IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-4

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Petitioners

v.

SCOTT S. SEGAL,
Defendant Below, Respondent.

and

No. 22-ICA-46

SCOTT S. SEGAL,
Defendant Below, Petitioner

v.

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Respondents

and

UNITED BANK,
Third-Party Defendant Below, Respondent

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

This is a Reply by the Petitioners, PITA, LLC, and the Milan Puskar Revocable Trust Restated 9/28/11 to the Brief of the Respondent Scott S. Segal.

First, in the Introduction to his Brief, Segal repeatedly references "alter ego,"[1] but as noted in the Petitioners' opening brief, "[T]he Defendant never raised the defense of alter ego/veil piercing, never briefed the issue of alter ego/veil piercing, and his proposed order contains no discussion of the elements of alter ego/veil piercing."[2] This Court will scour Segal's Brief in vain for any reference to the record where he ever did so. Now, having failed to preserve this issue for appeal, Segal urges "courts are not bound in general to ignore what is patently clear"[3] as if the due process clauses and the civil rules somehow do not apply to him.

Second, Segal states that "the alter ego … sued the remaining guarantors for the ***entire*** debt,"[4] which is false. PITA sued Segal for breaching his $1 million guaranty agreement:

> 57. The Defendants were further advised that no further payments from Protea were expected and that, under their Guaranties, they were each responsible for the Protea debt up to the amount of $1,000,000 for amounts associated with the Loan Agreement. [5]

He knew that in 2018 when PITA sued him, and he knew that when he filed his Brief with this Court stating the contrary.

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[1] Respondent's Brief at 1.

[2] App. 2467. The only prior references to "alter ego" in the record were in conjunction with Segal's counterclaims, App. 188-189, which he abandoned. Segal never raised the issue of veil piercing at any time before including it in his proposed judgment order.

[3] Respondent's Brief at 12.

[4] Respondent's Brief at 1 (emphasis in original).

[5] App. 22 (emphasis supplied).

Third, Segal states, "The trust performed those legal gymnastics, rather than simply paying off the debt and sue for contribution because it could not otherwise hope to secure an award of attorney fees,"[6] but (1) there would have been no attorney fees had Segal honored either his contractual or indemnification obligations, (2) Segal has spent the last five years contesting the Trust's contribution claim, and (3) Segal's other coguarantors settled with PITA and the Trust.

Finally, Segal states, "Most uncharitably,[7] the trust did all that notwithstanding its prior assurances to the others that they would be taken care of and shielded from liability in the event of default,"[8] but (1) there is nothing in the record where the Trust, as an entity, made any such assurances; (2) the only record evidence is not that any "assurances" were made to any "others," but an electronic copy of an affidavit[9] was allegedly found after PITA demanded payment in which a coguarantor, Stanley Hostler, who had died six months earlier, referenced an alleged conversation in 2011 with Milan Puskar when Mr. Puskar was terminally ill in which Mr. Puskar allegedly said, "in the event Protea did not make it, he had taken steps to see I did not get hurt,"[10] making no reference whatsoever to Segal and of such dubious authenticity and accuracy,[11] that the

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[6] Respondent's Brief at 1.

[7] Apparently, this is a sarcastic reference to the Trust's charitable purposes but how that militates in Segal's favor when his involvement with Protea Biosciences, Inc., as a director, investor, and guarantor was for his private financial benefit is difficult for the Petitioners to comprehend.

[8] Respondent's Brief at 1.

[9] The Court will note that Segal makes no reference in his Brief to the actual document; instead, he refers only to a portion that was read at a deposition. Respondent's Brief at 3, citing App. 1180. Moreover, there is no evidence that Hostler mentioned the affidavit to United Bank, the Trust, his coguarantors, or even his son.

[10] App. 1180.

[11] Indeed, the affidavit references an alleged conversation between Mr. Hostler and United Bank's representative, Randy Williams, who testified under oath that the conversation "did not happen." App. 1339. And, when asked, "So Mr. Hostler is being dishonest in his affidavit?" United's representative reiterated, "I did not have that discussion with Mr. Hostler." App. 1339-1340.

