DIVISION ONE
FILED: 02/23/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | |
|---|---|
| COBIZ BANK, a Colorado corporation doing business as ARIZONA BUSINESS BANK,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>GRACE CAPITAL, L.L.C., an Arizona limited liability company; JONATHON VENTO and LORI VENTO, husband and wife; THE VENTO FAMILY TRUST dated April 25, 2003, an Arizona Trust; JONATHON J. VENTO, in his capacity as Trustee for The Vento Family Trust dated April 25, 2003; LORI D. VENTO, in her capacity as Trustee for The Vento Family Trust dated April 25, 2003; JONATHON and LORI VENTO FAMILY QUALIFIED PERSONAL RESIDENCE TRUST dated September 24, 2008; ZELTOR, L.L.C., a Nevada limited liability company; DONALD ZELEZNAK and SHIRLEY A. ZELEZNAK, husband and wife,<br><br>Defendants/Appellants. | No. 1 CA-CV 10-0826<br><br>DEPARTMENT E<br><br>**MEMORANDUM DECISION**<br><br>(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-022112

The Honorable Robert H. Oberbillig, Judge

**AFFIRMED**

---

Bolliger Law Offices — Washington
By Scott T. Ashby
Attorneys for Plaintiff/Appellee

Wilenchik & Bartness, P.C. — Phoenix
By Dennis I. Wilenchik
And Thomas E. Lordan
Attorneys for Defendants/Appellants

---

**H A L L**, Judge

**¶1** Appellants Grace Capital, L.L.C. (Grace Capital), Jonathon Vento, Lori Vento, The Vento Family Trust, Jonathon and Lori Vento Family Qualified Personal Residence Trust, Zeltor, L.L.C., Donald Zeleznak, and Shirley A. Zeleznak (the Guarantors) (collectively Appellants) appeal the trial court's grant of summary judgment in favor of Appellee Cobiz Bank. For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

**¶2** On January 9, 2006, Grace Capital obtained a loan from Cobiz Bank for the principal amount of $500,000.00. The loan stated that Grace Capital "will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on January 9, 2007."

**¶3** The loan was guaranteed by the Guarantors. The Guarantors each signed a commercial guaranty, which contained, in part, the following clauses:

**CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE**. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of [Grace Capital] to [Cobiz Bank], and the performance and discharge of all [Grace Capital's] obligations under the [loan] and the Related Documents. This is a guaranty of payment and performance and not of collection, so [Cobiz Bank] can enforce this Guaranty against Guarantor even when [Cobiz Bank] has not exhausted [Cobiz Bank's] remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to [Cobiz Bank] or its order, on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform [Grace Capital's] obligations under the [loan] and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

. . . . .

**Amendments**. This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

. . . . .

**Integration**. Guarantor further agrees that Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds [Cobiz Bank] harmless from all losses, claims, damages, and costs (including [Cobiz Bank's] attorneys' fees) suffered or incurred by [Cobiz Bank] as a result of any breach by Guarantor

> of the warranties, representations and agreements of this paragraph.

**¶4** On April 9, 2007, Grace Capital and Cobiz Bank entered into a Change in Terms Agreement that extended the maturity date of the loan to April 9, 2008. Grace Capital and Cobiz Bank then entered into a Second Change in Terms Agreement that extended the loan's maturity date from April 9, 2008 to April 9, 2009.

**¶5** In July 2009, Cobiz Bank filed a verified complaint against Appellants, alleging that Grace Capital defaulted on its payment and obligations under the loan and that the Guarantors failed to cure the default. Cobiz Bank demanded the entire balance of the loan due immediately, which included the principal amount at that time of $249,958.68, and accrued interest.

**¶6** In its verified answer, Grace Capital admitted that it was "in default for failure to pay installments under the [loan] when due, and [Cobiz Bank] has exercised its right to accelerate the [loan]." Grace Capital also admitted that "[a]ll conditions precedent and subsequent to [its] liability to [Cobiz Bank] have been performed or have occurred." The Guarantors, however, denied that the conditions precedent and subsequent to their liability to Cobiz Bank were performed or occurred.

**¶7** Cobiz Bank moved for summary judgment, arguing that Grace Capital defaulted on the loan and had no defense. Cobiz

Bank further argued that the Guarantors' defense set forth in their verified answer that "[a]ny performance of any of the guarantors under any of the guarant[ies] is subject to the occurrence of the condition that [Cobiz Bank] first proceed against and exhaust certain security for the [loan]," was "legally insufficient under Arizona law and [] contrary to the express terms and conditions of the Guaranties."

