[Cite as *Wells Fargo Bank v. Blough*, 2009-Ohio-3672.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

WELLS FARGO BANK,	:	
Plaintiff-Appellee,	:	Case No. 08CA49
vs.	:	
PAUL A. BLOUGH AND PROFESSIONAL COLLECTORS AND BILLING SERVICE CENTER INC.,[1]	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: James H. McCauley, 1710 Washington Boulevard, Post Office Box 196, Belpre, Ohio 45714

COUNSEL FOR APPELLEE: Brad A. Council, 9435 Waterstone Boulevard, Suite 270, Cincinnati, Ohio 45249

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 7-23-09

ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court summary judgment in favor of Wells Fargo Bank, plaintiff below and appellee herein.

{¶ 2} Paul Blough, defendant below and appellant herein, raises the following assignments of error for review:

[1] Professional Collectors and Billing Service Center, Inc., did not appeal the trial court's judgment.

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT OHIO REVISED CODE SECTION 1335.05, OHIO'S STATUTE OF FRAUDS, BARRED HOLDING DEFENDANT-APPELLANT BLOUGH PERSONALLY LIABLE ON HIS ORAL GUARANTY OF A CORPORATE DEBT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN RULING THAT CALIFORNIA LAW APPLIED TO THIS CASE TO ENFORCE AN ORAL PROMISE TO GUARANTY A CORPORATE DEBT."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY NOT CORRECTLY APPLYING THE TESTS REQUIRED IN OHIO'S LEADING OBJECT RULE."

{¶ 3} On November 26, 2007, appellee filed a complaint against appellant and his business, Professional Collectors and Billing Service Center, Inc. Appellee alleged that appellant and his business failed to pay $121,167.08 in credit extended under an agreement. Appellee asserted that appellant agreed to be personally liable for the debt.

{¶ 4} On October 6, 2008, appellee requested summary judgment and claimed that no genuine issues of material fact remained as to whether appellant owed the amounts alleged in the complaint. Appellee observed that appellant admitted the liability of the business, but denied that he had any personal liability. To refute appellant's claim that he is not personally liable for the debt, appellee submitted a transcript of the telephonic credit application between appellant and appellee's agent. During the conversation, appellant answered "yes" to the following question: "[Y]ou do

personally guarantee the repayment of that debt, is that correct?" He also stated that he did not have any questions when informed, "[Y]ou'll guarantee and you personally guarantee and promise to pay to the bank upon demand all that the Professionals Collectors and Billing Services Center Incorporated may owe on the business line." Appellee argued that the transcript demonstrated that appellant agreed to be personally liable for the debt.

{¶ 5} Appellee further asserted that by using the account, appellant agreed that California law would apply. The Customer Agreement stated: "Use of a Supercheck, or a MasterCard BusinessCard, or a request for a transfer from the account by anyone authorized by the Customer, shall evidence the Customer's agreement to the terms and conditions of this BusinessLine Customer Agreement." The second page of the agreement states that California law will apply. Appellee also contended that appellant orally agreed that California law would apply. During the telephone conversation, appellant stated that he did not have any questions when the agent stated: "* * * [Y]ou also agree on behalf of the Professional Collectors and Billing Service Center Inc that we may use this tape recording, the use of a supercheck or the business credit line master card or telephone transfer from the business line by anyone authorized by the company as evidence that you agree to the terms and conditions of the business line customer agreement that you will receive, California Law will part [sic] of this agreement * * *." Appellee then argued that under California law, appellant's oral agreement to personally guarantee the debt was enforceable.

{¶ 6} On October 23, 2008, appellant filed a summary judgment motion and requested judgment in his favor on appellee's claim that he is personally liable for the

debt. Appellant also filed a memorandum in opposition to appellee's summary judgment motion and argued that the Ohio statute of frauds, R.C. 1335.05, prohibits the enforcement of his alleged oral promise to pay the debt of his business. He further disputed appellee's claim that California law, which permits a tape recording to constitute a "writing" and further allows an oral promise to guaranty a debt to be enforced, governed. Appellant asserted that appellee's failure to produce a written document in which he agreed to be personally liable for the debt is fatal to its claim that he is personally liable.

{¶ 7} Appellant admitted that the telephonic transcript shows that he responded affirmatively when asked whether he agreed to be personally liable for the business debt, but he averred in an affidavit that he did not recall making this personal guarantee. Appellant stated that he thought he would receive a written document that he would be able to review and sign. He further claimed that he did not receive a document to indicate that the law of the State of California would govern the account, but instead, the first time he had any knowledge that California law would apply was when appellee attached the credit agreement to its complaint. Appellant stated: "I did not agree to have California law applied to this credit account, and I would never knowingly agree to allow California law to be applied to any business or personal debt."

