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SARASOTA COUNTY, FLORIDA
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IN THE CIRCUIT COURT OF THE TWELFTH
JUDICIAL CIRCUIT IN AND FOR
SARASOTA COUNTY, FLORIDA

Case No: 2012-CA-003599

PS CONCEPTS, INC., F/K/A
PS CABINETS, GRANITE & TILE, INC.,
a Florida corporation,

Plaintiff,

v.

WESTSHORE HOME IMPROVEMENT, LLC
a Florida Limited Liability Company, JOAN
MULA AND STEPHEN WALKER,

Defendants.

**FINAL JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST
WESTSHORE HOME IMPROVEMENT, LLC; JOAN MULA, A/K/A JOAN CATHERINE
WALKER; AND STEPHEN WALKER A/K/A WILLIAM S. WALKER**

THIS CAUSE came before the Court for a bench trial on March 3, 2014. The Court considered an Evidentiary Stipulation for Purposes of Trial dated February 24, 2014 (the "Stipulation"), stipulating as to the authenticity and admissibility of Exhibits "A" through "J", which were admitted into evidence pursuant to the Stipulation. The Stipulation also provided that the unpaid principal amount due and owing on the February 2, 2009 Promissory Note is \$62,472.40 as of February 1, 2012. The Plaintiff rested its case based on the documents in evidence and the stipulated amount of the default. Thereafter, Defendant Westshore Home Improvement, LLC ("Westshore") announced that it was not pursuing its Counterclaim, thereby conceding its corporate liability. Defense counsel then presented evidence as to the three affirmative defenses to the individual liability of Joan Mula (n/k/a Joan Catherine Walker but referred to herein as "Mula") and Stephen Walker (a/k/a William S. Walker and William Stephen Walker, and referred to herein as "Walker"), to wit:



1. That the individual Defendants did not sign the note;
2. That the terms of the Standard Asset Purchase Contract merged in the closing of the transaction; and
3. That the Plaintiff had waived the personal liability of Mula and Walker.

The Defendants presented the testimony of Walker and Mula in support of their affirmative defenses, upon which the Defendants have the burden of proof. One additional exhibit, Exhibit "K", a copy of a demand letter dated April 3, 2012, was admitted into evidence during Defendants' case in chief. In its rebuttal to the affirmative defenses of Defendants Mula and Walker, Plaintiff called Paul Sorke, one of the principals of the corporate Plaintiff.

The Court also received trial memoranda and case law during and prior to closing arguments of counsel. Based on the foregoing, the Court being advised in the premises, the Court makes the following

FINDINGS OF FACT:

1. The case concerns monies due and owing pursuant to a "Standard Asset Purchase Contract" which was admitted into evidence as Exhibit "A" (the "Contract").
2. Pursuant to the terms of the Contract, Mula and Walker are listed as "Buyer".
3. The Contract states that the purchase price is payable by "Buyer", and includes provisions for payment of a Promissory Note, which was admitted into evidence as Exhibit "B".
4. Article 7 of the Contract provides for a Security Agreement and for the provision of collateral by execution of UCC-1 Forms, which were admitted into evidence as Exhibits "D" and "E", respectively. The Security Agreement and UCC-1 Forms provide a list of furniture, fixtures and equipment in schedule "A" appended to each exhibit.

5. Article 9 of the Contract provides that the Buyer may elect to incorporate but that "original Buyer shall continue to be personally liable for the performance of the terms, covenants and conditions . . ." which are contained in the Contract.

6. Article 38 of the Contract states that the Contract "shall survive the Closing of this transaction as to the terms and conditions . . ." contained in the Contract.

7. Article 40 of the Contract contains an integration clause stating that the Contract "constitutes the entire agreement and understanding of the parties and cannot be modified except in writing executed by all parties." It also states that "All representations made herein shall survive the Closing of this transaction."

8. The closing of the transaction took place on February 2, 2009 at the law offices of attorney Stephen K. Boone. At that time, Exhibits "B" through "J" were executed (hereinafter, the "Closing Documents").

