In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
BARRY MAX BURRELL	)	
SANDRA LACY BURRELL	)	Number 90-4136
(Chapter 7 Case 90-40838)	)	
	)	
Debtors	)	
	)	
	)	
L. RICHARD LEE, E. B. MILES	)	
W. K. POLK, JAMES M. GODLEY	)	
and THE PEMBROKE STATE BANK	)	
	)	
Plaintiffs	)	
	)	
	)	
	)	
v.	)	
	)	
BARRY MAX BURRELL	)	
and CHARLES W. SMITH	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

The above-styled matter having come on before the Court for a hearing on the Plaintiffs' Motion to Enforce a Settlement Agreement, and the Court having heard all of the evidence submitted, and considered the briefs of counsel, the Court finds as follows:

FINDINGS OF FACT

Plaintiffs filed this matter seeking to impose an equitable trust on certain property titled in the name of Charles W. Smith, which they contend was purchased with proceeds of loans which Plaintiffs made to the Debtor in this case. Charles W. Smith denies that this is true, but has admitted that the Debtor had some interest in the property at one time. The Court finds that there is a bona fide controversy between Plaintiffs and Defendants concerning the issues raised in Plaintiffs' complaint, and though the Court has not made any findings, nor does the Court express any opinion that Plaintiffs have proven their allegations in any of the proceedings, at the time this matter came before the Court for hearing on the Motion to Enforce a Settlement Agreement, Plaintiffs had a viable cause of action pending in the Court.

In that action Plaintiffs contended that Burrell had defrauded them and used the funds to construct improvements to land owned by Smith. As a result relief was sought from Burrell for fraud and against Smith to force reconveyance to Burrell of the land improved with those funds for administration for the benefit of Burrell's creditors.

Burrell agreed to settle the action by executing a note in the principal amount of $75,000.00 in favor of Pembroke State Bank. Contemporaneously with Burrell's agreement the Bank insisted that the settlement must include co-defendant Charles W. Smith's guaranty of Burrell's note. On November 5, 1990, Smith agreed in a conversation

with the Bank's counsel, initiated by Smith when he was unable to reach his attorney, to guarantee the note. (Wells Affidavit dated July 26, 1991). Wells drafted all necessary papers to accomplish this. On November 6, 1990, Burrell executed the note and delivered it to the Bank's counsel. Smith's counsel later told Bank's counsel that Smith had agreed to the guaranty. However, Smith ultimately refused to execute the guaranty. Nevertheless Smith did subsequently admit the agreement and stated that he reneged after his wife objected (Wells Affidavit; Affidavit of L. Richard Lee dated July 26, 1991; Affidavit of E.B. Miles dated July 26, 1991).

The Guaranty Agreement and the Note contain normal and customary terms found in similar documents except that the Guaranty Agreement contains, at Smith's request, a provision for default that is more favorable to the guarantor than many guaranties contain.

CONCLUSIONS OF LAW

Defendant Smith raises the statute of frauds as a defense to this Motion asserting that O.C.G.A. Section 13-5-30(2) (4) or (5) make the agreement enforceable. I disagree, Subsection (2) is inapplicable inasmuch as Smith was a co-defendant whose title to real estate was at risk. In agreeing to guaranty the note he received direct consideration in the dismissal with prejudice of that claim. Subsection (4) is likewise inapplicable because the agreement to execute a guaranty involved land only in that it removed a cloud on Smith's title. His agreement had nothing to do with the sale, mortgaging or lease of land. Finally,

Subsection (5) does not apply. While Burrell's note would not be repaid for twelve years, the agreement Plaintiffs seek to enforce is the agreement to execute a guaranty. The execution of that document was to be performed within a few days at most. The length of time that Smith's exposure under the guaranty would have lasted is irrelevant.

Having concluded that the statute of frauds does not control, I find that Plaintiffs are entitled to prevail. It is axiomatic that oral contracts are enforceable in Georgia. Venable v. Block, 138 Ga. App. 215, 225 S.E.2d 755 (1976). An agreement to settle a lawsuit is no different. It is clear that Smith agreed to settle, on the terms alleged by Plaintiffs, and changed his mind, apparently under family pressure. He subsequently admitted his prior agreement in the presence of several witnesses. On these facts I find that the settlement is binding.

Georgia Courts have enforced oral agreements to settle law suits where the terms of the agreement could be determined with fair certainty. *See* Brumbelow v. Northern Propane Gas Company, 251 Ga. 674 (1983). The enforceability of such oral agreements, reduced to writing by one of the attorneys in anticipation of the completion of the settlement, is recognized as a factual question in Wells v. Mullis, 255 Ga. 426 (1986).

It is true that the Courts of Georgia have expressed a preference for written agreements of settlement, but the preference and desirability of the writing is not to determine whether or not settlement was reached, but to avoid the problem of determination

of the terms of the agreement when the parties or their attorneys dispute the terms of their agreements. In the instant case, there is no real disagreement between the parties as to the broad terms of the proposed agreement, but rather the existence of the agreement, based on Mr. Smith's denial. However, I have found by a preponderance of the evidence that the agreement was made and that the documents prepared by counsel for Plaintiff in anticipation of obtaining signatures of all parties fairly reflect the settlement which was negotiated.

However, since there is no evidence that all the specific terms of the guaranty were expressly consented to and in recognition of the holding of Pelletier v. Zweifel, 921 F.2d 1465, 1503 (11th Cir. 1991), I will not order that the guaranty agreement tendered by Plaintiffs be executed. I do, however, rule that Smith obligated himself to pay Plaintiffs up to $75,000.00 plus interest to the extent Burrell fails to pay in accordance with the terms of the note dated November 6, 1990.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that judgment be entered in favor of Plaintiffs and against the Defendant Charles W. Smith in the amount of $75,000.00 with interest after November 6, 1990, at the rate of twelve percent (12%) per annum, provided that Charles W. Smith or Barry Max Burrell may retire said debt by paying installments in the amount of $1,000.00 per month, beginning December 6, 1990, and continuing with a payment due on the 6th day

of each month thereafter until the final payment shall be due on November 6, 2002.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of February, 1992.