STATE OF MICHIGAN

COURT OF APPEALS

METRO HAMPTON COMPANY,

Plaintiff-Appellee,

v

EDGAR J. DIETRICH and THERESITA K. DIETRICH,

Defendants/Cross-Defendants-Appellants,

and

DONALD J. HOULAHAN and SYLVIA A. HOULAHAN,

Defendants/Cross-Plaintiffs-Appellees,

and

OLYMPIC GROWTH PROPERTIES, MULTI-GROWTH PROPERTIES, and NOTRE DAME MANAGEMENT COMPANY,

Defendants.

.

UNPUBLISHED
December 28, 1999

No. 210050
Wayne Circuit Court
LC No. 96-610965 NZ

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendants Edgar Dietrich and Theresita Dietrich appeal as of right from two orders. The first granted plaintiff's motion for partial summary disposition pursuant to MCR 2.116(C)(10), against the Dietrichs on the issue of their liability on a $150,000 promissory note. The second order granted

defendants/cross-plaintiffs' (the Houlahans) motion for summary disposition pursuant to MCR 2.116(C)(10), for indemnification in the amount of $100,000 from the Dietrichs. This case arises out of the purchase of two apartment complexes from plaintiff by Olympic Growth Properties, L.P., a partnership in which Edgar Dietrich and Donald Houlahan had an interest and which subsequently defaulted on a land contract and a promissory note that the Houlahans and the Dietrichs had personally guaranteed.[1] We affirm both orders.

I

The Dietrichs first argue that a novation occurred when (1) plaintiff altered the terms of the land contract by executing an "Amendment to Land Contract" dated March 27, 1997, and/or when (2) the trustee in Olympia West's subsequent bankruptcy case sold the apartments to Concorde Club, thereby materially altering the terms of the guaranty by removing the security for the note. They conclude that this novation extinguished any further liability under the note as to them. We disagree.

This Court reviews de novo a trial court's grant of partial summary disposition under MCR 2.116(C)(10). In deciding a motion pursuant to MCR 2.116(C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 397; 572 NW2d 210 (1998).

A novation requires (1) parties capable of contracting, (2) a valid obligation to be displaced, (3) consent of all parties to the substitution based on sufficient consideration, and (4) the extinction of the old obligation and the creation of a valid new one. *In re Yeager Bridge Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986); *George Realty Co v Gulf Refining Co*, 275 Mich 442, 447-448; 266 NW 411 (1936). All parties must consent to the novation, and consent can be implied from the surrounding facts and circumstances. *Gorman v Butzel*, 272 Mich 525, 529; 262 NW 302 (1935); *Chicago Boulevard Land Co v Nutten*, 268 Mich 541, 545; 256 NW 541 (1934).

The Dietrichs rely on *Gorman*, *supra*, in support of their argument that plaintiff's actions triggered a novation. Their reliance is misplaced because, unlike the instant case, *Gorman* did not involve a situation in which individuals agreed to guarantee a note in their personal capacities.

The Dietrichs and Houlahans executed the guaranty on June 30, 1982. Paragraph 3 of the guaranty specifies that the Dietrichs' obligations would not be affected by the "substitution, exchange, or release of any collateral securing payment of the Note"; the "waiver, release or termination of any of the covenants or agreements of Olympic under the Note or under the Collateral Agreement"; or the "modification or amendment (whether material or otherwise) of any obligation, covenant or agreement set forth in the Note or Collateral Agreement to the extent such does not increase the principal amount due or the rate of interest." This agreement covers both of the alleged novation-triggering events – the exchange or termination of the collateral and the modification or amendment of Olympic Growth's obligations. Moreover, ¶ 4 provides that the guaranty cannot be waived, released, amended, or modified "by conduct, custom or course of dealing, but solely by an instrument in writing duly executed

by the parties to this Guaranty." The guaranty, by its own terms, precludes a novation as to the note, and belies any suggestion that plaintiff intended to release the Dietrichs from liability.

The Dietrichs also place reliance on the fact that Concorde assumed all the obligations of the "Debtor" to support their assertion that a novation took place. The "debtor" in the bankruptcy case was Olympia West Properties, not the Dietrichs. Nothing in the bankruptcy trustee's "Assignment and Assumption of Vendee's Interest in Land Contract" suggests that the guaranty, to which Olympia West Properties was not a signatory, was assumed by Concorde. The land contract was an obligation of the debtor partnership, but the guaranty was not. We find nothing in the documentary evidence to suggest that the Dietrichs were replaced by Corcorde as guarantors of the note.

II

Next, the Dietrichs argue that the trial court misinterpreted and misapplied the law regarding the duty owed by a secured party to a guarantor of a promissory note.

On March 27, 1997, plaintiff discharged the mortgage created between itself and Olympic Growth, but the note and guaranty remained intact. The Dietrichs first argue that permitting plaintiff to destroy the collateral and still enforce the guaranty would violate public policy. In their view, to hold otherwise would mean that a secured party could willfully destroy the collateral and nevertheless enforce a guaranty.

The Dietrichs cite *In re Allied Supermarkets, Inc*, 951 F2d 718, 728 (CA 6, 1991), for the proposition that "misconduct by a creditor which has a material adverse effect on the rights or obligations of a guarantor voids the contract of guaranty between the parties." *Allied Supermarkets*, however, unlike the present case, involved an intentional misrepresentation. *Id*. The Dietrichs point to no evidence in the record that suggests misconduct on the part of plaintiff. Plaintiff discharged the mortgage on the property and then entered into a new land contract agreement with Concorde the same day. Plaintiff did not harm or destroy the property.

The guaranty in this case expressly states that the Dietrichs' obligations would not be affected by the "substitution, exchange, or release of any collateral securing payment of the Note." We find this language unequivocal, and that it effectuated a waiver of any defense to performance the Dietrichs may have had when plaintiff discharged the mortgage. See Restatement Suretyship and Guaranty, 3d, § 33, 141 (1996). Nor do we find any support for the Dietrichs' claim that plaintiff violated its duty to act in good faith.

III

The Dietrichs' final argument is that the trial court erred when it granted the Houlahans' motion for summary disposition to recover on their cross-claim for indemnification from Edgar Dietrich[2] because they were given no prior notice of the settlement and no opportunity to participate or influence the settlement amount. We do not agree.

The Dietrichs argue that under equitable principles of indemnity, they should have been provided with notice of the settlement negotiations between plaintiff and the Houlahans and an opportunity to participate in those negotiations. The Dietrichs cite 42 CJS, Indemnity, § 24, 114, in support. The cited section, however, only states that notice and an opportunity to participate should be given in order to satisfy the indemnitee's duty to prove actual liability to the original plaintiff. In the instant case, however, the Dietrichs do not dispute the Houlahans' liability to the original plaintiff. Even assuming arguendo that the Dietrichs' were unaware of the settlement negotiations, their authority is unpersuasive and irrelevant to the facts of this case.

The Dietrichs cite MCL 600.2925a(1); MSA 27A.2925(1)(1), which applies to tortfeasors, and ask us to extend its mandates to the context of an indemnity agreement. We decline to do so.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

[1] In June 1994, Olympic Growth was divided into Olympia East Property Limited Partnership and Olympia West Property Limited Partnership. Olympia West assumed sole responsibility for paying the land contract obligation owed to plaintiff.

[2] The Houlahans only sought indemnification from Edgar Dietrich in the trial court. Therefore, only he should be regarded as a party-appellant to the motion granting indemnification in favor of the Houlahans.