9. Among the Closing Documents executed was Exhibit "H" which is the Assignment of the Contract from Mula and Walker, as Assignors, to the corporate entity, Westshore, as Assignee, pursuant to Article 9 of the Contract. Included therein is a section entitled "Acceptance by Assignee" wherein the Assignee, Westshore, agrees "to indemnify Assignors against any liability arising from the performance or nonperformance . . ." of the obligations under the Contract.

10. Although provided for in Article 7 of the Contract, the personal and individual guarantee of Mula and Walker was not provided to the Plaintiff at the closing.

11. Pursuant to the Stipulation, Plaintiff is owed the principal sum of \$62,472.40 which remains due and owing as of February 1, 2012.

Based on the foregoing, the Court makes the following

CONCLUSIONS OF LAW:

1. The terms of the Contract are clear and unambiguous and no extrinsic facts have been proven which would render the Contract subject to explanation by means of parol evidence. *Duval Motors Company v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st DCA 2011). The terms and conditions of the Contract must be read and construed together with the Closing Documents, because they represent one continuous transaction involving the same parties. *Cushman v. Smith*, 528 So.2d 962, 964 (Fla. 1st DCA 1988) (citing *J.M. Montgomery Roofing Co., Inc. v. Howland*, 98 So.2d 484, 486 (Fla. 1957); *Dodge City, Inc. v. Byrne*, 693 So. 2d 1033, 1035 (Fla. 2d DCA 1997)).

2. The Defendant Corporation, Westshore, owes the Plaintiff \$62,472.40, plus prejudgment interest from February 1, 2012, together with costs of this action and attorney's fees. Mula and Walker are *prima facie* liable for the obligations under the Contract, including the payment of the Promissory Note, pursuant to Article 9 of the Contract. The burden of proof then shifted to the individual Defendants, Mula and Walker, to prove their affirmative defenses.

3. As to the Affirmative Defenses raised by Defendants Mula and Walker, the Court reaches the following conclusions of law as to each Affirmative Defense:

A. As to the defense that the individual Defendants did not sign the Promissory Note, the Court finds that, as a matter of law, when there is a clear covenant in the contract for the individual buyers to pay the purchase price and a provision (Article 9) specifically stating that they remain liable notwithstanding the assignment of their interest to a corporation, the failure to have Mula and Walker sign the Promissory Note does not defeat Plaintiff's claim of personal liability. In the instant case, the Contract and the Closing Documents, read together, reflect a clear expression of the covenant of Mula and Walker

to remain liable for payments due under the Promissory Note. See *Ehrlich v. Mangicapra*, 626 So.2d 702 (Fla. 4th DCA 1993). Exhibit "H", the assignment of Walker and Mula's personal rights to Westshore contains an indemnification clause, which also suggests that the intent of the parties was for Mula and Walker to remain liable for all obligations under the Contract, including the covenant to make payments under the Promissory Note.

B. The Defendants have failed to sustain their burden of proof on the issue of merger, as the clear expression of the Contract, in Articles 38 and 40, is that all terms, conditions and representations shall survive the closing.

C. The Defendants have likewise failed to sustain their burden of proof on the issue of waiver. The Second District Court of Appeal has identified the elements of waiver in *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007), as follows:

The supreme court has defined a "waiver" as a voluntary and intentional relinquishment of a known right . . . The elements that must be established to prove waiver are the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage

"The crux of the waiver doctrine rests upon conduct demonstrating an intent to relinquish a known right." *Ferry-Morse Seed Company v. Hitchcock*, 426 So.2d 958, 962 (Fla. 1983). Accordingly, "[i]n order to constitute waiver, the party's conduct must establish clear relinquishment, and while conduct can imply waiver, the conduct relied upon to do so must make out a clear case of waiver." *Costello v. The Curtis Building Partnership*, 864 So.2d 1241, 1244 (Fla. 5th DCA 2004) (emphasis added).

