5-12-2016

Agstar Financial v. Gordon Paving Co, Inc Respondent's Brief Dckt. 43747

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 43747

AGSTAR FINANCIAL SERVICES, ACA

Plaintiff-Respondent,

v.

GORDON PAVING COMPANY, INC.; NORTHWEST SAND & GRAVEL, INC.; BLACKROCK LAND HOLDINGS, LLC; BRANDON HANSEN, an individual; BRIAN HANSEN, an individual; CAROL HANSEN GPC NEVADA TRUST; CRAIG HANSEN GPC NEVADA TRUST; CANYON EQUIPMENT AND TRUCK SERVICE, INC.; and DOE ENTITIES OWNED BY BRIAN, BRANDON and CRAIG HANSEN

Defendants-Appellants.

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District in and for Twin Falls County
Case No. CV-2015-2062
The Honorable Randy J. Stoker, District Judge

Attorneys for Plaintiff-Respondent
AgStar Financial Services, ACA,

Bradley J. Dixon, ISB No. 6167
Kersti H. Kennedy, ISB No. 9064
GIVENS PURSLEY LLP
601 W. Bannock Street
PO Box 2720
Boise, ID 83701-2720
Telephone (208) 388-1200
Facsimile (208) 388-1300
bradleydixon@givenspursley.com
kerstikennedy@givenspursley.com

Attorneys for Defendants-Appellants Gordon Paving Company, Inc., Northwest Sand & Gravel, Inc., and Blackrock Land Holdings, LLC, Brandon Hansen, Brian Hansen, Carol Hansen GPC Nevada Trust, Craig Hansen GPC Nevada Trust, Canyon Equipment and Truck Service, Inc,; and Doe Entities owned by Brian, Brandon and Craig Hansen,

Brent T. Robinson, ISB No. 1932
W. Reed Cotten, ISB No. 8976
ROBINSON & TRIBE
PO Box 396
Rupert, ID 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804
btr@idlawfirm.com
wrc@idlawfirm.com

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a straightforward application of prior precedent. In *First Security Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988), this Court held that the trust deed antideficiency statute did not shield guarantors from claims against them for the balance due after a foreclosure sale. 115 Idaho 172, 765 P.2d 683 (1988). Here, the district court relied on *Gaige* in entering judgment against the Guarantors. Now, the Guarantors seek to avoid their contractual obligations and sidestep *Gaige* by reading a meaning into the judicial foreclosure antideficiency statute that is not there, and by rehashing policy arguments that this Court has already rejected.

The precedent of *Gaige*, the plain language of I.C. § 6-108, the public policy of this state, and the statute's legislative history all lead to the conclusion that the district court reached in this case—the Guarantors are not saved by the antideficiency statute. And, even if they were, the language of the guaranty agreements preclude the statute's application. For these reasons, this Court should affirm the district court's judgment against the Guarantors.

B. Facts

In 2007 and 2008, Gordon Paving Company, Inc., Northwest Sand & Gravel, Inc., and Blackrock Land Holdings, LLC (collectively, "Gordon Paving") borrowed a total of $10 million from AgStar Financial Services, ACA ("AgStar"). (R. 9-10.) Gordon Paving executed separate mortgages and security agreements on its real and personal property. (R. 9-10, 37-48.) The indebtedness was also secured by separate guaranty agreements executed by the Craig Hansen

GPC Nevada Trust; the Carol Hansen GPC Nevada Trust; Brandon Hansen, individually; and Brian Hansen, individually (collectively, "the Guarantors").[1] (R. 21-36.)

Under these agreements, the Guarantors agreed to "irrevocably, absolutely, and unconditionally" guarantee the full payment of Gordon Paving's obligation to AgStar. (R. 22 ¶ 1.) The Guarantors also waived most defenses, including the release of Gordon Paving, and gave AgStar the ability to enforce its rights against the Guarantors or Gordon Paving as it saw fit. (R. 22 ¶¶ 2-3.) The Guarantors agreed that if AgStar pursued foreclosure, it was only required to apply the net proceeds of the sale to the total indebtedness to determine the outstanding obligation owed by the Guarantors. (R. 22 ¶ 3.)

