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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

In Re)
)
KAVIR DEVELOPMENT, LLC)
)
)
Debtor.)
)
)
)
CAVIR DEVELOPMENT, INC.; MAX)
MAZOOK,)
)
Plaintiffs,)
)
v.)
)
JAPEH YOUSSEFI, et al.,)
)
Defendants.)
)
)
)
)
)

Chapter 11 Proceedings

Case No. 08-BK-02978-PHX-CGC

Adv. No. 08-00370-CGC

**UNDER ADVISEMENT
DECISION RE TRIAL on AMENDED
NOTE, GUARANTY, AND DEED OF
TRUST**

I. Introduction

Max Mozoon and Japeh Youssefi are former business partners who at one time were friends. Almost ten years ago, they formed the Debtor, Kavir Development, LLC, to purchase land in Gilbert, Arizona with the intention of developing a commercial project. Like many recent Arizona real estate investments, the project suffered financial difficulties that eventually led to this bankruptcy proceeding.

Mozoon claims that the Debtor, owned by Youssefi, owes him almost \$1 million on an Amended Note that Youssefi and his wife guaranteed. Youssefi counters that he and/or Kavir has paid Mozoon and Cavar Development, Inc., an entity owned by Mozoon, more than what they are owed and have therefore satisfied the debt.

1 **II. Background & Facts**

2 *A. Construction*

3 Mozoon is a contractor who has operated through various companies over the years.
4 Youssefi is a reseller of custom software. The two met when Mozoon was the general
5 contractor for the construction of Youssefi's software company's headquarters. The construction
6 of the headquarters was Youssefi's first construction experience. Apparently, the experience
7 was successful for both as they did further business together.

8 In 2000, Mozoon, Youssefi, and Kevin Moshir, Youssefi's cousin, formed Kavir
9 Development, LLC ("Kavir"). Mozoon owned 40%; Youssefi owned 40%; and Moshir owned
10 20%. Kavir's purpose was to purchase and develop land at Baseline and Monterey in Gilbert,
11 Arizona ("Property") - the eventual site of the Gilbert Corporate Center ("Project"). Mozoon
12 sold his interest in Kavir to Youssefi in October 2002 for \$500,000. Youssefi financed the buy
13 out via a promissory note in favor of Mozoon for the entire amount ("October 2002 Note"). At
14 the end of 2004 or the beginning of 2005, Moshir also sold his interest in Kavir to Youssefi.

15 Construction of the Project began in summer 2005. Kavir,¹ now wholly owned by
16 Youssefi, selected Mozoon's company, Cavar Development, Inc. ("Cavar"), as its general
17 contractor. Stearns Bank of Arizona, N.A. ("Stearns") provided the construction financing.

18 By September 2006, the Project faced financial trouble and needed additional funding.
19 Mozoon testified that he personally lent \$500,000 to Kavir which, when added to the \$350,000
20 remaining due under the October 2002 Note, brought the total amount due from Kavir to
21 Mozoon to \$850,000. Mozoon testified that he funded the loan through the sale of land by one
22 of his other companies.

23 Youssefi disagrees with the source of funding for the loan. Relying on the January 7,
24 2009 deposition of Mozoon, Youssefi contends that Cavar lent Kavir the money, not Mozoon. In
25 the deposition when asked who provided the \$500,000 to Kavir, Mozoon answered "Cavar."

26 _____
27 ¹ The Kavir Desert, approximately 240 miles wide, is the "great salt desert of central Iran." Encyclopedia Britannica,
28 *Kavir Desert* <<http://www.britannica.com/EBchecked/topic/313548/Kavir-Desert>> (accessed September 22, 2009) . In
an effort at clarity during the trial, all parties referred to Kavir as "K"-vir (or "Kavir with a 'K'") and Cavar as "C"-vir
(or "Cavar with a 'C'").

