IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 5, 2022 Session

BLUE WATER BAY AT CENTER HILL, LLC ET AL. v. LARRY J. HASTY ET AL.

Appeal from the Chancery Court for Williamson County
No. 43307 Deanna B. Johnson, Judge

No. M2020-01336-COA-R3-CV

This appeal concerns the enforceability of a promissory note and a coguarantor's right to seek contribution from another guarantor. The note and guaranties were assigned several times and, at one point, held by the coguarantor. On a motion for summary judgment, the trial court concluded on the undisputed facts that the promissory note had been discharged and that there was no right to contribution. We conclude that the promissory note was not discharged but agree that there was no right to contribution.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

M. Andrew Pippenger, Daniel H. Puryear, and Kennneth S. Schrupp,[1] Nashville, Tennessee, for the appellants, Blue Water Bay at Center Hill, LLC and Edmond R. Queen.

Ben M. Rose, Brentwood, Tennessee, for the appellee, Larry J. Hasty.

[1] After briefing, Mr. Schrupp withdrew as counsel for the appellants.

OPINION

I.

A.

In 2007, Greyhawk Development Corporation borrowed $3.1 million from Cadence Bank, N.A. (the "2007 Note"). Larry J. Hasty and Edmond R. Queen, who were each half-owners of Greyhawk, signed personal guaranties of the Cadence debt.

The debt matured in 2010. When Greyhawk failed to pay, Cadence Bank filed suit against Greyhawk on the 2007 Note and against Mr. Hasty and Mr. Queen on their guaranties. After mediation, the parties agreed to settle. The settlement agreement provided that "Greyhawk, Mr. Queen and/or Mr. Hasty" would pay Cadence Bank $1.8 million. The settlement payment would be "in full satisfaction of the indebtedness due and owing" or "upon the unanimous request of Greyhawk, Mr. Queen and Mr. Hasty," Cadence Bank would sell the 2007 Note.

Greyhawk could not pay or obtain financing to make the agreed settlement payment. So PDQ Disposal, Inc., a corporation wholly-owned by Mr. Queen, took out a loan from Franklin Synergy Bank for that purpose. After the payment, Cadence Bank signed an allonge endorsing the 2007 Note to PDQ Disposal. Greyhawk then signed an amended and restated promissory note in favor of PDQ Disposal in the principal amount of $1.8 million (the "Amended and Restated Note") with an extended maturity date. PDQ Disposal pledged the Amended and Restated Note as collateral for its loan from Franklin Synergy Bank.

In 2012, PDQ Disposal sold substantially all of its assets, including its name, to a third party. But the sale did not include the debts owed by Greyhawk to PDQ Disposal. As part of a plan of liquidation and dissolution, PDQ Disposal, then known as End Time, Inc., assigned all of its rights to the 2007 Note, the Amended and Restated Note, and the personal guaranties to Mr. Queen. Mr. Queen, in turn, assigned his rights in the 2007 Note, Amended and Restated Note, and the personal guaranties to Blue Water Bay at Center Hill, LLC.

B.

Following the assignment, Blue Water Bay and Mr. Queen sued Mr. Hasty. Blue Water Bay alleged that Greyhawk made no payments under the Amended and Restated Note. So it asserted a claim under Mr. Hasty's guaranty for one-half of the amounts due under the Amended and Restated Note plus costs of collection and attorney's fees. As an alternative claim, Mr. Queen alleged that he had paid the entire amount due under the 2007 Note by having his wholly-owned corporation, PDQ Disposal, make the settlement

payment to Cadence Bank. So he asserted a claim for one-half of the amount paid for the settlement.

Mr. Hasty denied liability. Among other things, he claimed that the 2007 Note "was satisfied and its obligations discharged by payment." So "all guarantees were discharged." Mr. Hasty also claimed that the Amended and Restated Note was "a new indebtedness and not guaranteed by either Mr. Queen or Mr. Hasty." As for the alternative claim for contribution, Mr. Hasty stated that the claim failed because Mr. Queen did not personally make the settlement payment.

Mr. Hasty moved for summary judgment on the claims of both Blue Water Bay and Mr. Queen. On Blue Water Bay's claim, Mr. Hasty argued that Greyhawk's debts were paid in full by PDQ Disposal, so his personal guaranty "was entirely discharged and . . . no longer exists." He also argued that the 2007 Note was "automatically deemed satisfied by operation of law" when it was transferred to a co-guarantor, Mr. Queen, which resulted in the termination of the guaranties. On Mr. Queen's claim, Mr. Hasty argued that there could be no claim for equitable contribution because payment was made by PDQ Disposal, which was not a party to the case.

The trial court granted Mr. Hasty summary judgment. It concluded that Blue Water Bay's claim should be dismissed "because PDQ's payment of the 2007 Note and the transfer of the [Amended and Restated Note] to Mr. Queen discharged Mr. Hasty of his obligations." And PDQ Disposal's "payment of Greyhawk's debt cannot be viewed as a payment by Mr. Queen personally," so Mr. Queen's contribution claim should be dismissed.

II.

Blue Water Bay and Mr. Queen appeal the dismissal of their respective claims on summary judgment. Under Rule 56 of the Tennessee Rules of Civil Procedure, summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The party moving for summary judgment has "the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993).

A trial court's grant of summary judgment presents a question of law, which we review de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Thus, we must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.*

A.

In granting summary judgment, the trial court accepted both of Mr. Hasty's assertions for why he was no longer liable under his guaranty. He was not liable "because PDQ [Disposal's] payment of the 2007 Note" and "the transfer of the [Amended and Restated Note] to Mr. Queen discharged Mr. Hasty of his obligations." We first consider the court's conclusion that PDQ Disposal's payment of $1.8 million to Cadence Bank "satisfied Greyhawk's debt" and "extinguished Mr. Hasty's obligation" under his guaranty. Of course, "the liability of a guarantor is discharged when the underlying debt has been paid in full." *Cumberland Bank v. G & S Implement Co.*, 211 S.W.3d 223, 231 (Tenn. Ct. App. 2006).

Under the Uniform Commercial Code, which governs the 2007 Note,[2] "an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument." Tenn. Code Ann. § 47-3-602(a) (2001). And "[t]o the extent of the payment, the obligation of the party obliged to pay the instrument is discharged." *Id.* Here, the undisputed evidence shows that the 2007 Note was not paid by PDQ Disposal.

PDQ Disposal was not obliged to pay the 2007 Note, and it did not make the $1.8 million payment to Cadence Bank on Greyhawk's behalf. *See Henning v. Mainstreet Bank*, 538 F.3d 975, 978 (8th Cir. 2008) (recognizing that payments made by purchasers at foreclosure sale were not on behalf of the obligor). The settlement agreement signed by Cadence Bank, Greyhawk, Mr. Hasty, and Mr. Queen provided for two options. Cadence Bank would accept the $1.8 million payment "in full satisfaction of the indebtedness due and owing," or Cadence Bank would, upon unanimous request of Greyhawk, Mr. Hasty, and Mr. Queen, "agree to sell the [2007 Note] for the amount of the Satisfaction Payment." The parties pursued the latter option, with Cadence Bank assigning the loan documents and signing an allonge endorsing the 2007 Note payable to PDQ Disposal. And the Amended and Restated Note, which Mr. Hasty signed on behalf of Greyhawk, specifically acknowledged that PDQ Disposal purchased and was the holder of the 2007 Note.

These facts distinguish this case from *Cumberland Bank v. G & S Implement Co.*, which the trial court relied on in determining that PDQ Disposal "paid the debt in full." In *Cumberland Bank*, guarantors of a promissory note provided the obligee with a new promissory note in fulfillment of the terms of a confirmed bankruptcy plan of reorganization. 211 S.W.3d at 226-27. The plan of reorganization committed the guarantors to obtain refinancing and pay the unpaid balance of the original promissory note in full within nineteen months. *Id.* at 226. The obligee argued that its acceptance of the

[2] The parties acknowledge that Article 3 of the Uniform Commercial Code governs.

new promissory note twenty months after confirmation of the plan did not discharge the earlier promissory note. *Id.* at 230. This Court concluded that the bankruptcy court's confirmation order left no doubt that the new promissory note discharged the original promissory note by "paying off the . . . [original promissory] note in full." *Id.* at 231. The new promissory note was the refinancing contemplated by the plan of reorganization. *Id.*

As in *Cumberland Bank*, here the parties contemplated the potential satisfaction of an existing indebtedness. *See* Tenn. Code Ann. § 47-3-601(a) (2001) (providing that an obligation to pay an instrument can be discharged by agreement). And a new promissory note, the Amended and Restated Note, was signed. But the similarities end there. The settlement agreement signed by Cadence Bank, Mr. Hasty, and Mr. Queen also allowed for the existing indebtedness to be sold. And the Amended and Restated Note states that the indebtedness was sold. So the Amended and Restated Note did not discharge the 2007 Note. *See Commerce Union Bank v. Burger-In-A-Pouch, Inc.*, 657 S.W.2d 88, 90 (Tenn. 1983) (holding that "a renewal note does not discharge the original note unless all of the parties thereto agree that the renewal is to have this effect"); *see also* 11 AM. JUR. 2D *Bills and Notes* § 173, Westlaw (database updated May 2023) (recognizing that "[a] subsequent note does not discharge or extinguish the original indebtedness secured unless there is an express agreement between the parties or it clearly appears that such was the intention of the parties as revealed by the facts and circumstances of the transaction" (footnotes omitted)).

B.

The trial court also concluded that Mr. Hasty's obligation under his guaranty was discharged as a result of the transfer of the Amended and Restated Note to Mr. Queen. As noted above, the Amended and Restated Note was transferred to Blue Water Bay by Mr. Queen. As Mr. Hasty explains:

> [Blue Water Bay]'s claim against Mr. Hasty under the Hasty Guaranty fails because once Mr. Queen came into possession of the 2007 Note—regardless of whether such possession resulted from his claimed "purchase" of the 2007 Note through PDQ [Disposal] or through an assignment of the [Amended and Restated] Note from PDQ [Disposal] and/or End Times—the entirety of Greyhawk's corporate debt under the 2007 Note was satisfied and the Hasty Guaranty was therefore no longer effective. It simply ceased to exist.

This argument is not founded on the terms of Mr. Hasty's guaranty. In fact, the guaranty supports the opposite conclusion.

Under his guaranty, Mr. Hasty agreed the 2007 Note could be modified without "impair[ing] or affect[ing]" the guaranty. And he agreed that the 2007 Note and any debt that Greyhawk might owe to Cadence Bank, which the guaranty defined broadly as

"Obligations," could be sold or assigned and that any purchaser or assignee could enforce the guaranty. Specifically, Mr. Hasty agreed that

> [t]he Lender may, without notice of any kind, sell, assign or transfer all or any of the Obligations, and in such event, each and every immediate and successive assignee, transferee, or holder of all or any of the Obligations, shall have the right to enforce this Guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers, and benefits.

Mr. Hasty also agreed that he would not be released "by any action or thing which might . . . be deemed a legal or equitable discharge of a surety or guarantor . . . or by reason of any further dealings among [Greyhawk, Cadence Bank] and any other guarantor, surety, or third party." Mr. Hasty must be held to these terms. *See SunTrust Bank v. Dorrough*, 59 S.W.3d 153, 156 (Tenn. Ct. App. 2001).

Despite the terms of his guaranty, Mr. Hasty argues the "merger rule"[3] extinguished the Greyhawk debt. He claims that "a co-guarantor like Mr. Queen cannot 'purchase' or be 'assigned' his own obligation under a promissory note and enforce a note as an assignee, as such a transaction should be viewed as what it really is—the satisfaction of a debt." So, the question

> presented is whether a debt is extinguished, as a matter of law, when the original creditor sells the promissory note to a coguarantor and assigns the creditor's rights under attendant guaranties or, instead, whether the purchasing coguarantor can maintain an action, as an assignee of the creditor, to enforce the guaranties against his coguarantors.

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[3] A merger of interests can occur when real property subject to a deed of trust is transferred to beneficiary of the deed of trust. *See Polston v. Scandlyn*, 108 S.W.2d 1104, 1107 (Tenn. Ct. App. 1937). The merger of interests potentially effects the debt secured by deed of trust.

> Ordinarily, a transfer of interest of the mortgagor in mortgaged property to the mortgagee operates as a merger of the two estates, which effects a discharge of the mortgage and satisfaction of the debt, whether the interest transferred by the mortgagor to the mortgagee is a legal title or an equity of redemption.

Budensiek v. Williams, No. C.A. 1168, 1988 WL 102774, at *5 (Tenn. Ct. App. Oct. 6, 1988) (quoting 55 Am. Jur. 2d *Mortgages* § 1256 (1971)); *see also* 59 C.J.S. *Mortgages* § 443, Westlaw (database updated May 2023) (recognizing that, absent a contrary intention, "a transfer of the mortgage or mortgage debt to the owner or other person having an interest in the mortgaged premises may result in a merger of the two estates and precludes the mortgage from being kept alive as a subsisting lien").

Sterling Sav. Bank ex rel. Nw. Lending Partners, LLC v. Emerald Dev. Co, 338 P.3d 719, 726 (Or. Ct. App. 2014).

When the Court of Appeals of Oregon was presented with this question, it identified "two, competing approaches to determining a guarantor's rights against his or her coguarantors when he or she has purchased a note and obtained an assignment of the underlying obligation and guaranties." *Id.* at 727. Under the first approach, the merger rule does not "extinguish the debt when a guarantor becomes, in effect, the creditor by virtue of an assignment." *Id.* Thus, the guarantor may "purchase the underlying note and assert a cause of action against the coguarantors as an assignee of the creditor." *Id.* (citing *Byrd v. Estate of Nelms*, 154 S.W.3d 149, 165 (Tex. Ct. App. 2004); *Albrecht v. Walter*, 572 N.W.2d 809, 813 (N.D. 1997); and *Estate of Frantz v. Page*, 426 N.W.2d 894, 898 (Minn. Ct. App. 1988)). But the guarantor's recovery against coguarantors is "limited, as a matter of law, to the coguarantors' proportionate share of what the guarantor paid the creditor for the note." *Id.* at 727-28 (citing *Mandolfo v. Chudy*, 573 N.W.2d 135, 138-39 (Neb. 1998); *Weitz v. Marram*, 366 A.2d 86, 89 (Md. Ct. Spec. App. 1976); *Albrecht*, 572 N.W.2d at 813; and *Byrd*, 154 S.W.3d at 165).

Under the second approach, the approach advocated by Mr. Hasty, "a guarantor may not sue on the note as an assignee of the creditor[;] . . . the guarantor can only recover from his or her coguarantors through a cause of action for contribution." *Id.* at 728 (citing *Koeniger v. Lentz*, 462 So.2d 228, 228-29 (La. Ct. App. 1984)). The Oregon court noted that, "under either approach, equitable principles grounded in the law of suretyship and guaranty operate[d] to limit the recovery of one guarantor against his or her coguarantors to their pro rata share of the obligation." *Id.*

The Oregon court adopted the first approach, allowing the guarantor to "proceed against its coguarantors as the creditor's assignee." *Id.* Tennessee courts have not previously addressed the question. But we conclude that the first approach should be applied. As the Oregon court reasoned, the first approach "reflects the actual intent of the parties to the purchase and sale of a note." *Id.* More importantly, the first approach gives effect to the contract language between the creditor and assignee-guarantor. *See Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013) (holding that "[t]he literal meaning of the contract language controls if the language is clear and unambiguous"). We also note that the merger doctrine is not favored. It should only be employed to "serve the purpose of justice and the actual and just intent of the parties, whether expressed or implied.'" *Browning v. Browning*, 132 S.W.2d 359, 361 (Tenn. Ct. App. 1939) (quoting 21 C.J. *Estate* § 234).

Having determined that a guarantor can maintain an action, as an assignee of the creditor, to enforce guaranties against coguarantors, we conclude that Mr. Queen could have recovered a pro rata share of what he paid for the Greyhawk debt. *See Sterling Sav. Bank ex rel. Nw. Lending Partners, LLC*, 338 P.3d at 727-28. Absent a contract fixing a

different distribution of liability, "[t]he presumption is that cosureties are liable to the obligee in proportion to the number of cosureties, that is, two cosureties are each liable for half, three sureties are each liable for one third, and so on." Peter A. Alces & Susan Sieger-Grimm, THE LAW OF SURETYSHIP AND GUARANTY § 5:5, Westlaw (database updated June 2023). But the parties admit that the Amended and Restated Note was assigned by Mr. Queen to Blue Water Bay.

Blue Water Bay is not a coguarantor of the Greyhawk debt; it is an obligee that acquired its interest from a coguarantor. Generally, an "obligee may proceed against any secondary obligor, irrespective of the secondary obligors' relative rights." *Id.* at § 5:4; *see also* Tenn. Code Ann. § 20-1-107 (2021) (allowing suits "against all or any part of the original obligors"). Although it has chosen to proceed only against one guarantor, Mr. Hasty, Blue Water Bay has sued him "for half of the amounts due and owing under the [Amended and Restated] Note, plus costs of collection, including reasonable attorney's fees."[4] So we need not resolve the question of whether equitable principles grounded in the law of suretyship and guaranty in any way limit its recovery. Blue Water Bay is only seeking to recover Mr. Hasty's pro rata share of the obligation.

C.

Having concluded that Blue Water Bay's claim was not subject to dismissal based on either payment or extinguishment of the debt as a matter of law, we consider Mr. Queen's claim for contribution. In the complaint, the claim is alleged as an alternative, not an additional, claim to that of Blue Water Bay. The trial court concluded that Mr. Queen had no right of contribution.

When there is more than one guarantor or surety of an obligation, absent an agreement to the contrary, the law treats them "as though they agreed among themselves to share the cost of their performance." RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57 cmt. a (AM. L. INST. 1996). Contribution is an equitable concept arising from this principle. *TRW-Title Ins. Co. v. Stewart Title Guar. Co.*, 832 S.W.2d 344, 346 (Tenn. Ct. App. 1991). It applies when parties are equally liable on a common obligation and one party has paid more than his proportional or contributive share. *Id.* Performance beyond a contributive share is an essential element of the claim. *Thompson v. Davis*, 308 S.W.3d 872, 881 (Tenn. Ct. App. 2009). Otherwise, no right of contribution arises. *See Young v. Kittrell*, 833 S.W.2d 505, 508 (Tenn. Ct. App. 1992) (explaining that "the right to contribution among contract debtors does not arise until the party actually pays more than his or her share of a joint obligation").

[4] A demand from Blue Water Bay for more than Mr. Hasty's pro rata share of the debt would trigger a duty of performance on the part of Mr. Queen as a coguarantor. *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 55 cmt. b (AM. L. INST. 1996).

Mr. Queen argues that the dismissal of his contribution claim ignores his "extensive contribution to extricating" Greyhawk and Mr. Hasty from the suit filed by Cadence Bank. The undisputed facts[5] do show that Mr. Queen played an integral role in arranging for the financing that permitted PDQ Disposal to purchase the 2007 Note. To assist PDQ Disposal with obtaining a loan from Franklin Synergy Bank, he provided a personal guaranty, obtained an insurance policy on his life, and caused his other closely-held company to provide credit enhancements. And, undoubtedly, those steps came with a cost to Mr. Queen. But the facts do not show that Cadence Bank or its assignee, PDQ Disposal, or any subsequent assignee obtained any recovery from Mr. Queen personally.

Mr. Queen also argues that PDQ Disposal's payment to Cadence Bank should be credited as a payment from him personally. He contends that "the payment of a note by a corporate entity can act as a payment by the individual[] who provides the resources for the corporate entity to purchase the note." In *Thompson v. Davis*, a case cited by Mr. Queen, a payment on a promissory note by a limited liability company was found to be a payment by the members of the LLC. 308 S.W.3d at 883. The members were personally obligated on the note and had supplied the LCC with the necessary funding for the payment. *Id.* at 875, 883.

Mr. Queen's argument fails because a payment cannot be both on the note and for the purchase of the note. In *Thompson*, it was the former. *Id.* at 875. The members provided money to the LLC that "was intended for, and was actually used for funding the . . . payoff." *Id.* at 883. Here, it was the latter. The obligation was not paid by PDQ Disposal. The undisputed facts show that PDQ Disposal purchased the obligation.

A claim for contribution can only arise after a coguarantor has paid more than his proportional or contributive share. *TRW-Title Ins. Co.*, 832 S.W.2d at 346; *Young*, 833 S.W.2d at 508. Because Mr. Queen cannot establish that he did, he cannot maintain a claim for contribution.

[5] Some of the facts relating to Mr. Queen's contributions are undisputed only for purposes of ruling on the motion for summary judgment. *See* TENN. R. CIV. P. 56.03.

III.

Because we conclude that the Greyhawk debt was not paid and that the promissory note was not extinguished by merger when it was transferred to a coguarantor, we reverse the dismissal of Blue Water Bay's claim. But we affirm the dismissal of the coguarantor's claim for equitable contribution. The case is remanded for such further proceedings as may be necessary and consistent with this opinion.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE