[Cite as *VCS Properties, L.L.C. v. Viking Steel, L.L.C.*, 2010-Ohio-5929.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

VCS PROPERTIES, LLC.	C. A. No. 09CA0090-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 08CIV0391
VIKING STEEL LLC, et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: December 6, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, VCS Properties, LLC ("VCS") and Shiloh Industries, Inc. ("Shiloh") (collectively "Plaintiffs"), appeal from the judgment of the Medina County Court of Common Pleas in favor of Defendant-Appellee, Patrick James. This Court affirms.

I

{¶2} At some point prior to July 2001, Shiloh sought to sell the assets of one of its wholly-owned subsidiaries, Valley City Steel, Co. The end result was that James and his company, Viking Steel, LLC ("Viking Steel"), joined with Valley City Steel, Co. to form a joint venture that they named Valley City Steel-7779, LLC ("Valley-7779"). Valley City Steel, Co. took a 49% ownership interest in Valley-7779 while Viking Steel took a 51% interest and James took a position as the head of the company. To fund Valley-7779's purchase of Valley City Steel Co.'s assets, Valley-7779 had to obtain several loans. On July 31, 2001, Valley-7779 borrowed $4.9 million from Comerica Bank ("Comerica") by way of a loan agreement and

mortgage note. As security for the loan, Comerica acquired several items, including, but not limited to: (1) a lien on all of Valley-7779's assets and personal property; (2) a personal guaranty from James; and (3) a "first priority Open-End Continuing Collateral Mortgage on the real property located at 804 Steel Drive, Valley City, Ohio."

{¶3} Subsequently, Valley-7779 changed its name to Valley City Steel, LLC and Valley City Steel, Co. changed its name to VCS. Valley City Steel, LLC defaulted on the loan with Comerica in late 2002 and filed a petition for Chapter 11 bankruptcy. To protect the real property they mortgaged as security for the loan with Comerica from foreclosure, Plaintiffs entered into a settlement agreement with Comerica whereby they satisfied the amount due and owing on the note. In exchange, Comerica delivered the original mortgage note to Plaintiffs, along with a discharge of the open-end mortgage on the real property located at 804 Steel Drive, Valley City, Ohio.

{¶4} On February 27, 2008, Plaintiffs brought suit against Viking Steel for contribution and against James for breach of contract based on the guaranty that he signed. On January 20, 2009, Plaintiffs filed a motion to stay their contribution claim against Viking Steel due to a pending matter in another court. The trial court denied the motion for a stay, but later permitted Plaintiffs to amend their complaint so as to remove Viking Steel as a defendant. On March 10, 2009, Plaintiffs filed their amended complaint against James for breach of contract.

{¶5} On July 14, 2009, Plaintiffs filed a motion for summary judgment. James filed his own motion for summary judgment on July 21, 2009. The trial court initially concluded that a genuine issue of material fact existed for trial because it was unclear whether Comerica still had a right to seek collection costs and attorney fees under the note at issue. The parties then filed a joint stipulation, indicating that Comerica did not incur any collection costs or attorney

fees. On November 17, 2009, the trial court granted James' motion for summary judgment and denied Plaintiffs' motion.

{¶6} Plaintiffs now appeal from the court's judgment and raise two assignments of error for our review. We consolidate the assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO JAMES."

Assignment of Error Number Two

"SHILOH IS ENTITLED TO SUMMARY JUDGMENT."

{¶7} In their assignments of error, Plaintiffs argue that the trial court erred by granting James' motion for summary judgment and by denying their own motion. Specifically, Plaintiffs argue that they have the right to collect funds from James as the current holder of the mortgage note that James guaranteed in favor of Comerica to secure a loan for Valley-7779 n/k/a Valley City Steel, LLC. We disagree.

{¶8} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for

> summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} Both Plaintiffs and James essentially relied upon the same materials in support of their respective motions for summary judgment. In particular, they relied upon the loan agreement, including the mortgage note for $4.9 million, between Valley-7779 and Comerica, the guaranty that James signed as security for the loan, and a settlement agreement between Plaintiffs and Comerica. Plaintiffs' argument is that Comerica assigned its mortgage note with Valley-7779 to them when they paid Comerica pursuant to the settlement agreement. Based on this purported assignment, Plaintiffs assert that they have the right to enforce James' personal guaranty as if they are a creditor. In truth, what Plaintiffs want is to hold James responsible for a portion of the debt they paid on behalf of Valley-7779 n/k/a Valley City Steel, LLC because he owned 51% of that company.

{¶11} The guaranty that James signed in favor of Comerica to secure Valley-7779's mortgage note indicates that James absolutely guaranteed Valley-7779's total obligation to Comerica without limit. According to the guaranty, James' total obligation "shall include, IN

ADDITION TO any limited amount of principal guaranteed, all interest on that limited amount, and all costs incurred by [Comerica] in collection efforts ***, including without limit attorney fees." It also gives Comerica the "right to sell, assign, transfer, negotiate, or grant participations in all or any part of the Indebtedness and any related obligations, including, without limit, this Guaranty[.]" The underlying mortgage note, secured by the guaranty, provides that "[a]ny transferees of, or endorser, guarantor or surety paying this [n]ote in full shall succeed to all rights of [Comerica.]"

{¶12} The settlement agreement that Plaintiffs and Comerica entered into provided, in relevant part, as follows:

> "H. As of the date of this Agreement, [Valley-7779 n/k/a Valley City Steel, LLC] owes Comerica $3,072,255.77 (which amount includes principal of $3,052,762.43) under the Loan Documents, including the Mortgage Note[.]
>
> "***
>
> "3. *** In consideration for the obligations under this Agreement and concurrently with the execution of this Agreement: (a) [Plaintiffs] have paid to Comerica the sum of $3,072,255.77 in immediately available funds; [and] (b) Comerica has delivered the original Mortgage Note to VCS [] together with discharges of the Mortgage and Lease Assignment[.]"

Thus, pursuant to the settlement agreement, Plaintiffs paid Valley-7779 n/k/a Valley City Steel, LLC's total outstanding debt on its loans with Comerica. In return, Comerica delivered the original mortgage note to them and discharged the "Open-End Continuing Collateral Mortgage on the real property located at 804 Steel Drive, Valley City, Ohio."

{¶13} Both parties agree that Michigan substantive law applies in this case due to choice of law provisions in the mortgage note and guaranty at issue. Yet, Plaintiffs have not pointed this Court to any Michigan law in support of their position that a party who satisfies a note in order to save his own security interest may seek reimbursement from another party who also gave a security interest for the note. Valley-7779 was the only primary obligor on the mortgage

note with Comerica. The mortgage note was secured by various items, including James' guaranty and an open-end mortgage on real property located at 804 Steel Drive, Valley City, Ohio. The securities stood on equal footing such that, at the time Valley-7779 n/k/a Valley City Steel, LLC defaulted, Comerica could have sought to collect upon either security. Plaintiffs concede that they paid Comerica because Comerica sought to foreclose upon their real property at 804 Steel Drive. There also is no dispute that Comerica received the full amount outstanding on the mortgage note. Thus, Comerica received full payment on the note from one of the parties who pledged a security after Comerica sought to collect on it.

{¶14} Plaintiffs first rely upon *First State Bank & Trust Co. of Valdosta, Georgia v. McIver* (C.A.11, 1990), 893 F.2d 301, to argue that they can collect from James. In *McIver*, the Eleventh Circuit ruled that a surety could bring suit against the maker of a note after the maker defaulted, the bank sought to collect from the surety, and the surety acquired the note through a settlement agreement with the bank. *McIver*, 893 F.2d at 305-06. The court specified that "[t]he sale of a note, although it may provide the seller with sufficient funds to cover the debt, does not discharge *the maker's* obligation to pay the note according to its terms." (Emphasis added.) Id. at 304. *McIver* does not apply here because James was not the maker of the note at issue. Nor was he a primary obligor on the note. James merely pledged a security for the note, as did Plaintiffs.

{¶15} Second, Plaintiffs rely upon *Commercial Sav. Bank v. G & J Wood Products Co., Inc.* (1973), 46 Mich.App.133, to argue that a transferee may enforce a note against an obligor even when the note was satisfied. *G & J Wood* involved a guarantor seeking to set off the debt he paid in favor of the maker of a note when the maker defaulted. *G & J Wood*, 46 Mich.App. at

134-37. Once again, the case upon which Plaintiffs rely did not involve a situation where, upon satisfying a note, one guarantor pursued another guarantor for reimbursement.

{¶16} Finally, Plaintiffs rely upon *Bednarowski and Michaels Dev., LLC v. Wallace* (E.D.Mich. 2003), 293 F.Supp.2d 728. The specific statement of law from *Bednarowski* upon which Plaintiffs rely discusses equitable subrogation and provides as follows:

> "The doctrine [of equitable subrogation] rests on the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt *for which another is primarily liable*, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect." (Emphasis added.) *Bednarowski*, 293 F. Supp.2d at 730, quoting *In re Air Crash Disaster* (C.A.6 1996), 86 F.3d 498, 549.

Apart from the fact that James was not primarily liable on the note in question, Plaintiffs did not plead equitable subrogation at trial. Plaintiffs brought suit against James based solely on breach of contract. Neither the parties involved, nor the cause of action at issue is analogous. Accordingly, *Bednarowski* does not apply.

{¶17} In short, Plaintiffs have not supplied this Court with any law that would support their breach of contract action against James. See App.R. 16(A)(7). Plaintiffs and James both gave security interests on Valley-7779 n/k/a Valley City Steel LLC's behalf as a part of their endeavor to form a joint venture. Unfortunately for them, Plaintiffs alone ultimately satisfied the total obligation remaining on the loan in order to protect their security interest from foreclosure. James may have been equally responsible to Comerica for Valley-7779 n/k/a Valley City Steel LLC's outstanding mortgage note, but Plaintiffs have not demonstrated that James' guaranty survived once Plaintiffs satisfied the note's remaining balance. This is not a case where a creditor pursued co-guarantors after the primary obligor defaulted. Compare *Flagstar Bank, F.S.B. v. Dilorenzo* (July 6, 2010), Mich.App. 2d Dist. No. 289856, at *4 (affirming judgment for breach of guaranty where creditor foreclosed upon real property and then proceeded against

defendants for the remainder of the indebtedness based on their guaranty agreements). Certainly, Comerica could not have pursued James for additional monies under the mortgage note once Plaintiffs satisfied the note in full. See *Bank of Three Oaks v. Lakefront Properties* (1989), 178 Mich.App. 551, 561 ("[W]ith the bank's bid at the foreclosure sale of the entire amount of the indebtedness, no deficiency existed and the absence of a deficiency removed any potential claim of the bank under the guarantee."). It is unclear what the parties' respective obligations to each other were with regard to their joint venture agreement. In any event, Plaintiffs chose to bring suit against James based upon a breach of his guaranty, not the joint venture agreement. The record does not support Plaintiffs' cause of action. Accordingly, the trial court did not err by granting summary judgment in favor of James and by denying Plaintiffs' motion for the same. Plaintiffs' assignments of error are overruled.

III

{¶18} Plaintiffs' assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS, SAYING:

{¶19} I agree with the result reached by the majority but I write separately to expand on the discussion in the conclusion.

{¶20} Plaintiffs argued that Comerica assigned its interest in James' guaranty to them when they paid the balance due on the loan from Comerica. While James guaranteed Valley-7779's total obligation owed to Comerica, Plaintiffs also secured that loan with a mortgage on their real property. When the loan went into default, Comerica chose to pursue a remedy solely against Plaintiffs by attempting to foreclose on the real property. Plaintiffs declined to file a third-party claim against James on the basis of James' guaranty.

{¶21} James' guaranty contained a provision which allowed Comerica to sell, assign, or otherwise transfer its rights in relation to the guaranty. The guaranty was one for payment of the debt owed to Comerica for the loan. Plaintiffs settled with Comerica to prevent foreclosure on their real property and paid the entire amount owed on the loan. Accordingly, Plaintiffs extinguished any further rights Comerica had to collect on the loan. James was, therefore, relieved of any further obligation under the guaranty. Once the loan was paid in full, no person retained any right to additional payments under the loan instrument.

{¶22} Plaintiffs presented no evidence to demonstrate that they did not pay off the loan but instead merely purchased Comerica's right to collect on the loan. In fact, the terms of the settlement agreement between Plaintiffs and Comerica establish that Plaintiffs paid $3,072,255.77 to Comerica to pay off the amount due under the terms of the loan. The settlement agreement contains no language indicating that Comerica was merely assigning its right to collect under the terms of the loan to Plaintiffs in exchange for payment. James' guaranty states that "this Guaranty shall continue effective until the same shall have been fully paid." Provision 10 of the guaranty allows for sale or assignment of "all or any part of the indebtedness and any related obligations[.]" Plaintiffs failed to demonstrate, however, how any further indebtedness or other related obligations remained after they paid the loan in full. Moreover, Plaintiffs failed to append a copy of the parties' joint venture agreement which might have evidenced some obligation by James to indemnify or otherwise contribute to the repayment of the Comerica loan. Because Plaintiffs failed to meet their initial burden in support of their motion for summary judgment, and failed to meet their reciprocal burden in opposition to James' motion, I would affirm the trial court's judgment.

{¶23} Moreover, I disagree with the statement by the dissent that Plaintiffs maintained a claim for contribution against James in the second amended complaint. In fact, in the original complaint, Plaintiffs alleged a claim for contribution against Viking Steel, demonstrating that they knew how to allege such a claim, if they so desired. Unlike the dissent, I would not so liberally construe the statement in the second amended complaint to recognize a claim for contribution against James.

DICKINSON, P. J.
DISSENTS, SAYING:

INTRODUCTION

{¶24} Valley City Steel and Viking Steel entered into a joint venture, forming Valley City Steel-7779. Under the terms of the joint venture, Valley City Steel owned 49% of Valley City Steel-7779 and Viking Steel owned 51%. Valley City Steel sold assets to Valley City Steel-7779, but retained the land on which those assets were located. In order to finance the transaction, Valley City Steel-7779 borrowed approximately 18 million dollars from Comerica Bank and executed three notes to it totaling that amount. Valley City Steel secured the notes with a mortgage. Patrick James, who owned Viking Steel, also personally guaranteed the notes. When Valley City Steel-7779 went bankrupt, it sold its assets and paid Comerica all but three million dollars of one of the notes secured by the Valley City Steel mortgage and Mr. James's Guaranty. Comerica foreclosed on the mortgage, but Valley City Steel, which had become VCS Properties, settled the action by paying Comerica three million dollars. Comerica, therefore, discharged the mortgage. VCS Properties, claiming it had purchased the note, sued Mr. James for breach of contract, alleging he owed his share of the three million dollars it had paid Comerica. The trial court granted summary judgment to Mr. James, concluding that VCS Properties only received from Comerica the minimal rights it had against Mr. James after the note had been paid off. Accordingly, it could not recover from Mr. James. The trial court's judgment should be reversed because, as a co-guarantor of the note, Mr. James is liable to VCS Properties for his share of the three million dollars it paid Comerica.

THE AGREEMENTS

{¶25} In July 2001, Valley City Steel-7779 and Comerica entered into a "Loan Agreement," which consisted of that document, a term note, a revolving credit note, and a

mortgage note. The Loan Agreement provided that the security for the notes would include several security and subordination agreements, a guaranty from Mr. James, and a mortgage on property owned by Valley City Steel. The Loan Agreement also provided that it and the notes "shall be governed by and construed and enforced in accordance with the laws of the state of Michigan." The term note was for 4.1 million dollars, the mortgage note was for 4.9 million dollars, and the revolving credit note was for 9 million dollars.

{¶26} Under the terms of his Guaranty, Mr. James agreed to pay Comerica "all existing and future indebtedness . . . of Valley City Steel-7779 . . . ." He also agreed that Comerica could "sell, assign, transfer, negotiate, or grant participations in all or any part of the indebtedness . . . including . . . this Guaranty . . . ." He further agreed that the Guaranty shall be governed by Michigan law. Like Mr. James's Guaranty, Valley City Steel Company's mortgage provided that it was "made to secure . . . all existing and future indebtedness . . . of Valley City Steel-7779 . . . ."

{¶27} After Valley City Steel-7779 defaulted on the notes, Comerica and VCS Properties entered into a Settlement Agreement. One of the settlement agreement's provisions was entitled "Settlement Payment/Discharge of Mortgage and Lease Assignment/Termination . . . ." It provided that, "[i]n consideration for the obligations under this Agreement and concurrently with execution of this Agreement: (a) VCS Properties . . . ha[s] paid to Comerica the sum of $3,072,255.77 in immediately available funds; [and] (b) Comerica has delivered the original Mortgage Note to VCS Properties together with discharges of the Mortgage and Lease Assignment . . . ." That same day, Comerica executed a "Discharge of Open-End Mortgage," providing that "[t]his is to certify that the conditions of a certain Open-End Mortgage on

property . . . from Valley City Steel Company . . . n/k/a VCS Properties . . . to Comerica . . . have been fully complied with and the same is hereby satisfied and discharged in full."

SUMMARY JUDGMENT

{¶28} VCS Properties' first assignment of error is that the trial court incorrectly granted Mr. James's motion for summary judgment. "In choice-of-law situations, the procedural laws of the forum state . . . are generally applied." *Nationwide Mut. Fire Ins. Co. v. Rose*, 9th Dist. No. 05CA008814, 2007-Ohio-1216, at ¶7 (quoting *Lawson v. Valve-Trol Co.*, 81 Ohio App. 3d 1, 4 (1991)). Under Rule 56(C) of the Ohio Rules of Civil Procedure, a trial court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

DISCHARGE OF THE MORTGAGE

{¶29} VCS Properties has argued that, because it acquired the mortgage note from Comerica, it has the right to enforce Mr. James's Guaranty. It has argued that its payment to Comerica did not pay off the note, only discharged the mortgage. Mr. James has argued that VCS Properties is incorrect because the settlement agreement does not contain any language regarding assignment of the note. According to him, VCS Properties paid off the mortgage note,

discharging his obligations as a guarantor. Mr. James has further argued that VCS Properties failed to allege a claim for subrogation.

{¶30} Under Michigan law, a mortgage is "[a] conveyance of an interest in real estate to secure the performance of an obligation." *In re Van Duzer*, 213 N.W.2d 167, 170 (Mich. 1973). In general, it "is a mere security interest incident to an underlying obligation . . . ." *Prime Fin. Servs. LLC v. Vinton*, 761 N.W.2d 694, 703-04 (Mich. Ct. App. 2008). If, however, "the mortgage itself contains a promise to pay," "[i]t is not necessary that a mortgage be accompanied by a note." *Cooklin v. Cooklin*, 244 N.W. 232, 232 (Mich. 1932). Under Section 565.41(1) of the Michigan Compiled Laws, a mortgagee is entitled to discharge "after a mortgage has been paid or otherwise satisfied . . . ."

{¶31} Comerica discharged VCS Properties' mortgage because the "conditions of [the] [m]ortgage . . . have been fully complied with . . . ." The mortgage did not contain a promise to pay Comerica. It was merely a security interest incident to Valley City Steel-7779's debt obligations. Accordingly, the only way that the conditions of the mortgage could have been "fully complied with" was through satisfaction of Valley City Steel-7779's debt. It is undisputed that VCS Properties paid Comerica $3,072,255.77, which was the exact amount that Valley City Steel-7779 owed Comerica. There is no genuine issue of material fact that VCS Properties' payment to Comerica did not merely discharge its mortgage, but also paid off Valley City Steel-7779's note.

SURETY LAW

{¶32} VCS Properties has argued that, even if its payment to Comerica paid off the note, it is still entitled to enforce Mr. James's personal guaranty. It has noted that, under the terms of

the note, "[a]ny . . . guarantor or surety paying this Note in full shall succeed to all rights of [Comerica]." It has also argued that it has a right to collect Mr. James's share of the debt it paid.

{¶33} "Michigan case law is minimal concerning sureties . . . ." *Will H. Hall & Son Inc. v. Ace Masonry Constr. Inc.*, 677 N.W.2d 51, 56 (Mich. Ct. App. 2003). Accordingly, its courts have looked to the Restatement of the Law of Suretyship and Guaranty for guidance. *Id*. The Restatement uses the term "surety" for both guarantors and sureties. Restatement (Third) of Suretyship and Guaranty § 1 cmt. c. (1996). Section 55(1) provides that, "[a]s between cosureties for the same underlying obligation, each cosurety is a principal obligor to the extent of its contributive share, and a secondary obligor as to the remainder of its duty pursuant to its second obligation." "When secondary obligors are cosureties, . . . the relationship between them is such that they should share the cost of performance of their secondary obligations." *Id*. § 55 cmt. a. "[C]osureties are treated as though they agreed among themselves to share the cost of their performance." *Id*. § 57 cmt. a. As the Michigan Supreme Court explained in *Comstock v. Potter*, 158 N.W. 102, 105 (Mich. 1916), "[t]he right of one surety to call upon his cosurety for contribution, like the right of all the sureties to call upon the principal for indemnity, arises from a principle of equity, growing out of the relations which the parties have assumed towards each other."

{¶34} In general, "a cosurety's contributive share is the aggregate liability of the cosureties to the obligee divided by the number of cosureties." Restatement (Third) of Suretyship and Guaranty § 57(1) (1996). In some cases, however, courts may infer an implied agreement regarding contributive shares based on the cosureties' general relationship. *Id*. cmt. c. For example, if three cosureties do not enter into an express agreement regarding their contributive shares, but one of them owns 50 percent of the corporation, another 30 percent, and

the third 20 percent, "[t]he fact finder may find an implied agreement that the cosureties' contributive shares are to be in proportion to their ownership interests." *Id*. cmt. c. Ill. 4. According to the Michigan Supreme Court, "the overwhelming weight of authority is to the effect that in suits between cosureties brought for contribution, the party who has settled the liability of all sureties . . . may only recover from his cosureties their proportionate share of the sum so paid." *Rider v. Coyne*, 224 N.W. 332, 333 (Mich. 1929).

{¶35} Mr. James has argued that payment of the note discharged his guaranty as a matter of law. His argument, however, misses the point. The only reason that the note was paid was because VCS Properties, another of the note's sureties, paid it. It is precisely because VCS Properties paid the note that it may recover from Mr. James for contribution on his guaranty.

{¶36} Mr. James has also argued that VCS Properties' argument that he is liable under his guaranty even though it paid the balance of the mortgage note is "inconsistent with [what it] argued in the trial court." VCS Properties, however, argued to the trial court that, "[u]nder Michigan law, a guarantor is entitled to contribution from fellow guarantors of the same indebtedness if he has paid more than his proportionate share of the obligation, regardless of whether the guarantors signed different instruments creating their obligation." Accordingly, his argument that VCS Properties did not raise that argument in the trial court is without merit.

{¶37} Mr. James has further argued that VCS Properties can not argue that it is entitled to its "fair share" because it did not plead a claim for equitable subrogation or contribution in its second amended complaint. Rule 8(A) of the Ohio Rules of Civil Procedure "requires that a complaint state a cause of action through 'a short and plain statement of the claim showing that the pleader [party] is entitled to relief . . . .'" *Truax v. Arora*, 9th Dist. No. 2758, 1993 WL 99893 at *2 (Apr. 7, 1993) (quoting Civ. R. 8(A)). "[Rule] 8(F) further provides [that] '[a]ll

pleadings shall be so construed as to do substantial justice.'" *Id.* (quoting Civ. R. 8(F)). "This liberal pleading rule merely requires sufficient operative facts which give fair notice of the nature of the action, and permits as many claims for relief to which a party may be entitled under the operative facts." *Id.* "Any legal theory applicable to the stated facts will support a recovery." *Id.*

{¶38} In its second amended complaint, VCS Properties alleged that, "[a]s a result of [its payment of the note], [it is] entitled to recover from James, on his Personal Guaranty, the proportionate share of the Payment owed by Viking Steel, L.L.C. as the fifty-one percent (51%) member of [Valley City Steel-7779]." That statement is sufficient to allege a claim for contribution against Mr. James. The statement, in fact, alleges that there was an implicit agreement between VCS Properties and Mr. James that their contributive shares would be based on the ownership percentage of Valley City Steel-7779 between Valley City Steel and Viking Steel. See Restatement (Third) of Suretyship and Guaranty § 57(1) cmt. c (1996).

{¶39} Mr. James has further argued that VCS Properties can not recover from him because it was a surety that had a primary obligation on the debt secured by the mortgage while he was merely a guarantor. According to the Michigan Supreme Court, although "a surety and guarantor are not the same in all respects, they are similar in the particular that each promises to answer for the debt or default of another, the surety assuming liability as a regular party to the primary undertaking, while the guarantor does not, but his liability depends upon an independent collateral agreement by which he undertakes to pay the obligation if the primary payor fails to do so." *First Nat'l Bank & Trust Co. of Ann Arbor v. Dolph*, 283 N.W. 35, 37-38 (Mich. 1938) (quoting *In re Kelley's Estate*, 139 N.W. 250, 252 (1913)).

{¶40} VCS Properties, however, was not a primary party to the note. VCS Properties signed an independent collateral agreement, the mortgage, under which it agreed to pay Valley City Steel-7779's debt if Valley City Steel-7779 failed to do so. Under the terms of the mortgage, Comerica did not have a right to collect from VCS Properties until there was an "Event of Default." For purposes of surety law, there is no substantive difference between the independent agreement VCS Properties signed and the independent agreement Mr. James signed.

{¶41} Mr. James's final argument is that VCS Properties can not recover against him because he was merely an accommodation party. According to him, "[i]f an instrument is exchanged for value for the benefit of a party . . . , and another party to the instrument . . . signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, then the instrument is signed 'for accommodation.'" See Mich. Comp. Laws § 440.3419(1). His argument fails because he only signed the Loan Agreement as "Chairman" of Valley City Steel-7779. He did not sign it in a personal capacity, let alone for accommodation. *Strather v. Detroit Disc. Distrib. Inc.*, Case No. 252086, 2005 WL 625460 at *2 (Mich. Ct. App. Mar. 17, 2005) (concluding that defendant who did not sign promissory note, but only a separate guaranty agreement was not a party to the promissory note and, therefore, could not be deemed an accommodation party).

{¶42} The trial court incorrectly concluded that VCS Properties could not recover from Mr. James because it had paid Valley City Steel-7779's remaining debt on the mortgage note. VCS Properties' first assignment of error should be sustained.

{¶43} VCS Properties' second assignment of error is that the trial court incorrectly denied its motion for summary judgment. Although VCS Properties has established that it is entitled to contribution from Mr. James for his contributive share of the debt it paid, a genuine

issue of material fact exists regarding Mr. James's share. In particular, a question of fact exists as to whether VCS Properties and Mr. James implicitly agreed that their contributive shares would reflect the investment percentages of Valley City Steel and Viking Steel in Valley City Steel-7779. VCS Properties' second assignment of error should be overruled.

CONCLUSION

{¶44} Because VCS Properties and Mr. James were cosureties of Valley City Steel-7779's debt, Mr. James is liable to VCS Properties for his contributive share of the note that VCS Properties paid for Valley City Steel-7779. The judgment of the Medina County Common Pleas Court should be reversed, and this matter should be remanded for further proceedings.

APPEARANCES:

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