1 [Transcript p. 240 l. 16 - p. 441 l. 16]. Notwithstanding this discrepancy, the record supports a
2 finding that the funding came from Mozoon, given that the parties entered into a September 29,
3 2006 Promissory Note (“September 2006 Note”), September 29, 2006 Guaranty (“Guaranty”),
4 and October 2, 2006 Deed of Trust (“Deed of Trust”), all showing Mozoon as lender and Kavir
5 as borrower, with the Youseffi’s as guarantors, for the amount of \$850,000.

6 The Project was still in financial difficulty in January 2007. Around this time, the parties
7 executed Change Order #9. Mozoon testified that Youssefi asked him to add the amount due
8 under Change Order #9 to the September 2006 Note to avoid penalties on the Stearns Loan.
9 Youssefi testified that Change Order #9 was first presented in October 2006 as the last change
10 order after which all construction would be completed. Youssefi claims that Mozoon presented
11 a new Change Order #9 in January 2007 which had many more changes than the October change
12 order. Youssefi testified that he signed Change Order #9 on the condition of Cavir’s completing
13 the work by February 15, 2007. In any event, both parties agree that after negotiations, Kavir
14 and Mozoon entered into an amended and restated promissory note in the amount of
15 \$1,393,838.59 (“Amended Note”).

16 Soon thereafter, Mozoon’s and Youssefi’s relationship deteriorated quickly. Youssefi
17 claims that because Cavir never completed the Project, Kavir was forced to hire another
18 contractor to complete the Project at a cost of \$200,000. Cavir claims that it was never paid for
19 work done under Change Order #9 and Change Order # 12 and filed a mechanic’s lien against
20 the Property.

21 *B. Trial Proceedings*

22 Due to its continuing financial difficulties, Kavir could not repay its loan to Stearns and
23 filed bankruptcy on March 21, 2008. On May 28, 2008 Cavir and Mozoon filed this adversary
24 against Kavir, the Youssefis, Stearns, Olympic Communications, Inc. and others. The Court
25 scheduled a trial on the matter for March 16, 2009 to decide whether Cavir’s mechanic’s lien is
26 superior to Stearns’ lien on the Property and other related issues.

27 On the morning of the trial, the parties asked to delay the trial to continue settlement
28 negotiations, but after two hours of negotiations the trial commenced because the parties could

1 not reach a settlement. After the lunch break, the parties asked the Court to suspend the trial to
2 continue settlement negotiations. Later in the afternoon, Stearns, Olympic, Cavar and Mozoon
3 asked the Court to postpone the trial to continue settlement talks which were nearing a resolution
4 for those parties. Kavar and Youssefi, who were not part of the proposed settlement, asked the
5 Court to proceed with the trial. In an effort to accommodate all parties, the Court ordered Kavar,
6 Youssefi, Cavar and Mozoon to continue settlement negotiations in good faith until 5:00 p.m.
7 The next day Cavar, Mozoon, Olympic, and Stearns reached a settlement (“Settlement”), but
8 Cavar, Mozoon, Kavar and Youssefi did not. As part of the Settlement, Stearns agreed to pay
9 Cavar \$615,000 to release its arguably senior mechanic’s lien on the Property.

10 After the Settlement, the only remaining issues before the Court are: 1) the amount due
11 under the Amended Note; 2) whether the Amended Note is guaranteed by the Youssefis; and 3)
12 whether Mozoon holds a valid third deed of trust on the Property.² The Court held a trial on the
13 remaining issues on April 20, 2009. After the completion of post-trial memoranda, the Court
14 took the matter under advisement.

15 *C. Key Documents*

16 There are several key documents in this matter, the essential points of which may be
17 summarized in the following way.

18 October 2002 Note [Ex. 4.]

19 Effective Date: October 1, 2002
20 Amount: \$500,000
21 Maker: Youssefi
22 Payee: Mozoon
23 Due Date: \$100,000 - 6 months from Effective Date
\$200,000 - 18 months from Effective Date
Remaining principal and interest - 24 months from
Effective Date
24 Governing Law: Arizona

25 AIA Contract [Ex. 15] (“Contract”)

26 Title: AIA Document A101 - 1997 Standard Form of Agreement
Between Owner and Contractor
27 Date: July 1, 2005

28 ² Prior to the trial both sides contended that they were entitled to prevail because the other side’s positions were not properly raised in the Joint Pretrial Statement. The Court denied the motions and will determine the matter on the merits.

1 Owner: Kavir
2 Contractor: Cavar
3 Key Terms: *Cover Page* - "AIA Document A201 - 1997, General
4 Conditions of the Contract for Construction, is adopted in
5 this document by reference."
6 *AIA Document*³
7 §4.3.2 - Time Limit on Claims - Claim must be
8 made in writing within 21 days of occurrence.
9 §7.2.1 - Change order is defined as written
10 agreement that states: 1) a change in the Work; 2) the
11 amount of adjustment, if any, in the Contract Sum; and 3)
12 the extent of the adjustment, if any, in the Contract Time.
13 §9.1.1 - Contract Sum - defined as "[t]he Contract
14 Sum is stated in the Agreement and, including authorized
15 adjustments, is the total amount payable by the Owner to
16 the Contractor for performance of the Work under the
17 Contract Documents."
18 §14.2.4 - Termination for Cause - "If the unpaid
19 balance of the Contract Sum exceeds costs of work, including
20 compensation for the Architect's services and expenses made
21 necessary thereby, and other damages incurred by the Owner and
22 not expressly waived, such excess shall be paid to the Contractor.
23 If such costs and damages exceed the unpaid balance, the
24 Contractor shall pay the difference to the Owner. The amount to be
25 paid to the Contractor or Owner, as the case may be, shall be
26 certified by the Architect, upon application, and this obligation for
27 payment shall survive termination of the Contract."

15 Amendment One to AIA Contract ("Amendment One")

16 Dated: July 2, 2005
17 Signed by: Youssefi on behalf of Kavir.
18 Mozoon, on behalf of Carvir.
19 Key language: "[T]he Contract Sum Owner shall pay the Contractor for
20 performance of the Contract shall be Four Million Six
21 Hundred Thirteen Thousand Eight Hundred Seven-Eight
22 [sic] and Five Cents (\$4,613,878.05)."
23 "The parties acknowledge that the Contractor's Profit and
24 Overhead for the Work shall be One Hundred and Sixty-
25 Nine Thousand Four Hundred and Three Dollars and Sixty-
26 Five Cents (\$169,403.56)."
27 "Contractor's Profit and Overhead of any future phases
28 (Phases 2, 3, or 4) shall not exceed four percent (4%) of the
construction costs of any future phases (Phases 2, 3 or 4)
not included in the Work."

24 September 2006 Note [Ex. 55]

25 Effective Date: September 29, 2006
26 Amount: \$850,000

³ The front page of the Contract states, "AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified" ("General Conditions").

1 Payor: Kavir
2 Payee: Mozoon
3 Date of Payment: Tied to the completion of the Gilbert Corporate Center or to
the amount of the Stearns Loan.
4 Signed by: Japeh Youssefi and Amy Youssefi on behalf of Kavir.

4 Guaranty [Ex. 56]

5 Dated: September 29, 2006
6 Guarantors: Japeh Youssefi
Amy Youssefi
7 Lender: Max Mozoon
8 Key Terms: *Recital A* - Made in connection with September 2006 Note.
Recital B - "As a condition to making the Loan, the Lender
9 has required the Guarantor execute and deliver this
10 Guaranty."
Section 2(a)(ii) - "The liability of the Guarantor under this
11 Guaranty shall be absolute and unconditional irrespective
of ... the advancement of additional funds by the Lender in
its discretion.
Section 12 - "This Guaranty is a continuing guaranty."
12 Governing Law: Arizona
13 Signed by: Japeh Youssefi
Amy Youssefi

13 Deed of Trust [Ex. 57]

14 Dated: October 2, 2006
15 Trustor: Kavir
16 Beneficiary: Mozoon
Trustee: Lawyer's Title Insurance, Corporation ("Lawyer's Title")
17 Obligation Secured: September 2006 Note
Property: The Property
18 Governing Law: Arizona
Signed by: Japeh Youssefi, as managing member of Kavir
Amy Youssefi, as managing member of Kavir

19 Change Order #9 [Ex. 67]

20 Dated: January 12, 2007
21 Printed Contract Sum: \$339,549.88
22 Handwritten Notes: Deductions of \$36,000 and \$26,820 for line items 30 and
12.
Deductions results in a new total \$336,729.88.
23 Notes that work is to be completed by 2/15/07.
Signed by Japeh Youssefi.
24 Handwritten Notes
25 on Following Page: Shows a total of \$178,000 added to \$336,739 totaling
\$514,4729. \$514,729 then added to \$850,000 for a total of
26 \$1,364,729

27 Amended Note [Ex. 71]

28 Dated: January 31, 2007

1 Amount: \$1,393,838.59
2 Payor: Kavir
3 Payee: Mozoon
4 Key Contract Term: Releases Mozoon from any liability in connection with the
5 Contract.

6 Pay Application No. 12 - Final [Ex. 75]

7 Dated: Revised April 6, 2007
8 Total earned to Date: \$5,252,424.65
9 Payment Due: \$268,713.51
10 Total Changes
11 approved by Owner: \$638,546.60

12 **III. Position of the Parties**

13 *A. Mozoon*

14 Mozoon asks the Court to determine three issues: 1) the amount owed under the
15 Amended Note; 2) the amount the Youssefis are responsible for under the Guaranty; and 3)
16 Mozoon's lien priority position based on the Deed of Trust.

17 Mozoon claims that he personally loaned \$500,000 to Kavir in September 2006. Mozoon
18 testified that Four Valleys, LLC (of which Mozoon is part owner) sold land in the summer 2006
19 for \$2,000,000. Four Valleys, according to Mozoon, disbursed \$850,000 to Mozoon. In turn,
20 Mozoon explained, Mozoon lent a large portion of the disbursement to Mozoon Construction
21 Inc. When Kavir asked for funds in September 2006, Mozoon testified that he directed Mozoon
22 Construction to wire the funds to Kavir, as evidenced by Trial Ex. 54. Mozoon claims that in
23 return for the funds he received the Deed of Trust and the Guaranty from the Youssefis.⁴

24 Mozoon testified that the September 2006 Note became due in January 2007, but Kavir
25 did not have the funds to pay. Instead, according to Mozoon, Youssefi asked Mozoon to add the
26 amount due to Cavir under Change Order #9 to the September 2006 Note. Mozoon agreed, but
27 insisted upon a release for himself personally for any damages under the Contract. Further,
28 Mozoon argues that the Youssefis are still liable on the Guaranty because Section 2(a)(ii) the
Guaranty operates as a continuing guaranty.

⁴By directing Mozoon Construction, Inc. to wire the funds, Mozoon was in effect receiving payment on its debt to him in that amount and then advancing the funds to Yousseffi.

1 Mozoon argues that no payments have been made on the Amended Note. Mozoon
2 testified that he only made verbal demands for payment until he filed suit in February 2008.
3 During his testimony Mozoon acknowledges payments of \$30,000, \$30,000, \$40,000, and
4 \$85,000 to Cavir after January 31, 2007, with at least two of the checks made out to
5 Cavir/Mozoon. However, all the payments, according to Mozoon, were credited towards the
6 Contract and deposited into Cavir's account.

7 Pointing to the face of the Contract, Mozoon claims that the Contract is a stipulated sum
8 contract, thereby disagreeing with Youssefi's contention that the Contract is a cost plus contract.
9 Mozoon contends that even if it was a cost plus contract, the total costs were approximately \$5.6
10 million of which Cavir was only paid \$5.2 million. Mozoon concedes that he did not provide all
11 checks documenting costs to Youssefi before March 6, 2009 because his records are
12 disorganized due to his former office manager leaving. Mozoon further contends that he found
13 additional records and notified all parties after Youssefi reviewed the checks.

14 Mozoon is not seeking payment on the Amended Note for amounts due under Change
15 Order #9. Therefore, according to Mozoon, Youssefi's contention that payment of Change
16 Order #9 were contingent on providing costs are irrelevant. Mozoon asks the Court to find
17 Youssefi liable for \$994,288.71 plus interest due under the Amended Note.

18 *B. Youssefi*

19 Youssefi argues that the Amended Note and Contract constitute a single course of
20 dealing; therefore, the amounts due under the two of them are a single obligation. Combining
21 payments under the Contract (\$4,736,047), payments made by Youssefi and Moshir after April
22 6, 2007 (\$301,000), and the Settlement (\$615,000) Youssefi claims total payments to Mozoon
23 and Cavir of \$5,652,047. Comparatively, Youssefi contends that there is only \$4,363,293.24 due
24 to Mozoon and Cavir based on the actual costs under the Contract (\$3,200,000), the Profit and
25 Overhead per the Contract (\$169,403.65), and the amount due under the Amended Note
26 (omitting \$400,000 for Change Order # 9) (\$993,889.59). Thus, according to Youssefi, Mozoon
27 has been overpaid by \$1,288,753.76.

28

1 Because the Contract states the total contract price is \$4,613,878.05 inclusive of profit
2 and overhead and Amendment One caps profit at 4% to Cavar, Youssefi claims that the Contract
3 is a cost plus contract. Further, according to Youssefi, the numerous change orders⁵ show that
4 every time there was an increase in costs Mozoon passed the costs on to Youssefi - an action
5 inconsistent with a fixed price contract. Ultimately, according to Youssefi, the costs are
6 unknown because they were never produced during discovery; however, Youssefi's review of
7 the checks reveal total costs of \$3.2 million. Youssefi testified that despite continued requests
8 (although none in writing) for cost receipts, Mozoon never provided them. As a final effort to
9 obtain the receipts Youssefi claims that he conditioned payment of Change Order #9 on
10 receiving receipts.

11 Pointing to Mozoon's deposition testimony in which Mozoon states that Cavar provided
12 the money, Youssefi argues that funds for the September 2006 Note came from Cavar not
13 Mozoon. Youssefi further argues that the release in the Amended Note released Mozoon
14 personally on the Contract which was entered into by Cavar. This, urges Youssefi, is evidence
15 that parties treated the Contract and the Amended Note as a single transaction.

16 **IV. Analysis**

17 *A. Validity of the Amended Note*

18 A valid note must be signed and delivered. 10 C.J.S. Bills and Notes §§36 and 47.
19 Under A.R.S. § 47-3401(a), a person is liable on a note if an agent signed the note on the
20 person's behalf. The signature is presumed valid, if not specifically denied. A.R.S. § 47-
21 3308(A). Further, "[w]here an instrument is no longer in the possession of the maker, it is
22 presumed to have been effectively delivered until the contrary is proved." 10 C.J.S. Bills and
23 Notes §316.

24 Here, Youssefi signed the Amended Note on behalf of Kavir and the validity of the
25 signature has not been disputed. Further, Mozoon is in possession of the Amended Note.
26 Youssefi does not claim that the Amended Note was not delivered. Mozoon has made a prima
27 facie case regarding the validity of the Amended Note.

28 ⁵ Exs. 35, 37, 40, 41, 43, 47, 50, 53, 59, 67, 68, 104, and 122.

1 However, payment discharges the obligation on the Amended Note. A.R.S. § 47-3602.
2 Youssefi contends that the Contract and the Amended Note are a unitary debt, therefore payment
3 on one is a payment on the other. Further, according to Youssefi, the Settlement is essentially a
4 payment on the Contract; as such it must be applied to the Contract and Amended Note. Because
5 payments on the Contract exceed the amount due on the Contract, argues Youssefi, the excess
6 payments should be applied to the amount due on the Amended Note. If true, Youssefi's claims
7 that Kavir, Youssefi and Moshir paid the Amended Note in full.

8 *B. Settlement*

9 Youssefi contends that the Settlement should be credited against the Amended Note and
10 Contract citing to *Evanow v. M/V Neptune*, 163 F.3d 1108 (9th Cir. 1998) and *Western*
11 *Technologies, Inc., an Arizona Corporation v. All-American Golf Center, Inc.*, 139 P.3d 858
12 (Nev. 2006). Under *Evanow*:

13 contract damages are offset *pro tanto* by the amount of the settlement with a co-
14 obligor. See, e.g., 2 Samuel Williston & Walter H.E. Jaeger, Williston on
15 Contracts § 341 (3d ed.1959); Restatement (Second) of Contracts § 294(3) & cmt.
 f(1979). This is simply a manifestation of the rule that a contracting party should
 not receive more than was bargained for.

16 *Id.* at 1119. Further under *Western Technologies*:

17 an obligor may offset an award of total damages by the amount of the obligee's
18 settlement with a co-obligor in contract actions, to the extent that the amounts
19 reflect the same damages. This will ensure that the obligee is restored to the
 position he or she would have been in had the contract been performed and
 prevent that party from receiving a double recovery.

20 *Id.* at 861. Under these cases, Youssefi must establish that Kavir and Stearns are co-obligors on
21 the same debt in order to offset the amount due on the Amended Note.

22 In the Settlement, Stearns agreed to pay Cavir \$615,000 to settle Cavir's mechanic's lien.
23 Cavir recorded the lien against Stearns based on the non-payment of the Contract by Kavir.
24 However this does not establish that Stearns was a co-obligor on the Contract. First, Stearns is
25 not a party to the Contract or the Amended Note. Absent the mechanic's lien, it has no
26 obligation to pay Cavir. Further, the existence of the Contract was only one of many legal
27 hurdles Cavir needed to clear to establish a valid mechanic's lien. Prior to the trial there were
28 open issues whether the lien was recorded properly and whether Cavir's lien was subordinate to

1 Stearn's lien. In short, Stearns' payment was not to settle its obligation to Cavir under the
2 Contract, but rather to clear the mechanics lien that encumbered its collateral. Accordingly,
3 Stearns is not a co-obligor on the Amended Note or the Contract.

4 Because Stearns is not a co-obligor on the Contract or Amended Note, Youssefi's
5 Settlement offset claim fails.

6 *C. Obligation on Amended Note and Contract*

7 Youssefi's unitary transaction theory claim rests on two prongs - 1) that the Contract is
8 "cost plus" and 2) the Contract and the Amended Note are a unitary debt. Both prongs must
9 exist for Youssefi to prevail. Because both prongs fail, the Court finds in favor of Mozoon.

10 i. Cost Plus Contract?

11 The Contract is not a cost plus contract. If a contract is "facially unambiguous, its
12 language should be relied upon as providing the best objective manifestation of the parties'
13 intent." William Meade Fletcher, 6 Fletcher Cyc. Corp. § 2585.10. Further, under *In re Estate of*
14 *Lamparella*, 210 Ariz. 246, 250 (Ariz.App.Div. 1, 2005):

15 Contracts are to be read in light of the parties' intentions as reflected by their
16 language and in view of all circumstances; if the intention of the parties is clear
17 from such a reading, there is no ambiguity. A contract is not ambiguous just
18 because the parties to it ... disagree about its meaning. Language in a contract is
19 ambiguous only when it can reasonably be construed to have more than one
20 meaning.

21 Here, the top of the first page of the Contract states, "the basis of payment is a STIPULATED
22 SUM" (capitalization in original). This is a unambiguous and concise statement that the contract
23 is a stipulated sum, and thereby, not a cost plus contract.

24 Youssefi bases his cost plus theory on the language in Amendment One and the myriad
25 of change orders. In Amendment One "Profit and Overhead" is \$169,403.65. However Profit
26 and Overhead is also listed as a line item of the various costs in Exhibit "A" to the Contract.
27 Despite Youssefi's testimony to the contrary, the Court is unconvinced that this language was
28 meant as a profits cap on a cost plus contract. Instead, it is merely replaces the line item for
Profit and Overhead on Exhibit "A" of the Contract. Further buttressing this conclusion is
language later in Amendment One which states, "Profit and Overhead of any future phases
(Phases 2, 3 or 4 shall not exceed four percent (4%) of the construction costs." This is a clear

1 statement that *future phases* would be on a cost plus basis. If the parties intended the Contract
2 for the initial phase to be a cost plus contract similarly clear language would have been used.

3 Youssefi's argument regarding change orders is equally unpersuasive. Section 7.2.1 of
4 the General Conditions provides a process for submitting and agreeing to change orders. The
5 fact that work changed during the construction process resulting in an increase in the Contract
6 Sum does not change the underlying nature of the Contract. Particularly persuasive to the Court
7 is the fact that Contract and General Provisions are both "boilerplate" documents. This indicates
8 that there is nothing extraordinary about change orders in a stipulated sum contract.⁶ Further, if
9 the parties intended to enter into a cost plus contract there are "boilerplate" cost plus contracts
10 available.⁷

11 The Court is unpersuaded by Youssefi's testimony that he continually asked for costs but
12 they were not provided by Mozoon or Cavar. Although Youssefi has little construction
13 experience, he is an experienced businessman. If Youssefi truly thought that this was a cost plus
14 contract, then he, on behalf of Kavar, would not have approved payments to Cavar without
15 corresponding invoices.

16 The Court concludes that the Contract was not a cost plus contract. Youssefi's
17 contention that Cavar has been overpaid on the Contract therefore fails.

18 ii. Unity of Transaction

19 Youssefi asks the Court to rule on the equities of the case claiming that the Amended
20 Note and Contract constitute a unitary transaction and debt; as such, the Court should find that
21 the Amended Note has been paid based on overpayments made on the Contract. Here, the
22 equities run in favor of Mozoon.

23
24 ⁶ According to American Institute of Architects, "AIA Document A101-2007 is a standard form of agreement between
25 owner and contractor for use where the basis of payment is a stipulated sum (fixed price)." The American Institute of
26 Architects, *A-Series: Owner/Contractor Agreements* <<http://www.aia.org/contractdocs/AIAS076742>> (accessed
27 September 1, 2009).

28 ⁷ See for example AIA Contract A102-2007 ("This standard form of agreement between owner and contractor is
appropriate for use on large projects requiring a guaranteed maximum price, when the basis of payment to the contractor
is the cost of the work plus a fee") and AIA Contract A103-2007 ("AIA Document A103-2007 is appropriate for use
on large projects when the basis of payment to the contractor is the cost of the work plus a fee, and the cost is not fully
known at the commencement of construction.") The American Institute of Architects, *A-Series: Owner/Contractor
Agreements* <<http://www.aia.org/contractdocs/AIAS076742>> (accessed September 1, 2009).

1 Youssefi claims that the parties treated the Amended Note and the Contract as a unitary
2 debt. Other than Youssefi's and Moshir's testimony there is no evidence to support this
3 contention. Youssefi makes much of Mozone's lack of records in this matter; implying that if
4 they were available, the records would show that Mozone and Cavar treated two transactions as
5 one. Assuming that the Court did reach this conclusion, which it does not, Youssefi still has not
6 provided the records memorializing his state of mind. Youssefi has easy access to his and
7 Kavar's records. Despite this availability, he provided no checks, receipts, invoices, accounting,
8 ledgers or any other records to indicate how Kavar treated its debts to Mozone or Cavar.

9 What the parties have provided to the Court is a paper trail of the loans. The October
10 2002 Note shows that Youssefi agreed to repay Mozone. The September 2006 Note shows
11 Kavar replaced Youssefi as the obligor. This change is not surprising when read in conjunction
12 with the Guaranty and Deed of Trust. Mozone allowed Youssefi to replace Kavar as the obligor
13 in exchange for the Guaranty and Deed of Trust. When more money was lent, Mozone and
14 Kavar simply amended the September 2006 Note. There is no evidence in these transactions that
15 the Contract and Amended Note represented a single debt.

16 Accordingly, the Court finds that the Amended Note and Contract did were not a unitary
17 transaction or a unitary debt.

18 *D. Guaranty*

19 A guaranty signed by both spouses binds the community property. A.R.S. § 25-
20 214(c)(2). A guaranty is valid if it supported by consideration. *Restatement (Third) of*
21 *Suretyship and Guaranty* 8 (1996). Here, the Guaranty is signed by Mr. and Ms. Youssefi.
22 Mozone agreed to lend \$500,000 to Kavar and roll the October 2002 Note into the September
23 2006 Note on the condition that the Youssefis guaranty Kavar's obligation on the September
24 2006 Note.⁸ The Guaranty is supported by consideration.

25 Youssefi argues that he and Ms. Youssefi are not liable on the Amended Note because

26 _____
27 ⁸ This is the exact scenario contemplated in Illustration 1 to *Restatement (Third) of Suretyship and Guaranty* § 8:
28 C agrees to lend D \$1,000 if S will guarantee D's obligation to C. Following S's execution of a written
guaranty, C makes the loan. S's guaranty is supported by consideration even though S receives no
direct benefit from the loan.

1 they did not contemporaneously sign a new guaranty. Further, they argue that Ms. Youssefi is
2 not liable on the Guaranty because she did not sign the Amended Note. They are incorrect on
3 both premises.

4 The Guaranty contains two key provisions: 1) under Section 2(a)(ii), the Youssefis
5 agreed that their liability continued if additional funds were advanced by Mozoon; and 2)
6 Section 12 - which states “[t]his Guaranty is a continuing guaranty.” “A continuing guaranty of
7 debts is, in effect, an offer accepted serially by each extension of credit. ‘Each extension of
8 credit creates a new suretyship contract because a revocable continuing guarantee is merely a
9 continuing offer which the creditor accepts each time he extends credit to the principal.’”
10 *Georgia Pacific Corp., Williams Furniture Div. v. Levitz*, 716 P.2d 1057, 1059 (Ariz.App. 1986).
11 (citing *Sumitomo Bank v. Iwasaki*, 70 Cal.2d 81, 92-93, 73 Cal.Rptr. 564, 572, 447 P.2d 956,
12 964 (1968)). Here, the Youssefis entered into a continuing guaranty. The Amended Note, as the
13 title suggests, is not a new note, but instead is an extension of more credit. There was no need
14 for Mr. or Ms. Youssefi to enter into a new guaranty or for Mrs. Youssefi to sign the Amended
15 Note. The Youssefis are liable under the Guaranty.

16 *E. Deed of Trust*

17 Following the Settlement, Stearns foreclosed on its first lien, thereby wiping out
18 Mozoon’s junior position in the Deed of Trust. This issue is now moot.

19 **V. Conclusion**

20 Based on the foregoing, the Court finds and concludes that the Yousseffis are liable under
21 the guaranty to Mozoon for the unpaid amount under the Restated Note, less the sum
22 representing Change Order #9, or \$994,288.71, plus accrued interest.

23 The Court will lodge today a form of judgment to which any party may object within ten
24 days of lodging. If no objection is filed, the judgment will be entered as lodged. If an objection
25 is filed, the Court will conduct such further proceedings as may be appropriate.

1 DATED: October 26, 2009

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Charles G. Case II
UNITED STATES BANKRUPTCY JUDGE

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4 **COPY** of the foregoing mailed by the BNC and/or
sent by auto-generated mail to:

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