon the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006); *Myers v. Woods*, 374 Ill. App. 3d 440, 449 (2007).

¶ 14 After reviewing the record in the present case, we find that the trial court's judgment was not based upon the evidence presented. The mere fact that Pribaz was an officer, shareholder, or manager of the business entities cannot, as a matter of law, support a finding that he personally guaranteed the debts of the corporation or LLC. It is a well-settled principle that shareholders, officers and employees of corporate and limited liability entities are not personally liable for the contractual obligations of the business when they are fulfilling legitimate corporate or managerial functions. *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1112 (2010); *IOS Capital, Inc. v. Phoenix Printing, Inc.*, 348 Ill. App. 3d 366, 371 (2004). Here, the record does not establish that Pribaz was acting beyond the proper functions of an officer or manager when he engaged in the functions filling out applications for credit, or engaging in the financial dealing of the business entities. The actions of applying for credit and utilizing that credit as an officer or manager of the entities, without more, cannot rise to the level of evidence of an unequivocal intent to personally guarantee the debts of the original debtors. If that were so, then any action by an officer, employee, or manager of a corporate or limited liability entity that resulted in corporate/business

debt would be potentially liable for that debt. To do so would be contrary to law regarding the legitimate limited liability principles established for these entities. *Id.* Here, there was no evidence of record to establish that when Pribaz performed the duties described he was acting in his own pecuniary or business interest rather than merely fulfilling legitimate services for the business entities.

¶ 15 Moreover, CACH provides no more than mere speculation that Pribaz personally benefited from the credit advanced to the two business entities by the original creditor. Were we to assume, *arguendo*, that Pribaz personally benefitted from the credit extended by the original creditor to the two business entities, it would still be necessary for CACH to establish that "the main" purpose of any promise was his own pecuniary or business interest. *Brown & Shinitzky Chartered v. Dentinger*, 118 Ill. App. 3d 517, 520 (1983) (exception for guarantees the "main purpose" of which is to advance the guarantor's pecuniary or business interest does not apply where the guaranty benefits the debtor entity directly, and the guarantor only indirectly).

¶ 16 We find *Brown* to be instructive. In that case, a partnership needed a lawyer to help guide the partnership through a bankruptcy proceeding. One partner orally agreed to guaranty the partnership's payment of its legal fees. When the partnership failed to pay the legal fees, the law firm sued to enforce the oral promise. The *Brown* court held that Statute of Frauds prevented recovery from the guaranteeing partner since the partnership benefited directly from the promise in that it received services from the law firm, while the individual partner only gained an "indirect" benefit from the legal services that were provided to the partnership. *Brown & Shinitzky Chartered*, 118 Ill. App. 3d at 250. Here, even if CACH could establish that Pribaz gave an oral promise to pay the debts of the two business entities, the record established that credit was extended to those entities and not to Pribaz. As in *Brown*, there was no evidence that

Pribaz benefited directly or independently from credit extended to the original debtor. At best, the record established that he benefited indirectly from the credit advanced to the business entities in which he had an ownership interest. As such, he stands in the same shoes as the partner in *Brown* who guaranteed the partnership legal fees.

¶ 17 We are left to determine whether, standing alone, the presence of the last four digits of Pribaz's social security number on the documents sent to CACH by the original lender at the time the debts were assigned was sufficient evidence of an "absolute promise" to pay the debts incurred by the two limited liability entities (*Rosewood*, 266 Ill. 2d at 568), and whether such promise was supported by "new consideration" (*Greenberger*, 293 Ill. App. 3d at 94). CACH maintains that the only reason it would have the partial social security number would be to indicate that Pribaz had agreed to personally guaranty the accounts of the business entities. It supports its argument with Mason's opinion based upon her "understanding" of the business practices of the original creditor.

¶ 18 Assuming that the evidence regarding the partial social security number was properly admitted over Pribaz's foundation and hearsay objections, the mere presence of the partial social security number on the assignment documents sent by the original creditor to CACH cannot establish: 1) whether Pribaz in fact made an oral promise to pay the debts of the business entities; 2) whether the main purpose or leading object of such a promise was to advance his own pecuniary or business interests independently from the business entities; and 3) whether additional consideration was provided to induce Pribaz to enter into an agreement to provide surety on the business loans. Given the requirement that evidence of suretyship be unequivocal and strictly construed (*Ringgold Capital IV, LLC*, 2013 IL App (1st) 121702, at ¶ 16), the evidence in the record failed to establish: 1) that Pribaz made an oral promise to guarantee the



debts at issue; 2) supported by additional consideration; 3) the main purpose of which was his direct pecuniary or business interest. The trial court's finding to the contrary was not based upon the evidence presented, and was, therefore, against the manifest weight of the evidence. Accordingly, we reverse the trial court's judgment in favor of CACH, Inc. and remand the matter with instructions to enter judgment in favor of Pribaz on all claims.

¶ 19 Pribaz also maintained on appeal that the trial court had erred in admitting certain documents and Mason's testimony over foundational and hearsay objections. Because of our holding reversing the trial court's judgment, we need not address the remaining issues raised on appeal.

¶ 20 **CONCLUSION**

¶ 21 The judgment of the circuit court of Peoria County is reversed and the cause is remanded to the circuit court for entry of judgments consistent with this order.

¶ 22 Reversed; cause remanded with instructions.