IN THE COURT OF APPEALS OF THE STATE OF NEVADA

COLFIN BAM FUNDING, LLC, Appellant, vs. LUIS ROSALES, Respondent.	No. 70403
LUIS ROSALES, Appellant, vs. COLFIN BAM FUNDING, LLC, Respondent.	No. 72659

FILED

JUN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Colfin Bam Funding, LLC and Luis Rosales both appeal from a district court judgment in a contract dispute. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Rosales owned an apartment building in North Las Vegas, financed by a loan with First Imperial Loan (Imperial).[1] In 2005, Rosales created and acted as the sole member and manager of Statz Apts, LLC (Statz) to own and operate the property. Statz, through Rosales, entered into a loan refinancing agreement with LaSalle Bank National Association (LaSalle) and executed a multifamily note for the loan amount in favor of LaSalle; the note contained a limited personal guaranty by Rosales. The LaSalle loan purportedly required Rosales to transfer title of the apartment building to Statz. Rosales failed to do so. Nevertheless, funds from the LaSalle loan were paid to Imperial to satisfy the prior loan in full, and the remainder was paid to Rosales. Rosales, first on behalf of Statz and then

[1]We do not recount the facts except as necessary to our disposition.

himself personally, made payments on the loan until sometime in 2011.[2] LaSalle's successor, Bank of America, sued Rosales and Statz in December 2013, alleging claims of specific performance, judicial foreclosure, breach of contract, breach of implied covenant of good faith and fair dealing, declaratory relief, and deficiency judgment for nonpayment. The district court entered default against Statz in July 2014 for failing to answer.

A bench trial ensued. Before the close of its case-in-chief, Bank of America's successor, Colfin Bam Funding, LLC,[3] successfully moved to amend its complaint, adding claims of unjust enrichment, equitable subrogation, and equitable lien. Rosales then moved for a directed verdict, which the district court denied. On January 27, 2016, the district court entered its findings of facts and conclusions of law and judgment, awarding Colfin Bam $250,000 against Rosales under the limited guaranty and denying all other claims. Colfin Bam moved to alter or amend the judgment, which the district court denied.

In these consolidated appeals, the parties dispute whether: (1) the district court erred awarding Colfin Bam breach of contract damages and (2) the court erred in denying Colfin Bam's equitable claims.

We first consider whether the district court erred in granting Colfin Bam's breach of contract claim. Colfin Bam contends that the district court erred in interpreting the guaranty and awarding it only $250,000—the amount contemplated in the limited guaranty—when the guaranty

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[2]The record is unclear as to the exact date Rosales stopped making payments, but both parties on appeal accept the district court's finding that Rosales stopped making payments on or about July 1, 2011.

[3]The LaSalle loan was first assigned to Wells Fargo, then to Bank of America, and finally to Colfin Bam during the litigation.

provides for unlimited liability in the event of fraud, material misrepresentation, or failure to disclose a material fact. Rosales maintains that Colfin Bam does not have standing to sue under the guaranty, that Colfin Bam did not assert claims in its complaint under the guaranty, and that the statute of limitations precludes the claim because the injury accrued in July 2005 when Rosales failed to transfer the property.

To begin, Rosales argues Colfin Bam does not have standing to sue under the guaranty because there was no evidence that Wells Fargo's assignment of the loan to Bank of America, Colfin Bam's predecessor, included the guaranty. We disagree and conclude that Colfin Bam has standing because the record supports that the assignment from Wells Fargo to Bank of America included the guaranty, and the guaranty was transferred with the loan by operation of law. 38 Am. Jur. 2d Guaranty § 24, at 972 (2010) ("[T]he assignment of a debt passes to the assignee any security for its payment, [and] a transfer of the primary obligation operates as an assignment of a guaranty of it." (footnote omitted)); *see, e.g.*, *Sinclair Mktg., Inc. v. Siepert*, 695 P.2d 385, 388 (Idaho 1985) ("There is no question that the assignment of a principal obligation also operates as an assignment of the guaranty of the obligation, and the guaranty is effective to collect this obligation which existed at the time of the assignment."); *Am. First Fed., Inc. v. Battlefield Ctr., L.P.*, 282 S.W.3d 1, 5-6 (Mo. Ct. App. 2009) ("[A] transfer of the principal obligation is held to operate as an assignment of the guaranty and [ ] this is so even though there is no specific reference to the guaranty in the assignment." (internal quotation omitted)); *Self-Help Ventures Fund v. Custom Finish, LLC*, 682 S.E.2d 746, 750 (N.C. Ct. App. 2009) ("Furthermore, a guaranty is assignable with the obligation secured

thereby, and goes with the principal obligation." (internal quotation omitted)).