Gordon Paving defaulted, AgStar sued for foreclosure, and on June 19, 2013, a Judgment and Decree of Foreclosure was entered against Gordon Paving in Twin Falls County Case No. CV 12-2731.[2] (R. 10.) AgStar liquidated the real property of Gordon Paving via sheriff's sale in November 2013. (*Id.*) AgStar moved for a deficiency judgment, but that motion was denied. (*Id.*) In addition, AgStar has liquidated all of the personal property collateral that it could locate. (R. 11.) After liquidation, Gordon Paving still owes over $2,732,241.40 as of October 12, 2015, not including fees and costs incurred since February 10, 2015. (R. 116-18.)

C. Procedural History

On June 1, 2015, AgStar sued the Appellants on a number of theories, including Breach of Personal Guaranty against the Guarantors. (R. 13-14.) In suing for breach of personal guaranty, AgStar sought to recover the leftover indebtedness from the Guarantors. *Id.*

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[1] Brandon Hansen declared personal bankruptcy after AgStar filed its complaint. AgStar does not seek to recover against Brandon Hansen in this litigation.

[2] The foreclosure case was the subject of another appeal before this Court (Docket No. 42932). This case is *sub judice*.

The Guarantors were served with the complaint on June 8, 2015. (R. 70-73.) Twenty-one days later, on June 29, 2015, counsel for the Guarantors filed their Notice of Appearance. (R. 57-58.) AgStar filed and served a Notice of Intent to Take Default Against Defendants on June 30, 2015. (R. 59-61.) On July 7, 2015, despite having had ample time to respond, the Guarantors failed to answer, and AgStar filed the Application for Entry of Default Pursuant to IRCP 55. (R. 62-64.) Upon this application, the district court entered an Order for Default on July 9, 2015. (R. 75-76.)

On July 15, 2015, the Guarantors filed a Motion to Set Aside Default. (R. 82-83.) Despite the default, they also filed a Motion to Dismiss that same day. (R. 77-81.) The Motion to Dismiss was premised on the affirmative defense that AgStar's claims were barred by *res judicata*. (R. 77-81.)[3] AgStar opposed both of these motions. (R. 97-115.) The Guarantors also filed an answer, alleging the affirmative defense that the anti-deficiency statute, and AgStar's lack of a deficiency judgment, satisfied any balance remaining on the debt. (R. 126.)

On October 19, 2015, the district court heard the motions. (Tr. Oct. 19, 2015.) The district court declined to set aside the default, holding that there was no meritorious defense shown. The district court held that *res judicata* did not bar a claim on the guaranties, and that the "antideficiency statute does not preclude a separate and distinct action by guarantors to enforce a debt." (Tr. 33: 22-24.) Based on this holding, as well as AgStar's affidavit of amounts due on judgment (R. 116-120), the district court entered a judgment against the Guarantors on the cause of action of Breach of Personal Guaranties for $2,732,241.40. (R. at 128-30.) AgStar agreed to dismiss the other claims with prejudice, as the judgment amount on the guaranties represented the total remaining indebtedness. (*See* Tr. at 34:7-24; 35:10-14.)

[3] Note that the Guarantors have abandoned the defense of *res judicata* on appeal.

On November 12, 2015, AgStar petitioned for its attorney fees and costs. (R. 131-34.) The Guarantors failed to file a timely objection or motion to disallow, and thus the district court granted the petition on December 18, 2015. (R. at 139-40.) On January 7, 2016, the district court entered an amended final judgment for the total amount of $2,760,111.90. (R. 142-44.)

II. ISSUES PRESENTED ON APPEAL

Issue No. 1 – Motion to Set Aside Default. In light of the precedent of *Gaige*, the antideficiency statute does not apply to a guarantor. The language of the guaranty agreement precludes application of the anti-deficiency statute. Wasn't the district court correct in denying Guarantors' motion to set aside default despite the defense of the antideficiency statute?

