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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PACIFIC COAST STEEL, et al.,)
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Plaintiffs,)
)
vs.)
)
TODD LEE LEANY, et al.)
)
Defendants.)
_____)

2:09-cv-2190-KJD-PAL

ORDER

Presently before the Court is the Motion of Defendants Lynn M. Leany and Lynn M. Leany Family Trust for Summary Judgment (#238). Plaintiffs have filed an Opposition (#282) to which Movants replied (#309).

Also before the Court is the Motion of Defendants Tamara Mae L. Hunt and Tamara Mae L. Hunt Trust for Partial Summary Judgment (#246). Plaintiffs have filed an Opposition (#283) to which Movants replied (#312). These parties are sometimes referred to hereinafter as “Movants”.

I. BACKGROUND

This action arises from the purchase by Plaintiffs’ Pacific Coast Steel and San Diego Steel Holdings Group, Inc. in April 2008, of the assets of Century Steel and related entities for \$151,500,000. Movant, Tamara M. Hunt, through the Tamara Mae L. Hunt Irrevocable Trust owned approximately 40.5% of Century Steel, Inc. and its related entities (“Century”). Movant, Lynn Leany,

1 and the Lynn M. Leany Family Trust, held a 1% interest, and Defendant Todd Lee Leany held a
2 58.5% interest.

3 The purchase price for the Century entities consisted of \$121,500,000 in cash and two
4 promissory notes in the amount of \$15,000,000 each as “hold back” to insure that ongoing projects
5 acquired by PCS would reach an agreed upon profitability level of 18%. The two promissory notes
6 consisted of a Pacific Coast Steel note in the amount of \$15,000,000 and a San Diego Steel Holdings
7 Group note in the principal sum of \$15,000,000. The San Diego Steel Holdings Group note was
8 payable on demand and, as part of the purchase, converted by Todd Leany to stock in San Diego
9 Steel Holdings Group, Inc. The PCS instrument was a term note payable in 3-5 years conditioned on
10 the profitability of work in progress purchased by Plaintiffs from Century as part of the acquisition.
11 From the PCS Note, \$12,150,000 was assigned to Tamara Hunt as Trustee of the Tamara Mae L.
12 Hunt Irrevocable Trust. Todd Leany was assigned \$2,550,000 and Lynn Leany was assigned
13 \$300,000.

14 Pursuant to the Asset Purchase Agreement (“APA”) Century was required to deliver to PCS a
15 Work-In-Progress Report showing current projects as of the time of closing. Within fifteen days of
16 the due date of the note, PCS was to deliver to Century, a written statement showing the actual cost
17 on each project to determine whether the projects had met the profitability rate of 18%. If there was
18 a profit shortfall, the Century entities would be required to repay PCS all or a portion of the
19 \$30,000,000 represented by the promissory notes.

20 The Asset Purchase Agreement required that the Century owners, including Movants,
21 personally guaranty contractual obligations of the Sellers under the Asset Purchase Agreement.

22 10.16 of the APA provided, in part, as follows:

23 Guaranty. Each owner hereby agrees, jointly and severally, to
24 absolutely, irrevocably and unconditionally guarantee the payment and
25 performance of all obligations of the Sellers under this Agreement and
26 each of the Transaction Documents to the Purchasers and their
Affiliates, successors and assigns under this Agreement and the
Transaction Documents (The “guaranteed obligations”). Each Owner

1 acknowledges and agrees that this guaranty is a continuing and
2 unconditional guaranty of payment and performance and not of
3 collection. In the event any Sellers at any time fail to pay or perform
4 any of the guaranteed obligations as and when the same become due,
5 in accordance with all applicable terms and conditions, each Owner
6 agrees to pay such debt or perform such obligation immediately. Each
7 Purchaser, may in its discretion, enforce the collection of such debt or
8 the performance of such obligation against owner by action in court of
9 competent jurisdiction, or in any other manner provided by law, the
10 same as if such debt or obligation were the primary and individual debt
11 or obligation of such owner, and without first seeking to enforce such
12 debt or obligation by action or otherwise against any Seller, or, each
13 Purchaser may, in their discretion, proceed in any manner provided by
14 law or by contract for collection of debts or the performance of
15 obligations against either or any of the Owners and the Sellers the
16 same as if debts and obligations were primarily and individually the
17 debt of both each Owner and each Seller, jointly and severally

18 Section 10.16 of the APA also expressly provides, in pertinent part, as follows:

19 This guaranty is an absolute, unconditional and continuing guaranty. Each owner
20 hereby irrevocably:

21 (a) Consents to all terms, covenants, conditions and agreements heretofore or
22 hereafter made by any Seller with any Purchaser.

23 (b) Consents that each Purchaser may, without discharging any Owner or in any way
24 affecting the obligations of any Owner under this Agreement or the Transaction
25 Documents, without notice to or further consent from any Owner . . . (iii) renew,
26 extend or modify the terms of any of the Guaranteed Obligations or any other
instrument or agreement evidencing the same . . . ;

(c) Waives all notices whatsoever with respect to this Agreement, the Transaction
Documents or with respect to the Guaranteed Obligations, including, without
limitation, notice of . . . (ii) the existence, creation or incurring of any of the
Guaranteed Obligations or the terms or amounts thereof or any changes therein . . . ;

. . .

