IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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ML MANAGER, LLC, an Arizona limited liability company, as authorized agent for certain investors; and SOJ LOAN LLC, an Arizona limited liability company, *Plaintiffs/Appellees*,

*v.*

JOSEPH PINSONNEAULT and CAYLEE PINSONNEAULT, husband and wife, *Defendants/Appellants*.

No. 1 CA-CV 12-0590
FILED 01-21-2014

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Appeal from the Superior Court in Maricopa County
No. CV2010-010514
The Honorable Mark H. Brain, Judge

**REVERSED AND REMANDED**

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COUNSEL

Gust Rosenfeld P.L.C., Phoenix
By Christopher M. McNichol, Justin M. Scorza

*Counsel for Plaintiffs/Appellees*

Hopkins Law Offices, P.L.C., Phoenix
By Stephen M. Hopkins

*Counsel for Defendants/Appellants*

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**MEMORANDUM DECISION**

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Patricia A. Orozco and Judge Lawrence F. Winthrop joined.

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**J O N E S,** Judge:

**¶1** Joseph and Caylee Pinsonneault appeal from a summary judgment granted to ML Manager, L.L.C. (ML Manager) and SOJ Loan L.L.C. (SOJ Loan) (collectively, Plaintiffs). We reverse because Plaintiffs failed to meet their burden of proof for summary disposition.

**BACKGROUND**[1]

**¶2** SOJAC I, L.L.C. (SOJAC) obtained a loan from ML Manager's predecessor, Mortgages Ltd. (Mortgages), in 2007. In addition to providing a promissory note in the amount of $24.15 million, SOJAC executed a Deed of Trust, Assignment of Rent and Leases, Security Agreement and Fixture Filing (Deed of Trust) granting Mortgages a security interest in unimproved lots in downtown Phoenix (the Property). As further assurance, the Pinsonneaults, Bradley and Sarah Yonnover, and Dale and Vicki Jensen executed guaranties.

**¶3** SOJAC, the Pinsonneaults, and the other guarantors twice agreed to extend the loan's maturity date. Nevertheless, SOJAC did not repay the debt, and the Pinsonneaults failed to pay pursuant to their guaranty. SOJ Loan, an entity created to hold interests in the loan, and its manager, ML Manager, then sued the Pinsonneaults and Yonnovers[2] for breach of contract.

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[1] On appeal from a grant of summary judgment, we examine the entire record in the light most favorable to the losing party, giving that party the benefit of all reasonable inferences from the evidence. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

[2] The Yonnovers settled and secured a dismissal of the claim against them.

**¶4** The Plaintiffs also initiated a non-judicial trustee's sale of the Property in accordance with the Deed of Trust. SOJAC filed a Chapter 11 bankruptcy petition immediately before the scheduled sale. Following the bankruptcy case's dismissal, the Plaintiffs completed the trustee's sale, securing a successful bid of $3.6 million.

**¶5** Meanwhile, the Plaintiffs and the Pinsonneaults litigated cross-motions for summary judgment on the Pinsonneaults' deficiency liability. The Pinsonneaults moved (1) for additional time under Rule 56(f), and (2) to strike the affidavit of Mark Winkleman, ML Manager's Chief Operating Officer and designated representative, based upon a lack of foundation. ML Manager then filed a supplemental affidavit from Winkleman. The Pinsonneaults renewed the motion to strike, and asserted that enforcing the guaranty was unconscionable and the transaction was the product of fraud.

**¶6** Following oral argument, the trial court held as a matter of law that the Pinsonneaults were liable for the principal balance of $23.97 million and awarded twenty seven percent interest "as set forth in the Winkleman affidavit." It declined, however, to enforce the contractual late charges. Ultimately, the Plaintiffs submitted a form of judgment purportedly reflecting the difference between the loan amount and the Pinsonneaults' valuation of the Property.

**¶7** Further disputes over the calculation ensued. While reasserting their objection to the lack of evidentiary support for the summary judgment, the Pinsonneaults stipulated that the amount due on the judgment as of May 31, 2012, was $11,778,084.66 plus interest of twenty seven percent per year. The trial court filed a signed judgment, and this timely appeal followed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2013).

## STANDARD OF REVIEW

**¶8** A trial court properly grants summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). On appeal, we determine de novo whether any genuine question of material fact exists and whether the trial court properly applied the law. *L. Harvey Concrete, Inc. v. Argo Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997).

## DISCUSSION

I. Winkleman's Supplemental Affidavit Fails to Support the Grant of Summary Judgment.

**¶9** As the moving parties, Plaintiffs had the burden to persuade the trial court, by a preponderance of the evidence, that they were entitled to judgment for the amount claimed. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 15, 180 P.3d 977, 980 (App. 2008). To carry its burden, "a plaintiff who seeks summary judgment must submit 'undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim.'" *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 18, 292 P.3d 195, 199 (App. 2012) (quoting *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293, ¶ 20, 229 P.3d 1031, 1035 (App. 2010)).

**¶10** The Pinsonneaults contend Plaintiffs failed to provide competent evidence of either their liability or the amount owed, and consequently failed to discharge their burden of proof. The Pinsonneaults argue, therefore, the trial court erroneously denied their motion to strike Winkleman's supplemental affidavit[3] and prematurely entered summary judgment.

**¶11** To support the admissibility of a document on summary judgment, a witness must establish: (1) familiarity with the person who prepared the document submitted, and (2) the manner in which it was prepared. *See Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992). In his supplemental affidavit, Winkleman states that he is ML Manager's Chief Operating Officer, and that ML Manager is the manager for SOJ Loan. He further affirms that he is "familiar with the facts of this matter based on personal knowledge and/or through the business records relating thereto maintained by ML Manager, and I am authorized by ML Manager to make this Affidavit on its behalf." Winkleman then proceeds to describe the odyssey of the loan made by Mortgages, the entity identified as the lender on the promissory note, deed of trust, and guaranty.

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[3] The motion to strike was unnecessary. An objection is sufficient to alert the court to "the need to disregard legally infirm evidence." *Sitton v. Deutsche Bank Nat'l Trust Co.*, 233 Ariz. 215, 220 n.5, ¶ 22, 311 P.3d 237, 242 n.5 (App. 2013). Effective January 1, 2014, such motions are prohibited under Arizona Rule of Civil Procedure 7.1(f)(2).

**¶12** Nowhere in his affidavit does Winkleman demonstrate (1) his personal knowledge of the operations of Mortgages and its business records, or (2) his familiarity with the person who prepared such records or the manner in which they were kept. Winkleman, who is ML Manager's Chief Operating Officer, does not purport to be an officer, director, or employee of Mortgages. In fact, Winkleman does not even assert his own familiarity with how documents are kept at ML Manager or any persons who maintain them. Accordingly, Winkleman's supplemental affidavit fails to "show affirmatively that [he] is competent to testify to the matters stated therein" as required by Arizona Rule of Civil Procedure 56(e)(1). *See Hidden Lakes*, 174 Ariz. at 82, 847 P.2d at 127 (holding the plaintiff had failed to establish a prima facie case entitling it to summary judgment because the supporting affidavit did not provide foundation for the affiant's personal knowledge and conclusions, nor did it show familiarity with the person who prepared the affidavit's exhibits or the manner in which they were prepared); *Chess v. Pima Cnty.*, 126 Ariz. 233, 235, 613 P.2d 1289, 1291 (App. 1980) (holding that an affidavit fails to comply with the summary judgment rule when "it contains conclusions and fails to show that the affiant is competent to testify to the matters stated therein").

**¶13** Nevertheless, the Plaintiffs contend that the Pinsonneaults' answer previously conceded the loan's existence, and authenticated their own guaranty, which bears their signatures. The Pinsonneaults concede the existence of the documents. The difficulty is that Rule 56(e) requires submission of sworn or certified copies of all documents. Winkleman's supplemental affidavit does not even state that any of its attachments are true and correct copies. Merely attaching a document to an affidavit does not make it admissible evidence. *See Meserole v. M/V Fina Belgique*, 736 F.2d 147, 149 (5th Cir. 1984).

**¶14** Moreover, Winkleman's supplemental affidavit fails to provide evidentiary support for the allegations stated in paragraphs 4 and 6. Paragraph 6 states that the principal balance is $23.97 million, and then adds interest, attorneys' fees, late charges, and other fees and costs, bringing the balance to $59,831,050.09. There is no basis given, or record supplied, establishing key components of this calculation, including the amount of property taxes, the monthly servicing fee, or the daily default rate.

**¶15** Likewise, Winkleman fails, in paragraph 4, to establish the basis for withholding the $2.25 million "delay funded" portion of the loan, identify who made this calculation, and establish what provisions of the

parties' agreements authorize him to credit only a $180,000 balance from delay funding. Nor does Winkleman identify any individual with knowledge who transmitted such information to him. *See* Ariz. R. Evid. 803(6)(A). The Plaintiffs refer this Court to letter agreements extending the loan's maturity date, but nothing in those exhibits substantiates the amounts referred to in paragraph 4.

**¶16** As a result of these deficiencies, the trial court had no means of evaluating the accuracy of the supplemental affidavit's statements. On this record, we hold that the Plaintiffs failed to discharge their burden of persuasion and establish their entitlement to judgment as a matter of law. *See Wells Fargo Bank*, 231 Ariz. at 214, ¶ 19, 292 P.3d at 200 (holding that an affidavit, which did not affirmatively establish the affiant's personal knowledge, was inadequate for purposes of Rule 56(e) and Rule 803(6)).

**¶17** In view of the preceding analysis, we reverse the grant of summary judgment, vacate the fee award, and remand for further proceedings. To guide the court on remand, we briefly address the other issues raised.

## II. The Trial Court Correctly Resolved the Unconscionability and Fraudulent Inducement Issues.

### A. Unconscionability and the Blue Pencil Rule

**¶18** The Pinsonneaults challenge the trial court's application of the "blue pencil" rule, which authorizes courts to strike "broad, unreasonable provisions in an agreement while keeping in place less onerous, enforceable ones." *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006) (applying Arizona law). Because the invalid late charge provision in the guaranty was entwined with other provisions, the Pinsonneaults contend, the entire agreement must fail.

