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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001554-MR

CHRISTOPHER BUSH — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 06-CI-00129

DORIS OLDFIELD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Christopher Bush appeals from the Morgan Circuit Court's order holding Bush liable for contribution on a co-signed note. For the following reasons, we affirm.

Bush was a customer at Oldfield's Store, owned by Doris Oldfield, and became indebted to the store for $13,447.85. This debt went unpaid and, instead of pursuing a collection action, Oldfield had Bush sign with her a bank note

for the full amount of the debt; the bank then issued a check that was made payable to and deposited by Oldfield's Store. The parties did not have a written or oral agreement between them indicating how the note would be paid or who had responsibility for repayment. After the bank demanded payment from Oldfield she paid off the entire sum to prevent interest from accruing and then attempted to collect the full amount from Bush.

The trial court held the parties to be co-makers of the note and thus jointly and severally liable to the bank. Although the parties had no express agreement as to reimbursement, the trial court found that an implied contract for reimbursement existed between them by law. However, since Oldfield willingly executed the bank note, the trial court found Bush liable to Oldfield for only one-half of the note's value, plus interest. This appeal follows. We review the trial court's findings of fact for clear error and conclusions of law *de novo*. *Bishop v. Commonwealth*, 237 S.W.3d 567 (Ky. App. 2007).

Bush contends that the trial court erred in relying on a statement made by the Kentucky Supreme Court in *Schmuckie*, which said:

> It is not uncommon, of course, for a promissory note to be signed by two or more persons as co-makers. In the absence of an express agreement to the contrary, such persons are jointly and severally liable to the holder even though the instrument contains no such express provision. (citation omitted). ***As between or among themselves, however, in the absence of evidence of a contrary agreement, co-makers are presumed to be liable in equal amounts and a right of contribution, based upon an implied contract of reimbursement and not the instrument, exists between or among them.***

Schmuckie v. Alvey, 758 S.W.2d 31, 33-34 (Ky. 1988) (*citing* Am. Jur.2d, *Bills & Notes* § 588 (1963) (emphasis added)).[1]

Bush argues that the emphasized selection was not relevant to the court's decision and thus merely dicta. Kentucky case law is sparse on this issue but KRS[2] 355.3-116[3] governs negotiable instruments and states that makers of a note with the same liability are jointly and severally liable. KRS 355.3-116(1). Bush signed the loan documents as a co-applicant and the documents clearly stated "I jointly and severally promise to pay" and "[t]he obligations under this note are joint and several." Thus, the application of KRS 355.3-116 and liability of both parties to the bank is clear.

The statute further states, "[e]xcept as provided … 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." KRS 355-3.116(2). Even if the statement from *Schmuckie* was only dicta, the trial court could have relied on this statute for their decision and Bush should be liable for contribution of one-half of the note's value, plus interest.

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[1] The modern version of this source reads: "Except as otherwise provided by statute 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 … If a co-maker is required to pay the entire obligation, he or she may seek contribution or reimbursement from his or her co-maker for one-half of the amount paid." 12 Am. Jur.2d, *Bills & Notes* § 402.

[2] Kentucky Revised Statutes.

[3] Kentucky's adaptation of the Uniform Commercial Code § 3-116.

Lastly, Bush argues that the trial court erred in finding an implied contract for reimbursement. A contract implied by law is a legal fiction supplied by the courts to allow recovery and prevent unjust enrichment. *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky. App. 1987). It was not erroneous for the trial court, wanting to prevent Bush from taking advantage of the generosity extended to him by Oldfield and from being completely absolved of his debt to Oldfield's, to find a contract implied in law to allow Oldfield partial recovery.

For these reasons the Morgan Circuit Court's order holding Bush liable for one-half contribution for the amount of the note plus interest is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick E. O'Neill
Jackson, Kentucky

BRIEF FOR APPELLEE:

Chris Frederick
West Liberty, Kentucky