STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) OF THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-26-00873
I.D. Jeram and Mayur Jeram,)
)
Plaintiffs,)
)
vs.) ORDER
)
Rajendra V. Patel, Bhupendra Patel, and)
Pankaj Patel,)
)
Defendants.)

This is an action based upon contribution. The Plaintiffs, I.D. Jeram and Mayur Jeram, allege they have paid a common debt and that the Defendants are required to contribute their just proportion of the liability. The evidence at trial reveals few factual disputes. Bayview Resort ("Bayview I") is an oceanfront condominium tower developed by Jeram Tej, LLC, a company in which, the Plaintiffs are the sole two members. Bayview Resort II, LLC (Bayview II) was organized in January of 2006 to develop a second phase of the Bayview Resort, and consisted of the following members: I.D. Jeram, Mayur Jeram, C&P Partnership, LLC and BRP Properties, LLC. BPR Properties, LLC was comprised of the following members: Defendants Rajendra Patel, Bhupendera Patel, and Pankaj Patel.

On January 30, 2006, Bayview II borrowed $2,707,250.00 from NBSC for the purpose of constructing additional levels upon the existing parking garage servicing Bayview I, for the purpose of serving the future unit owners of the second phase. Bayview II executed the Promissory Note ("Note"). I.D. Jeram, Mayur Jeram, Rajendra Patel, Bhupendra Patel, and Pankaj Patel (the parties to this case) also signed the Note as personal guarantors. Additionally, each party executed identical individual Unconditional Limited Guaranty Agreements ("Personal Guaranties") on the

same date. Each individual guarantor's maximum obligation with respect to the loan was capped at $812,175.00.

Payment of the Note was secured by a second mortgage upon the entire parking garage property, which was signed by its owner, Jeram Tej, LLC. On January 17, 2007, construction of the parking garage was complete. The proposed Phase II of the Bayview Resort was never developed. Bayview II and NBSC later agreed to modify and extend the Note on two occasions.

All parties admit that Bayview II never had the ability to pay the Note. The Note never went into default, but it appears that the loan had matured in full as of January 14, 2008. Through April of 2008, Jeram Tej, LLC paid off the Note through closing proceeds from the sales of condominiums from the Bayview Resort. In this regard, Plaintiffs directed Jeram Tej as their agent and nominee (i) to pay Plaintiffs' personal profits directly to the bank at five closings and (ii) to pay from a line of credit, which was repaid by Plaintiffs' personal profits at subsequent unit sales. Without contradiction, the testimony of the Plaintiffs' accountant verifies that these funds were Plaintiffs' individual profits, realized at the time of sale.

Because the Plaintiffs paid $2,729,465.88 to satisfy the Garage Loan, all parties were relieved of their mutual obligation on the underlying debt. The Plaintiffs seek contribution from the Defendants for their pro-rata share of that amount (20% each).

The Defendants deny that the Plaintiffs are entitled to contribution and assert defenses and counterclaims including, but not limited to equitable estoppel, unclean hands, indemnification and set-off. After carefully considering the pleadings, testimony, exhibits and law, this Court finds and concludes as follows:

Contribution

This case first requires a look at the elements of contribution. An action for contribution is recognized as equitable under common law and is defined as "the right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." RIM Associates v. Blackwell, 359 S.C. 170, 179, 597 S.E.2d 152, 157 (Ct. App. 2005) (internal quotations omitted). "The liability to contribute is the result of a general equity, founded on the equality of 'burthens and benefits.'" Screven v. Joyner, 1 Hill Eq. 252, 10 S.C. Eq. 252 (1833). "To establish the right of contribution, the plaintiff must shew that his payment has removed a common burthen from the shoulders of himself and the defendants, and that they are each benefitted by it. This occurs in all cases of payments made by one surety on the debt for which several are bound- a common burthen is removed and a common benefit received." Id.

If a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right. 38 *Am.Jr. 2d Guaranty* § 100. The right to contribution among co-guarantors arises from their implicit agreement that each would contribute his or her just proportion of any liability and, thus, is based on an implied contract. That right is governed by equitable principles and is subject to equitable defenses. Id. A guarantor is entitled to contribution regardless of whether the guarantors signed a single or separate documents, or the creditor released the co-guarantors after the default of the underlying loan. Id.

The remedy of contribution is also recognized in the Uniform Commercial Code ("UCC"). Section 36-3-116 of the South Carolina Code of Laws Annotated states:

> (a) Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

> (b) Except as provided in Section 36-3-419(f) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

The parties have raised the following issues that require a detailed analysis: (1) joint and several liability and the applicability of the UCC, (2) mutuality of benefit, (3) default as a requirement, (4) lack of contribution agreement, (5) Bayview II Operating Agreement, (6) alternate theories of recovery, (7) effect of Jeram Tej, LLC making the payments rather than the individual Plaintiffs, (8) statute of limitations/laches, (9) other affirmative defenses and counterclaims, and (10) notice of payment by the Plaintiffs.

1. Joint and several liability and the applicability of the UCC

The Defendants argue that the UCC does not apply in this case because the UCC does not govern guaranty agreements, since a guaranty agreement is not a negotiable instrument, and that the UCC further does not apply because it only provides a remedy for those guarantors who are jointly and severally liable. *See* S.C. Code Ann. § 36-3-116. The Defendants argue that the parties are not jointly and severally liable because they are only liable for twenty percent (20%) of the total debt per individual, according to the Unconditional Limited Guaranty Agreements.

As the Plaintiffs point out, the individual guarantors each signed the Note, in addition to the limited guaranties. A promissory note is a negotiable instrument that is governed by Article III of the UCC. S.C. Code Ann. § 36-3-104 (a) and (e). Section 36-3-419 of the South Carolina Code of Laws Annotated states the following:

> If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation"... A person

> signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument.

The *Official Comment* #2 to S.C. Code Ann. § 36-3-116 states that "[i]f more than one accommodation party indorses a note as an accommodation to the maker, the indorsers have joint and several liability and subsection (b) applies." The *South Carolina Reporter's Comment* to the same section further states that "[s]ubsection (b) provides that as a general rule, a party with joint and several liability on an instrument who pays the instrument is entitled to receive contribution from any other party having the same joint and several liability."

The UCC states that multiple accommodation parties have joint and several liability. Even more convincing is the language of the Personal Guaranties themselves that states:

> The term "Undersigned" as used in this agreement shall mean the signer or signers of this agreement or other guaranty agreements issued in respect of the Loan; and such signers, if more than one, shall be **jointly and severally liable** hereunder as follows:
>
> > Debtor and Lender intend for the Liabilities to be recourse up to Two Million Seven Hundred Seven Thousand Two Hundred Fifty and no/100 ($2,707,250.00) Dollars. The Undersigned shall be responsible for a percentage of the Liabilities, which shall equal, $812,175.00, which is the Undersigned's maximum obligation with respect to the Liabilities. (*emphasis added*).

Based on the evidence presented in this case, including the language of the Personal Guaranties, and the language of the UCC, itself, I find that the Note is a negotiable instrument governed by the UCC and that the guarantors are jointly and severally liable for the purposes of determining whether or not S.C. Code Ann. 36-3-116 is applicable to this case.

2. *Mutuality of benefit*

The Defendants argue the Plaintiffs and Jeram Tej, LLC, the company owned by the Plaintiffs, derived some additional benefits from the payment of the Garage Loan, benefits not realized by the Defendants. The Defendants further assert that these perceived additional benefits somehow affect the Plaintiffs' right to contribution and/or the Defendants' obligation to pay their percentage of the debt.

Specifically, the Defendants state that Jeram Tej, LLC, not Bayview II, owned the parking garage. Later, Jeram Tej, LLC conveyed the parking garage to Yana, LLC, another entity owned by the Jerams and not the Patels. Therefore, according to the Defendants, only Jeram Tej, LLC, and not Bayview II, much less the Patels, benefitted from the paying off the Garage Loan, for it gained equity equal to the value of the garage addition, which far exceeded the loan amount of $2,707,250.00. Defendants further allege that, when Jeram Tej, LLC paid off the Note, it did so for its own benefit and not the benefit of the five individual guarantors of the Note. Paying off the loan released property only Jeram Tej, LLC owned from mortgages, namely condominiums at the Bayview Resort and the parking garage. As a result, Jeram Tej, LLC was able to profit from closings and increase the value of property it owned by paying off debt secured thereby.

This argument ignores key facts. Of course, since the garage addition was on Plaintiffs' existing property, they technically owned (for a brief period of time) both the original Bayview I garage and the Bayview II garage addition. However, it is uncontroverted that the garage addition was designed to benefit Bayview II so it could save up to a million dollars in construction costs. On the other hand, Plaintiffs (i) already had an approved parking garage for Bayview I, and (ii) did not need the addition nor any extra parking, which is illustrated by the limited easement created upon completion of the garage. If anything, the Plaintiffs were burdened by subjecting their property to a

second mortgage to accommodate the addition needed by Bayview II. The Defendants did not encumber any of their personal property for the benefit of Bayview II's addition, nor did they lose any of their individual properties when Bayview II defaulted.

