STATE OF MICHIGAN

COURT OF APPEALS

JULIAN D. FEILER and CITIZENS COMMERCIAL & SAVINGS BANK,

Plaintiff-Appellees,

v

KENNETH COOK, SR., KENNETH COOK, JR., FLINT CANVAS COMPANY,

Defendant-Appellants.

UNPUBLISHED
December 6, 1996

No. 179858
LC No. 93-024539

Before: Gribbs, P.J., and Saad and J.P. Adair,* JJ

PER CURIAM.

In this action for contribution, defendant Kenneth Cook, Sr., appeals from an order granting summary disposition against him pursuant to MCR 2.116(C)(10), in favor of plaintiff Julian Feiler.[1] We affirm.

Prior to 1985, Feiler ("plaintiff") was president of Flint Canvas Company ("FCC"), and owned 100% of its stock. On June 4, 1985, FCC signed a $200,000 demand promissory note in favor of Citizens Commercial & Savings Bank, in order to establish a $200,000 revolving line of credit. Plaintiff signed the note in his capacity as president, as well as individually.

On March 13, 1986, Kenneth Cook, Sr. (hereafter "defendant"), purchased 40% of the stock of FCC, and became president of the company. At this point, FCC had already drawn $170,000 on its $200,000 line of credit. According to the bank, once defendant became an owner of FCC, the bank considered his guarantee a condition for the loan's renewal. Defendant signed the guaranty agreement, and he admitted that when he did so, he understood that he was personally guaranteeing the note, along with plaintiff, for $200,000. Defendant managed FCC until December of 1990, when he resigned and transferred his interest to his son.

* Circuit judge, sitting on the Court of Appeals by assignment.

In 1993, the bank learned that FCC had been dissolved and was about to file for bankruptcy. It received notice of a federal tax lien filed against FCC. When the bank telephoned defendant's son to obtain financial information, the son would not return telephone calls. As a result, the bank became insecure and considered the loan in default. On September 20, 1993, the bank demanded payment from plaintiff and defendant. Defendant declined to pay, and plaintiff paid the entire amount ($197,789.25) from his personal trust. Plaintiff then sued defendant for contribution and, following cross-motions for summary disposition, the lower court granted plaintiff's motion, ordering defendant to pay $104,651.18 to plaintiff. Defendant appeals.

I

Defendant first argues (in two separate points) that he is not liable to plaintiff because the guaranty agreement was not supported by consideration. According to defendant, he was afforded no benefit by virtue of the agreement, nor did the bank suffer a detriment. However, contrary to defendant's assertion, the uncontradicted testimony of the bank employees is that the bank would not have renewed FCC's revolving line of credit if defendant had refused to guarantee the note. See *Chris Nelson & Son v Shubow,* 374 Mich 403, 406-407; 132 NW2d 122 (1965). This was sufficient consideration.

II

Defendant claims in the alternative that, even if the guaranty is valid, he is not liable because *plaintiff* signed the note as a borrower (making plaintiff primarily liable on the note), while *defendant* merely guaranteed the note, making defendant secondarily liable. We disagree. A guaranty agreement is a contract that is enforced according to the parties' intentions. *First Nat'l Bank of Ypsilanti v Redford Chevrolet Co,* 270 Mich 116, 121; 258 NW 221 (1935); *Miller Industries v Cadillac Bank*, 40 Mich App 52, 55; 198 NW2d 433 (1972). When the guaranty is not ambiguous, construction of the guaranty (including the parties' intention) is a question of law. *Redford Chevrolet Co,* 270 Mich at 121; *Angelo Iafrate Co v M & K Development Co,* 80 Mich App 508, 514; 264 NW2d 45 (1978). In determining this, the court considers not only the language of the contract, but also the situation and circumstances at the time the contract was made. *Cadillac Bank,* 40 Mich App at 55.

Here, the note itself and the circumstances surrounding its execution indicated that defendant intended to become obligated on the note upon *FCC's* default, and not upon the default of both FCC and plaintiff. The guaranty agreement specifically stated that FCC was the borrower of the loan secured by the promissory note that defendant agreed to guarantee; it made no mention of plaintiff as an additional borrower. Most importantly, defendant admitted that he believed that he was guaranteeing FCC's promissory note, along with plaintiff, when he signed the agreement; he thought that he would have to pay the note if FCC could not. We therefore reject defendant's arguments premised upon the mistaken belief that he was only secondarily liable.

III

In reliance upon the law of negotiable instruments, defendant asserts that because plaintiff signed the note as a borrower, *plaintiff* cannot now look to defendant, a guarantor, for contribution. If plaintiff had indeed signed the note as a maker, defendant would be correct, because contribution only exist among parties who have common burdens. *Comstock v Potter*, 191 Mich 629, 638; 158 NW 102 (1916); *United States Fidelity & Guaranty Co v Liberty Mutual Ins Co*, 127 Mich App 365, 372; 339 NW2d 185 (1983). However, this was not the case because plaintiff signed the note as an endorser, that is, as one secondarily liable after the FCC's primary obligation. When the note was signed, the law then in effect stated that, "[u]nless the instrument clearly indicates that a signature is made in some other capacity it is an endorsement." MCL 440.3402; MSA 19.3402, [later amended by PA 1993, No. 130, effective September 22, 1993]. Here, there is nothing to indicate that when plaintiff signed in his individual capacity he did so other than as an endorser. Therefore, because plaintiff and defendant both signed as endorsers, their burdens were equal, and plaintiff was entitled to contribution from defendant. Accordingly, the fact that plaintiff paid the note in full did not extinguish defendant's obligation on the note.

IV

Defendant's final argument is that no liability was triggered pursuant to the guaranty, because there was never a "default" as defined in that agreement. The May 7, 1986 Loan Guaranty, signed by defendant, states in relevant part:

> Upon default by Borrower [FCC], Bank may demand payment from Guarantor(s) [plaintiff and defendant] and may proceed against Guarantor without resort to Borrower, any other Guarantor(s), or any security held by it.
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> * * *
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> Bank may declare that Borrower has committed a default upon (a) its failure to pay the debt guaranteed, or any part thereon, due according to the terms of the document evidencing such debt or (b) bankruptcy of Borrower or appointment of judicial receiver, or assignment for benefit of creditors or (c) discovery by Bank of a material misstatement by Borrower to Bank made in connection with the application for the credit guaranteed, or made in any way, intended by Borrower to induce Bank to act upon the granting of the loan modifying or extending the terms of the loan.

Contrary to defendant's assertion, a "default" did occur. In 1993, FCC was dissolved and ceased operation; it was about to enter bankruptcy. In March, 1993, the Bank received a copy of a federal tax lien filed against FCC, and the Bank made telephone calls to defendant's son (who had taken over the business from defendant) to obtain financial information, but the son would not return the telephone calls. These actions constitute a "default" under subsection (a).

V

The circuit court correctly held that defendant was liable to plaintiff for one-half of the amount paid on the promissory note, and thus properly granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10).

We affirm.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair

[1] Citizens Commercial & Savings Bank is named as a plaintiff because it served as trustee for Julian Feiler's personal trust. Kenneth Cook, Jr. was dismissed by stipulation below and is not a party to this appeal. Flint Canvas Company (which is now defunct) was named as a nominal defendant.