Estate of Hostler settled after the deposition of a United Bank representative;[12] and (3) both Segal and Hostler signed a reaffirmation agreement in 2017, *six years after* this alleged ambiguous conversation between Mr. Puskar and Hostler, stating that, "There are no unwritten oral agreements between the parties"[13] contradicting their 2009 guaranty agreements.

II. STATEMENT OF THE CASE

There are many inaccurate representations in Segal's Statement of the Case referencing not evidence but Segal's pleadings which were unsworn and unsupported by any record evidence.

First, Segal incorrectly states, "By 2009 … Puskar was on the board at Centra Bank,"[14] but the Appendix pages cited make no reference to Mr. Puskar's board status, which is incorrect as Mr. Puskar's membership on Centra Bank's board ended in 2008[15] *before* he signed his similar $1 million guaranty of the Protea Note almost a year later in 2009.[16]

Second, Segal states, "Notwithstanding that the $3 million loan was more than adequately anchored by the $4 million guarantees, Puskar … executed … the 'Umbrella Guaranty' … whereby the Trust agreed to cover the ***entire liability*** in case Protea defaulted,"[17] but there is not a single reference in the record to the Trust's co-guaranty as an "Umbrella Guaranty" and the five guaranty agreements have no such language and instead make each of them a coguarantor. The record reference for Segal's statement in his Petitioner's Brief, "the Trust agreed to cover the

[12] App. 1921.

[13] App. 116.

[14] Respondent's Brief at 2.

[15] https://www.sec.gov/Archives/edgar/data/1099932/000095015207005072/l26483asv1.htm

[16] Respondent's Brief at 2.

[17] Respondent's Brief at 2 (emphasis in original).

entire liability in case Protea defaulted" - "JA 248-49" - is the Trust's 2010 guaranty, which is identical to Segal's guaranty, including the following:

> (a) "The Guarantor waives any and all defenses, claims and discharges of Borrower, or any other obligor …."
>
> (b) "[T]he Guarantor will not assert, plead or enforce against the Lender any defense of waiver, release, estoppel … fraud … which may be available to Borrower or any other person liable in respect of any indebtedness, or any setoff available against the Lender to Borrower or any such other person …."
>
> (c) "The Guarantor expressly agrees that the Guarantor will be liable … for any deficiency …."
>
> (d) "Until the obligations of the Borrower to Lender have been paid in full, the Guarantor waive(s) any claim, remedy or other right which the Guarantor may now have or hereafter acquire against Borrower or any other person obligated to pay indebtedness … including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration or any right to participate in any claim or remedy the Guarantor may have against the Borrower, collateral, or other party obligated for Borrower's debt."[18]

There is a good reason Segal does not include this language from these industry-standard personal guaranties of a commercial debt obligation – *they obliterate every one of his legal arguments*.

Third, again in a bit rewriting history, Segal states, "Puskar knew that he was dying … and he told Hostler that the purpose of the new guaranty was to afford the bank recourse against the Trust in the event of Protea's default, obviating the need to collect on the individual guaranties,"[19] forgetting that (1) the Trust's guaranty was executed on *July 30, 2010*,[20] well before Mr. Puskar became ill and allegedly had some conversation days before his death on *October 7, 2011, over a year*

[18] App. 249.

[19] Respondent's Brief at 2.

[20] App. 41.

later,[21] before Mr. Puskar was ill, let alone when he "knew that he was dying;" (2) the guaranty executed by the Trust had the same provisions as and said absolutely nothing about negating Segal's guaranty;[22] (3) *after Mr. Puskar's death in 2011*, United Bank rejected Hostler's request to be released from his 2009 guaranty;[23] (4) both Hostler and Segal affirmatively stated in 2017, *six years after Mr. Puskar's death*, that "There are *no unwritten oral agreements* between the parties"[24] contradicting their obligations under their 2009 guaranty agreements; and (5) the representative of United Bank, which had to approve any changes in guaranty agreements, testified as follows:

> Q. Why was the Trust added?
>
> A. Because Mike had, at some point, had formed the Trust. I think it had been out there for a while, but it was actually starting to move assets and we had numerous other loans in which Mike was involved in, and so *we added the Trust as a guarantor as well to not just this one, to many other ones*. …
>
> Q. Okay. *Did you approach Mr. Puskar about having the trust guarantee this debt?*
>
> A. Yes, *I did*. …
>
> Q. *Did he ever make a comment to you about protecting the other guarantors*?

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[21] App. 1945.

[22] App. 41.

[23] App. 1337-1339 (Q. … How do you know Mr. Hostler? A. I just met him through the relationship with Protea. Q. … Did you ever talk to him about Protea and the loan it had with United? A. Yes, we did some. Q. … Did you ever talk about the guarantee? A. Yeah. There were several discussions about the guarantees. Q. What did you discuss with him about the guarantees? A. I think a couple of different times he just, he talked about the limited guarantee and … if there was any thought of releasing the guarantee. Q. … Did you ever talk to him about Mr. Puskar or his trust increasing the guarantee from, their guarantee from $1 million to $3 million? A. Yeah. … That was after it was done. Q. … What did you discuss regarding that? A. The discussion basically was that the trust had a $3 million guaranty. It wasn't a long discussion. … Q. Do you recall Mr. Hostler stating to you that Mr. Puskar increased the guaranty to protect its' co-guarantors? A. That did not happen.").

[24] App. 116 (emphasis supplied). Moreover, not only did he reaffirm it in 2017, but Segal's also contemporaneous conduct was inconsistent with his understanding that he had been relieved in 2011 from his 2009 guaranty obligations as he produced to United his net worth statements and/or income tax returns in 2012, 2013, 2014, 2015, 2016, and 2017 in conjunction with his 2008 guaranty agreement. App. 1889.

A. *He did not.*[25]

Finally, Segal states, "Puskar also enjoyed close friendships with Harris and Segal, and he informed them as well that the Trust was intended to satisfy any Protea default without rendering them liable on their individual guaranties,"[26] but Segal was deposed and never offered such testimony nor was it placed in the record of this case and the appendix reference accompanying this statement in his Brief is to an interrogatory response, not sworn to by Segal, but by the representative of the Estate of Harris, referencing an alleged conversation not with Segal, but with Harris.[27] Accordingly, there is no evidence in the record of any alleged oral promise by Mr. Puskar, binding on the Trust, made to Segal, who, as we have seen, did later affirm, "There are no unwritten oral agreements between the parties,"[28] which at that time included Segal and the Trust.

Moreover, Segal constantly and conveniently ignores that his guaranty agreement states:

(1) "No act or thing … except the full payment and discharge of all indebtedness, shall in any way … modify … or release the liability of the Undersigned …."

(2) "This is an absolute, unconditional and continuing guaranty … and shall continue to be in force and binding upon the Undersigned … until this guaranty is revoked by written notice actually received by the Lender …."

(3) "The liability of the Undersigned … shall be limited to a principal amount of $1,000,000.00 … The Lender may apply any sums received by or available to the Lender [which] shall not reduce, affect or impair the liability of the Undersigned …."

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[25] App. 1309 (emphasis supplied).

[26] Respondent's Brief at 3. Segal would have this Court believe that instead of a charitable foundation in his name, Mr. Puskar preferred that up to $3 million, plus interest and late charges, would benefit Harris, Hostler, and Segal, instead of West Virginia 501(c)(3) charitable organizations, which are the beneficiaries of his foundation.

[27] App. 382.

[28] App. 116.

(4) "The liability of the Undersigned shall not be affected or impaired by any of the following acts … any acceptance of collateral security, guarantors … for any and all indebtedness … any waiver … compromise … any full or partial release of … any other guarantor … any failure to … enforce any collateral security … any transfer of any indebtedness … any order of application of any payments … upon indebtedness …."

(5) "The Undersigned waives any and all defenses of … any other obligor … except the defense of discharge by payment in full …."

(6) "the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release … fraud … or unenforceability … or any setoff …."

(7) "The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency … whether or not the liability of … any other obligor … is discharged …."

(8) "Until the obligations of the Borrower to Lender have been paid in full, the Undersigned waives any claim, remedy or other right which the Undersigned may have now or hereafter acquire against … any other person obligated to pay indebtedness …."

(9) "*Except as authorized by the terms herein, this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the … Lender ….*"[29]

There is a reason commercial lenders use guaranty agreements containing this boilerplate language – to prevent guarantors from claiming some side oral agreement relieves them of their contractual obligations. Segal signed two documents in this case, the 2009 guaranty and the 2017 reaffirmation agreements, and now essentially argues they are not worth the paper they were written on, that his word is not his bond, that his agreement in his 2009 guaranty obligations could

[29] App. 109-110. Randy Williams, United's representative, testified that he was unaware of any document signed by a representative of the lender, releasing Segal or the other two coguarantors from their obligations under their guaranty agreements. App. 1352, 1354-1355. He also testified that he was unaware of any evidence that the lender had authorized Mr. Puskar to release any of the coguarantors from their guaranty agreements. *Id.* at 1353, 1355.

not be modified except by a writing signed by the lender is meaningless, that his 2017 reaffirmation agreement stating that he had no oral agreements with any other party modifying his obligations under his 2009 guaranty is meaningless, and that this Court should ignore the language of those contracts based on not a single shred of record evidence in which he affirmed that any enforceable oral promises modified his solemn obligations under those contracts.

If one objectively considers the applicable law, Segal's delusions of persecution are just that – delusions. The Trust paid more than $3.2 million for the Protea Note, which Segal now, after five years of litigation, reluctantly concedes is entitled to his contribution. The Trust created PITA to hold the Protea Note and, if necessary, to enforce the contractual rights of United, the lender, as the beneficiary of the guaranty agreements. There would be no interest, late fees, or collection costs if Segal and the other two coguarantors had, as demanded, contributed their shares of the Protea indebtedness as per their 2009 guaranty and 2017 reaffirmation agreements. Instead, they vigorously contested PITA's enforcement of the guaranty agreements and the Trust's right to contribution. Now, Segal wants to walk away owing nothing but a fraction of his contribution obligation to the Trust and none of his contractual obligation to PITA, claiming somehow to be the victim in all of this – none of which is supported by the law or the record evidence.

III. ARGUMENT

A. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT SEGAL ON THE PETITIONERS' FRAUD CLAIM WHERE SEGAL'S BANKING EXPERT AGREED THEY PRESENTED AN ISSUE FOR THE TRIER OF FACT AND THE EVIDENCE SATISFIED THE STANDARDS FOR A FRAUD IN THE INDUCEMENT CLAIM.

Segal persists in ignoring this Court's well-recognized cause of action for fraud in the inducement, mischaracterizing the Petitioners' cause of action as nothing more than for breach of

contract.[30] He also fails to comprehend the authority he cites: "the requisite false representation … 'must ordinarily relate to a past *or existing fact*, or to an alleged past *or existing fact*, and not to future occurrences.'"[31] Here, the "existing fact" was Segal's solemn, written promise that "There are *no unwritten oral agreements* between the parties."[32] It was a promise of an "existing fact" upon which there is record evidence that both the lender, United, and a coguarantor, the Trust, relied. Accordingly, under the authority cited by Segal, the evidence presented was sufficient to raise a trial-worthy issue of the cause of action of fraud in the inducement.

It is noteworthy in this case that Segal never placed his sworn deposition testimony into evidence nor offered a single affidavit. So, he resorts to making this sort of theoretical argument: "The far more plausible inference[33] … is that Segal executed the Change in Terms Agreement to keep his guaranty in place, striving to do his part to prevent United from calling the loan and immediately putting Protea out of business."[34] *First*, if Segal wanted to explain why he signed a contract representing that he had no oral agreement with the Trust or Mr. Puskar if one existed, he could have done so through sworn testimony or an affidavit, but did not. *Second*, why would he sign the 2017 reaffirmation agreement "to keep his guaranty in place" if it had been replaced by the Trust's $3 million guaranty? *Finally*, why would Segal care if Protea defaulted on a $3 million

[30] Respondent's Brief at 13-14.

[31] *Id.* at 14 (emphasis fact).

[32] App. 116 (emphasis supplied).

[33] Similarly, Segal states, "it can be reasonably inferred that Segal …." Respondent's Brief at 14.

[34] *Id.*

Note if the Trust, as he now argues, promised to satisfy the Note with its $3 million guaranty?[35] The phrase "what a tangled web" jumps to mind when navigating Segal's logical gymnastics.

Next, Segal argues, "Plaintiffs' fraud claims also fail the essential element of justifiable reliance,"[36] but United's representative, Randall Williams, who signed the reaffirmation agreement on behalf of the lender, testified that it relied on Segal's representation that "There are no unwritten oral agreements between the parties" in extending Protea's credit line in 2017. *First,* he testified that the purpose of the 2017 agreement was to permit collateral being held in a brokerage account to be deposited into a money market account where it would accrue more interest.[37] *Second,* he testified that it is common for a coguarantor to acquire the underlying note from the creditor.[38] *Finally,* he testified (1) the lender relied on Segal's guaranty when it extended a $3 million credit line to Protea;[39] (2) United is unaware of any document releasing Segal from his guaranty or of any authorization by the lender to permit Milan Puskar to release Segal from his guaranty;[40] and (3) United relied on Segal's representations in the 2017 reaffirmation agreement: "Did United rely on Scott Segal's representations by executing the Change in Terms Agreement on January 26, 2017? … Yes."[41] The Trust, as another coguarantor, likewise relied upon Segal's

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[35] Indeed, under the "foolish consistency" theory of litigation, Segal states in the very same Brief: "The Trust could have honored its commitment, through Puskar, to the individual guarantors and simply let United satisfy Protea's $3 million indebtedness by the transfer of the money market account assets." Respondent's Brief at 4.

[36] *Id.* at 15.

[37] App. 1325-1326.

[38] App. 1327-1328.

[39] App. 1352.

[40] App. 1352-1354.

[41] App. 2569; see also App. 2570-2571 ("Did United assume when Scott Segal signed the Change in Terms Agreement … that Scott Segal would honor his obligations as the guarantor? … Yes. … Would United [have] continued the $3 million Protea note if it knew that Scott Segal did not intend to honor the

representations that (1) he would honor his 2009 personal guaranty and (2) he had no "unwritten oral agreement" with any other party, including Mr. Puskar, impacting the enforceability of Segal's guaranty. Likewise, as an assignee, PITA is entitled to the benefit of the representations to the lender upon which it relied relative to Segal's 2017 reaffirmation agreement.[42]

It is axiomatic that a "fraud in the inducement" claim[43] is not defeated due to the underlying contractual relationship between the fraudster and the defrauded. Indeed, our Supreme Court of Appeals has held that although "[f]raud cannot be predicated on a promise not performed," here for Segal to honor his 2009 personal guaranty, "a false assertion in regard to some *existing* matter," here Segal's representation that he had no "unwritten oral agreements" with any other party, "by which a party," like United and the Trust, "is induced to part with his money or his property,"[44] will support a cause of action for fraud in the inducement.[45] For example, in *Fluharty, Tr. of Ests. of Johnson v. Peoples Bank, NA*,[46] the court held that a genuine issue of fact was presented where borrowers asserted that they were fraudulently induced into

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terms of the Change in Terms Agreement when he signed it, but that he intended to contend that Mike Puskar had released him from his obligations as guarantor? … no …").

[42] Segal also brushes aside the testimony of his expert, who testified that the fraud claims presented issues for the trier of fact [Respondent's Brief at 15], but the expert's testimony speaks for itself. App. 1177-1180.

[43] Which is what PITA, and the Trust are asserting, i.e., their predecessor-in-interest and the Trust were fraudulently induced to (1) extend the $3 million Protea credit lien and (2) reaffirm the Trust's coguarantor obligations by Segal's false representations that he had no "unwritten oral agreements" with any other party impacting Segal's obligations under his 2009 personal guaranty.

[44] Syl. pt. 4, *Janssen v. Carolina Lumber Co*., 137 W. Va. 561, 73 S.E.2d 12 (1952) (emphasis in the original).

[45] Stated differently, "the representation required, in order that there be actionable fraud, must ordinarily relate to a past or existing fact, or to an alleged past or existing fact, and not to future occurrences." *Janssen v. Carolina Lumber Co*., supra at 567, 73 S.E.2d at 17.

[46] No. 3:16-BK-30063, 2018 WL 10593642 (S.D.W. Va. Sept. 17, 2018).

entering certain loan agreements by a lender's allegedly fraudulent misrepresentations regarding the accuracy of specific appraisals.[47]

The "no unwritten oral agreements" clause is very common in the banking industry to prevent the very strategy employed by Segal in this case. Just as a party cannot allege, as Segal has done, that the terms of a contract do not bind him or her because of some alleged "unwritten oral agreement" contradicting its terms,[48] where a party fraudulently makes such representation regarding the non-existence of a fact relied on by the other parties to that contract, that party is

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[47] See also *Heslep v. Americans for Afr. Adoption, Inc.*, 890 F. Supp. 2d 671, 685 (N.D.W. Va. 2012) ("The plaintiffs' claims thus allege more than a mere failure to fulfill a future promise; they assert that the defendants knowingly made materially false statements about past events and present facts related to their adoption of Sam. The Hesleps allege that they relied on those misrepresentations and claim resulting damages. (Id. at ¶¶ 87, 90). As such, they have stated a plausible claim of fraud under West Virginia law."); *Powell v. Bank of Am., N.A.*, 842 F. Supp. 2d 966, 980 (S.D.W. Va. 2012) ("The specific allegations of fraud—that defendants induced plaintiffs to agree to the loan by misrepresenting that the interest rate and payments would not increase, by suppressing from plaintiffs that the loan was an adjustable rate mortgage, and by misrepresenting that plaintiffs could refinance after one year—are sufficient to permit the inference that defendants did not intend to fulfill any of those terms or representations at the time made."); *Russell v. Bank of Am., N.A.*, No. 3:11-CV-88, 2012 WL 13028202, at *5 (N.D.W. Va. Jan. 18, 2012) ("At the core of the plaintiffs' fraud claim are the allegations that BofA represented that they would be granted a permanent loan modification as long as they first fell behind on their mortgage by three of four payments and successfully completed a trial period, that BofA nonetheless sought foreclosure, and that BofA made this false representation with deliberate disregard for their rights. Drawing all reasonable inferences in the plaintiffs' favor, this Court construes their allegations to assert that BofA had "no intention to fulfill the promise at the time it was made."); *Corder v. Countrywide Home Loans, Inc.*, No. CIV.A. 2:10-0738, 2011 WL 289343, at *6 (S.D.W. Va. Jan. 26, 2011) ("Viewed in this light, Corder's fraud claim is premised not on the breach of an alleged oral contract concerning the sale or lease of land, but on defendant's knowingly false statements of material fact. Thus, under West Virginia law, Corder's fraud claim is precluded neither by the statute of frauds nor the bar on promissory fraud.").

[48] *See, e.g., Oberman, Tivoli & Pickert, Inc. v. Merrill Lynch Bus. Fin. Servs.*, 2012 IL App (1st) 113128-U (the plain language of a loan agreement barred any claims against the lender for fraud based on statements made outside the written agreement where the integration clause stated there were no unwritten oral agreements of parties); *Fin. Fed. Credit, Inc. v. NE Rentals Inc.*, No. CIV.A. H-09-2956, 2009 WL 4667571, at *4 (S.D. Tex. Dec. 1, 2009) (the presence of a merger clause providing that there are no 'unwritten oral agreements between the parties,' Delmonico's conclusory, one-sentence, assertion of fraud, undue influence, and overweening bargaining power, and his statement that he was misled into believing any disputes would be resolved in Massachusetts, are insufficient to meet his 'heavy burden of proof' to show that the clause is unreasonable.").

liable for fraud in the inducement. Accordingly, as there was sufficient evidence for a trier of fact relative to the fraud claim, and the damages for fraud are not the same as for the Trust's contribution claim, the Circuit Court's judgment relative to PITA's and the Trust's fraud claims should be reversed and this matter remanded for a trial on those claims.

B. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT SEGAL ON THE PETITIONER PITA'S BREACH OF CONTRACT CLAIM.

Segal's core argument relative to this assignment of error is that "the Trust cannot do through an alter ego what it could not do for itself."[49]

First, in support of this argument, Segal misrepresents the facts. There was no "elaborate artifice," as PITA sent a letter to Segal before Protea's default.[50] Nothing was done "in anticipation … of litigation" as (1) Protea had not defaulted at the time PITA acquired the Protea Note from United, (2) no litigation had been filed or was contemplated, and (3) there would have been no litigation had Segal honored his 2009 guaranty and 2017 reaffirmation agreements. Also, no one ever sought "to recover the ***entire*** amount of Protea's defaulted obligation with ***no*** net loss to itself" as the Trust funded the $3.2 million acquisition of the Protea Note, and neither the Trust nor PITA ever sought to recover more than each coguarantor's allocable share of the Protea debt obligation. Even the testimony quoted in Segal's brief states: "[W]e want to collect what's owed per each of them and then anything beyond that, the trust would be responsible for, per their guarantee."[51]

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[49] Respondent's Brief at 10.

[50] App. 1438.

[51] Respondent's Brief at 10.

Second, Segal acknowledges that he did not raise the alter ego defense upon which the Circuit Court relied in dismissing PITA's contract claim and admits that, as a result, the Circuit Court never applied the appropriate test.[52] He meekly argues that "courts are not bound in general to ignore what is patently clear"[53] and cites as his sole authority for this novel proposition a 1934 California case, but that case had nothing to do with an appellate court affirming a trial court ruling based on a defense never asserted, argued, or briefed. Indeed, in *Mirabito v. San Francisco Dairy Co.,*[54] the defendant argued that it should not be held liable for the acts of another, not its employee. On appeal, the court noted that there was substantial evidence that the milk truck in the accident bore the defendant's name, the employee reported to the defendant each day to begin his route, and the employee reported to the defendant at the end of each day. Accordingly, *based on evidence and arguments made in the trial court*, the appellate court held, "Upon all the testimony taken together, the only logical conclusion to be drawn was that appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company."[55] How this case supports Segal's arguments relative to his failure to assert, argue, or brief the alter ego issue below or for the Circuit Court's failure to engage in the required legal analysis is beyond the Petitioners' comprehension.[56]

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[52] *Id*. at 12.

[53] *Id.*

[54] 1 Cal. 2d 400, 35 P.2d 513 (1934).

[55] 1 Cal. 2d at 406, 35 P.2d at 516.

[56] Segal cites a later decision involving the same parties, but that decision expressly noted that the alter ego issue had already been decided in the earlier case. *Mirabito v. San Francisco Dairy Co*., 8 Cal. App. 2d 54, 60, 47 P.2d 530, 533 (1935) ("The Supreme Court having heretofore declared San Francisco Dairy Company to be merely the alter ego of appellant, the cases … upon which appellant relies, may be readily distinguished from the instant case, and the principles therein declared are not applicable herein.").

Finally, and most critically, Segal makes no effort to contradict PITA's analysis of the nineteen factors set forth by the Court in *Laya v. Erin Homes, Inc.*[57] because, based on record evidence, he would fail that test. He asks this Court to affirm based on a defense he never raised, argued, or briefed, so the trial court never applied the proper standard even when he makes no effort to do so on appeal.

Regarding the *only* other legal authority cited in this section of Segal's Brief, *In re Basil St. Partners, LLC*,[58] the court affirmed the right of a co-guarantor to acquire the underlying debt obligation, including through the use of a separate corporate entity, but merely held that the co-guarantor cannot recover more than it paid:

> Antaramian characterizes the acquisition price of the BSP Loan as being the payment of his fair share of the Note under his Guaranty obligation. In other words, Antaramian argues that he has not escaped liability on his Guaranty, because he paid real dollars out of his own pocket to discharge that liability. But, Antaramian paid less than $9 million to Regions, an amount that would be more than offset by the profit he stands to gain if he is awarded a judgment of $15,000,000.00 against each of PZS. The Court cannot countenance this unjust enrichment at the expense of Antaramian's co-guarantors, who would each end up being liable to Antaramian for more than what he alone paid to Regions. The amount of a claim for contribution is based on the amount paid to acquire an assignment of the underlying debt. *The Court holds that Antaramian is entitled to seek contribution from PZS based solely on the amount of his payment*.

Here, the Trust paid over $3.2 million for the Protea Note, and neither it nor PITA is seeking more than $3.2 million from Segal. Instead, relative to PITA's breach of contract action, it is seeking to enforce Segal's obligation under his 2009 guaranty and 2017 reaffirmation

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[57] 177 W. Va. 343, 352 S.E.2d 93 (1986).

[58] No. 9:11-BK-19510-FMD, 2012 WL 6101914, at *17 (Bankr. M.D. Fla. Dec. 7, 2012) (emphasis supplied and footnote omitted).

agreements to pay it $1 million, plus Note interest, late fees, and collection costs, including attorney and accounting fees, and Segal has cited no law precluding that cause of action.

C. THE CIRCUIT COURT ERRED IN CREDITING THE RESPONDENT SEGAL ON THE CONTRIBUTION CLAIM BY THE PETITIONER TRUST WITH A PARTIALLY-FUNDED SETTLEMENT BY ONE OF SEGAL'S COGUARANTORS.

As Segal has done elsewhere throughout his Brief, he has cited almost no legal authority in this section,[59] referencing *only* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57(b)(2), *which was cited in the Petitioners' Brief and is relied upon by them*. It provides, "When, because of … other reasonable circumstances, the contribution obtained from a cosurety after reasonable collection efforts *is less than that cosurety's contributive share*, *the contributive shares of the other cosureties as among themselves are recalculated pursuant to subsection (2)(a) as though the secondary obligation of the former cosurety limited its liability to the contribution obtained from that cosurety*."[60] In other words, this provision, cited by Segal, states that if the Trust, a coguarantor, recovers "less than that cosurety's," in this case the Estate of Hostler's "contributive share," then "the contributive shares … are recalculated." This is precisely the opposite of Segal's argument and the Circuit Court's actions. There is no dispute in the record that the Trust has recovered only $175,000 from the Estate of Hostler and that the Estate currently has no additional assets to use to pay its remaining $362,500 obligation. Accordingly, per Section 57(b)(2) of the RESTATEMENT, the uncollectible amount from the Estate of Hostler gets reallocated among the remaining two coguarantors – the Trust and Segal.

[59] Respondent's Brief at 16-17.

[60] RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57 (1996) (emphasis supplied).

Accordingly, this Court should reverse the judgment of the Circuit Court of Monongalia County and remand for entry of a judgment in favor of the Trust against Segal, allocating to Segal one-half of the actual payment of $175,000 made by the Estate of Hostler towards the Protea debt and one-half of any future payments, and not with one-half of the $362,500 the Estate of Hostler never paid the Trust.

VI. CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court reverse the judgment of the Circuit Court of Monongalia County and remand with directions to (1) schedule a jury trial on the fraud claims of the Respondents against Segal; (2) enter judgment in favor of PITA against Segal for breach of contract and the award of contractual interest, late fees, and collection costs; and (3) enter judgment in favor of the Trust allocating one-half of the actual payment of $175,000 made by the Estate of Hostler towards the Protea debt and one-half of any future payments, rather than with one-half of the $362,500 the Estate of Hostler never paid the Trust.

PITA, LLC, AND THE MILAN PUSKAR REVOCABLE TRUST

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I served the foregoing **"PETITIONERS' REPLY BRIEF"** upon the following counsel of record using the E-Filing System:

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