RECEIVED
DEC 09 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT

Robert S. Jones,	)	Civil Action No. 2011-CP-40-1980
Plaintiff,	)	
vs.	)	**ORDER GRANTING DEFENDANTS BUILDERS INVESTMENT GROUP, LLC AND BRIAN D. BOONE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**
Builders Investment Group, LLC, Brian D. Boone and Arden Homebuilders, LLC,	)	
Defendants.	)	

2013 MAY 15 AM 11:03
JEANETTE W. McBRIDE
C.C.P.
RICHLAND COUNTY
FILED

This matter came to be heard before me on April 11, 2013, upon motion of the Defendants Builders Investment Group, LLC and Brian D. Boone filed December 21, 2012, pursuant to Rule 50(b), SCRCP, for an order granting a judgment notwithstanding the verdict or, in the alternative, a new trial, following a jury trial which resulted in a verdict for the Plaintiff. Kathleen McDaniel of Callison Tighe & Robinson, LLC appeared on behalf of the Plaintiff Robert S. Jones, and Thornwell F. Sowell of Sowell Gray Stepp & Laffitte, LLC appeared on behalf of the Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone ("Boone"). Based upon arguments of counsel and the applicable laws of South Carolina, I find and conclude that Defendants BIG and Boone are entitled to judgment notwithstanding the verdict.

FACTS

This dispute arises out of the alleged failure to contribute to the debts of a failed limited liability company. Holt Family Homes, LLC was formed in 2005 to develop, build, and sell

residential homes. At its inception, Holt Family Homes had four initial Class A members: Robert S. Jones ("Jones"), Robert A. Keisler ("Keisler"), Carl Edward Buck ("Buck"), and Wetzel Ray Holt ("Holt"). These Class A members also served as the managers of Holt Family Homes. Holt Family Homes also had five Class B members including BIG. Boone had no ownership interest in Holt Family Homes.

On January 26, 2007, the managers of Holt Family Homes decided to obtain a loan from Southern First Bank (formerly known as Greenville First Bank, N.A.). The loan was for $300,500 and was signed for Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on the loan from Southern First Bank.

On April 25, 2007, the managers of Holt Family Homes decided to obtain a second loan from Southern First Bank. The loan was for $199,250 and was signed once again by Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on this loan. Neither BIG nor Boone was a Class A member or manager of Holt Family Homes at the time the loans from Southern First Bank were made.

In mid-2007, BIG and Boone agreed to make additional capital contributions and investments in Holt Family Homes. On July 31, 2007, the Holt Family Homes operating agreement was amended to reflect these investments. As part of the changes to the Operating Agreement, the name of the LLC was changed from Holt Family Homes to Arden Homebuilders, LLC ("Arden"). BIG contributed additional capital of $625,000 and Boone contributed $125,000. No other members contributed additional capital. In return, BIG and Boone were made Class A members and managers of Arden.

On September 25, 2007, Jones, Keisler, and Buck consolidated the two loans at Southern First Bank into one new loan in Arden's name ("Arden Loan"). Again, only Jones, Keisler, and Buck signed the note from Southern First Bank and only Jones, Keisler, and Buck signed personal guarantees on the loan.

On September 24, 2008, the Arden Loan was modified to remove Buck as a personal guarantor. Only Jones and Keisler signed the new note and only Jones and Keisler signed personal guarantees. Neither BIG nor Boone was ever asked to vote on the release of Buck as a personal guarantor on the Arden Loan, and neither BIG nor Boone ever personally guaranteed the Arden Loan from Southern First Bank.

On December 8, 2009, Jones took out a personal loan with Southern First Bank to satisfy the Arden Loan. Southern First Bank marked the Arden Loan as satisfied on the books and transferred the balance to the personal loan of Jones. Southern First Bank then wrote-off the personal loan of Jones. On November 8, 2012, Jones gave Southern First Bank a confession of judgment regarding his personal loan. Jones testified that he has not made any actual payments on his personal loan or the confession of judgment.

Nevertheless, Jones sought contribution from BIG and Boone for their alleged proportionate share of funds he claims to have paid, but were actually written-off. A jury trial was held before the undersigned beginning December 10, 2012. Defendants BIG and Boone properly moved for a directed verdict at the close of the evidence. On December 12, 2012, the jury returned a verdict in favor of the Plaintiff. On December 21, 2012, Defendants BIG and Boone filed a motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial based on the same grounds as the motion for a directed verdict.

LAW / ANALYSIS

Standard of Review

"A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCP. "In reviewing a motion for judgment notwithstanding the verdict, the trial court must view the evidence and its inferences in the light most favorable to the non-moving party." *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996) (citing *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)).

Analysis

Jones brought suit against BIG and Boone for breach of contract and breach of fiduciary duty.[1] The breach of contract claim is premised on the allegation that the Arden Homebuilders, LLC Operating Agreement ("Arden Operating Agreement") requires BIG and Boone to contribute to the Arden Loan from Southern First Bank. The Court finds that Jones has not paid more than his proportionate share of the Arden Loan as required by the Operating Agreement and thus is not entitled to contribution from BIG or Boone as a matter of law.

The alleged breach of the Arden Operating Agreement is in connection with Section 2.3, which states:

> **Guaranty of Loans to Company.** Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provisions of this Agreement or any provisions of the Guaranteed Loan documents, as between the Members, each Class A member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage").

[1] Plaintiff's cause of action for breach of fiduciary was dismissed by this Court's Form 4 Order filed April 26, 2012.

> The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. **Any Class A Member who <u>pays</u> more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.** Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

(emphasis added). Plaintiff and Defendants BIG and Boone are all Class A Members of Arden Homebuilders, LLC.

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "It is a question of law for the court whether the language of a contract is ambiguous." *Id.* (citing *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001)). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enters., Inc. v. S. Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

I find that the language in Section 2.3 of the Arden Operating Agreement regarding contribution is clear and unambiguous. A plain and unambiguous reading of Section 2.3 of the Arden Operating Agreement makes it clear that a member must actually pay more than his share to recover from the other members. Section 2.3 does not provide any other situation for recovery; it explicitly requires payment. Because Jones has not paid more than his proportionate share of the Arden Loan, he is not entitled to contribution as a matter of law.

It is undisputed from the evidence presented at trial that Jones signed a personal promissory note, also with Southern First Bank, which was used to satisfy the Arden Loan. It is also undisputed that Jones has not made any payments on this personal promissory note or on his confession of judgment to Southern First Bank. Because there are no factual disputes regarding payment, the only issue before this Court is whether a promissory note or confession of judgment constitutes payment under the Arden Operating Agreement.

Jones admitted in his testimony that he signed a personal promissory note which was used to satisfy the Arden Loan on the books of Southern First Bank. He also testified that he did not actually make any payments to Southern First Bank totaling more than his proportionate share. A promissory note is only a promise to pay, not payment.

The South Carolina Uniform Commercial Code provides that a promissory note is simply a promise to pay and does not mean a bank has received any sum of money or funds. S.C. Code Ann. § 36-9-102 (1976) ("'Promissory note' means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds."). By signing a personal promissory note, Jones simply incurred a liability on behalf of Arden. Jones has not made payment as required by the plain language of the Arden Operating Agreement, and has thus suffered no actual damages, and is not entitled to contribution.

South Carolina case law regarding contracts for indemnity supports the plain reading of the Arden Operating Agreement which requires a member to pay more than his proportionate share before he can recover from another member. Because Jones simply incurred a liability

related to the Arden Loan and did not make actual payment, he is not entitled to contribution from BIG or Boone.

Section 2.3 of the Arden Operating Agreement is a contract of indemnity under South Carolina law because it regulates the liability of one Class A member to another when one member incurs damage to a third party. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) ("South Carolina courts have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'").

South Carolina courts recognize two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *Piper v. Am. Fid. & Cas. Co. et al.*, 154 S.C. 106, 108 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred. *Id.* By contrast, in a contract for indemnity against loss, "liability does not attach until loss has been suffered, that is when the [indemnitee] has <u>paid</u> the damages." *Id.* (emphasis added).

Whether a contract for indemnity is one for liability or for loss "depends on the intention of the parties as shown by the phraseology of the agreement contained in the policy." *Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 82-83, 66 S.E.2d 461, 462 (1951). "In construing contracts of this character, the courts generally have held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the [indemnitee] until some loss or damage has been sustained by him, either by <u>payment</u> of the whole or some part of the claim." *Id.* (emphasis added).

Here, Section 2.3 of the Arden Operating Agreement is a contract for indemnity against loss because the Agreement specifically requires a member to "pay" more than his proportionate share. Jones has not paid more than his proportionate share of the Arden Loan. At most, Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note. As discussed above, a promissory note is merely a promise to pay. It is not payment. Accordingly, I find that Jones did not make payment on the Arden Loan as required by the Arden Operating Agreement, and he is not entitled to contribution from BIG or Boone as a matter of law.

This finding is supported by the case of *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). In *Kuznik*, the South Carolina Court of Appeals held that actual payment is not necessary for indemnification when a "partnership agreement allowed indemnity for a 'threat of loss.'" *Id.*, 342 S.C. at 607, 538 S.E.2d at 29. The court in *Kuznik* reasoned that because the partnership agreement in question contained the phrase "threat of loss," it allowed the plaintiff to recover even though he had not yet made payment. In this case, the Arden Operating Agreement has no such provision. The Arden Operating Agreement does not mention "liability" or "threat of loss." The Arden Operating agreement allows only for contribution in one situation: payment.

In the alternative, BIG and Boone are entitled to a judgment notwithstanding the verdict because the only reasonable inference that can be drawn from the evidence is that BIG and Boone were never required to guaranty the Arden Loan. Section 6.6(a) of the Operating Agreement specifically states:

> No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise **unless a Member guarantees any debt or obligation as required under Article 2.3.**

(emphasis added). It is undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. The only argument raised by Jones at trial was that Section 2.3 of the Arden Operating Agreement required BIG and Boone to guaranty the Loan, and thus contribute to it.

Section 2.3 of the Operating Agreement provides in pertinent part:

> **2.3 Guaranty of Loans to Company.** Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") **for so long as any guaranty of such loan is required by the lender**.

(emphasis added). A plain and unambiguous reading of Section 2.3 provides that a Class A member is required only to guaranty a loan "for so long as any guaranty of such loan is required by the lender."

The Southern First Bank President and loan officer on all of the loans, Justin Strickland, repeatedly testified at trial that neither BIG nor Boone was required to guaranty the Arden Loan. It is also undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank.

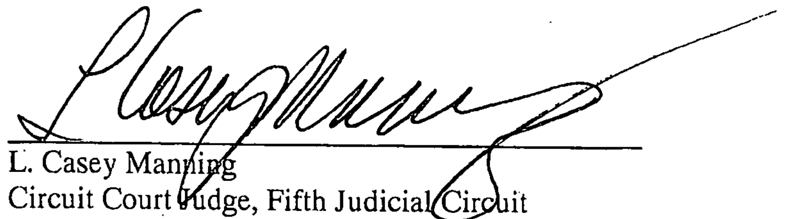
Further, the Arden Loan was entered into before BIG and Boone became Class A members of Arden. All of the documents presented at trial demonstrate that the Arden Loan from Southern First Bank was treated differently than all other loans to Arden, and that the details of that Southern First Loan were kept from BIG and Boone. Additionally, Section 4.2 of the Arden Operating Agreement specifically provides that the Southern First Loan was guaranteed by "Jones, Keisler, and Buck." Lastly, it is undisputed that neither BIG nor Boone

was ever asked by anyone to vote on the release of Buck as a personal guarantor on the Arden Loan.

Section 6.6 of the Operating Agreement plainly states that a Member is not responsible for any debt of Arden "unless a Member guarantees any debt or obligation as required under Article 2.3." Because BIG and Boone were not required by Southern First Bank to guaranty the Arden Loan and did not guaranty the Loan, they cannot be liable for any portion of the Loan as a matter of law. The only reasonable inference to be drawn from all the evidence presented at trial is that neither BIG nor Boone was ever required guaranty the Arden Loan from Southern First, and therefore BIG and Boone are entitled to a judgment notwithstanding the verdict.

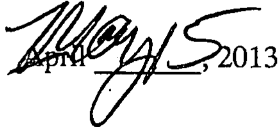
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants BIG and Boone's motion for judgment notwithstanding the verdict is granted, and judgment shall be entered for the Defendants.

IT IS SO ORDERED.



L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

Columbia, South Carolina



April ___, 2013