Issue No. 2 – Award of Attorney Fees and Costs. After obtaining a judgment against the Guarantors, AgStar petitioned for its fees and costs under the language of the guaranties and I.C. § 12-120(3). The Guarantors failed to file a timely objection or motion to disallow. Wasn't the district court correct in awarding AgStar its fees and costs?

Issue No. 3 – Attorney Fees on Appeal: AgStar seeks costs and attorney fees on appeal as authorized by I.A.R. 40 and 41. AgStar bases its claim for fees on the guaranty agreements or, alternatively, I.C. § 12-120(3).

III. STANDARD OF REVIEW

Issue No. 1 - A district court's refusal to set aside entry of default is reviewed for abuse of discretion. *E.g.*, *Dorion v. Keane*, 153 Idaho 371, 373, 283 P.3d 118, 120 (Ct. App. 2012). "Where the trial court makes factual findings that are not clearly erroneous, applies correct criteria pursuant to the applicable legal standards to those facts, and makes a logical conclusion, while keeping in mind the policy favoring relief in doubtful cases and resolution on the merits, the court will be deemed to have acted within its discretion." *Id.* (citations omitted).

Issue No. 2 - Awarding attorney fees and costs is within the discretion of the trial court and subject to review for an abuse of discretion. *Smith v. Mitton*, 140 Idaho 893, 897, 104 P.3d 367, 371 (2004).

IV. ARGUMENT

A. The District Court Did Not Err in Holding That the Guarantors Have No Meritorious Defense, as I.C. § 6-108 Protects the Borrower, Not the Guarantor.

The legal standard for a motion to set aside a default under Idaho Rule of Civil Procedure 55(c) is "for good cause shown." *Bach v. Miller*, 148 Idaho 549, 552, 224 P.3d 1138, 1142 (2010). Good cause includes a meritorious defense. *Id.* At 553, 224 P.3d at 1142. This policy recognizes that it would be an idle exercise and a waste of judicial resources for a court to set aside a judgment or entry of default if there is in fact no genuine justiciable controversy. *Id.* (citation and internal quotations omitted).

The Guarantors' stated "meritorious defense" is the antideficiency statute: I.C. § 6-108. This defense then turns on the proper reading of the statute. Statutory analysis "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). "This Court interprets statutes according to their plain, express meaning and resorts to judicial construction only if the statute is ambiguous, incomplete, absurd, or arguably in conflict with other laws." *Arambarri v. Armstrong,* 152 Idaho 734, 739, 274 P.3d 1249, 1254 (2012). "Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language." *Friends of Farm to Mkt. v. Valley Cnty.,* 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). "An unambiguous statute would have only one reasonable

interpretation. An alternative interpretation that is unreasonable would not make it ambiguous." *Verska,* 151 Idaho at 896, 265 P.3d at 509. "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *State v. Neal*, 159 Idaho 439, 362 P.3d 514, 519 (2015)(quoting *In re Estate of Miller,* 143 Idaho 565, 567, 149 P.3d 840, 842 (2006)).

1. Gaige prohibits the interpretation offered by the Guarantors.

The district court correctly interpreted the statute and declined to relieve the Guarantors from their contractual duties because of the precedent of *First Security Bank of Idaho, NA v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988). In *Gaige*, a bank sought to collect from the Gaiges the amount due on promissory notes executed by their business. *Id.* at 173, 765 P.2d at 684. The promissory notes were secured by deeds of trust on the business's building. *Id.* Gaige's business defaulted, and the bank foreclosed and sold the building for less than the amount due under the notes. *Id.* The bank sued the Gaiges on the guaranties. *Id.* The Gaiges attempted to skirt their contractual duties on the grounds that the deed of trust antideficiency statute (I.C. § 45-1512) applied to guarantors. *Id.* This Court disagreed, holding that the antideficiency statute did not apply to guarantors:

> The first issue we address is whether our anti-deficiency statute, I.C. § 45-1512, applies to Gaige as a guarantor. Resolution of this issue had been reserved previously in *Valley Bank v. Larson,* 104 Idaho 772, 663 P.2d 653 (1983). We decide it today, and we hold that it does not.
>
> I.C. § 45-1512 applies to claims by a creditor secured by a deed of trust for the balance due after a deed of trust sale. The protection in I.C. § 45-1512 is given to the borrower-grantor who gives the security interest described in the deed of trust. However, Gaige was not the borrower-grantor who gave the security interest covered by the deed of trust. The corporation, A.J. Gaige & Associates, Inc., was the borrower and grantor of the security. John Gaige merely guaranteed that debt.

115 Idaho at 174, 765 P.2d at 685. The Court concluded that the statute's language—set forth below—did not encompass guarantors:

> At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

I.C. § 45-1512. Under *Gaige*, then, a "money judgment . . . for the balance due upon the obligation . . ." cannot mean a judgment against a guarantor for the balance due—it can refer only to judgments against the principal obligor. *Gaige* clarifies that the trust deed antideficiency statute refers only to suits against the original borrower-grantor.

2. The Plain Language of I.C. § 6-108 Does Not Apply to Guarantors.

Here, the Guarantors ask this Court to resurrect the Gaiges' argument. But the argument fails, as nowhere does the language judicial foreclosure deficiency statute protect a guarantor:

> No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

I.C. § 6-108. By latching on to a single phrase, the Guarantors attempt to distinguish *Gaige*, and extrapolate that the statute bars the entry of a judgment against them on the guaranty contracts.

This conclusion is incorrect. First, the term "deficiency judgment"—analogous to term "money judgment" in the trust deed antideficiency statute—does not apply to a judgment on a guaranty. While AgStar has not found an explicit statutory or case law definition of the term in Idaho, Black's Law Dictionary defines "deficiency judgment" as follows:

> - **deficiency judgment** (1865) A judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due. — Also termed *deficiency decree.*

JUDGMENT, Black's Law Dictionary (10th ed. 2014). Under this definition, a "deficiency judgment" (like the term "money judgment" in *Gaige*) is against a *debtor* for the unpaid balance, not against a guarantor. The statute says that "No court in the state of Idaho shall have jurisdiction to enter a ***deficiency judgment*** . . ." I.C. § 6-108 (emphasis added.) As with the trust deed version, the judicial foreclosure antideficiency statute only protects the borrower, not the guarantor. A judgment against the Guarantors on the separate guaranty contracts is not a deficiency judgment. There is no statutory or case authority allowing a lender to seek a deficiency judgment against a guarantor.

And, the guaranty contracts are simply separate obligations from the mortgage, thus exempting the Guarantors from the statutory protections afforded to principal debtors. *See Valley Bank v. Larson*, 104 Idaho 772, 774, 663 P.2d 653, 655 (1983)(Trial court's conclusion that "[t]he Trust Deed Statutes protect the principal debtor, but the guarantor may not claim the protection because his obligation is independent of the principal debtor's" was well supported by persuasive case law (brackets in original; internal quotation marks and citation omitted)). Generally, "[a] guarantee is an undertaking or promise on the part of the guarantor which is collateral to a primary or principal obligation and binds the guarantor to performance in the event of non-performance of the principal obligor." *Indus. Inv. Corp. v. Rocca*, 100 Idaho 228, 232,

596 P.2d 100, 104 (1979). A guaranty and a principal obligation are mutually exclusive. *Mickelsen Constr., Inc. v. Horrocks*, 154 Idaho 396, 404, 299 P.3d 203, 211 (2013). Thus, statutes that apply to the primary obligor do not automatically extend to protect obligors from their separate contractual undertakings.

B. If I.C. § 6-108 Is Ambiguous, Public Policy and Legislative History Support the Interpretation that the Statute Does Not Cover Guarantors.

As shown above, the plain language of the antideficiency statute is not ambiguous, and does not include the Guarantors within its scope. The Guarantors' interpretation of the statute is unreasonable, and should not subject the statute to statutory construction. *See Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 597, 288 P.3d 810, 814 (2012)(citing *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)("If a statute is ambiguous because more than one reasonable interpretation exists, we look to rules of statutory construction for guidance.")

But, to the extent that the Court is inclined to treat the statute as ambiguous, public policy, legislative history, and context support AgStar's interpretation. *See Pioneer Irr. Dist.*, *supra*, at *id.* (citing *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999)("In the event that this Court is required to engage in statutory construction, we may ascertain legislative intent from the statute's context, the public policy in support of the statute, and the statute's legislative history.")

1. The Idaho Supreme Court has already rejected the public policy advanced by the Guarantors, and has determined that the best public policy is to leave any expansion of the antideficiency statute to the Legislature.

The Guarantors cite several cases for the public policy that they should be protected from their contractual undertakings by the antideficiency statute. Their argument to this Court flies in the face of clear precedent. They cite *First Interstate Bank of Nevada v. Shields*, 730 P.2d 429,

431 (Nev. 1986) for the proposition that not extending the statute to guarantors would create a windfall for lenders. (App. Br. at 5.) This very case law and policy was already advanced and rejected in *Gaige*:

> While there may be arguments for extending anti-deficiency protection to guarantors, that action is for the legislature to do, not the court. In some states, such as Alaska, the legislature saw fit to extend protection to guarantors, AS § 34.20.100 (1985); at present ours has not. Although the Nevada court is apparently "convinced that it is unsound to deny guarantors the benefits of [anti-deficiency] legislation," *First Interstate Bank of Nevada v. Shields,* 730 P.2d 429, 431 (Nev.1986), a majority of state courts considering the issue have declined to expand the coverage of the statute to those not covered by the statute. *See Bank of America National Trust & Savings Ass'n v. Hunter,* 8 Cal.2d 592, 67 P.2d 99 (1937); *Bank of Kirkwood Plaza v. Mueller,* 294 N.W.2d 640 (N.D.1980); *Riverside National Bank v. Manolakis,* 613 P.2d 438 (Okla.1980). ***We deem it better policy to follow the wording of the statute and leave any expansion of coverage to the legislature.***

115 Idaho at 174-75, 765 P.2d at 685-86 (emphasis added). The Guarantors provide no reasoning for why this Court should reverse course on its prior case law and disregard the principles of *stare decisis*. *See Houghland Farms, Inc. v. Johnson,* 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)("When there is controlling precedent on questions of Idaho law 'the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'") Nor do the Guarantors offer a sound policy reason to treat nonjudicial and judicial foreclosures differently.

Other jurisdictions have also rejected the policy laid out in *Shields*. Recently, in *Mutual of Omaha Bank v. Murante*, 829 N.W.2d 676, 285 Neb. 747 (Neb. 2013), the Supreme Court of Nebraska rejected *Shields*. 829 N.W. 2d 676, 684 (Neb. 2013). That court rejected *Shields* on the basis that the case failed to consider the separate obligation that the guarantor undertook contractually:

> The cases Murante cites do not give sufficient weight to the separate obligations of the borrower and the guarantor. Instead, they conclude that guarantors are protected because the guaranty and the deed of trust secure the same obligation.

Id. Indeed, as noted above, this Court has recognized that a guaranty and a deed of trust are separate contractual undertakings. *E.g.*, *Valley Bank,* 104 Idaho at 774, 663 P.2d at 655.

Murante goes on to cite a litany of persuasive cases (including *Gaige*) for the proposition that because a guaranty is a contractual undertaking separate from the principal loan, the antideficiency statutes are inapplicable. 829 N.W. 2d at 684-85(citing *Bank of America Nat. Trust & Savings Assn. v. Hunter*, 8 Cal. 2d 592, 67 P.2d 99 (1937); *National City Bank v. Lundgren*, 435 N.W. 2d 588 (Minn. App. 1989)(The court focused on the observation that an unconditional guaranty is separate obligation from the principal loan); *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980)(Guaranty is separate contract not falling within the protections of the antideficiency statute.)

Other courts have appreciated the distinction between the contractual duties of guarantors versus principal obligors, and have embraced the policy that the differing contractual duties support different applications of the antideficiency statutes *E.g., LP XXVI, LLC v. Goldstein*, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004)("The note was executed to provide capital, the mortgage to secure the note. Defendant personally provided the guaranty in order to assure the lender that any shortfall in the security provided by the mortgaged property would be made good."); *Poughkeepsie Sav. Bank, FSB v. Harris*, 833 F. Supp. 551 (W.D.N.C. 1993)(North Carolina statute allowing mortgagor, in suit for deficiency following mortgage foreclosure, to show as matter of defense and offset that property sold was fairly worth amount of debt secured by it or that amount bid was substantially less than true value is not available to guarantors, even when they are also the property owners, if they are sued to enforce their duties as guarantors.); and

Sumner v. Enercon Dev. Co., 307 Or. 579, 584, 771 P.2d 619, 621 (1989)("[A]n action on a debt is distinct from an action on a guarantee of that debt. Thus, raising a bar to one of the actions does not affect the ability to bring the other.")

The Guarantors also marshal the support of *Surety Life Ins. Co. v. Smith*, 892 P.2d 1 (Utah 1995). While Idaho has not passed judgment on this case, the *Murante* court did. As with *Shields*, the *Murante* court rejected the Utah Supreme Court's reasoning because that court "focused on the note of indebtedness and concluded that the antideficiency statute applied because both the deed of trust and the guaranty secured the note. This focus ignores the fact that the note and the guaranty are separate agreements involving different parties." 829 N.W.2d at 684. And, *Murante* also rejected the Guarantors' other proffered case, *First Interstate Bank v. Tatum and Bell*, 821 P.2d 1384 (Ariz. App. 1991), on the same grounds. *Id.*

2. The Legislative history of the statute supports AgStar's interpretation.

The legislative history of the antideficiency statute also provides no relief to the Guarantors. In fact, it shows that the statute was intended to only apply to protect obligors in the foreclosure case-in-chief. The legislative preamble is as follows:

> AN ACT
> Prohibiting courts from entering a deficiency judgment in mortgage foreclosures in any amount greater than the difference between the mortgage indebtedness, plus costs of foreclosure, and the reasonable value of the mortgaged property; and declaring an emergency.

S.L. 1933, ch. 150 § 1. Note that this statement says that courts may not enter a deficiency judgment *in mortgage foreclosures* without determining the reasonable value of the property. This language shows the statute was intended to protect borrowers in the foreclosure case-in-chief.

And this statute was passed for the purposes of changing the common law. In 1930s America, states were scrambling to protect mortgagors from the vicissitudes of the Great Depression economy, and chose to legislatively protect mortgagors from the traditional rule allowing the mortgagee to be subject to a deficiency judgment. *See* Grant S. Nelson et al., 1 Real Estate Finance Law § 8:3, *Anti-deficiency Legislation* (6th ed. 2014). This Court cannot presume that the legislature intended to apply the common-law altering statute to guarantors in addition to mortgagors. *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002)("We presume that the legislature did not intend to change the common law unless the language of a statute clearly indicates the legislature's intent to do so.")(citations omitted). Given this context of altering the common law, this statute cannot apply to the Guarantors.

C. The Guaranty's Language Bars the Guarantors' Defense.

This Court has repeatedly held guarantors to the language of their contracts. A guaranty agreement must be "enforced according to its literal terms." *First Sec. Bank of Idaho, N.A. v. Mountain View Equip. Co.*, 112 Idaho 158, 160-61, 730 P.2d 1078, 1080-81 (Ct. App. 1986), *aff'd*, 112 Idaho 1078, 739 P.2d 377 (1987)(citing *Valley Bank, supra.*); *McGill v. Idaho Bank & Trust Co.,* 102 Idaho 494, 632 P.2d 683 (1981). In *Valley Bank*, this Court specifically held that a waiver of the antideficiency statute's protection contained in a guaranty is effective. *Valley Bank*, 104 Idaho at 774, 663 P.2d at 655, *cited with approval by Gaige*, 115 Idaho at 175, 765 P.2d at 686. In *McGill*, the Court also held that the creditor could release the principal debtor without discharging the guarantor under the language of the guaranty agreement waiving the defense of release. 102 Idaho at 497-98, 632 P.2d at 686-87.

The Guaranty Agreements in the present case make clear that they are separate obligations to be enforced apart from the foreclosure against the principal debtors. In addition to

waiving most defenses (including release), the Guarantors also agreed that AgStar would only apply the "net proceeds of any foreclosure sale to the obligation":

> Investor may enforce this Guaranty without first proceeding against Issuer, any other guarantor, any other person or any security or collateral and without first pursuing any other right or remedy. This Guaranty remains enforceable regardless of any defenses which the Issuer may assert on the Obligations including but not limited to failure of consideration, breach of warranty, fraud, statute of frauds, bankruptcy, lack of legal capacity, statute of limitations, Investor liability, accord and satisfaction, and usury, provided, however, that nothing herein shall waive Guarantor's right to assert in good faith payment or performance of any of the Obligations as a defense to a claim relating to such Obligations, to the extent of such payment or performance. ***If foreclosure or other remedy is pursued, only the net proceeds, after deduction of all charges and expenses, shall be applied to the amount due on the Obligations.*** Investor shall not be required to institute or prosecute proceedings to recover any deficiency as a condition of payment hereunder or enforcement hereof. Investor may purchase all or part of the collateral or security at any foreclosure or other sale for its own account and may apply the amount bid against the amount due on the Obligations.

(R. 23)(emphasis added). This is an effective waiver of the antideficiency statute, which would require that AgStar apply the reasonable value of the property to the amount due. Even if the antideficiency statute applies, the Guarantors waived that protection, and the guaranties must be enforced according to their terms.

D. The District Court Did Not Err in Awarding AgStar its Fees and Costs for Obtaining the Judgment.

AgStar requested and was awarded its fees and costs under the language of the guaranty agreements [or alternatively under I.C. § 12-120(3)] for its recovery against the Guarantors. (R. 131-34.) The Guarantors failed to file an objection, and the court awarded the requested fees and costs. (R. 139-41.) The district court did not err in awarding AgStar its fees and costs, as AgStar was the prevailing party in recovering on the guaranties.

E. AgStar Should be Awarded its Fees and Costs on Appeal.

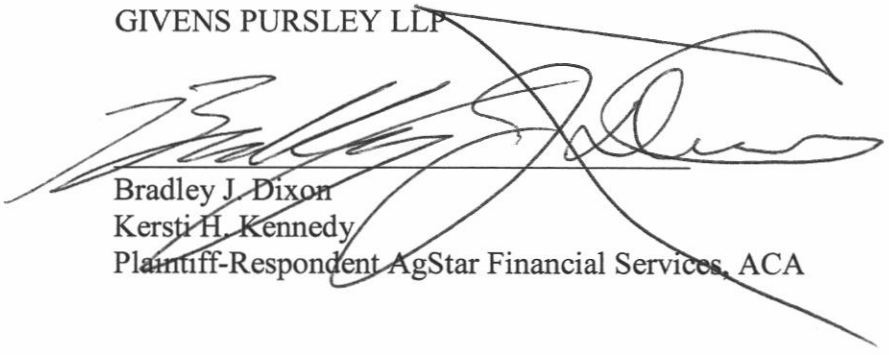
AgStar requests and is entitled to attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and the language of the guaranties or under Idaho Code § 12-120(3).

V. CONCLUSION

For the foregoing reasons, AgStar respectfully requests this Court affirm the judgment of the district court and award AgStar its attorney fees and costs in defending this appeal

DATED: May 12, 2016.

GIVENS PURSLEY LLP



Bradley J. Dixon
Kersti H. Kennedy
Plaintiff-Respondent AgStar Financial Services, ACA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2016, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** in the above-entitled matter as follows:

Brent T. Robinson W. Reed Cotten Robinson & Tribe PO Box 396 Rupert, ID 83350 Telephone: (208) 436-4717 Facsimile: (208) 436-6804 btr@idlawfirm.com wrc@idlawfirm.com *Attorney for Defendants-Appellants*	[X] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via email

By: _____
Bradley J. Dixon
Kersti H. Kennedy