**¶8** Appellants argued in their response that "the guarant[ies] were subject to the oral condition that the Bank would first proceed against and exhaust certain security for the loan. Because of the Bank's own mistake, that condition cannot occur, and the guarantors duties under the guarant[ies] are discharged. Therefore the Bank cannot recover any judgment against any of the guarantors, and the Bank is not entitled to summary judgment against any of the guarantors under any of the guarant[ies.]" Appellants' only support for their argument was a declaration from Donald Zeleznak, one of the Guarantors.

**¶9** Cobiz Bank replied that the guaranties were fully integrated documents and the purported oral statement directly contradicted the express terms contained in the guaranties, particularly in the Continuing guarantee of payment and performance, Amendments, and Integration provisions.

**¶10** The trial court granted Cobiz Bank's motion for summary judgment. Appellants moved for reconsideration, arguing

that the Restatement (Second) of Contracts § 217 (1981) provision: "Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition," lent support for their argument. Appellants also contended that *Anderson v. Preferred Stock Food Markets, Inc*., 175 Ariz. 208, 854 P.2d 1194 (App. 1993) provided support.

**¶11** The court, however, denied Appellants' motion, finding that "parol[] evidence [was not] admissible given the specific language in the Guarant[ies] and [it did] not believe that the *Anderson* decision support[ed] admissibility of extrinsic evidence that expressly contradict[ed] the clear and unambiguous language in the Guarant[ies]." The court further ordered that Cobiz Bank recover from Appellants $254,728.99, which included attorneys' fees and costs.

**¶12** Appellants timely appealed the court's ruling.[1] We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

[1] The court dismissed count 2, unjust enrichment as to Grace Capital, and count 6, fraudulent conveyance, with prejudice and Appellants do not appeal that portion of the judgment.

## DISCUSSION

**¶13** Appellants argue that Cobiz Bank was not entitled to entry of summary judgment. We review de novo the grant of a motion for summary judgment, *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007), and consider the record in the light most favorable to the party against whom summary judgment was granted. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140, ¶ 26, 128 P.3d 756, 763 (App. 2006). We will affirm if there are no genuine issues of material fact and the party seeking judgment is entitled to judgment as a matter of law. *Id*.

**¶14** The moving party has the burden of proving no genuine issue of material fact as to each element of its claim, and all defenses, and that it is entitled to judgment as a matter of law. *Orme Sch. v. Reeves,* 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). If the moving party meets its burden, the burden shifts to the opposing party to produce sufficient evidence indicating that an issue of material fact exists as to one or more elements of the claim or defense. *Doe v. Roe,* 191 Ariz. 313, 323, ¶ 33, 955 P.2d 951, 961 (1998); Ariz. R. Civ. P. 56(c).

**¶15** Appellants relied extensively on *Anderson*, 175 Ariz. 208, 854 P.2d 1194, as support for their argument that summary judgment was improperly granted due to the court’s failure to

admit parol evidence offered by Appellants. Appellants' reliance on *Anderson* is misplaced. In *Anderson,* the court clearly stated that "when parol evidence does not directly contradict the express terms of the writing but is generally consistent with the writing, it may be admitted." *Id*. at 213, 854 P.2d at 1199. In *Anderson*, this court found that the alleged oral condition was neither inconsistent with the purpose of the express terms of the guarantee, nor did it directly contradict those terms. *Id*. We also determined that "the parties obviously never reduced their entire agreement to writing." *Id*. Thus, *Anderson* concluded that "although the guaranty in this case is fully executed and unconditional on its face, the trial judge who granted plaintiff summary judgment should have considered defendants' parol evidence to determine if the guaranty was subject to an oral condition precedent that did not vary or contradict the terms of the guaranty." *Id*. at 214, 854 P.2d at 1200; see *also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152-53, 854 P.2d 1134, 1138-39 (1993) ("[T]he court considers all of the proffered evidence to determine its relevance to the parties' intent and then applies the parol evidence rule to exclude from the fact finder's consideration only the evidence that contradicts or varies the meaning of the agreement.").

**¶16** Here, the oral condition alleged by Appellants, that Cobiz Bank "orally agreed with the guarantors that any performance of any of the guarantors under any of the guarant[ies] would be subject to the occurrence of the condition that the Bank first proceed against and exhaust certain security for the loan," directly contradicts several portions of the guaranties. First, it contradicts the amendment portion, which stated, in part, that: "No alteration of or amendment to this Guaranty shall be effective unless in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment." Second, it contradicts the integration part of the guaranty, which stated, in part, that: "the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty." Finally, the oral condition is not consistent with the guaranty terms stating: "This is a guaranty of payment and performance and not of collection, so [Cobiz Bank] can enforce this Guaranty against Guarantor even when [Cobiz Bank] has not exhausted [Cobiz Bank's] remedies against anyone else obligated to pay the indebtedness or against any collateral securing the indebtedness, this Guaranty or any other guaranty of the indebtedness" and "Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the

indebtedness." Thus, the alleged oral condition directly contradicts the terms of the guaranty.