In the instant case, the only evidence of waiver was the failure of the Plaintiff to obtain a personal guarantee at the closing, and some conflicting testimony concerning an alleged oral exchange between Mr. Sorke and his then wife, Jeanine Cioffi, which allegedly occurred at the closing table. (Mr. Sorke denied that the conversation, as described by Mula and Walker, ever took place.) Even assuming, *arguendo*, that the conversation

testified to by Mula and Walker took place, the Defendants have failed to establish by preponderance of the evidence that there was a waiver of a right, privilege or advantage, that there was actual or constructive knowledge thereof, and that there was a clear intention to relinquish that right, privilege or advantage, all of which are elements which must be proven by the Defense to establish waiver.

4. Plaintiff is entitled to prejudgment interest and late fees pursuant to the Promissory Note, which contains a default interest rate of 18%. Plaintiff is entitled to an award of attorney's fees and costs pursuant to the terms of the Promissory Note and Article 34 of the Contract.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of the Plaintiff, PS Concepts, Inc., 7352 Van Lake Drive, Englewood, Florida 34224, and against the Defendants, Westshore Home Improvement, LLC, 718 East Venice Avenue, Venice, Florida 34285; Joan Mula (a/k/a Joan Catherine Walker), 1483 Seafarer Drive, Osprey, Florida 34229; and Stephen Walker (a/k/a William S. Walker and William Stephen Walker), 1483 Seafarer Drive, Osprey, Florida 34229, jointly and severally.

2. Plaintiff, PS Concepts, Inc., shall recover from Defendants Westshore Home Improvement, LLC, Joan Mula (a/k/a Joan Catherine Walker), and Stephen Walker (a/k/a William S. Walker), the sum of \$62,472.40 plus prejudgment interest at the rate of 18% per annum, from February 1, 2012 through March 11, 2014, in the amount of \$23,722.40, and late fees in the amount of \$3,123.62, for a total of \$89,318.42, which shall bear interest at the statutory rate per annum thereafter, all for which let execution issue.

3. Plaintiff shall recover possession of the property at issue under the Security Agreement and the Clerk of the Circuit Court shall forthwith issue a Writ of Replevin for

recovery of the items set forth on Exhibit "A" attached to the Security Agreement, or replacements thereof.

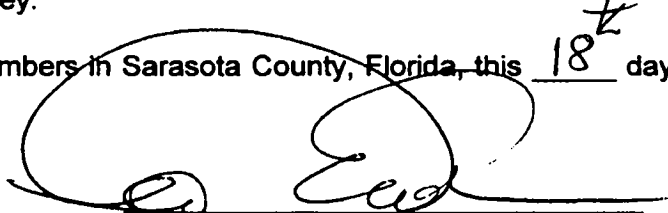
4. Plaintiff shall recover attorney's fees and costs pursuant to the terms of the Contract, the Promissory Note, and the Security Agreement. The Court reserves jurisdiction to determine the amount of attorney's fees and costs which are due Plaintiff concerning these proceedings and shall enter a supplemental Final Judgment for the same.

5. On the Counterclaim of Defendant Westshore, Westshore shall take nothing by this action and shall go hence without day.

6. It is further ordered and adjudged that the judgment debtor(s) shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed.

7. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor(s) to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

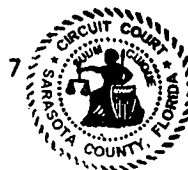
DONE AND ORDERED in Chambers in Sarasota County, Florida, this 18th day of March, 2014.



HONORABLE DENO G. ECONOMOU
Circuit Court Judge

cc: John W. Chapman, Jr., Esq.
James L. Essenson, Esq.

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"STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of pages 1 through 7 of the instrument filed in this office. The original instrument filed contains 7 pages.

This copy has no redactions. This copy has been redacted pursuant to law.

Witness my hand and official seal this 19 day of March, 2014.

KAREN E. RUSHING, CLERK OF THE CIRCUIT COURT

By: 

Deputy Clerk