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CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

IDAHO INDEPENDENT BANK,)
)
 Plaintiff,)
 vs.)
)
 KEITH H. COULTRAP, II,)
)
 Defendant.)
 _____)

Case No. **CV 2013 7184**

**MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed by plaintiff Idaho Independent Bank (IIB).

IIB initiated the instant action against defendant Keith H. Coultrap, II (Coultrap), for monetary damages, alleging breach of Forbearance Agreements regarding a Commercial Guarantee executed by Coultrap in favor of IIB. Verified Complaint for Breach of Guaranty and Declaratory Judgment, pp. 2-15. IIB claims it is entitled to judgment against Coulter for \$205,490.60 plus interest and attorney fees, based on his guaranty of Loan No. 2290553 between IIB and North Idaho Land Company & Holdings, Inc. (NIL). IIB maintains that under the terms of the Commercial Guarantee, Coultrap “unconditionally guaranteed all amounts loaned by IIB to [NIL]” Memorandum In Support of Motion for Summary Judgment, p. 2. Coultrap claims that prior to executing the Commercial Guarantee, he had no knowledge that a \$100,000.00 line of

credit to NIL under Loan No. 2290533 was contained within the scope of the guarantee. Memorandum In Opposition to Plaintiff's Motion for Summary Judgment, p. 5.

On August 12, 2005, NIL executed a Promissory Note in the amount of \$100,000.00 for the benefit of Idaho Independent Bank (IIB). Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, p. 3 ¶ 3. Between September 12, 2006, and April 17, 2009, NIB executed six additional promissory notes and two change in term agreements in favor of IIB, under the terms of which, the prior promissory notes were renewed and the maturity date was extended. *Id.*, pp. 3-4 ¶¶ 4-8. The original promissory note, the six additional promissory notes and the change in term agreements are collectively referred to as Loan No. 2290553. *Id.*, p. 4 ¶ 8.

On November 14, 2005, Coultrap executed the Commercial Guarantee in favor of IIB. Affidavit of Keith Coultrap in Opposition to Plaintiff's Motion for Summary Judgment, p. 3. The Commercial Guarantee provides in pertinent part:

CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of Guarantor's Share of the indebtedness of [NIL] to [IIB], and the performance and discharge of all [NIL]'s obligations under the Note and the Related Documents. This is a guarantee of payment and performance and not of collection, so Lender can enforce this Guarantee against Guarantor even when lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order, on demand, in the legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform [NIL]'s obligations under the Note and Related Documents. Under this Guaranty, Guarantor's obligations are continuing.

INDEBTEDNESS. The word "indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time any at ant one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, reasonable attorney's fees, arising from any and all debt, liabilities and obligations of every nature or form now existing or hereafter arising or acquired, that [NIL] individually or collectively or interchangeably with others, owes or will

owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, liabilities and obligations whether, voluntarily or involuntarily incurred; due or to become due by their terms or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against [NIL] for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise[]); and originated then reduced or extinguished and then afterwards increased or reinstated.

GUARANTOR'S SHARE OF THE INDEBTEDNESS. The words "Guarantor's Share of the Indebtedness" as used in this Guaranty mean an amount not to exceed Seven Million & 00/100 Dollars (\$7,000,000.00) of the principal amount of the Indebtedness that is outstanding from time to time at any one or more times.

GUARANTOR'S REPRESENTATIONS AND WARRANTIES. Guarantor represents and warrants to Lender that (A) no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms or this Guaranty, . . . (I) Lender has made no representation to Guarantor as to the creditworthiness of [NIL]; and (J) Guarantor has established adequate means of obtaining from [NIL] on a continuing basis information regarding [NIL]'s financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information, Lender shall have no obligation to disclose to Guarantor any information or documents acquired by Lender in the course of its relationship with [NIL].

Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, Exhibit B.

At the time Coultrap executed the Commercial Guarantee on November 14, 2005, four loans had been issued by IIB to NIL. *Id.*, pp. 4-5 ¶ 10. Two additional loans were issued following the execution of the Commercial Guarantee. *Id.* By April 24, 2007, NIL had defaulted under the terms of the loans. *Id.*, p. 5 ¶ 10. On that date, at the request of NIL, Coultrap and other guarantors and IIB entered into a Forbearance Agreement that extended the maturity dates to October 7, 2007. *Id.* Among other things, the Forbearance Agreement provides:

C. On or about August 12, 2005, [NIL] executed a Promissory Note in favor of IIB in the original principal amount of \$100,000.00 with interest

accruing at a variable interest rate ("Loan No. 2290553"). [NIL] agreed to pay monthly interest payments with all the principal, interest and fees due on August 12, 2006. Pursuant to the request of [NIL] and in reliance upon representations thereof, IIB extended the maturity date of Loan No. 2290553 to February 21, 2007. Loan No. 2290553 has matured and [NIL] is in default. The payoff outstanding as of April 24, 2007, is \$105, 848.98, which includes principal of \$98,500.00, interest of \$2,384.24 and late fees of \$4,964.74. This amount presently accrues interest at the non-default per diem rate of \$25.6370. This loan constitutes a line of credit, which line is terminated and can no longer be drawn upon.

G. Guarantors executed Commercial Guarantees, guarantying the indebtedness owed to IIB by [NIL].

9. **Guarantors.** Guarantors by executing this Agreement reaffirm and acknowledge their obligations under the Commercial Guarantees executed by the Guarantor for any and all indebtedness currently owed or in the future owed by [NIL] to IIB.

16. **Recommendation to Seek Counsel.** All parties signing this Agreement declare that they have read and fully understand and have been given the opportunity to be advised by legal counsel of their choice in connection with this Agreement, and acknowledge that they are not relying on any representations of IIB or its lawyers in executing this Agreement, that they are not acting under any misrepresentations or misapprehension as to the legal effect of this Agreement, and that they have not executed it under any duress from IIB or any other party.

18. **Reaffirmation.** [NIL] and Guarantors acknowledge and reaffirm all existing Loan Documents and balances due under the Loan Documents, and acknowledge their intentions that such Loan Documents, which include by are not limited to, the Deeds of Trust, shall create continuing lien with no interruption in the security interest in the Real Properties, including but not limited to, the proceeds generated therefrom, pursuant to the terms hereof. [NIL] and Guarantors further acknowledge that the Loans are cross-defaulted and cross-collateralized: A default by [NIL] under this Agreement or any applicable Loan Document with regard to any of the Loans constitutes an event of default under the other Loans, and all real property secures the payment and performance of each of the Loans. [NIL] and Guarantors further acknowledge and reaffirm all covenants, representations, and warranties made by them in the Loan Documents, all of which survive execution of this Agreement.

Id., Exhibit C.

NIL, Coultrap, and the other guarantors were unable to liquidate real property or obtain adequate funds by the new maturity date of October 7, 2007, and on November

21, 2007, the parties entered into a second Forbearance Agreement, which extended the maturity dates for the loans to March 31, 2008, acknowledged the six outstanding loans entered into by NIL and reaffirmed the obligation of the Guarantors under the Commercial Guaranty. *Id.*, p. 5 ¶ 12, Exhibit D.

By May 27, 2008, only two loans remained outstanding, Loan No. 2290553 and Loan No. 2290646. *Id.*, p. 6 ¶ 14. A request was made by NIL to extend the maturity date of the two remaining loans and for IIB to forebear its collection and foreclosure rights on the two remaining loans. *Id.*, p. 6 ¶ 14. A third Forbearance Agreement was executed, which extended the maturity dates for the loans to October 10, 2008, acknowledged the two remaining outstanding loans entered into by NIL and reaffirmed the obligation of the Guarantors under the Commercial Guaranty. *Id.*, Exhibit E.

The two remaining loans continued unpaid and outstanding as the new maturity date approached. *Id.*, p. 6 ¶ 16. NIL made another request to extend the maturity date and for IIB to forebear its collection and foreclosure rights on the two remaining loans. *Id.* A fourth Forbearance Agreement was executed, which extended the maturity dates for the loans to April 17, 2009, acknowledged the two remaining outstanding loans entered into by NIL and reaffirmed the obligation of the Guarantors under the Commercial Guaranty. *Id.*, Exhibit F.

Following the execution of the fourth Forbearance Agreement “NIL and Coultrap defaulted under the terms of the 4th Forbearance Agreement, by failing to make the required payments, by failing to pay real and property taxes, and by allowing liens to be filed against the real property securing the Loans.” *Id.*, p. 7 ¶ 19. Following default, IIB initiated a law suit in Kootenai County Case CV-2009-9163 for breach of the Guaranty for the Loans. *Id.*, p. 7 ¶ 20. At the request of Coultrap, IIB dismissed Kootenai County

Case No. CV-2009-9163 without prejudice, in exchange for the purchase of Loan No. 2290646. *Id.*, p. 7 ¶ 21. On December 29, 2009, the parties entered into the Agreement to Assign Loan Documents, which among other things, required Coultrap to agree that IIB would retain his Commercial Guaranty, guarantying the obligations owed by NIL under Loan No. 2290553. *Id.*, Exhibit G. The obligation was secured by a Deed of Trust upon real property located at 9600 North Easy Street, Hayden Lake, Idaho. *Id.*, p. 7 ¶ 22, Exhibit I.

In June 2013, Coultrap requested IIB release its lien on the Hayden Lake Property in exchange for sale proceeds that he anticipated to receive. *Id.*, p. 8 ¶ 23. “IIB agreed to release its lien in exchange for all remaining net proceeds, due to the cross-collateral agreement of Coultrap, and the outstanding obligation that remained due and owing under Loan No. 2290553.” *Id.*, p. 8 ¶ 24. Coultrap declined the offer, but “stated he would proceed with the sale of the Property and payment of a portion of the sale proceeds to IIB, provided that the remaining funds of \$15,194.16 were held in escrow pending a resolution of the dispute over those Funds or a court order.” *Id.*, p. 8 ¶ 25.

On October 4, 2013, IIB then initiated the instant action, seeking monetary damages still owing under Loan No. 2290553. Coultrap maintains he is not liable for the line of credit debt owing under Loan No. 2290553. Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, p. 3. This matter is now before the Court on IIB’s Motion for Summary Judgment. On April 8, 2014, IIB filed its Memorandum in Support of Motion for Summary Judgment, which was accompanied by the Affidavit of Sheila Schwager and the Affidavit of Lynn Taylor. IIB filed a Reply Memorandum in Support of Motion for Summary Judgment on April 30, 2014. The response

memorandum prepared by Coultrp was not filed with the Court until May 1, 2014. It was accompanied at that late date by the Affidavit of Robert Covington and the Affidavit of Keith Coultrap. Oral argument on IIB's Motion for Summary Judgment was held on May 7, 2014.

Prior to hearing oral argument on IIB's Motion for Summary Judgment, counsel for IIB moved to strike the Supplemental Affidavit of Robert Covington in Opposition to Plaintiff's Motion for Summary Judgment, as it was untimely filed and the discovery responses were not verified, not signed. At the time of oral argument, the Court had not had the opportunity to review such affidavit, as it was not in the Court's file, as it had only been filed late in the afternoon the day before oral argument, and no copy had been sent by Coultrap's counsel to the Court. Upon reviewing a copy of that affidavit at oral argument, the Court stated IIB's Motion to Strike the Supplemental Affidavit of Robert Covington in Opposition to Plaintiff's Motion for Summary Judgment, was granted. Coultrap has failed to meet the requirements of I.R.C.P. 56(c) as to the late filing of such affidavit, and counsel for Coultrap failed to articulate any reason to shorten the time period under that rule. At no time did counsel for Coultrap make a motion under I.R.C.P. 56(f) for a continuance. Coultrap's answers to IIB's interrogatories attached to the affidavit of Coultrap's counsel, are unsigned. Coultrap failed to meet the requirements of and affidavit under I.R.C.P. 56(e) and of a verified pleading. *Camp v. Jimenez*, 107 Idaho 878, 693 P.2d 1080).

At the conclusion of the May 7, 2014, hearing, the Court stated that it was granting IIB's Motion for Summary Judgment in all respects, directed counsel for IIB to prepare an appropriate Judgment, and that the Court would be issuing a written decision setting for the reasoning in granting summary judgment. As the Court indicated at the hearing, Coultrap's claims entirely lack factual basis and legal merit.

II. STANDARD OF REVIEW.

“Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party,” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

The non-moving party’s case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); see *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different

conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

III. ANALYSIS.

A. The Commercial Guaranty is an Absolute Guarantee, it is Unambiguous, and as Such, the Court Must Determine the Intent of the Parties Only From the Guarantee.

“A guaranty is an undertaking or promise on the part of the guarantor which is collateral to a primary or principal obligation on the part of another and which binds the obligor to performance in event of nonperformance by the other.” *Commercial Credit Corp. v. Chisholm Bros. Farm Equip. Co.*, 96 Idaho 194, 196, 525 P.2d 976, 978 (1974) (citing *Durant v. Snyder*, 65 Idaho 678, 151 P.2d 776 (1944)). A continuing guaranty assumes a future course of dealing covering a series of transactions extending over an indefinite time. *Id.* A conditional guaranty expressly or impliedly contemplates the happening of some contingent event or some act on the creditor’s part, as a condition precedent to the guarantor’s liability. *Id.* at 197, 525 P.2d at 979. Conversely, an absolute or unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation without requiring the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb’s Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). Language that states that the guarantors are “jointly, severally, and unconditionally promise and guaranty full and complete payment” of the obligation of the principal has been held to be that of an absolute guaranty. *McConnon & Co. v. Stallings*, 44 Idaho 510, 510, 258 P. 527, 528 (1927).

A court can hold a defendant liable on the guaranty agreement only. *Id.* “The rights of a creditor against a guarantor are determined strictly from the terms of the guaranty agreement. If the guaranty is clear and unequivocal, there is no occasion for

the court to consider extrinsic evidence of the parties' intent. Rather, the intent of the parties must be derived from the language of the guaranty if it is unambiguous.”

Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 319, 870 P.2d 663, 672 (Ct. App. 1994) (citing *Valley Bank v. Larson*, 104 Idaho 772, 775, 663 P.2d 653, 656 (1983); *McGill v. Idaho Bank & Trust*, 102 Idaho 494, 498, 632 P.2d 683, 687 (1981); *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990); *Johnson Equipment v. Nielson*, 108 Idaho 867, 871, 702 P.2d 905, 909 (Ct. App. 1985)).

In this case, the Commercial Guaranty executed by Coultrap contains the following pertinent language:

CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of Guarantor's Share of the indebtedness of [NIL] to [IIB], and the performance and discharge of all [NIL]'s obligations under the Note and the Related Documents.

Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, Exhibit B. This language creates an absolute guarantee.

Moreover, the language of the Commercial Guaranty does not leave the Court room to interpret the intent of the parties outside the language of the agreement.

Coultrap executed the Commercial Guaranty on November 14, 2005, which unequivocally provides: “The word “indebtedness” as used in this Guaranty means . . . any and all debt, liabilities and obligations of every nature or form **now existing or hereafter arising** or acquired, that [NIL] individually or collectively or interchangeably with others, owes or will owe [IIB].” *Id.* (emphasis added). Three months prior to the execution of the Commercial Guaranty, on August 12, 2005, IIB extended a line of

credit to NIL under Loan No. 2290553. However, the Commercial Guaranty agreement signed by Coultrap specifically provides as follows:

(J) Guarantor has established adequate means of obtaining from [NIL] on a continuing basis information regarding [NIL]'s financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information, [IIB] shall have no obligation to disclose to Guarantor any information or documents acquired by [IIB] in the course of its relationship with [NIL].

Id. (emphasis added). In signing the Commercial Guaranty, Coultrap acknowledged he has the means to obtain NIL's financial information, Coultrap agrees to keep himself adequately informed of NIL's financial situation, and agreed IIB has no duty to disclose to Coultrap documents IIB acquired from NIL. The situation could not have been made more clear to Coultrap.

Loan No. 2290533 was extended on August 12, 2005. Three months later, on November 14, 2005, Coultrap executed the Commercial Guaranty which clearly puts all the onus on Coultrap to keep informed about NIL's financial obligations currently owing at the time the Commercial Guaranty was executed or arising thereafter. This language does not leave room for ambiguity. Coultrap now wants this Court to find that he did not knowingly commit to pay Loan No. 2290553 when he executed the Commercial Guaranty. Memorandum in Opposition to Motion for Summary Judgment, p. 8. In support of his position, Coultrap asks this Court to consider conversations he had with Craig Burkhart, manager of the Hayden branch of IIB, prior to the execution of the Commercial Guaranty. Affidavit of Keith Coultrap, pp. 3-4, ¶ 6. However, the Court cannot look outside the unambiguous language of the Commercial Guaranty to determine the intent of the parties. *Ponderosa Paint Mfg., Inc.*, 125 Idaho 310, 319, 870 P.2d 663, 672; *McGill*, 102 Idaho 494, 498, 632 P.2d 683, 687; *CIT Financial*

Services, 118 Idaho 185, 187, 795 P.2d 890, 892; and *Johnson Equipment*, 108 Idaho 867, 871, 702 P.2d 905, 909.

The written intent of the parties is further evidenced by Coultrap continuing to sign forbearance agreements specifically addressing the existence of Loan No. 2290533. On October 7, 2007, Coultrap signed the first Forbearance Agreement, which specifically addressed the August 12, 2005, line of credit extended by IIB to NIL. It provides: “On or about August 12, 2005, [NIL] executed a Promissory Note in favor of IIB in the original principal amount of \$100,000.00 with interest accruing at a variable interest rate (“Loan No. 2290553”).” *Id.* Coultrap continued to affirm his knowledge of Loan No. 2290533 with each additional forbearance agreement he executed.

Based on the foregoing, the Court finds that the rights of the parties are determined from the clear and unambiguous terms of the guaranty agreement. As such, the Court cannot consider extrinsic evidence to determine the parties’ intent. Summary judgment must be granted to IIB on this issue.

B. There Was no Duress as a Matter of Fact and as a Matter of Law.

Coultrap asks this Court to find that when he executed the four Forbearance Agreements, he did so under economic duress or business compulsion. Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, p. 10. Coultrap claims he involuntarily signed the forbearance agreements “only because of the duress threatened by IIB...because IIB had a legitimate right to foreclose on loans that he had guaranteed.” *Id.* at p. 11. Coultrap’s claim has no factual or legal merit.

“A party claiming economic duress must prove that it involuntarily accepted the terms offered by the other party, that the circumstances permitted no other alternative, and that the circumstances were the result of coercive acts of the other party.” *Primary*

Health Network, Inc. v. State, Dep't of Admin., 137 Idaho 663, 668, 52 P.3d 307, 312 (2002) (citing *Isaak v. Idaho First Nat'l Bank*, 119 Idaho 988, 989, 812 P.2d 295, 296 (Ct.App.1990); *Lomas & Nettleton Co. v. Tiger Enterprises*, 99 Idaho 539, 585 P.2d 949 (1978)). The evidence proffered must demonstrate “that the duress resulted from the defendant's wrongful and oppressive conduct and not by the plaintiff's necessities.” *Id.* (citing *Lomas*, 99 Idaho at 542, 585 P.2d at 952). It “cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do.” *Liebelt v. Liebelt*, 118 Idaho 845, 848, 801 P.2d 52, 55 (Ct. App. 1990) (citing *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953)). The defense of duress must be shown by clear and convincing evidence. *Saint Alphonsus Regional Med. Ctr., Inc. v. Krueger*, 124 Idaho 501, 507, 861 P.2d 71, 77 (Ct. App. 1992) (citing *Lomas*, 99 Idaho at 542, 585 P.2d at 952-53).

Coultrap has failed to satisfy the requirements of economic duress. Coultrap claims he involuntarily signed the four forbearance agreements because otherwise IIB would have foreclosed on the loans he guaranteed. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 11. Specifically he attests:

Though I objected to the inclusion of the line of credit in the forbearance agreement and felt that IIB was wrong to forced me to sign something that was untrue, I signed the agreement because IIB had the right to foreclose on loan of more than \$3,800,000 and I did not have the resources to pay or borrow that amount or even the deficiency that I expected at the time. Only under the duress threatened by IIB did I sign the Forbearance Agreement when it included a provision for the line of credit that I believed was wrongful.

Affidavit of Keith Coultrap in Opposition to Plaintiff's Motion for Summary Judgment, p. 5 ¶ 7. The forbearance agreement instructed Coultrap to seek legal counsel.

Specifically stating:

16. Recommendation to Seek Counsel. All parties signing this Agreement declare that they have read and fully understand and have been given the opportunity to be advised by legal counsel of their choice in connection with this Agreement, and acknowledge that they are not relying on any representations of IIB or its lawyers in executing this Agreement, that they are not acting under any misrepresentations or misapprehension as to the legal effect of this Agreement, and that they have not executed it under any duress from IIB or any other party.

Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, Exhibit C.

Coultrap claims he was willing to litigate the line of credit at the time the first forbearance agreement was executed, but he signed the agreement anyways.

Specifically, he attests:

At all times between April, 2007 and December 2009, I was willing to litigate the merits of IIB's claim against me on the line of credit, but IIB was unwilling to decouple the line of credit from the forbearance agreements thereby leaving me no reasonable choice but to sign the forbearance agreements.

Affidavit of Keith Coultrap in Opposition to Plaintiff's Motion for Summary Judgment, p. 5 ¶ 7.

Foreclosure on the loans was clearly within the rights of IIB. The Court cannot find based on the evidence in the record and the statements made by Coultrap that he was incapacitated by duress when he executed the forbearance agreements. While Coultrap's financial situation may have made it necessary for him to sign the forbearance agreements, that alone is not duress. Coultrap voluntarily accepted the terms of the forbearance agreements, when other alternatives were available, such as allowing IIB to file suit against him on the guaranty he executed. IIB would have been within its rights to file suit against him on that guaranty. Coultrap has failed to show any wrongdoing on the part of IIB at any pertinent time, from the date Coultrap signed the guaranty to the date Coultrap signed the last forbearance agreement. Accordingly, the Court finds in favor of IIB on this issue.

C. There is No Genuine Issue of Material Fact as to the Amount of the Outstanding Obligation.

Coultrap also argues “IIB’s claim that \$213,000 is due on loan number 2290553 is not substantiated by specific facts sufficient to support of finding of fact that the claimed amount us actually due.” Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, p. 7. This argument by Coultrap is without merit. IIB has provided the following evidence, by way of the Affidavit of Lynn Taylor, which provides:

After all lawful offsets and credits have been allowed, the unpaid balance due to IIB under Loan No. 2290553 by Coultrap, as of May 7, 2014, totaled \$216,362.79, which consists of principal in the amount of \$98,425.06, non-default interest in the amount of \$21,321.05, default interest in the amount of \$76,706.82, and late charges in the amount of \$19,909.86. . . . Default interest at the rate of \$56.63 per diem also accrues from May 8, 2014, to the date of judgment.

Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, p. 8 ¶ 27.

Moreover, the fourth Forbearance Agreement signed by Coultrap provides:

On or about August 12, 2005, [NIL] executed a Promissory Note in favor of IIB in the original principal amount of \$100,000.00 with interest accruing at a variable interest rate (“Loan No. 2290553”). [NIL] agreed to pay monthly interest payments with all the principal, interest and fees due on August 12, 2006. Pursuant to the request of [NIL] and in reliance upon representations thereof, IIB extended the maturity date of Loan No. 2290553 to February 21, 2007, and later to October 10, 2007, and later to March 8, 2008, and later to October 10, 2008, and later to December 17, 2008. Loan No. 2290553 has matured and [NIL] is in default. The payoff outstanding as of April 17, 2009, is \$118, 327.18, which includes principal of \$98,425.06, interest of \$169.88 and late fees of \$19,732.24. This amount presently accrues interest at the non-default per diem rate of \$9.4380. This loan constitutes a line of credit, which line is terminated and can no longer be drawn upon.

Id., Exhibit F. This is enough to shift the burden to Coultrap to provide admissible evidence which disputes the amounts owing claimed by IIB. Coultrap has failed to do so. As such, the Court finds in favor of IIB on this issue.

D. There is No Genuine Issue of Material Fact that the Agreement to Assign Loan Documents Requires the Escrow Funds be Applied to Loan No. 2290553.

Coultrap claims “contrary to IIB’s assertions, the Agreement to Assign Loan Documents was not intended by either party to alter the then status quo of the line of credit except to provide secondary collateral security should it be determined that Coultrap was liable to IIB for the line of credit loan.” Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, p. 8. IIB maintains the Agreement to Assign Loan Documents requires the escrow funds from the sale of real property by Coultrap be applied to the loan. Reply Memorandum in Support of Motion for Summary Judgment pp. 9-10. The Court agrees with IIB.

In his affidavit, Coultrap attests as follows:

On December 29, 2009, I entered into a certain Agreement to Assign Loan Documents with IIB As a condition of the agreement, I agreed with IIB that its claim against me for the line of credit on the guarantee would be secured by a parcel of real estate that I owned. . . . When I was finally able to sell the parcel of real estate, the sale price was sufficient to discharge my obligation to IIB for the loan that amount that had been used to pay of NIL loan number 2290646. After paying off that loan, the net proceeds of approximately \$15,000 were claimed by IIB on the line of credit obligation. As I have intended to litigate IIB’s claim on the line of credit, the net sale proceeds are in escrow pending the outcome of this case.

Affidavit of Keith Coultrap in Opposition to Plaintiff’s Motion for Summary Judgment, pp.

5-6 ¶ 8. However, the Agreement to Assign Loan Documents provides in pertinent part:

. . . Assignee hereby acknowledges that the Loan No. #2290553 (“**Line of Credit**”) and the New Loan are cross-collateralized and that all Real Properties and Collateral which secure the New Loan or the Line of Credit hereby secures the payment and performance of the Now Loan and the Line of Credit. Assignee further acknowledge and reaffirm all covenants, representations, and warranties made by him in the Assigned Loan Document and the loan documents that relate to the Line of Credit, all of which survive execution of this Agreement.

Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, Exhibit G (emphasis in original). This is enough to shift the burden to Coultrap to provide admissible evidence which disputes the escrow funds should be applied to Loan No. 2290553. Coultrap has failed to do so. As such, the Court finds in favor of IIB on this issue.

E. Attorney's Fees Under the Agreement to Assign Loan Documents

Coultrap disputes that he is liable for attorney fees and costs in the amount of \$5,436.70, which were alleged incurred by IIB under the terms of the Agreement to Assign Loan Documents and Deed of Trust. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 13.

The Agreement to Assign Loan Documents specifically contains a provision, which provides: "Assignee shall pay all costs and expenses of Assignee incurred in connection with the New Loan, including, without limitation, credit report fees, appraisal review fees, title insurance charges, escrow and recording fees, document preparation charges, and charges of outside legal counsel." Affidavit of Lynn Taylor in Support of Motion for Summary Judgment, Exhibit G. Moreover the Deed of Trust provides:

Attorneys' fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its right shall become part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure, reports), surveyors' reports, and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor will also pay any court costs, in addition to all other sums provided by law.

Id., Exhibit I. Attached to the Affidavit of Lynn Taylor in Support of Motion for Summary Judgment as Exhibit K is an itemization of fees and costs incurred by IIB under the December 29, 2009 Promissory Note, which has a total of \$5,436.70 for expenses incurred. *Id.*, Exhibit K.

The documents executed by the parties clearly provides for attorney fees and costs that were incurred under the terms of the Agreement to Assign Loan Documents and Deed of Trust. Coultrap has failed to present the Court with admissible evidence to the contrary. As such, the Court awards IIB \$5,436.70 from the escrow funds.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED IIB's Motion to Strike the Supplemental Affidavit of Robert Covington in Opposition to Plaintiff's Motion for Summary Judgment

IT IS FURTHER ORDERED IIB's Motion for Summary Judgment is GRANTED in all respects on all claims against Coultrap.

IT IS FURTHER ORDERED IIB is the prevailing party in this litigation and has in fact prevailed on all claims against Coultrap.

Entered this 9th day of May, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Sheila R. Schwager	208-954-5261	Robert E. Covington	208-762-4546

Jeanne Clausen, Deputy Clerk