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 DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER PURSUANT TO RULE 59(e), SCRCP**
Builders Investment Group, LLC, Brian D. Boone and Arden Homebuilders, LLC,	)	
Defendants.	)	

This matter came to be heard before me on October 17, 2013, upon motion of the Plaintiff, Robert S. Jones ("Jones"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an order altering or amending this Court's Order, dated and filed May 15, 2013, which granted Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone's ("Boone") motion for judgment notwithstanding the verdict. 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 BIG and Boone. Based upon arguments of counsel and the applicable laws of South Carolina, I find and conclude that Plaintiff's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP, should be denied.

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 by 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. 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.

On May 15, 2013, this Court granted Defendants BIG and Boone's motion for judgment notwithstanding the verdict based on the reasons set forth in that Order. On May 24, 2013,

Plaintiff moved, pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure, for an order altering or amending this Court's Order. On October 17, 2013, this Court heard arguments from both sides regarding the motion to alter or amend the Order. Additionally, both sides provided written memorandum on their arguments.

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

"A party may wish to file [a 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In his motion, the Plaintiff makes the same two arguments previously raised before this Court during the arguments over Defendants' motion for a judgment notwithstanding the verdict. Specifically, the Plaintiff argues that Jones did pay the Arden Loan from Southern First Bank, and that BIG and Boone were required to guaranty the loan. This Court has already fully considered both of these issues and ruled upon them. Further,

the Court is not persuaded by Plaintiff's additional arguments on these points. Accordingly, the Plaintiff's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP, is denied.

I. Payment

Plaintiff first argues that because Southern First Bank used Jones' personal promissory note to mark the Arden Loan as satisfied on its books, Jones has paid more than his proportionate share. Plaintiff cites to the American Jurisprudence, Second Edition, and a Kansas appellate court case to support the proposition that contribution allows for satisfaction by promissory note. However, these authorities are misplaced for several reasons.

The authorities cited by the Plaintiff deal generally with the concept of contribution. They discuss the rights and remedies between co-guarantors when two or more individuals have guaranteed a single loan and there is no written agreement. However, in this case, the rights and remedies between the parties is specifically governed by contract. The Kansas case cited by the Plaintiff specifically states "a cause of action for contribution is based on an implied agreement not in writing." *Kee v. Lofton*, 12 Kan. App. 2d 155, 160, 737 P.2d 55, 59 (1987) (emphasis added). As this Court previously ruled, 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.

Additionally, the facts of this case are substantially different than the authorities cited by Plaintiff. The authorities cited by Plaintiff rely on the premise that all parties guaranteed the loan. However, in this case it is undisputed that BIG and Boone never guaranteed the Arden Loan. Further, there is substantial South Carolina law, cited previously by this Court in its Order

of May 15, which deals with issues raised in this case. Accordingly, there is no need to look to secondary sources or other jurisdictions for case law.

The Plaintiff also argued that the Court confused the concepts of contribution and indemnity in its Order of May 15. The Plaintiff argues that indemnification only involves shifting the entire loss whereas contribution involves shifting a proportionate loss, thus the concept of contribution should apply and not indemnity. However, as discussed above, the concept of contribution arises when there is no written contract and thus is not applicable in this case.

Regardless, the concept of indemnification was used by the Court to highlight the definition of payment in the Arden Operating Agreement and the distinction between a contract protecting against loss versus a contract protecting against liability. As this Court previously held, Section 2.3 of the Arden Operating Agreement is a contract protecting 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.[1] At most, Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note. Accordingly, he has not met the requirements of the contract and is not entitled to any payment by the Defendants as a matter of law.

[1] At the hearing on the Rule 59(e) motion, Plaintiff handed up supplemental answers to Defendants' Interrogatories and Requests to Produce. These documents were not presented at trial and only provided after this Court's May 15 Order granting judgment notwithstanding the verdict. Accordingly, this new information is not properly before the Court and this Court refuses to consider it. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

II. Requirement to Guaranty

Plaintiff argues that the Defendants were required to guaranty the Arden Loan based on the terms of the Operating Agreement. Plaintiff relies on the Section 2.3 of the Arden Operating Agreement which provides in part: "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).

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. In fact, Section 4.2 of the Arden Operating Agreement specifically provides that the Southern First Loan was guaranteed by "Jones, Keisler, and Buck." The Arden Operating Agreement specifically sets forth who is to guaranty the Southern First Loan.

Further, Plaintiff ignores Section 6.6(a) of the Operating Agreement which 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). Because BIG and Boone were not required to guaranty the Southern First Loan, they cannot be responsible for it per the terms of the Arden Operating Agreement.

The actions of the members of Arden also make it clear that BIG and Boone were not responsible for the Arden Loan. Importantly, 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.

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. Jones, Keisler, and Buck unilaterally made decisions regarding the Southern First Loan without input from BIG or Boone.

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 to guaranty the Arden Loan from Southern First and BIG and Boone were never intended to be responsible for any portion of the Southern First Loan.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Jones' motion to alter or amend the Order pursuant to Rule 59(e), SCRCP, is DENIED.

IT IS SO ORDERED.

L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

Columbia, South Carolina
October 29, 2013