**¶17** Further, the trial court found that the parol evidence was not "admissible given the specific language in the Guarant[ies]" and the *Anderson* decision did not support the admissibility of extrinsic evidence that expressly contradicts the clear and unambiguous language in the Guaranties. Thus, the court did indeed consider whether the oral condition contradicted the guaranties' terms in finding that the parol evidence was not admissible, per the language in *Anderson*.[2]

**¶18** Appellants also cite to Restatement (Second) of Contracts § 217 cmt. b as support. Comment b addresses the scenario when an integrated agreement is subject to an oral requirement of a condition inconsistent with a written term. Comment b states that "evidence of the oral requirement bears directly on the issues whether the writing was adopted as an integrated agreement and if so whether the agreement was completely integrated or partially integrated." The unambiguous

---

[2] Appellants also cite to *Rogers v. Jackson*, 804 A.2d 379 (Me. 2002) as support. We believe this case is equally unavailing. *Rogers* held that the oral condition was not barred by the parol evidence rule because it was not inconsistent with the promissory note. *Id*. at 382, ¶ 12. The oral condition here *was* inconsistent with the guaranties and therefore *Rogers* fails to lend support to Appellants' argument. *See id.* (quoting 11 Richard A. Lord, Williston on Contracts § 33:18, 650 (4th. Ed. 1999) ("oral condition is inconsistent if 'repugnant to the conditions or terms actually stated in the writing [or] offered in substitution for them'").

language in the amendment and integration portions of the Guaranties makes it clear that it was a completely integrated document and therefore an inconsistent oral condition was not permitted as extrinsic evidence. Thus, § 217 cmt. b fails to persuade us to the contrary.

**¶19** Appellants also maintain that Restatement (Second) of Contracts § 225, the effects of the non-occurrence of a condition, demonstrates that the trial court should have considered the alleged oral condition. The definition of "condition" in the Restatement (Second) of Contracts § 224 is: "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." In this case, the only conditions that had to occur were those conditions set forth in the written guaranties. Because the guaranties explicitly prohibited oral extrinsic evidence, such a condition did not "discharge[] the duties of the" guarantors, as argued by Appellants.

**¶20** We therefore conclude that the trial court correctly granted Cobiz Banks' motion for summary judgment. The court also properly found Appellants' proferred parol evidence inadmissible.[3]

[3] We note that although not argued by the parties, the statute of frauds may provide further support for upholding the trial court's ruling. A.R.S. § 44-101 (Supp. 2011) states, in relevant part:

**¶21** Cobiz Bank requested its attorneys' fees pursuant to the contractual agreement and A.R.S. § 12-341.01 (2003). The loan stated, in part, that Cobiz Bank: "may hire or pay someone else to help collect this [loan] if [Grace Capital] does not pay. [Grace Capital] will pay [Cobiz Bank] that amount. This includes, subject to any limits under applicable law, [Cobiz Bank's] attorneys' fees and . . . legal expenses. . . . [Grace Capital] also will pay any court costs." The guaranties stated, in part: "Guarantor agrees to pay upon demand all of [Cobiz Bank's] costs and expenses, including [Cobiz Bank's] attorneys' fees and [Cobiz Bank's] legal expenses, incurred in connection with the enforcement of this Guaranty. . . . Guarantor also shall pay all court costs and such additional fees as may be

---

> No action shall be brought in any court . . . unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized . . . 9. Upon a contract, promise, undertaking or commitment to loan money or to grant or extend credit, or a contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit involving both an amount greater than two hundred fifty thousand dollars and not made or extended primarily for personal, family or household purposes."

Although the record is not clear as to the purpose of the loan, if it indeed "comes within provisions of the statute of frauds requiring certain agreements to be in writing, [then] the statute of frauds renders invalid and ineffectual a subsequent oral agreement changing the terms of the written contract." *Executive Towers v. Leonard*, 7 Ariz.App. 331, 333, 439 P.2d 303, 305 (1968) (quoting 49 Am. Jur. *Statute of Frauds* § 301).

directed by the court." Pursuant to the loan and guaranties' contractual agreements, we grant Cobiz Bank, the prevailing party, its reasonable attorneys' fees and costs on appeal upon compliance with ARCAP 21. *See Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 378, ¶ 26, 35 P.3d 426, 432 (App. 2001) (award of attorneys' fees pursuant to a contract is mandatory).

**CONCLUSION**

**¶22** For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Cobiz Bank. We also affirm the trial court's award of attorneys' fees and costs for Cobiz Bank and award it its reasonable attorneys' fees and costs on appeal.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge