

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

FIFTEENTH JUDICIAL CIRCUIT

RECEIVED

CASE NO: 2011-CP-26-0873

I.D. Jeram and Mayur Jeram, )

JUN 27 2018

SC Court of Appeals

vs. )

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

Rajendra V. Patel, Bhupendra Patel, )  
and Pankaj Patel, )

Defendants. )

\_\_\_\_\_ )

This matter is before me on Defendants' Motion for Reconsideration of my Order dated August 4, 2014 ("Order"). Defendants assert seven grounds with corresponding contentions in support of their motion. These are addressed as follows.

1. Defendants contend the payment of monies satisfying the NBSC Note were made by Jeram Tej, LLC ("Jeram Tej") as a loan to Bayview Resort II, LLC ("Bayview II") pursuant to Bayview II's operating agreement, and therefore Plaintiffs' and/or Jeram Tej's proper cause of action is against Bayview II and not the Defendants.

Neither Bayview II nor Jeram Tej are parties to this case. As such, any cause of action Plaintiffs or Jeram Tej may have against Bayview II is not before the court. As previously discussed in the Order, Plaintiffs' choice to pursue contribution is not affected by the fact that they or Jeram Tej may also have a cause of action against Bayview II. Indeed, Plaintiffs elected to pursue contribution against the Defendants, which is the only cause of action before the court in this case.

As noted in the Order, the preponderance of evidence shows Plaintiffs paid NBSC by directing Jeram Tej, as their agent and nominee, to pay Plaintiffs' own personal profits directly to the bank. Contrary to Defendants' contention that Bayview II's operating agreement is controlling

and establishes that Jeram Tej made these payments as a loan to Bayview II, a plain reading of the operating agreement reveals it only applies to members of Bayview II, and Jeram Tej was not a member of Bayview II. Moreover, there is no evidence the Plaintiffs entered into an agreement to designate the payments as an advance or loan by them personally to Bayview II as required by the operating agreement. The Plaintiffs testified they expected to be repaid through the success of the project or the Defendants individually, and Bayview II's accountant testified the payments consisted of Plaintiffs' individual profits not assets of Jeram Tej. As such, Defendants' motion for reconsideration on these grounds is denied.

Defendants further assert that no party intended the payments to result in liability to the Defendants unless NBSC declared default and pursued their remedies under the loan documents. While Defendants focus on their intent and bank documents, the law of contribution looks to the *effect* of Plaintiffs' payments and is based on an implicit agreement that each guarantor contributes their fair share of liability. Indeed, it is clear that all parties originally expected the development to be a financial success and they all intended to make a profit. When Bayview could not and did not make the payments to NBSC, the Plaintiffs did and the effect of their payments relieved Defendants of their common liability as co-guarantors. Therefore, Defendants' motion for reconsideration on these issues is denied.

2. Defendants contend that they are not liable, jointly and severally or otherwise, for Bayview II's debt because NBSC had not declared the Note to be in default, because Defendants were unaware of the payments, and because Plaintiffs had a UCC remedy against Bayview II as accommodation parties.

As previously discussed in my Order, the court is not aware of, and the Defendants have not provided, any case or statutory law requiring a lender to declare default or demand payment

  
#2

before a guarantor may assert a claim for contribution. The Defendants appear to confuse NBSC's rights and obligations under the terms of the loan documents with the elements of contribution among co-guarantors. Notably, however, even the Guaranties provide that NBSC could seek payment from the guarantors without making a demand or pursuing Bayview II if the debt was not paid when due. The preponderance of evidence shows that Defendants knew Bayview II could not pay the debt and only Plaintiffs' payments prevented the Note from going into default. Moreover, prior to the Note being fully paid, NBSC affirmatively notified the members of Bayview II that the Note had matured and the bank wished to be paid in full. In any event, NBSC's actions or inactions are not determinative as to Plaintiffs' cause of action for contribution and Defendants' motion for reconsideration on this issue is denied.

Defendants claim they did not know of any payments made to NBSC and therefore they should not be liable for contribution. As discussed in my Order, South Carolina law does not require that the paying guarantor give prior notice to a non-paying guarantor. Notice of payment affects only prejudgment interest calculations, not liability for contribution, and therefore Defendants' motion for reconsideration on this issue is denied.

The Defendants further maintain they are not jointly and severally liable as guarantors of the Note. As more fully discussed in the Order, the Note is a negotiable instrument and therefore the UCC applies. Plaintiffs and Defendants executed and signed the Note as guarantors. By signing the Note as guarantors, therefore, the Plaintiffs and Defendants became jointly and severally liable in their capacity as guarantors pursuant to S.C. Code 36-3-116. This section, and as illustrated in Official Comment #2 thereto, provides that a party having joint and several liability who pays the instrument is entitled to receive contribution from any other party having the same joint and several liability in accordance with applicable law. In addition to signing as guarantors on the Note, each



party also signed a separate Unconditional Limited Guaranty Agreement. These agreements are not subject to the UCC, and therefore common law provides Plaintiffs' remedy for contribution arising from those instruments.

Finally, as discussed above, whether or not Plaintiffs have a viable cause of action against Bayview II pursuant to the UCC as accommodation parties, or on any other ground, is not an issue before this court. Section 36-3-116 makes clear that an action against the borrower is not a guarantor's sole remedy under the UCC. Because the Defendants are jointly and severally liable as guarantors under the UCC, the Defendants' motion for reconsideration on these issues is denied.

3. Defendants contend they are not liable as co-guarantors because only Plaintiffs' company benefited from paying off the Note. In this regard, Defendants point to a brief window of time when the garage property was clear of the NBSC mortgage before the property was again encumbered as part of the parties' continued effort to save Bayview II and then subsequently lost as Bayview II failed. As discussed in the Order, a guarantor may have any number of possible external reasons to pay or not pay the liability, and may be subject to any combination of benefits or detriments for doing so, but the relevant fact in this case is that Plaintiffs' payment of the Note relieved Defendants of their common burden as guarantors of that loan. This was a benefit to the Defendants as contemplated under the law of contribution. As such, Defendants' motion for reconsideration on this issue is denied.

4. Defendants contend the statute of limitations bars Plaintiffs' claims of contribution for payments made in October of 2007. As noted in the Order, Plaintiffs' payments took place over a period of time up through the final payment in April of 2008. It is at this time their cause of action would accrue, as the final payment extinguished the common debt and relieved Defendants' burden as guarantors. Moreover, the ongoing payments continued the parties' implied contract and



implicit agreement to contribute each guarantor's just proportion of liability. As also described in the Order, Plaintiffs would not know they had a claim for contribution under the Guaranties until the total amount of their payments exceeded \$1,624,350.00, their combined total maximum personal obligation under the Guaranties, which took place within three years of the filed lawsuit. As such, Defendants' motion for reconsideration on this ground is denied.

5. Defendants maintain that Plaintiffs' claims are barred by estoppel, laches and unclean hands. In this regard, Defendants assert Plaintiffs never notified Defendants or sought their consent or agreement prior to paying the loan. As discussed in the Order, there is no legal duty that a paying guarantor give prior notice to a non-paying guarantor. Moreover, there is no legal requirement that the parties enter into a separate contribution agreement because the law already recognizes that the remedy of contribution arises when one guarantor discharges the common liability of a co-guarantor. As such, Defendants' motion on these grounds is denied.

Defendants also blame Plaintiffs for the failure of Bayview II. As discussed more fully in the Order, the preponderance of evidence shows that all parties were knowledgeable of the risks involved with real estate development and believed the project would be profitable, but ultimately it was the Great Recession that doomed Bayview II along with the rest of the Myrtle Beach real estate market. Therefore, Defendants' motion on this issue is denied.

Defendants assert error because Plaintiffs failed to take an assignment from NBSC of its rights upon payment and satisfaction of the Garage Loan. The court is aware of no law requiring a guarantor to take an assignment from the lender after paying the underlying debt, and the absence of such an assignment is not determinative as to Plaintiffs' cause of action for contribution. The Defendants further claim that Plaintiffs' payment of the Note precluded Defendants from negotiating a more favorable global settlement with NBSC. This is speculative, and as discussed

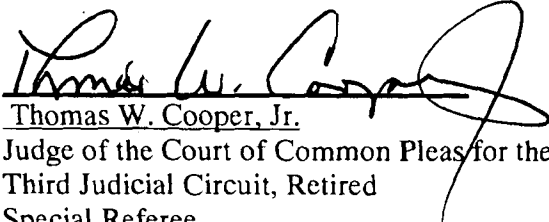


in the Order, counterintuitive: the only way Defendants could have negotiated the Garage Loan together with the acquisition loan is if Plaintiffs never paid the Garage Loan. Thus, Defendants' attempt to penalize Plaintiffs for making payment is inconsistent with the well-established law of contribution. Therefore, Defendants' motion for reconsideration on these issues is denied.

6. Defendants assert Plaintiffs do not have standing to sue because Jeram Tej made the payments to NBSC. Again, because the preponderance of evidence shows that Plaintiffs paid their profits to the bank out of Jeram Tej closings, the Defendants' motion is denied on this issue.

7. Defendants claim pre-judgment interest should be measured from the date of formal demand until the date of trial rather than a subsequent date. Prejudgment runs until a judgment is entered, and thereafter post judgment interest accrues. S.C. Code 34-41-20. Therefore, Defendants' motion on this issue is denied.

IT IS THEREFORE ORDERED, Defendants' Motion for Reconsideration is DENIED.

  
Thomas W. Cooper, Jr.  
Judge of the Court of Common Pleas for the  
Third Judicial Circuit, Retired  
Special Referee

Date: May 25, 2018

## Certificate of Electronic Notification

### Recipients

**W. DesChamps** - Notification transmitted on 05-30-2018 11:48:27 AM.

**Benjamin Barody** - Notification transmitted on 05-30-2018 11:48:27 AM.

**Arthur Justice** - Notification transmitted on 05-30-2018 11:48:26 AM.

**C. Masel** - Notification transmitted on 05-30-2018 11:48:27 AM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2011CP2600873

Official File Stamp: 05-30-2018 11:48:11 AM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: I D Jeram , plaintiff, et al VS Rajendra V Patel ,  
defendant, et al

Document(s) Submitted: Order/Denying Motion for Reconsideration  
Order/Other

Filed by or on behalf of: Bridgett Williamson

This notice was automatically generated by the Court's auto-notification system.

**The following people were served electronically:**

Benjamin Albert Baroodly for Rajendra V Patel,  
Bhupendra Patel, Pankaj Patel

Arthur E. Justice, Jr.

W. W. DesChamps, Jr. for (3Rd Party) C&P  
Partnership, LLC

C. Scott Masel for I D Jeram, Mayur Jeram

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

Bhupendra (3Rd Party) Patel

Rajendra V. (3Rd Party) Patel

Cody W. Smith, Jr.

Pankaj (3Rd Party) Patel