IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

Neil J. Arntz and Marian Arntz, husband and wife, d/b/a Arntz Family Limited Partnership, Neil J. ArNtz, General Partner, Respondents, v. Luz VaLdez, a.k.a. Luz Zabka, Appellant.	)	No. 64997-3-I UNPUBLISHED OPINION FILED: August 8, 2011

Schindler, J. — Luz Zabka, formerly Luz Valdez (Valdez),[1] appeals entry of the judgment on a promissory note. The trial court ruled that Valdez was personally, jointly, and severally liable for the outstanding amount owed to the Arntz Family Limited Partnership (AFLP). On appeal, Valdez argues the trial court abused its discretion in denying her motion to continue the summary judgment hearing and granting the motion to strike her untimely-filed response brief, and erred in ruling she was personally liable on the promissory note. We affirm.

[1] For clarity, we refer to the appellant as Valdez, which is the name she signed on the promissory note at issue.

FACTS

Jae Pak formed Seattle Capital Group LLC (SCG), a securities investment company, in November 2000. Pak did not register SCG with the secretary of state and did not obtain a license to act as an investment advisor.

Pak served as the Chief Executive Manager, President, and Chief Executive Officer of SCG. Valdez was the Chief Portfolio Manager. As the Chief Portfolio Manager, Valdez was authorized to enter into transactions on behalf of SCG and had power of attorney for SCG investments. Valdez also served as a director, manager, agent, and secretary for a number of other investment firms.

SCG shared office space and administrative staff with Protrader Securities Corporation, a registered securities broker-dealer that offers online trading accounts and proprietary trading software. From December 2000 through December 2002, Pak and Valdez provided investment advice and services at SCG for a fee, and offered and sold securities. SCG also maintained a number of accounts with Protrader and represented SCG as "The Seattle Capital Group @ Protrader Securities Corporation."

Neil Arntz is a retired Boeing engineer. Arntz sold his Boeing stock options and used the proceeds to form the AFLP. In response to a television advertisement, Arntz contacted Protrader in December 2000 to set up a trading account for the ALFP and obtain the Protrader trading software. Eventually, Arntz invested $200,000 in cash and approximately $63,000 in Boeing stock with Protrader. The investment agreement with Protrader contained a mandatory arbitration clause with the National Association of Securities Dealers, Inc. (NASD).

In early 2001, a Protrader employee recommended Arntz invest his retirement funds in the AFLP with SCG. The Protrader employee told Arntz that SCG employed "'professionals'" and used low-risk "'hedging strateg[ies].'" When Arntz met with Pak, Pak said that SCG could manage the AFLP funds with very low risk while doubling the original investment within one year. As the general partner for the AFLP, Arntz agreed to invest $700,000 from the AFLP with SCG.

On February 12, 2001, the AFLP entered into an agreement to set up a joint investment account with SCG. The contract is on SCG letterhead and SCG is mentioned in the contract terms eight times. The contract authorized SCG to engage in securities transactions on behalf of the joint investment account. The AFLP invested $700,000 and SCG contributed $300,000 to the joint investment account "to seek above average capital appreciation by investing in, and trading equities, options, private placements and other securities and investments." Under the contract, profit and loss is equally shared by the AFLP and SCG. Arntz signed the contract on behalf of the AFLP and Pak signed the contract on behalf of SCG.

After the joint investment account sustained substantial losses, Pak told Arntz that he would put Valdez, "'his best trader,'" in charge of the account. However, by January 16, 2002, the value of the joint investment account had dropped from $1,000,000 to approximately $621,000. In an amendment to the contract, SCG agreed to return at least $400,000 of the AFLP's initial investment of $700,000. While managing the joint investment account, Pak and Valdez withdrew fees from the joint investment account without notice, and Valdez used the fees to pay her salary.

After the account value continued to decline precipitously, Arntz told Valdez and Pak that he planned to withdraw his investment from the joint account. In response, Valdez and Pak agreed to execute a promissory note agreeing to pay the AFLP $462,000 if the joint investment account "suffers two weeks of consecutive downturn in its equity." The note provides, in pertinent part:

> This promissory is effective on date of sign off by maker but will not be ordered to pay unless the value of the Arntz/Pak partnership account, with . . . Protrader Securities account, suffers two weeks of consecutive downturn in its equity balance.
>
> For value received the undersigned jointly and severally promise(s) to pay to the order of Arntz Family Limited Partnership, Neil J. Arntz, General Partner or Marian Arntz, General Partner, the principal sum of FOUR HUNDRED SIXTY TWO THOUSAND AND NO/100 dollars ($ 462,000.00).
>
> This promissory note is secured by the balance of the Arntz/Pak partnership, . . . a Protrader Securities account and a PROMISE TO PAY by the maker of this note as follows: If the equity in the account is below FOUR HUNDRED SIXTY TWO THOUSAND ($462,000), then the difference will incur interest thereon from date of "pay_note_order" at the rate of ten (10%) percent per annum until paid, said principal and interest being payable monthly on the last day of each and every month in lawful money of the United States beginning on the "pay_note_order" date in monthly installments of one tenth of the balance, and continuing thereafter until said principal and interest have been paid in full . . . .
>
> Each installment payment shall be credited first to the interest then due, and the remainder to the principal.
>
> Each maker and endorser severally waives demand, protest and notice of maturity, non-payment or protest and all requirements necessary to hold each of them liable as makers and endorsers and, should litigation be necessary to enforce the note, each maker and endorser waives trial by jury and consents to the personal jurisdiction and venue of a court of subject matter jurisdiction located in the State of Washington and County of King.
>
> . . . .
>
> Default shall include, but not be limited to non-payment of any respective installment within ten (10) days from the date of demand payment of note.

Valdez and Pak signed the note. Valdez's signature appears first. "Luz Valdez, Chief

Portfolio Manager, Seattle Capital Group" is printed directly below her signature. "Jae H. Pak, Chief Executive Manager, Seattle Capital Group" is printed directly below Pak's signature.

The joint investment account continued to experience further losses. In November, Arntz demanded payment of $462,000 under the terms of the note. On December 4, Pak paid approximately $240,000 to the AFLP from the remaining balance in the joint investment account, leaving a principal amount due on the note of approximately $222,000, plus interest.

Arntz's Protrader investment account also sustained significant losses. When Arntz closed the Protrader account, the remaining balance from the original $263,000 investment was approximately $48,000.

On June 20, 2003, the Washington State Department of Financial Institutions (DFI) ordered SCG, Pak, and Valdez to cease and desist from acting as investment advisors and selling securities. The DFI found that SCG, Pak, and Valdez had engaged in a scheme to defraud investors and had made false representations and material omissions of fact.

On October 21, 2003, the AFLP sued Pak, Valdez, and SCG to enforce the promissory note and alleged violation of the Securities Act of Washington, chapter 21.20 RCW. The AFLP filed a motion for summary judgment to enforce the promissory note. In July 2004, the trial court granted the motion and ordered Pak and Valdez to pay the outstanding principal and interest on the promissory note. Valdez appealed. Because the AFLP did not properly effect service on Valdez by publication, we

reversed but without prejudice to filing a new action against her.[2]

On September 8, 2005, Pak filed for bankruptcy. The AFLP filed a proof of claim and a motion to enforce the promissory note in the bankruptcy court. The bankruptcy court granted the motion to enforce the note. The bankruptcy court ruled that the AFLP was entitled to payment of the outstanding principal, interest, and attorney fees, and ordered the trustee to pay the AFLP from Pak's personal assets. Following payment to the AFLP by bankruptcy trustee, approximately $48,500 remained due on the promissory note.

In a separate action, Arntz filed a demand for arbitration with the NASD over the separate losses of $215,000 sustained in dealing with Protrader. At the conclusion of the NASD arbitration, Arntz received an award of $212,500 against Protrader.

On May 14, 2008, the AFLP initiated another action in superior court against Valdez to obtain the remaining amount owed on the promissory note. The lawsuit also alleged breach of contract, fraud, misrepresentation, unjust enrichment, and negligence. Appearing pro se, Valdez filed a motion to dismiss, arguing that (1) the lawsuit was barred by the three-year statute of limitations, (2) she signed the note only in her representative capacity, and (3) the AFLP had already recovered the amount owed through NASD arbitration. The trial court granted the motion to dismiss the claims for fraud, misrepresentation, unjust enrichment, and negligence as barred by the three-year statute of limitations. The court denied the motion to dismiss the claim on the promissory note as barred by the three-year statute of limitations, and ruled that the six-year statute of limitations governed. But the court ruled that it would need to

[2] Arntz v. Valdez, 129 Wn. App. 1041, 2005 WL 2417626.

determine whether Valdez breached the promissory note, whether Valdez was personally liable on the promissory note, the outstanding amount owed, and whether attorney fees and costs shall be paid by either party. Following the court's ruling, Valdez filed an emergency motion to stay the proceeding and a motion for discretionary review. A commissioner of this court denied the motion for emergency stay and discretionary review.