{¶ 8} Appellee asserted that even if appellant's argument that Ohio law applied was correct, the "leading object rule" precluded application of the statute of frauds.

{¶ 9} The trial court subsequently determined that appellant agreed that California law would apply and that under California law, his oral agreement to be personally liable for the corporate debt was enforceable. The court awarded appellee

$121,167.08, plus accrued interest in the amount of $22,503.04. This appeal followed.

{¶ 10} In his three assignments of error, appellant asserts that the trial court improperly entered summary judgment in appellee's favor. Because the same standard of review applies to his three assignments of error, we jointly consider them.

{¶ 11} In his first assignment of error, appellant contends that the trial court erred by determining that the Ohio statute of frauds, R.C. 1335.05, did not apply to preclude appellee's claim that appellant is personally liable for the debt. In his second assignment of error, appellant contends that the trial court wrongly concluded that California law applied. In his third assignment of error, appellant asserts that the trial court did not properly apply the leading object rule.

A

STANDARD OF REVIEW

{¶ 12} Appellate courts review trial court summary judgment decisions de novo. Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, appellate courts must independently review the record to determine if summary judgment is appropriate. In other words, appellate courts need not defer to trial court summary judgment decisions. See Brown v. Scioto Cty. Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly determined summary judgment, an appellate court must review the Civ.R. 56 summary judgment standard as well as the applicable law.

{¶ 13} Civ.R. 56(C) provides:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 14} Accordingly, trial courts may not grant summary judgment unless the evidence demonstrates that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and after viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-430, 674 N.E.2d 1164.

B

CHOICE OF LAW

{¶ 15} Our resolution of appellant's first and third assignments of error hinges upon our disposition of his second assignment of error, i.e., whether California or Ohio law applies. We therefore will first address appellant's second assignment of error.

{¶ 16} In his second assignment of error, appellant asserts that the trial court improperly concluded that California law applied. Appellee asserts that the trial court properly determined that California law applied. Appellee notes that during the recorded phone conversation, appellant agreed that California law would govern and

that appellant received a Customer Agreement, which states: "use of a SUPERCHECK, or a MasterCard BusinessCard, or a request for a transfer from the account by anyone authorized by the Customer, shall evidence the Customer's agreement to the terms and conditions of this BusinessLine Customer Agreement." Additionally, the second page of the agreement states that California law governs the agreement. Appellee contends that appellant's oral agreement that California law would apply and his use of the account manifested his agreement that California law would govern.

{¶ 17} Choice of law provisions generally are enforceable. See Schulke Radio Prods., Ltd. v. Midwestern Broadcasting Co. (1983), 6 Ohio St.3d 436, 453 N.E.2d 683, syllabus (adopting Restatement of the Law 2d, Conflict of Laws (1971), 561, Section 187).[2] In Schulke, the court set forth the following test to determine when a choice of law provision is enforceable.

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a

[2] Schulke adopted Section 187, which provides:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

> state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties."

Id.; see, also, Jarvis v. Ashland Oil, Inc. (1985), 17 Ohio St.3d 189, 478 N.E.2d 786, syllabus; Columbus Steel Castings Co. v. Transp. & Transit Assocs., LLC, Franklin App. No. 06AP-1247, 2007-Ohio-6640.

{¶ 18} In the case at bar, we agree with the trial court's conclusion that no genuine issue of material fact remains as to whether appellant agreed that California law would apply. Appellee's agent informed him during the telephone conversation that California law would apply and appellant stated that he did not have any questions regarding the information. Moreover, the credit agreement recited that his use of the account would constitute his agreement to the terms of the agreement, including the provision that California law would govern. His self-serving affidavit that denies his agreement is insufficient to demonstrate the existence of a genuine issue of material fact.

> "This court has previously held that a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. * * * This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than 'bald contradictions of the evidence offered by the moving party' would necessarily abrogate the utility of the summary judgment exercise. * * * Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early state of the litigation and unnecessary dilate the civil process."

Greaney v. Ohio Turnpike Comm., Portage App. No. 2005-P-0012, 2005-Ohio-5284, at ¶16 (internal citations omitted); see, also, Citibank v. Eckmeyer, Portage App. No. 2008-P-69, 2009-Ohio-2435, at ¶60; Wolf v. Big Lots Stores, Inc., Franklin App. No. 07AP-511, 2008-Ohio-1837, at ¶12 (stating that a party may not use own self-serving

affidavit to establish a genuine issue of material fact if such affidavit contains "nothing more than bare contradictions of other competent evidence and conclusory statement of law"); Deutsche Bank Natl. Trust Co. v. Doucet, Franklin App. No. 07AP-453, 2008-Ohio-589, at ¶13 (stating that a self-serving affidavit that is not corroborated by any evidence is insufficient to establish the existence of a material issue of fact); Shreves v. Meridia Health Sys., Cuyahoga App. No. 87611, 2006-Ohio-5724, at ¶27 (stating that "a party's unsupported and self-serving assertions offered to demonstrate issues of fact, standing alone and without corroborating materials contemplated by Civ.R. 56, are simply insufficient to overcome a properly supported motion for summary judgment"). As we stated in Boulton v. Vadakin, Washington App. No. 07CA26, 2008-Ohio-666, at ¶20:

> "'[W]hen the moving party puts forth evidence intending to show that there are no genuine issues of material fact, the nonmoving party may not avoid summary judgment solely by submitting a self-serving affidavit containing no more than bald contradictions of the evidence offered by the moving party. To conclude otherwise would enable the nonmoving party to avoid summary judgment in every case, crippling the use of Civ.R. 56 as a means to facilitate "the early assessment of the merits of claims, pre-trial dismissal of meritless claims and defining and narrowing issues for trial.""'

McPherson v. Goodyear Tire & Rubber Co., Summit App. No. 21499, 2003-Ohio-7190, at ¶36 (internal quotation omitted), quoting Bank One, N.A. v. Burkey (June 14, 2000), Lorain App. No. 99CA7359 (Slaby, P.J., dissenting in part); see, also, RWS Bldg. Co. v. Freeman, Lawrence App. No. 04CA40, 2005-Ohio-6665; Hooks v. Ciccolini, Summit App. No. 20745, 2002-Ohio-2322.

{¶ 19} In the case at bar, appellant raises nothing specific in his affidavit, beyond his self-serving statements, to demonstrate the existence of a genuine issue of material

fact regarding his assent to the application of California law. Rather, he simply asserts that he does not recall the conversation. Consequently, his self-serving affidavit is not sufficient to preclude summary judgment regarding his agreement that California law would govern.

{¶ 20} Next, we must determine whether the choice of law provision is valid under Schulke. The first requirement is that the chosen state must have a substantial relationship to the parties or the transaction, or that there be some reasonable basis for the parties' choice. California has a substantial relationship to the transaction and there is a reasonable basis for the parties' choice. Appellee's business loan division was located in California at the time of the transaction. Appellee issued and approved appellant's application in California. Because the application was processed in California and because appellee issued the agreement from California, there is a reasonable basis for the parties' choice. See Sekeres v. Arbaugh (1987), 31 Ohio St.3d 24, 25, 508 N.E.2d 941 (stating that when transaction given final approval in chosen state, there is a reasonable basis for the parties' choice).

{¶ 21} The second requirement is that the application of the law of the chosen state must not violate the fundamental policy of the state which (1) has a greater material interest in the determination of the issue, and (2) is the state whose law would be applied in the absence of a choice by the parties. Id. at 25. In other words, the application of California law in the case sub judice must not violate the public policy of Ohio, but only if Ohio has a materially greater interest than California in this matter, and only if Ohio law would have governed the agreement if the parties had not specified otherwise. Id.

{¶ 22} In the instant case, Ohio law would have applied had the agreement not specified California law. Ohio does not, however, have a materially greater interest than California in the outcome of the case. While appellant is an Ohio resident, Ohio is not the place where the agreement was given final approval. Instead, appellee approved and issued the credit in California. Appellee had an expectation that California law would govern and it put this expectation in writing and verbally informed appellant that California law would apply. Moreover, appellant was not limited to using the account in Ohio. Appellant has not shown that Ohio has a materially greater interest than California in the outcome of this case. Consequently, under Schulke, the choice of law provision is enforceable and under that provision, California law applies.

C

CALIFORNIA LAW

{¶ 23} Appellant raises no argument regarding the correctness of appellee's assertion that his oral agreement to be personally liable is valid and enforceable under California law.[3] Thus, we adopt appellee's argument that under California law,

[3] We observe that generally, in a conflict of laws analysis, the procedural laws of the forum state govern while the substantive laws of the chosen state govern. See Keeton v. Hustler Magazine, Inc. (1984), 465 U.S. 770, 778, 104 S.Ct. 1473, 79 L.Ed.2d 790 fn. 10; Lawson v. Valve-Trol Co. (1991), 81 Ohio App.3d 1, 4, 610 N.E.2d 425; Columbus Steel Castings Co., supra. But, see, PNC Bank v. Schram (Apr. 30, 1999), Hamilton App. No. C-980683 (stating that Ohio Supreme Court has not recognized procedural-substantive distinction when parties' agreement contains choice of law provision). In the case at bar, however, neither party has raised this issue. Thus, we need not decide whether the statute of frauds constitutes a procedural or a substantive law.

We nevertheless note that in Ohio, the traditional view is that the statute is a procedural or evidentiary rule and not a substantive rule. See Lehman v. Huene (1932), 12 Ohio Law Abs. 161, 37 Ohio Law. Rep. 92; Hart v. Conger Helper Realty Co. (1929), 8 Ohio Law Abs. 76; Heaton v. Eldridge & Higgins (1897), 56 Ohio St. 87, 46

appellant is personally liable for the debt.

{¶ 24} Section 1624 of the California Civil Code contains the statute of frauds. It states:

> (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
> * * * *
> (2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

{¶ 25} Section 2794 of the California Civil Code sets forth the exceptions to the statute of frauds provision regarding answering for the debt of another and states:

> A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:
> (1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise;
> (2) Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made, his surety;
> (3) Where the promise, being for an antecedent obligation of

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N.E. 638; Schoenl v. Warner-White (1928), 32 Ohio App. 59, 61-62, 167 N.E.2d 598. The more modern, and the Restatement approach, is that the statute is substantive. See Restatement, supra, Section 141, comment b. However, because neither party raises this issue and because appellant does not argue that the statute of frauds is procedural, we will presume that California's statute of frauds applies. Additionally, we recognize the Restatement position that courts should apply the statute of frauds of the chosen, not the forum, state. See Section 141 (stating that "[w]hether a contract must be in writing, or evidenced by a writing, in order to be enforceable is determined by the law selected by application of the rules of Section 187-188"). Furthermore, the more recent view from the Ohio Supreme Court is to adopt the Restatement's conflict of law provisions. See Lewis v. Steinreich (1995), 73 Ohio St.3d 299, 303, 652 N.E.2d 981 (stating that "[i]n making choice-of-law determinations, this court has adopted the theories stated in the Restatement of the Law 2d, Conflict of Laws").

> another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation;
>
> (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;
>
> (5) Where a factor undertakes, for a commission, to sell merchandise and act as surety in connection with the sale;
>
> (6) Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

{¶ 26} The courts of California have construed these statutes to mean that a verbal agreement to personally guarantee a loan from which an individual gains a personal or business advantage is valid and enforceable. RCA Corp. v. Hunt (Cal.App. 1982), 184 Cal.Rptr. 633, 133 Cal.App.3d 903, 906. In short, in this type of situation oral guaranties are enforceable. See Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal.App.3d 618, 132 Cal.Rptr. 641.

{¶ 27} In the case at bar, appellant owed the business. His business owed the debt. He agreed to be personally liable for the debt. Under California law, his oral agreement is valid and enforceable.

{¶ 28} Even if we were to agree with appellant that the agreement would not be enforceable in Ohio, the Ohio Supreme Court has clearly stated that "[e]ven if the law of the chosen state 'is concededly repugnant to and in violation of the public policy of this state, the law of Ohio will only be applied when it can be shown that this state has a materially greater interest than the chosen state in the determination of a particular issue.'" Sekeres v. Arbaugh (1987), 31 Ohio St.3d 24, 25-26, 508 N.E.2d 941, quoting

Jarvis v. Ashland Oil, Inc. (1985), 17 Ohio St.3d 189, 17 OBR 427, 478 N.E.2d 786, paragraph two of the syllabus. As we previously determined, appellant has not shown that Ohio has a materially greater interest than California in the determination of this issue.

{¶ 29} Moreover, the Ohio Supreme Court also has recognized:

> "It is fundamental to our commercial intercourse that parties have the right to contract freely with the full expectation that their bargain will be permitted to endure according to the terms agreed upon. Any rule of law which would sanction the renunciation of an otherwise valid, voluntary agreement would lead to instability in all of our personal and business contractual relationships and assure multifarious litigation. Contractus legem ex conventione accipiunt."

Jarvis v. Ashland Oil, Inc. (1985), 17 Ohio St.3d 189, 192, 478 N.E.2d 786.

{¶ 30} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error. Because California law applies, appellant's remaining two assignments of error, premised upon his assertion that Ohio law applies, are meritless. Consequently, we hereby overrule them.

{¶ 31} Accordingly, based upon the foregoing reasons, we overrule appellant's three assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.