**¶19** The record does not support their argument. It is undisputed that the promissory note contained a severability clause[4] and

[4] The Guaranty authorized the lender to recover from the Pinsonneaults "the payment of all or any part of Debt . . . ." In turn, the promissory note provided a severability clause concerning recovery of this debt: "If any term or other provision of this Note or any other Loan Document is declared invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Note shall nevertheless remain in full force and effect."

that the late charge provision in paragraph 7 is grammatically severable from the rest of the agreement. *See Valley Med. Specialists v. Farber*, 194 Ariz. 363, 372, ¶¶ 30-31, 982 P.2d 1277, 1286 (1999) (noting a court may eliminate grammatically severable, unreasonable provisions of a restrictive covenant, but that it may not add terms or rewrite provisions). Accordingly, this is not a case like *Valley Medical Specialists*, in which the Arizona Supreme Court held that a court could not rewrite the duration and geographic terms of a restrictive covenant. *Id.* Nor does this case resemble *Jamison v. Southern States Life Insurance Company*, 3 Ariz. App. 131, 135-36, 412 P.2d 306, 310-11 (1966), in which the same consideration supported two separate agreements.

**¶20** Courts have repeatedly upheld transactions notwithstanding the elimination of unreasonable interest. When interest exceeds the amount permitted by A.R.S. § 44-1202 (2013), courts eliminate the interest without invalidating the principal and other components of the loan. *See Kissell Co. v. Gressley*, 591 F.2d 47, 52 (9th Cir. 1979); *LaBarr v. Tombstone Territorial Mint*, 119 Ariz. 283, 286, 580 P.2d 744, 747 (App. 1978). The trial court's elimination of late charges was consistent with these authorities.

B. Fraudulent Inducement

**¶21** Alternatively, the Pinsonneaults contest the enforcement of their guaranty on the ground they were fraudulently induced into entering the contract. They claim to have relied upon "representations and concealments of the truth" concerning Mortgages' solvency.

**¶22** A contract is voidable by a party that is misled by a fraudulent or material misrepresentation and that justifiably relies upon the misrepresentation. Restatement (Second) of Contracts § 164(1) (1981). Even in the absence of affirmative representations, a secondary obligation is voidable by the secondary obligor based upon non-disclosure of material facts if, before that obligation becomes binding, the obligee:

> (a) knows facts unknown to the secondary obligor that materially increase the risk beyond that which the obligee has reason to believe the secondary obligor intends to assume; and
>
> (b) has reason to believe that these facts are unknown to the secondary obligor; and
>
> (c) has a reasonable opportunity to communicate them to the secondary obligor.

Restatement (Third) of Suretyship and Guaranty § 12(3) (1996). We review de novo the trial court's rejection of the fraud argument. *Mohave Electric Co-op, Inc. v. Byers*, 189 Ariz. 292, 308, 942 P.2d 451, 467 (App. 1997).

**¶23** The Pinsonneaults fail to identify any material facts Mortgages would have had reason to believe the Pinsonneaults lacked that materially increased the risk already inherent in this transaction. Mortgages manifestly was not a conventional lender, such as a bank. The Pinsonneaults now claim that they needed more information about Mortgages and its principal, Scott Coles, but such vague fraud allegations afford no basis for relief. *See McAlister v. Citibank (Ariz.)*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992). To the extent that the Pinsonneaults claim they were unaware that Mortgages would be relying heavily upon their guaranty, the failure to inform them of that fact does not preclude summary judgment. *See N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc.*, 725 A.2d 1133, 1140 (N.J. Super. Ct. App. Div. 1998).

**¶24** Nor are we persuaded by the Pinsonneaults' claimed ignorance of the disadvantage of a "lender taken over by a receiver or successor corporation creat[ing] its own set of problems in lost documents or institutional knowledge." The Pinsonneaults knew that another entity could replace Mortgages, as they had executed a guaranty and promissory note granting Mortgages the right to assign rights under the note and the other loan documents.

**¶25** In any event, the Pinsonneaults waived any right to assert a defense belonging to SOJAC. They lack standing to challenge the loan on this basis. *See Mohave Electric*, 189 Ariz. at 309, 942 P.2d at 468 (holding that the defendant had an independent legal duty to the plaintiff and could not use the failure of others to fulfill their duties as a defense); *see also Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, 222-23, ¶ 20, 52 P.3d 786, 791-92 (App. 2002) (holding that a guarantor is separately and independently liable to the lender); *see generally* Restatement (Third) of Suretyship and Guaranty § 15(a) (1996). Our resolution of this issue obviates the need to address the remaining arguments.

## CONCLUSION

**¶26** We affirm the trial court's rulings on unconscionability and fraudulent inducement, but reverse the grant of summary judgment because the Plaintiffs failed to establish adequate foundation for the

admissibility of documents and calculations necessary to support summary disposition as to the amount owed on the personal guaranty. In addition, in our discretion, we deny the Plaintiffs' request for attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2013).


Ruth A. Willingham · Clerk of the Court
FILED: gsh