On July 13, Valdez filed a motion in the trial court to change the scheduled trial date of October 26, 2009 and amend the case schedule to give her more time to engage in discovery. The AFLP opposed the motion and filed a motion for discovery sanctions against Valdez. The AFLP argued that a delay in trial would be prejudicial because of the health of its main witness, 77-year-old Neil Arntz. On September 3, the trial court granted the motion to continue the trial date to allow Valdez additional time to engage in discovery. The order changes the trial to June 14, 2010 and amends the case schedule to allow additional time for discovery.[3]

On November 3, 2009, the AFLP filed a motion for summary judgment arguing that as a matter of law Valdez is liable for the remaining amount of principal and interest, as well as attorney fees and costs. The AFLP noted the summary judgment motion to be heard on December 4.

On November 30, Valdez filed a motion to continue the summary judgment hearing, a motion to shorten time to hear the motion to continue, a response, and a cross motion for dismissal.[4] Valdez also served the AFLP on November 30 with

[3] The trial court also granted the AFLP's motion for discovery sanctions.
[4] Valdez noted her cross motion for dismissal for January 8, 2010.

interrogatories and requests for production.

The AFLP objected to a continuance of the scheduled summary judgment hearing on December 4 and filed a motion to strike the late-filed response to summary judgment. The day before the December 4 summary judgment hearing, Valdez filed a declaration in support of her motion for a continuance. In the declaration, Valdez states that on November 23 she discovered new evidence related to the NASD arbitration.

The trial court granted Valdez's motion to shorten time and denied her motion to continue the summary judgment hearing. The trial court granted the AFLP's motion to strike the late-filed response.[5] Following the summary judgment hearing, the trial court granted summary judgment. The court ruled that Valdez was personally liable for the outstanding amount owed on the promissory note. The trial court entered judgment against Valdez for the remaining $48,490.59 owed under the promissory note, plus interest, attorney fees, and costs. Valdez appeals.

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[5] In the oral ruling denying the motion to continue, the court explained:

> [W]e've talked a lot in this case about you having to respond to things on time, and you have gotten continuances because of family issues. But it's been made clear to you that you have to pay attention to this lawsuit and respond in time and do things.
>
> It is quite clear from the pleadings before this Court that you're not an unsophisticated businesswoman. You were involved in some major business things here involving millions of dollars. So you should have the wherewithal to understand what you need to do to respond. When you file your briefs, they cite case law. They're competent briefs.
>
> But, for some reason, you just chose not to pay attention to this summary judgment motion. . . .
>
> . . . I'm not granting your continuance for the summary judgment motion. There is absolutely no basis for it. The only reason that you did not file a response in time is because you didn't do it in a timely fashion.
>
> You didn't conduct discovery that you needed. You didn't file a response for the issues that you knew were being addressed. And this issue that you talked about, the NASD arbitration, was an issue that has been consistently raised by you from the beginning of these pleadings. So you were clearly on notice that if that was going to be a defense that you were going to raise that you needed to do the discovery on that. So I am not granting your motion for continuance.

ANALYSIS

Motion For Continuance and To Strike Response

Valdez argues the trial court abused its discretion in denying her motion to continue the summary judgment hearing and granting the motion to strike her summary judgment response.[6] A trial court's ruling on a motion for a continuance under CR 56 is reviewed for manifest abuse of discretion. Janda v. Brier Realty, 97 Wn. App. 45, 54, 984 P.2d 412 (1999). A trial court abuses its discretion when it exercises that discretion based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CR 56(c) requires a party to file and serve the motion for summary judgment "not later than 28 calendar days before the hearing." The nonmoving party must file any response "not later than 11 calendar days before the hearing." In reply, "[t]he moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."

CR 56(f) allows the court to grant a continuance if a party shows there are facts essential to justify opposition and good reason for failure to obtain the evidence necessary to oppose summary judgment.[7] A court does not abuse its discretion where "(1) the requesting party does not offer a good reason for the delay in obtaining the

[6] For the first time on appeal, Valdez also argues that the trial court violated her constitutional right to due process because she did not receive notice of Arntz's motion to strike before the summary judgment hearing. But Valdez has not shown manifest constitutional error. RAP 2.5(a)(3); State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (holding that without a developed record a claimed error cannot be manifest and does not satisfy RAP 2.5(a)(3)).

[7] CR 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

The hearing on the AFLP's motion for summary judgment was noted for December 4. Valdez's response to summary judgment was due on November 23. Valdez filed a response to summary judgment and a motion to continue on November 30. In the motion to continue, Valdez argued new evidence showed that in the NASD arbitration, the AFLP obtained an award against Protrader for losses related to the promissory note. Valdez argued that she needed additional time to file a response based on the "new evidence," as well as additional time to obtain discovery. In the declaration filed the day before the December 4 summary judgment hearing, Valdez states that she only obtained the new evidence from the files at her in-laws on November 22. Valdez offered no reason to explain why she did not locate the evidence earlier or why she did not file the response on time. Because Valdez did not offer a good reason for delay, the trial court did not abuse its discretion in denying Valdez's motion for a continuance.

Valdez relies upon Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990) to argue that the trial court abused its discretion in denying her motion to continue the summary judgment hearing. Coggle is distinguishable.

In Coggle, the defendant filed a motion for summary judgment. Before the scheduled summary judgment hearing date, a new attorney for the plaintiff filed a notice

of appearance and a motion to continue. Coggle, 56 Wn. App. at 501-02. In the motion to continue, counsel identified the new evidence necessary to rebut the defense expert testimony. Coggle, 56 Wn. App. at 502. We reversed the trial court's denial of the motion to continue because the trial court failed to take into account legal representation by a new attorney and "the apparently dilatory conduct of [the] first attorney." Coggle, 56 Wn. App. at 508. We also held that the trial court erred by refusing to evaluate the need for the new evidence. Coggle, 56 Wn. App. at 508-09.

In contrast, here, Valdez did not present facts justifying a continuance or show that the information from the files at her in-laws was new evidence. Adams v. W. Host, Inc., 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (citing CR 59(a)(4)) (holding that a trial court cannot consider evidence that, with reasonable diligence, could have been discovered and produced before summary judgment).

The trial court also did not abuse its discretion in striking Valdez's late filed response to the motion for summary judgment because Valdez did not demonstrate excusable neglect. Trial courts have discretion whether to accept untimely filed documents. O'Neill v. Farmers Ins. Co. of Wash., 124 Wn. App. 516, 521, 125 P.3d 134 (2004). A trial court may accept late filed pleadings only if the party establishes excusable neglect. Colo. Structures, Inc. v. Blue Mtn. Plaza, LLC, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) (citing CR 6(b)(2)).

Likewise, in Idahosa v. King County, 113 Wn. App. 930, 937, 55 P.3d 657 (2002), we held that the trial court did not abuse its discretion when striking a late summary judgment response given the trial court's observation of the party's dilatory

pattern, the lateness of the response, and the proximity to trial.

Promissory Note

Valdez argues the trial court erred in granting summary judgment and entering judgment on the promissory note. Valdez claims there are material issues of fact as to whether she is personally liable on the promissory note.[8]

We review decisions on summary judgment de novo. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The party seeking summary judgment bears "the initial burden of showing the absence of an issue of material fact." Green v. A.P.C., 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

After the moving party shows the absence of an issue of material fact, the burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. Iwai v. State, 129 Wn.2d 84, 95-96, 915 P.2d 1089 (1996). If the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of

[8] Valdez also asserts that the trial court erred in ruling on summary judgment and enforcing the promissory note because the terms of the promissory note are unconscionable, the parties did not have mutual assent, and the action is barred by the statute of limitations. Under RAP 9.12, we do not consider these issues for the first time on appeal. See Nelson v. McGoldrick, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995). Moreover, Valdez did not appeal the order denying her motion to dismiss the lawsuit as barred by the statute of limitations. In re Marriage of Grigsby, 112 Wn. App. 1, 17, 57 P.3d 1166 (2002); see also RAP 9.12; Nelson, 127 Wn.2d at 140. Valdez also claims that material issues of fact prevent summary judgment as to what amounts remain unpaid on the note and whether there was breach of the note. But Valdez presents no argument or points to facts in the summary judgment record that raise a material issue of fact. RAP 10.3(a).

proof at trial', then the trial court should grant the motion." Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Interpretation of the terms of an agreement is a question of law and is reviewed de novo. Major Prods. Co., Inc. v. Nw. Harvest Prods., Inc., 96 Wn. App. 405, 411, 979 P.2d 905 (1999). We generally give words in a contract their ordinary meaning. Hearst Commc'ns, 154 Wn.2d at 504. "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions." Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

Valdez claims that because "Chief Portfolio Manager, Seattle Capital Group" is printed below her signature on the promissory note, there is a material issue of fact as to whether she is personally liable. We disagree.

It is well established that descriptive language following a signature on a promissory note, such as the title or the name of an entity, does not prevent personal liability for the signer. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 700, 952 P.2d 590 (1998). There is a presumption that the words are merely descriptive and do not indicate representative capacity. Wilson Court, 134 Wn.2d at 700. Where the face of the document does not indicate the signer's capacity, "a signature with additional descriptive language may create an ambiguity requiring judicial construction of the agreement to determine who is bound by its terms." Wilson Court, 134 Wn.2d at 700. The burden of proof is on the party that seeks to rebut this

presumption. Wilson Court, 134 Wn.2d at 700-01 (quoting Griffin v. Union Sav. & Trust Co., 86 Wash. 605, 610, 150 P. 1128 (1915)).

Valdez and Pak "jointly and severally" entered into the promissory note and each signed the note. Below Valdez's signature is printed "Luz Valdez, Chief Portfolio Manager, Seattle Capital Group." Below Pak's signature is printed "Jae H. Pak, Chief Executive Manager, Seattle Capital Group."

There is no mention of SCG in the note. The terms of the promissory note do not indicate that either Valdez or Pak signed the note in only a representative capacity. The plain language of the note explicitly states that the agreement is between the AFLP and the "undersigned" "maker and endorser[s]." The note makes several references to "each maker and endorser," and repeatedly emphasizes that Pak and Valdez jointly and severally promise to pay on the note. The trial court did not err in concluding that Valdez and Pak are individually, jointly, and severally liable on the note. See Wilson Court, 134 Wn.2d at 705.

In an effort to rebut the presumption that she is personally liable, Valdez points to Pak's declaration to argue that she signed in a representative capacity. However, regardless of Pak's stated subjective intent, the record establishes that Pak was personally liable for the outstanding amount owed on the promissory note. There is no dispute that the bankruptcy court ordered the bankruptcy trustee to pay the AFLP from Pak's personal assets. Because Valdez did not rebut the presumption that she is personally liable,[9] we conclude that the trial court did not err in granting summary judgment and entering judgment for the remaining amount owed, interest, and attorney

fees. See Key v. Cascade Packing, Inc., 19 Wn. App. 579, 582-84, 576 P.2d 929 (1978) (holding that the use of a corporate title under the defendant's signature did not create ambiguity that must be resolved at trial).

Valdez also argues that she is not liable for the remaining amount due on the note because she received no consideration for signing the note. "Every contract must be supported by a consideration to be enforceable." King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). There is no dispute that the note clearly states that Valdez received consideration, and Valdez did not set forth specific facts creating a material issue of fact to show that she did not receive consideration.

Valdez also contends that the trial court abused its discretion by waiving the requirements of King County Local Civil Rule (KCLCR) 58(c) by entering a judgment on the promissory note. KCLCR 58(c) states: "The court will sign no judgment upon a promissory note until the original note has been reviewed by the court." The trial court has the inherent power and discretion to waive local rules. Foster v. Carter, 49 Wn. App. 340, 343, 742 P.2d 1257 (1987). A trial court's application of a local rule will not be disturbed absent evidence of an injustice. Foster, 49 Wn. App. at 343.

Although Arntz could not locate the original note, he argued that the court should accept an authenticated copy because Valdez never challenged the authenticity or accuracy of the note. Following summary judgment, the trial court asked the parties to provide additional briefing on the requirements of KCLCR 58(c). The trial court waived the requirement in KCLCR 58(c) and ordered Arntz to draft a notice of satisfaction

[9] Valdez argues that reasonable minds could reach different conclusions on the interpretation of the note because a commissioner of this court concluded that the signature showed she signed in a representative capacity. But the ruling Valdez relies upon was later amended. The amended ruling does not support Valdez's argument.

indemnifying Valdez for expenses incurred in defending against a holder in due course

of the original note, and record the original note if it is found. The trial court did not abuse its discretion in waiving the requirements of KCLCR 58(c).

We affirm.[10]

WE CONCUR:

[10] On June 6, 2011, Valdez filed a motion in this court to take judicial notice of "seventeen adjudicative facts," including several exhibits that were attached to her summary judgment response. On June 7, Valdez filed another motion to take judicial notice in support of her argument that plaintiffs do not have standing to sue. Because Valdez did not present this evidence to the trial court, we deny the motion to take judicial notice and supplement the record on review. See Dep't of Labor & Indus. v. Brugh, 135 Wn. App. 808, 822-23, 147 P.3d 588 (2006) (denying "an impermissible attempt to present new evidence in violation of RAP 9.1 and 9.12" as outside the scope of ER 201(b)).