Rosales next argues that he did not have notice of Colfin Bam's claim for breach of the guaranty. A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a). Thus, for the defending party to have adequate notice of the nature of the claim and relief sought, the plaintiff is required to "set forth the facts which support a legal theory," but this notice pleading standard "does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

Here, the record supports finding that the complaint sufficiently notified Rosales that Colfin Bam was suing him personally for breach of the deed of trust and note, which contained the guaranty. The complaint alleged a claim of breach of contract against Rosales personally, and the guaranty, which was attached to the note, is the only document Rosales personally executed. Therefore, it is reasonable to conclude that Rosales was on notice of the breach of contract claim against him based on the guaranty.

Next, Rosales contends the statute of limitations bars Colfin Bam's breach of contract claim because the breach occurred in 2005 when he failed to transfer the property to Statz, not in 2011 when he failed to make payments on the loan. A breach of a written contract claim must be brought within 6 years "from the last transaction . . . ; and whenever any payment on principal or interest has been or shall be made upon an existing contract, . . . the limitation shall commence from the time the last payment was made." NRS 11.190(1)(b); NRS 11.200. For purposes of the running of

statute of limitations, a trier of fact must determine, as a question of fact, when the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his breach of contract claim. *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995).

Here, Colfin Bam's breach of contract claim is premised wholly on Rosales' failure to make payments on the note. Thus, the breach occurred in 2011 when Rosales' failure to make payments on the note violated the guaranty. *Carson Meadows Inc. v. Pease*, 91 Nev. 187, 195, 533 P.2d 458, 463 (1975) (calculating the statute of limitations as beginning to run when default occurred on promissory notes). Therefore, the statute of limitations does not bar Colfin Bam's breach of contract claim.

Colfin Bam contends that the district court erred in awarding it only $250,000 under the guaranty when the guaranty provides that the guarantor's liability "shall be unlimited" for certain conduct, such as fraud, material misrepresentation or failure to disclose a material fact. We disagree. The record shows that Colfin Bam's breach of contract claim was premised on Rosales' failure to make payments on the note. Moreover, Colfin Bam did not assert and the district court did not find that Rosales committed fraud or material misrepresentation on behalf of Statz that would have allowed for unlimited damages under the guaranty. Therefore, the district court did not err in awarding Colfin Bam damages for Rosales' breach as contemplated under the limited guaranty.

We next consider whether the district court erred in denying Colfin Bam's equitable claims. First, Colfin Bam argues that it was entitled to equitable subrogation. Specifically, it contends that under Nevada law, it is presumed that LaSalle used the refinancing loan to pay off the original Imperial loan with the expectation that it would receive a first priority

interest in the property, and that the district court made a legal error when it failed to apply that presumption.[4]

"[A] lender whose loan proceeds were used to pay the balance of a prior note is equitably subrogated to the former lender's priority lien position so long as an intervening lienholder is not materially prejudiced." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 425, 245 P.3d 535, 537 (2010). "When the material facts of a case are undisputed, the effects of the application of [equitable subrogation] to those facts are a question of law that this court reviews de novo." *Id.* at 428, 245 P.3d at 538. Thus, this court may "independently review the question of whether the doctrine of equitable subrogation applies to the circumstances present in a particular case." *Id.* (internal quotation omitted). However, because "district courts have full discretion to fashion and grant equitable remedies, . . . we will review a district court's decision granting or denying an equitable remedy for abuse of discretion." *Id.* (internal citation omitted).

Here, the district court denied Colfin Bam's equitable subrogation claim because "there was not sufficient evidence as to what LaSalle knew or did not know at the time of the transaction . . . [or] as to what Plaintiff's predecessors in interest purchased." However, Colfin Bam's claim more clearly fails because it offered no evidence that a junior interest existed for this doctrine to apply. *Am. Sterling Bank*, 126 Nev. at 429, 245

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[4]Rosales counters that even if this court determines that Colfin Bam established its equitable subrogation, unjust enrichment, and equitable lien claims, this court should nevertheless affirm on appeal because the lenders knew or should have known more than four years before the filing of the suit that title had not been transferred and therefore the claims are time-barred under NRS 11.220. Because we conclude the district court did not err in denying the above three claims, we need not address the merits of Rosales' statute of limitations arguments.

P.3d at 539 ("We note that if no junior interest existed, the subrogee could just sue on the obligation and obtain a judgment on the lien; however, where an interest exists that is subordinate to the mortgage, the judgment lien would be inferior to the junior interest and of little value absent the application of equitable subrogation."). Rosales testified that the refinancing loan extinguished the entire Imperial loan. Moreover, Colfin Bam admitted at trial that there was no evidence of an intervening lien holder asserting any right or interest. Thus, we affirm the district court's denial of Colfin Bam's equitable subrogation claim because it failed to establish that there was a junior interest. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that the appellate court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason).

Next, Colfin Bam argues that all of the elements of its unjust enrichment claim are met: LaSalle conferred a benefit on Rosales, Rosales appreciated the benefit, and Rosales accepted and retained the benefit.

Unjust enrichment is established when "the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (internal quotation omitted). But unjust enrichment is not available when there is an express, written contract. *Leasepartners Corp. v. Robert L. Brooks Tr.*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

Here, neither party argues that the guaranty, in which the parties agreed to limit Rosales' personal liability, is invalid. And because

there was a valid contract, Colfin Bam is not entitled to succeed on its unjust enrichment in addition to the breach of contract award. *See Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles."). Therefore, the district court did not err in denying Colfin Bam's unjust enrichment claim.

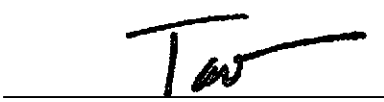
Last, Colfin Bam argues that the district court's ruling on its equitable lien claim was erroneous because sufficient evidence showed that Statz and LaSalle intended to create a lien against the property. In Nevada, equitable liens have their foundation in contract law and, where intended by the parties, allow a plaintiff to enforce an express or implied contract by acting upon a piece of property. *Union Indem. Co. v. A.D. Drumm, Jr., Inc.*, 57 Nev. 242, 256-57, 70 P.2d 767, 768 (1937); *see Commercial Credit Corp. v. Matthews*, 77 Nev. 377, 386, 365 P.2d 303, 307 (1961) (requiring clear intention to create an equitable lien). Additionally, "[a] contract of guaranty is a separate contract [from the promissory note], and is to be separately considered." *See Bank of Nev. v. Friedman*, 82 Nev. 417, 423-24, 420 P.2d 1, 5 (1966).

We conclude that the district court did not err in finding that Colfin Bam failed to establish its equitable lien claim. Nothing in the record supports that Rosales, personally, and LaSalle intended to create a lien on the property through the guaranty. Rather, the record shows that Rosales, as managing member of Statz, and LaSalle intended to create a security interest on the property. Because Rosales is not a party to the contract in which the parties intended to create a lien on the property, no remedy for equitable relief can be established. *See Noblesville Redevelopment Comm'n v. Noblesville Assocs. Ltd. P'ship*, 674 N.E.2d 558, 562-63 (Ind. 1996)

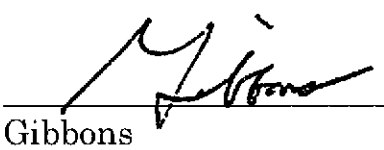
(holding that a guaranty agreement did not create a security interest on land despite a provision stating that the guaranty would be binding upon any successor in interest and that, at most, the guaranty may have created a personal obligation that would bind the current landowner). Thus, the district court did not err in denying the claim because Colfin Bam failed to establish that the parties intended to create a lien on the property through the guaranty. *Union Indem. Co.*, 57 Nev. at 259, 70 P.2d at 769 ("Courts cannot create liens. They can only declare and enforce them when they exist, either in law or equity." (internal quotation omitted)).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Tao



_____, J.
Gibbons

SILVER, C.J., concurring in part and dissenting in part:

I concur with the majority on all issues, but I respectfully dissent and agree with Colfin Bam that the district court abused its discretion in its finding that claims of equitable subrogation, unjust enrichment, and equitable lien did not exist in this case. The record *clearly* demonstrates that the evidence at trial supported a judgment for Colfin Bam on these claims. The district court's conclusions are clearly erroneous in its application of the law regarding those claims. *See Houston v. Bank of Am. Fed. Sav. Bank* 119 Nev. 485, 491, 78 P.3d 71, 74-75 (2003) (citing

Restatement (Third) of Property: Mortgages § 7.6), *abrogated on other grounds by In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 289 P.3d 1199 (2012); *see also Werner v. Mormon*, 85 Nev. 662, 462 P.2 42 (1969); *Union Indem. Co. v. A.D. Drumm, Jr., Inc.*, 57 Nev. 252, 70 P.2d 757 (1937), *distinguished by Globe Indem. Co. v. Peterson-McCaslin Lumber Co.*, 72 Nev. 282, 303 P.2d 414 (1956).

Silver, C.J.

Silver

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