On the other hand, because the garage property also secured the Bayview II land acquisition loan in the amount of approximately $11.4 million, when that loan went into default, the Plaintiffs lost the entire parking garage property to the bank via deed in lieu of foreclosure. In other words, because Bayview II could not pay either loan, the Plaintiffs paid $2,729,465.88 and still lost the entirety of the parking garage property.

Defendants also claim that by paying the Garage Loan, the Plaintiffs benefitted by being able to close their units in Bayview I. This, however, means the Plaintiffs had to pay an extra $2,729,465.88 million to close those units. This seems more like a penalty than a benefit.

Regardless, the case and statutory law on contribution does not indicate that parties must share **all** benefits in order for the paying party to be entitled to contribution. A co-guarantor will always have their own reason(s) to pay an underlying obligation, such as preserving good credit, avoiding a costly lawsuit or judgment, or even maintaining a productive or profitable relationship with the lender. Any mutuality of benefit requirement is satisfied by the fact that the payment of the debt relieves the common burden (the liability under the five Personal Guaranties).

3. Default as a requirement

The Defendants argue that because the Note was paid prior to it going into default, the Plaintiffs are barred from a contribution claim. However, there is no case or statutory law supporting the proposition that a lender's declaration of default or demand for payment for the underlying debt are prerequisites to a guarantor's right of contribution.

Relevant language in the Personal Guaranties states as follows:

> In case Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by Debtor as aforesaid in like manner as if such amount constituted the direct and primary obligation of the Undersigned (but limited as further provided herein). Lender shall not be required, prior to any such demand on or payment by, the Undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against Debtor or others with respect to the payment of any Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

While default on behalf of the principal does not appear to be a condition precedent to a claim for contribution, it appears from the language of the guaranty itself that the principal must fail to pay in order for the guarantors to be responsible for paying. In accordance with the general rule, to entitle a guarantor to contribution, payment must be made under legal compulsion in the sense that the guarantor must have been under a legal obligation to pay and that payment must not have been made as a mere volunteer. 38A *C.J.S. Guaranty* § 165.

The Defendants admit that they knew Bayview II did not have any money to pay the Garage Loan. The Defendants further admit that absent Plaintiffs' payments, the Garage Loan would have gone into default. The parties also indicate that Bayview II and NBSC later agreed to modify and extend the Note on two occasions. The record further shows that on January 15, 2008, the Lender notified the members of Bayview II, via letter, that the Garage Loan had matured in full with a balance as of January 14, 2008 of $1,235,044.53. This letter further states that the Bank wishes to be paid in full, on both the Garage Loan and the land acquisition loan no later than January 25, 2008.

Therefore, while there is no legal requirement that the lender take any specific action prior to a claim of contribution, it is nonetheless clear in this case, that the Defendants already knew that the loan had matured, that they would be subject to their personal guaranties if the loan were not

paid, that Bayview II could not and did not ever pay the loan, and that the lender could have required their payment even without a demand on Bayview II.

Because the evidence indicates that the Note had matured in full prior to the Plaintiffs paying it off, through acceleration or otherwise, and Bayview II did not and could not pay, the guarantors would have been under a legal obligation to pay.

4. Lack of contribution agreement

The Defendants state that when Jeram Tej, LLC paid off the Note, it did so without any agreement, such as a contribution agreement, with either Bayview II or any of its members. The Plaintiffs agree. Co-guarantors can alter or modify their mutual obligations by express agreement. Gourdin v. Trenholm, 25 S.C. 362 (1866). In this case, all parties concede there was no express agreement between the guarantors altering their mutual obligations. Therefore, the standard rule of contribution would apply.

5. Bayview II Operating Agreement

The Defendants argue that the terms of the Bayview II Operating Agreement establish that the Plaintiffs' payments were a loan and that the Defendants' remedy is to pursue repayment of that loan from Bayview II.

The pertinent section of the Bayview II Operating Agreement provides:

> 4.5 Advanced by Members If the Company does not have sufficient cash to pay its obligations, any Member(s) that may agree to do so with the manager's consent may advance all or part of the needed funds to or on behalf of the Company. An advance described in this section constitutes a loan from the Member to the Company, bears interest at the General Interest Rate from the date of the advance until the day of payment, and is not a Capital Contribution.

According to the terms of this section the Member(s) must agree to advance the money as a loan, with the manager's consent. There is no evidence that the Plaintiffs entered into an agreement to designate the payments as an advance or loan to the company. The Plaintiffs' accountant testified

that the payments were not reflected as loans on applicable tax returns, but merely identified as payments to describe activities unrelated to Jeram Tej's business.

Even if the Operating Agreement provides for a remedy against Bayview II in this circumstance, the Plaintiffs have the right to elect their remedy and their choice to pursue contribution is not affected by the fact that they may or may not have a remedy available to them against Bayview II under the terms of the Operating Agreement. South Carolina law is clear, "When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both." Cowart v. Poore, 337 S.C. 359 (S.C.App. 1999). In other words, the Defendants do not get to pick the Plaintiffs' cause of action although they may subsequently assert Plaintiffs are not entitled to a double recovery. Id.; *see also* Brown v. Felkel, 320 S.C. 292 (Ct.App. 1995).

6. *Alternate theories of recovery*

The Defendants argue that when Jeram Tej, LLC paid off the Note, it did so without any agreement with NBSC to either purchase or take assignment of the Note, in which case it could have demanded payment from Bayview II. Additionally, the Defendants argue that the Plaintiffs should have sought reimbursement from Bayview II, the accommodated party, under the UCC. S.C. Code Ann. § 36-3-419(f).

Again, the Defendants are trying to elect the Plaintiffs' remedy for them. Any assertion that the Plaintiffs are limited solely to any one of these claims misconstrues their right to elect their own remedy and ignores their right to contribution. South Carolina specifically recognizes alternate theories of recovery, exemplified in the fact that the UCC provides that parties with joint and several liability on an instrument (such as accommodation parties) are entitled to contribution under

Section 36-3-116(b) and, under Section 36-3-419(f) an accommodation party is entitled to reimbursement from the accommodated party.

The failure of the Plaintiffs to pursue alternate theories of recovery has no effect on their claim for contribution.

(7) Effect of Jeram Tej, LLC making the payments rather than the individual Plaintiffs

The Defendants argue that Jeram Tej, LLC, not the specific Plaintiffs, I.D. and Mayur Jeram, paid off the Note. The Defendants further state that Jeram Tej, LLC had no obligation to do so and instead, volunteered the payments. "Equity cannot aid a volunteer..." Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375, 381 (1938). The Defendants assert that, while the Plaintiffs are its sole members, Jeram Tej, LLC is a separate and distinct legal entity from them, with a separate and distinct business purpose from Bayview II, the development of the Bayview Resort and not Phase II.

A limited liability company is a legal entity distinct from its members. S.C. Code Ann. § 33-44-201. But, the Plaintiffs have presented a plethora of evidence to indicate that they directed Jeram Tej, LLC as their agent and nominee to make the payments from Plaintiffs' personal profits realized at the time of sale. Contribution is an equitable remedy and it would not seem equitable to preclude the Plaintiffs from recovery based on this technicality.

8. Statute of Limitations/Laches

The Defendants argue that the Statute of Limitations or the doctrine of Laches bars all or a portion of the recovery sought by the Plaintiffs. The statute of limitations in a claim for contribution is three years. Jeram Tej, LLC made payments to NBSC in October of 2007 totaling $1,501,619.23. The Plaintiffs did not commence this action until January of 2011, in excess of three years after those payments were made. The statute of limitations would begin to run when the Plaintiffs knew

or should have known they had a right to contribution. The total amount eventually paid was $2,729,465.88. The total contribution of the two Plaintiffs should total 2/5 of that amount, which would be $1,091,786.36. But, the language in the Personal Guaranties implies that the total maximum obligation under the Guaranty would not exceed $812,175.00. The interest rate is variable.

One cannot impute the knowledge of the total amount that would eventually be paid upon the Plaintiffs at the time they made those payments in October 2007. The Plaintiffs would not know with certainty that they had a claim to contribution until the total amount of their payments exceeded $1,624,350.00, their total maximum personal obligation under the Guaranty. Therefore, the Plaintiffs' claim for contribution is not barred by the statute of limitations.

The Defendants also make a laches argument, claiming that the Plaintiffs waited until after the parties entered into agreements with NBSC to settle their guaranties on the $11.4 million land acquisition loan to demand contribution, and that if the Defendants had known a demand would have been made upon them for contribution, the Defendants would have chosen to negotiate their releases from the guaranties of both loans at the same time for a substantially reduced price. The Defendants argue that they were, therefore, prejudiced by the Defendants waiting so long to demand contribution.

This argument fails, however, because the Defendants would not have had a chance to negotiate their release from both guaranties with NBSC at the same time even if the Plaintiffs made their claim for contribution immediately after paying the debt, as the Defendants would have had to negotiate separately with the bank and the Plaintiffs anyway. The only thing that would have allowed the Defendants to negotiate both at the same time would have been if the Plaintiffs had never paid the debt at all. To require the Plaintiffs to never pay the debt at all would negate the well

established law of contribution. Therefore, I find that the Plaintiffs claim is not barred by the doctrine of laches.

9. Other affirmative defenses and counterclaims

The Defendants raise affirmative defenses and counterclaims alleging unclean hands, equitable estoppel, indemnification and set-off. Based on the pleadings and testimony, these counterclaims appear to rest primarily on the fact that all parties initially believed that Bayview II would be a successful development, but ultimately it was not. To be sure, the Defendants are experienced businessmen and developers, participating in numerous prior developments, residential subdivisions, hotels and motels, bank loans and personal guaranties. Each visited the area and discussed the project numerous times before BRP Properties decided to invest in the project. Each knew the risks involved in real estate investment.

Nonetheless, the Defendants contend they relied on the optimism of the Plaintiffs, Bhupi Patel and the booming real estate market. The evidence is without dispute: all Bayview II members invested a lot of money toward the development, anticipating great success in the oceanfront real estate market. All parties lost a lot of money as well. The Defendants complain that the Plaintiffs told them that they fully expected to obtain written presale contracts for 80% of the units following the formation of Bayview II, the acquisition of the property and preparation of the plans for the tower. As shown in trial, the Plaintiffs clearly believed that this was true at the time as well, but unfortunately **all** parties learned – as did the rest of the real estate market in Myrtle Beach and nationwide – buyers were rapidly disappearing and banks were not making new development loans. Even the Defendants' extensive contacts and existing relationship with Marriott and the hotel industry could not rescue the project from the crashing market. As such, the Defendants' counterclaims, blaming the Plaintiffs for their losses, are clearly without sufficient evidentiary

support. Moreover, the Defendants assertions are speculative and provide no proof of damages sustained as a result thereof.

10. Notice of payment by the Plaintiffs

South Carolina law is clear that there is no requirement that the paying guarantor give prior notice to a non-paying guarantor. In Babb v. Rothrock, 310 S.C. 350 (1993), one guarantor paid the underlying debt and never notified the other guarantors until filing the lawsuit for contribution. The only thing affected was the prejudgment interest. The Supreme Court found that prejudgment interest is paid upon notice to the co-guarantors, which in that case was the date the lawsuit was filed.

In this case, it is undisputed that the Plaintiffs provided a formal written notice of payment and demand for contribution in October 2010.

In conclusion, the Plaintiffs paid $2,729,465.88 to satisfy the Garage Loan, and as a result, all parties were relieved of their mutual obligation on the underlying debt. The Plaintiffs are entitled to contribution from the Defendants under both the UCC and common law for their pro-rata share of that amount (20% each).

For the above stated reasons, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs are hereby granted judgment against Rajendra V. Patel in the amount of $545,893.18 plus prejudgment interest on this amount from October 31, 2010. The Plaintiffs are further granted judgment against Bhupendra Patel for $545,893.18 plus prejudgment interest on this amount from October 31, 2010. The Plaintiffs are further granted judgment against Pankaj Patel in the amount of $545,893.18 plus prejudgment interest on this amount from October 31, 2010.

AND IT IS SO ORDERED.

~~June~~ Aug 7, 2014

THOMAS W. COOPER, JR.
Judge of the Court of Common Pleas for the
Third Judicial Circuit, Retired
Special Referee

THOMAS W. COOPER, JR.

CIRCUIT COURT JUDGE, RETIRED

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August 4, 2014

The Honorable Melanie Huggins
Horry County Clerk of Court
1301 Second Avenue
Conway, South Carolina 29526

RE: I. D. Jeram and Mayur Jeram vs. Rajendra V. Patel, Bhupendra Patel and Pankaj Patel
Case Number: 2011-CP-26-00873

Dear Ms. Huggins:

In connection with the above case, I am enclosing herewith the following: An original signed Order for filing and two copies to be certified and mailed to the counsel of record below.

Please let me know if you need any further information in this regard. I appreciate very much your cooperation in providing the hearing place for the conducting of the trial last year.

I look forward to being with you all later in the fall.

Sincerely yours,

Thomas W. Cooper, Jr.

bmw
Enclosures
cc: Benjamin A. Baroody, Esquire
Carl Scott Masel, Esquire