(h) Agrees that the liability of such Owner under this Agreement and the Transaction
Documents shall not be affected or impaired by, and this Agreement or any
Transaction Document shall remain fully enforceable against such Owner for the full
amount of or performance of the Guaranteed Obligations less only payments thereon
actually received and retained by the Purchasers irrespective of and without reduction
on account of (I) any defense, offset or counterclaim which any Seller may have or
assert with respect to any of the Guaranteed Obligations, including, without
limitation, . . . failure of consideration, breach of warranty, statute of frauds, statute of
limitations, accord and satisfaction, waiver, estoppel, release, usury, or fraud
misrepresentation . . .

1 The Asset Purchase Agreement contained a Profit Shortfall Provision which provided an
2 adjustment of the purchase price in the event Sellers' projections regarding the profitability of the
3 work in progress, as of the date of the closing, proved wrong. In the Spring of 2009, the President
4 and Chief Executive Officer of PCS, warned Todd Leany that it appeared there would be a
5 significant profit shortfall. Thereafter, a disagreement arose regarding how to calculate the profit
6 shortfall figure, which resulted in the negotiation of what became known as the "Second Codicil".
7 The Second Codicil specified which cost elements should be included in the profit calculation, with
8 all other provisions of the Asset Purchase Agreement to remain in full force and effect. Todd Leany
9 and Lynn Leany signed the Second Codicil. Movant Lynn Leany asserts that he was signing the
10 Second Codicil only in his capacity as an owner and not as a guarantor. Movant Tamara L. Hunt
11 asserts that she was unaware of the Second Codicil and did not agree to its terms. According to
12 Plaintiffs, Todd Leany had full authority on behalf of the other owners, through corporate
13 resolutions, to enter into the Second Codicil and all ancillary agreements related to the Asset
14 Purchase Agreement. In response to Movant's assertion that she was not aware of or did not consent
15 to the Second Codicil, Plaintiffs' point to minutes of the annual meeting of board of directors and
16 stockholders of Century, executed by Movants and the other owners, resolving that "all actions of
17 every kind taken by the officers of the corporation pursuant to any such resolution, action, decision
18 or authorization be, and the same are hereby authorized, adopted, approved, ratified and confirmed."
19 The Second Codicil was drafted and negotiated by Bud Stoddard, Esq., an attorney representing the
20 owner/sellers in connection with the sale.

21 **II. POSITION OF THE PARTIES**

22 Movant Hunt asserts that the Second Codicil, executed without her knowledge or consent,
23 materially increases liability under the Guaranty, thus discharging Movant guarantors from their
24 obligations. Movant Lynn Leany concurs. Plaintiffs' position is that Todd Leany had full authority
25 to negotiate and execute the Second Codicil without further input or participation from the other
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1 owners and that the document is a “clarification” not a “modification” of the mechanics of a
2 necessary calculation.

3 **III. STANDARD FOR SUMMARY JUDGMENT**

4 Summary judgment may be granted if the pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine
6 issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
7 See Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving
8 party bears the initial burden of showing the absence of a genuine issue of material fact. See
9 Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts
10 demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio
11 Corp., 475 U.S. 574, 587 (1986).

12 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
13 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
14 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
15 or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial.
16 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
17 issues of controversy in favor of the non-moving party where the facts specifically averred by that
18 party contradict facts specifically averred by the movant. See Lujan v. Nat’l Wildlife Fed’n, 497
19 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345
20 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
21 issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on “mere
22 speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th
23 Cir. 1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine
24 issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d
25 1054, 1061 (9th Cir. 2002).

1 Summary judgment shall be entered “against a party who fails to make a showing sufficient
2 to establish the existence of an element essential to that party’s case, and on which that party will
3 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
4 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

5 **IV. ANALYSIS**

6 For purposes of this Summary Judgment Motion, the Court finds that Movants are not
7 entitled to judgment as a matter of law that they are released of their obligations under the Guaranty.
8 Both movants expressly consented to future agreements made by any Seller (§10:16(a)) with respect
9 to the guarantee. (Emphasis added.) However, even if Movants are correct that the Second Codicil
10 effected a material modification to their guaranteed obligations, and even if they had not consented
11 to such material modifications, their obligations are discharged only to the extent of the increased
12 loss caused by the modification. Restatement (Third) Surety and Guaranty, §41, comment (d).
13 Movants argue (1) that Delaware has not “specifically adopted” the subject Restatement comment
14 and (2) that the Idaho case of Gebrueder Heidemann, K. G. v. A.M.R. Corp., 746 P.2d 579, 584
15 (Idaho App. 1987), is distinguishable because it involved a compensated guarantor.

16 It is undisputed that the subject personal guaranties were required of Movants as a condition
17 of Plaintiffs’ asset purchase. Movants, having sold their interests for \$151,500,000, cannot be heard
18 to say they received no consideration for their guaranty. That the Courts of Delaware have not yet
19 had occasion to address the specific Restatement comment is not determinative of how this matter
20 may be resolved.

21 Accordingly, at a minimum, Movants would still be liable for the guaranteed amount less the
22 extent of the increased obligation, if any, attributed to the Second Codicil. Moreover, there are
23 genuine issues of material fact as to whether the Second Codicil altered or only clarified the
24 profitability determination for works in progress. Having failed to timely plead the affirmative
25 defense of novation, it has been waived by Movants.

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1 **V. CONCLUSION**

2 Defendants' Motions for Summary Judgment (#238) and Partial Summary Judgment (#246)
3 are **DENIED**.

4 DATED: March 27, 2012.

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8 Kent J. Dawson
9 United States District Judge

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