[J-125-2008] [MO: Greenspan, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

KISKI AREA SCHOOL DISTRICT, A MUNICIPAL AUTHORITY	:	No. 27 WAP 2008
v.	:	Appeal from the Order of the Superior Court entered April 18, 2007 at No. 428 WDA 2006 reversing the Order of the Court of Common Pleas of Westmoreland County, entered January 25, 2006 at No. 6225 of 1999 and remanding the case.
MID-STATE SURETY CORPORATION, A MICHIGAN CORPORATION, AND LANMARK, INC., A PENNSYLVANIA CORPORATION	:	
APPEAL OF: MID-STATE SURETY CORPORATION, A MICHIGAN CORPORATION	:	ARGUED: September 9, 2008

CONCURRING OPINION

MADAME JUSTICE TODD **DECIDED: DECEMBER 17, 2008**

I concur in the Majority's disposition of the instant case, as I agree Mid-State's obligations with regard to the School District were discharged by the School District's release of Lanmark. I write separately, however, because I believe this Court should adopt expressly Section 39 of the Restatement (Third) of Suretyship and Guaranty ("Restatement"), and that under Section 39, summary judgment should be entered in favor of Mid-State.[1]

[1] The text of Section 39 of the Restatement is as follows:

§ 39. Release of Underlying Obligation

(continued…)

The Majority, citing this Court's decision in Keystone Bank v. Flooring Specialists, 513 Pa. 103, 518 A.2d 1179 (1986), states that an obligee's reservation of rights against a surety must be express. Quoting Hagey v. Hill, 75 Pa. 108 (1874), the Majority goes on to conclude that an express reservation must be on the face of the instrument by which the parties make the compromise, and that evidence cannot be admitted to vary or explain the effect of the instrument. See Majority Op. at 7. However, immediately following the statement in Hagey quoted by the Majority, this Court acknowledged that "parol evidence

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(…continued)

> To the extent that the obligee releases the principal obligor from its duties pursuant to the underlying obligation:
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> (a) the principal obligor is also discharged from any corresponding duties of performance and reimbursement owed to the secondary obligor unless the terms of the release effect a preservation of the secondary obligor's recourse (§ 38);
>
> (b) the secondary obligor is discharged from any unperformed duties pursuant to the secondary obligation unless:
>
> (i) the terms of the release effect a preservation of the secondary obligor's recourse (§ 38); or
>
> (ii) the language or circumstances of the release otherwise show the obligee's intent to retain its claim against the secondary obligor;
>
> (c) if the secondary obligor is not discharged from its unperformed duties pursuant to the secondary obligation by operation of paragraph (b), the secondary obligor is discharged from those duties to the extent:
>
> (i) of the value of the consideration for the release;
>
> (ii) that the release of a duty to pay money pursuant to the underlying obligation would otherwise cause the secondary obligor a loss; and
>
> (iii) that the release discharges a duty of the principal obligor other than the payment of money;
>
> (d) the secondary obligor has a claim against the obligee to the extent provided in § 37(4).

might be given to show that an agreement, which would by itself operate to release the surety, was not to have that effect." Hagey, 75 Pa. at 112. Thus, Hagey itself suggests an inconsistency in our law regarding whether, in order to be express, a reservation of rights against a surety must be included within the language of a release of a principal obligor by an obligee, and the admissibility of parol evidence with respect thereto. Cf. Reliance Ins. Co. v. Penn Paving, Inc., 557 Pa. 439, 450, 734 A.2d 833, 838 (1999) ("In determining whether a surety has consented to a material modification, the suretyship 'contract must be given effect according to its own expressed intention as gathered from all the words and clauses used, taken as a whole, *due regard being had also to the surrounding circumstances*.'" (emphasis added)).

Furthermore, I believe that Section 39 of the Restatement strikes an appropriate balance in protecting the rights of both obligee and surety under circumstances which, due to hastened efforts between parties to reach a complete or partial settlement, often lead to disputes such as that in the instant case. See, e.g., 4 Bruner and O'Connor on Construction Law, § 12:2 (recognizing the complexity of suretyship law in construction cases due to the cumulative effect of, *inter alia*, "[t]he technical nature of factual issues addressing design adequacy and construction conformance, which typically require the assistance of experts to investigate and analyze correctly" and "[t]he limited amount of time and facts typically available for decision-making amid the smoke of competing contentions between the obligee and contractor"). Allowing an obligee to show, under Section 39(b), its intent to retain its claim against a surety, by virtue of the language or circumstances of the release,[2] protects parties who willingly settle their claims in a timely fashion, while

[2] Indeed, I believe the facts of the instant case present another basis for the introduction of parol evidence. It has been suggested that while "[p]arol evidence is inadmissible to show that a written agreement with the principal obligor releasing or giving the principal [an extension of] time was subject to a reservation of rights against the surety[,] when a settlement has been made by the creditor with the principal obligor otherwise than in (continued…)

Section 39(c) properly limits the extent to which a surety may be held liable in cases such as the present one where the discharge involves a non-monetary duty.

Nevertheless, I conclude, as the Majority suggests, the School District is not entitled to relief under Section 39 because, even if the School District's reservation of rights against Keystone could be inferred from the circumstances pursuant to Section 39(b)(ii), as held by the Superior Court, the School District's release of Lanmark from its performance obligation discharged Mid State from its surety obligation under Section 39(c)(iii). For these reasons, I concur in the result.

(…continued)
writing, it may be shown by parol [evidence] that it was made subject to a reservation of rights against the surety." 23 Williston on Contracts, § 61:23 (4th ed. 2008). As the Majority notes, the release executed between the School District and Lanmark was limited to the verbatim terms of an *oral* settlement agreement, reached following oral settlement negotiations, which was recorded on the record on July 12, 2001. See Majority Op. at 2-3. Thus, the School District's release of Lanmark arguably was "otherwise than in writing," and, in my view, would warrant the admission and consideration of parol evidence to allow the School District an opportunity to demonstrate a reservation of rights against Mid-State.