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This week, we report one decision by the Supreme Court of Alabama, involving the assignment of two guaranty agreements and the determination of whether to use the Alabama or Federal statute of limitations time period. This case was successfully argued by Sirote & Permutt attorneys.

SUPREME COURT OF ALABAMA

LPP Mortgage, Ltd. V. Emmitt H. Boutwell, Sr., et al., --- So.2d ---; CA No.:1080265 (Ala. October 23, 2009) (assignment of guaranty agreements/Statute of Limitations). On April 15, 1991, Boutwell Lumber Company, Inc. (Boutwell Lumber) executed a note, which was secured by a guaranty and mortgage, in the amount of \$750,000.00 to ITT Small Business Finance Corporation (ITT). The transaction was executed through the offices of the United States Small Business Administration (SBA). Emmitt H. Boutwell, Sr. and Jamie P. Boutwell and Emmitt H. Boutwell, Jr. and Cindy S. Boutwell (Boutwells) executed guaranty agreements funded by the SBA to ITT providing that they would pay the liabilities arising from any default on the note by Boutwell Lumber. Those guaranties, in turn, were secured by mortgages on properties owned by the Boutwells. ITT assigned the two guaranties to Farmers Exchange Bank, and on June 14, 1994, Farmers Exchange Bank assigned the guaranties to SBA.

In 1995, Boutwell Lumber defaulted on the note and declared bankruptcy. A portion of the outstanding principal of the note was paid by the sale of Boutwell Lumber's facilities and equipment; however, there was still debt in excess of \$680,000.00. In 1996, SBA began communications and correspondence with the Boutwells to settle the outstanding debt, and SBA agreed to not pursue its legal remedies on the note during the settlement negotiations. By October of 1998, SBA had offered to release Mr. and Mrs. Boutwell, Sr. from their personal liability for the payment of \$60,000.00 and Mr. and Mrs. Boutwell, Jr. from their personal liability for payment of \$15,000.00. On February 19, 1999, SBA sent letters to the Boutwells stating that it had failed to receive information concerning their payment plans and that if SBA did not receive written plans for repayment of the recommended settlement by March 1, 1999, then SBA must exercise its options to liquidate the Boutwells remaining collateral. Before the end of February of 1999, the Boutwells offered payment plans for the settlement of their debt.

In August of 2000, SBA sold the loan instruments to LPP Mortgage, Ltd. (LPP), and in May of 2001, LPP contacted the Boutwells with regard to their outstanding debt and obligations. The Boutwells made various small payments on the debt between March of 2001 and January of 2002. The Boutwells' debt was never paid in full.

On April 29, 2005, LPP sent letters to the Boutwells demanding payment, pursuant to their original guaranties, of the outstanding debt and interest in an amount of more than \$1,000,000.00. On August 5, 2005, LPP sued the Boutwells seeking the enforcement of the guaranties. The matter was tried before a Pike County, Alabama, Circuit Court Judge without a jury on May 29, 2008. The trial court held that LPP did not have privity and standing to bring the action against the Boutwells. The trial court held that LPP lacked privity to enforce the guaranties because they were specific to ITT and its successors and there was no assignment of the guaranties to LPP. The trial court also held that LPP was time-barred by the Alabama statute of limitations time period of 6 years from the time of the accrual of the claim.

LPP appealed the trial court's decision, arguing that the trial court erred in determining that the guaranties had not been assigned to LPP and that LPP's action was not time-barred by the statute of limitations.

(1) Whether LPP lacked privity to enforce the guaranties?

Alabama law provides that there are no formal requirements for an assignment. The Court must look to the substance of the assignment rather than to its form to determine whether there has been an assignment. An assignment has been made: (1) if the assignor intended to transfer a present interest in the subject matter of the contract; and (2) if the assignor and the assignee mutually assented to the assignment.

LPP's mortgage assignment stated in pertinent part: Together with such other documents, agreements, instruments, and other collateral that evidence, secure or otherwise relate to Assignor's right, title or interest in and to the Mortgage and/or the Note, including without limitation the title insurance policies and hazard insurance policies that might presently be in effect.

The Supreme Court of Alabama agreed with LPP's argument that SBA's delivery of the guaranties to LPP along with the other loan instruments and the general language of assignment were sufficient to constitute an assignment and operate to vest LPP with all SBA's rights to recovery on the loan instruments (i.e. guaranties). The Supreme Court of Alabama held LPP did not lack privity to enforce the guaranties against the Boutwells.

(2) Whether LPP was barred by the Alabama Statute of Limitations to bring the action against the Boutwells?

The trial court held that the Alabama Statute of Limitations applied to this matter; however, LPP argued and the Supreme Court of Alabama agreed that the assignment came from SBA, an office of the United States government, and therefore action on the guaranties was subject to the federal limitations time period of 28 U.S.C. § 2415(a).

It was undisputed that the loan transactions originated under the SBA; that the guaranties were SBA documents; and that the guaranties were specifically assigned to the SBA. Where the government acquires a derivative claim, whether by assignment, subrogation, or by other means, and that claim is not then barred by the state statute of limitations, the state statute ceases to run against the government at the time of such acquisition. United States v. Sellers, 487 F.2d 1268, 1269 (5th Cir. 1973). Pursuant to Alabama law, an assignee stands in the shoes of the assignor.

LPP, the assignee of the SBA, stands in SBA's shoes for the purposes of asserting its claim on the guaranties, and the guaranties are subject to the limitations period of the federal statute, which provides for a 6 year time limit from the time the guaranties accrued. The guaranties accrued at the time of the written demand by LPP. Further, the Supreme Court held that even if the trial court determined that the time of accrual was February of 1999, when SBA was attempting to settle with the Boutwells regarding the obligations under the notes and the guaranties, then LPP's claims are still not time-barred because the Boutwells made payments in various months between March of 2001 and January of 2002, which would not bar LPP's lawsuit that was filed in August of 2005, within the 6 year time period.

The Supreme Court of Alabama reversed and remanded the trial court's decision in favor of LPP.



The Answer Is Sirote.

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