

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

WILCOX HOLDINGS, LLC,

Plaintiff,

vs.

Case No. 13-09300-CKB

HON. CHRISTOPHER P. YATES

NEXT REST, LLC; HOWARD B. REYNOLDS;
and CAROL A. REYNOLDS,

Defendants,

and

CAROL A. REYNOLDS,

Third-Party Plaintiff and Third-
Party Counter-Defendant,

vs.

THOMAS REYNOLDS,

Third-Party Defendant, Third-
Party Counter-Plaintiff, and
Cross-Plaintiff,

vs.

HOWARD B. REYNOLDS,

Cross-Defendant.

OPINION AND ORDER RESOLVING CROSS-MOTIONS FOR SUMMARY DISPOSITION

“Neither a borrower nor a lender be,” cautioned Polonius in William Shakespeare’s *Hamlet*. Perhaps Polonius should have added: “Don’t be a co-signer, either.” In this case, Thomas Reynolds – apparently a man of means – reluctantly agreed to co-sign a loan that enabled his brother, Howard

Reynolds, to fulfill a lifelong dream of owning and operating a restaurant. In an effort to importune his brother, Howard Reynolds and his wife, Carol Reynolds, both signed personal guaranties in favor of the lender. What happened next was perfectly predictable: the restaurant flopped; the loan went into default; Howard and Carol Reynolds failed to meet their obligations on the personal guaranties; the lender demanded that Thomas Reynolds pay the entire outstanding loan obligation as a co-signer; Thomas Reynolds shelled out more than \$120,000 to settle the debt with the lender; and the whole mess wound up in court. In proceedings that have become so complicated that the caption can barely fit on one page, Plaintiff Wilcox Holdings, LLC (“Wilcox”) sought redress from Howard and Carol Reynolds, and eventually all three members of the Reynolds family filed claims against one another. Now, the Court must decide whether anybody must compensate Wilcox or Thomas Reynolds for the six-figure payment Thomas Reynolds made to settle the unpaid balance on the commercial loan. The Court rules that Thomas Reynolds may proceed against his brother, Howard Reynolds, and Howard’s wife, Carol Reynolds, on a promissory-estoppel theory. In all other respects, the competing claims, counterclaims, cross-claims, and third-party claims at issue cannot survive summary disposition.

I. Factual Background

Although the parties have variously referred to MCR 2.116(C)(7), (8), and (10) in requesting summary disposition, the Court has chosen to consider materials outside the pleadings, so the Court shall analyze the competing motions for summary disposition pursuant to MCR 2.116(C)(10). See Silberstein v Pro-Golf of America, Inc, 278 Mich App 446, 457 (2008). “In evaluating a motion for summary disposition brought under” MCR 2.116(C)(10), the Court “considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties[.]” Maiden v Rozwood, 461

Mich 109, 120 (1999). Therefore, the Court shall consider the entire record in determining whether any party is entitled to summary disposition. Id.

In 2009, Howard Reynolds attempted to obtain a loan from Comerica Bank (“Comerica”) to open a buffet-style restaurant in Caledonia. Comerica refused to extend credit to the company that Howard Reynolds created, called Next Rest, LLC (“Next Rest”), without the participation of some significantly credit-worthy co-obligor. Accordingly, Howard Reynolds enlisted his brother, Thomas Reynolds, to co-sign for the commercial loan. Although Thomas Reynolds expressed reluctance to participate in the lending arrangement, Howard Reynolds and his wife, Carol Reynolds, gave him an assurance that if Next Rest defaulted on the loan, Howard and Carol Reynolds would pay off the loan using money from Carol Reynolds’s retirement account. See Affidavit of Thomas Reynolds, ¶¶ 5(a) & (b). Based upon that assurance, Thomas Reynolds co-signed a Master Revolving Note in the amount of \$150,000.00 on September 23, 2009. See Plaintiff’s Motion for Summary Disposition as to Defendant Howard B. Reynolds, Exhibit A. In addition, Howard and Carol Reynolds executed personal guaranties of the note on September 23, 2009.¹ See id., Exhibit C. Then, on July 8, 2010, the note was amended to increase its value to \$200,000.00. Id., Exhibit B. Thomas Reynolds signed off on that amendment. See id.

By all accounts, Howard Reynolds used the proceeds from the loan to open and operate the Cobblestone Bistro and Banquet Center in Caledonia. But the restaurant eventually fell upon hard times, so Next Rest defaulted on its obligation under the note. In 2012, Comerica filed a collection action against Next Rest, Thomas Reynolds as a co-signer, and Howard and Carol Reynolds on their

¹ None of the parties has given the Court a copy of the guaranty executed by Carol Reynolds, but Carol Reynolds has conceded that she did personally guaranty the note, so the Court presumes for purposes of resolving the pending motions that Carol Reynolds signed a personal guaranty.

personal guaranties. While that lawsuit was pending, Thomas Reynolds realized that he would have to satisfy Comerica's demand because no other party had the wherewithal to pay off the debt. But Thomas Reynolds wanted to preserve his ability to seek redress from his brother and sister-in-law, so he created Wilcox as a single-member limited liability company on October 8, 2012. And shortly thereafter, Thomas Reynolds entered into a "Settlement and Non-Recourse Assignment Agreement" with Comerica that required him to pay \$123,725 plus interest to satisfy the obligation on the note. See Howard Reynolds's Brief in Opposition to Plaintiff's Motion for Summary Disposition, Exhibit D (Settlement and Non-Recourse Assignment Agreement, § 3(b)). In exchange, on September 17, 2013, Comerica executed an "Allonge" that gave Wilcox the right to recover on the note that Next Rest had signed in 2009. See Plaintiff's Motion for Summary Disposition as to Defendant Howard B. Reynolds, Exhibit D.

On September 30, 2013, Wilcox initiated this action against Next Rest, Howard Reynolds, and Carol Reynolds in an effort to recover from Next Rest on the note and from Howard and Carol Reynolds on their personal guaranties. The Court eventually dismissed Wilcox's claim against Next Rest for lack of service,² but Howard and Carol Reynolds remain targets. In fact, Carol Reynolds fired back with a third-party claim against Thomas Reynolds, who responded in kind by filing claims against Howard and Carol Reynolds for indemnification, promissory estoppel, and contribution. As a result, the Court must wade into the fray and figure out which, if any, claims, counterclaims, cross-claims, and third-party claims can withstand scrutiny under MCR 2.116(C)(10). The Court's mission could require untangling a procedural morass, but instead the Court's analysis cuts the Gordian knot, leaving only one viable claim at issue.

² As far as the Court can ascertain, Next Rest is now defunct and judgment-proof.

II. Legal Analysis

The Court shall consider all of the competing motions for summary disposition under MCR 2.116(C)(10). “A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint[.]” LaFontaine Saline, Inc v Chrysler Group, LLC, 496 Mich 26, 34 (2014). Summary disposition should be awarded under MCR 2.116(C)(10) “‘if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.’” Ramin v Allstate Ins Co, 495 Mich 316, 325 (2014). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these well-understood standards, the Court must determine whether any party has made a persuasive case for summary disposition.

A. Wilcox’s Claim Against Howard and Carol Reynolds.

Count Two of Plaintiff Wilcox’s complaint seeks recovery from Howard and Carol Reynolds on their personal guaranties of the note to Comerica. Specifically, Wilcox contends that the allonge signed by Comerica in September of 2013 vested in Wilcox the interest of Comerica in the note Next Rest signed and Thomas Reynolds co-signed. “An ‘allonge’ is a ‘slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements.’” Shaya v Karam, No 308905, slip op at 3 n1 (Mich App May 6, 2014) (unpublished decision). Thus, an allonge simply constitutes “a form of endorsement.” Id., slip op at 5. Here, the transaction underlying the allonge is spelled out in the “Settlement and Non-Recourse Assignment Agreement,” which defines the terms of the deal struck between Comerica and Thomas

Reynolds, in his capacity as an indebted co-signer on the note that Next Rest executed in 2009. See Howard Reynolds’s Brief in Opposition to Plaintiff’s Motion for Summary Disposition, Exhibit D.

That assignment agreement explains that:

Purchaser [*i.e.*, Thomas Reynolds] is indebted to Seller [*i.e.*, Comerica] as a co-obligor with Next Rest, LLC on the following instrument: \$150,000.00 Master Revolving Note, dated September 23, 2009, as amended by Agreement to Note dated July 8, 2010

Id. After identifying the balance due on that note as \$153,688.89, see id., the assignment agreement provides:

To resolve Purchaser’s obligations to Seller under the Note, Purchaser desires to purchase the Note from Seller, together with the Guaranties . . . executed by Howard B. Reynolds and Carol A. Reynolds[.]

Id. Consequently, the assignment agreement indicates that Comerica assented to assign the note and the personal guaranties of Howard and Carol Reynolds to Thomas Reynolds if, but only if, he paid “\$123,725, plus interest” to Comerica to “resolve [his] obligations to Seller [*i.e.*, Comerica] under the Note[.]” Id.

The assignment agreement conditioned the assignment of the note upon Thomas Reynolds’s “timely compliance with the terms of this Agreement and [Comerica]’s receipt of the full Purchase Price” of \$123,725 plus interest. See Howard Reynolds’s Brief in Opposition to Plaintiff’s Motion for Summary Disposition, Exhibit D (Settlement and Non-Recourse Assignment Agreement, § 4). Thus, when Thomas Reynolds paid off his negotiated obligation on the note, Comerica utilized the allonge to assign the note and guaranties to Thomas Reynolds’s chosen assignee, *i.e.*, Wilcox. But in assigning the note and guaranties, Comerica simply permitted Wilcox to step into its shoes, giving Wilcox the same rights as Comerica possessed. See First of America Bank v Thompson, 217 Mich

App 581, 587 (1996). And by that time, of course, Thomas Reynolds had already satisfied the note obligation he bore as a co-signer by making payments of \$123,725 plus interest to Comerica. Thus, before Comerica assigned the note and guaranties to Wilcox, all outstanding obligations on the note were extinguished by dint of Thomas Reynolds's payments to Comerica. See Lillie v Dennert, 232 F 104, 109 (6th Cir 1916). Comerica would have had no power, upon receipt of the payment from Thomas Reynolds as co-signer on the note, to pursue what would amount to a second recovery from Howard or Carol Reynolds on a personal guaranty. Consequently, Wilcox – as Comerica's assignee – cannot assert any right to collection from Howard or Carol Reynolds.³ See First of America, 217 Mich App at 587. As a result, the Court must grant summary disposition under MCR 2.116(C)(10) to Howard and Carol Reynolds on the claim for recovery on their guaranties set forth as Count Two of Wilcox's complaint.⁴

B. Thomas Reynolds's Claims Against Howard and Carol Reynolds.

Anticipating the possibility that Wilcox's claim against Howard and Carol Reynolds might not survive judicial scrutiny, Thomas Reynolds filed a "Third-Party Counterclaim and Crossclaim" against both of them, advancing claims for indemnity, promissory estoppel, and contribution in three

³ The Court recognizes that creditors certainly may assign their claims to collection agencies that, in turn, may seek recovery from those indebted to the creditors. See Dunn v Bennett, 303 Mich App 767, 775 n4 (2014). In such circumstances, however, the debt remains unsatisfied even though the assignment of the claim may be made in exchange for the payment of a sum of money from the collection agency to the creditor. The instant case, in contrast, presents a situation in which one of the debtors – Thomas Reynolds – paid off the creditor, *i.e.*, Comerica, and then the creditor made an assignment of the underlying obligation in the form of the note and the personal guaranties. Thus, unlike the usual assignment of the right to collect, the assignment in the instant case occurred after the obligation to the creditor had been extinguished by satisfaction from the co-signer on the note.

⁴ In light of the Court's dismissal of Wilcox's claim against Next Rest in Count One based upon failure of service, no claim asserted by Wilcox remains at issue in this case.

separate counts. Although the Court finds fatal flaws in the indemnity and contribution claims, the theory of promissory estoppel provides a viable basis for relief. Accordingly, the Court shall allow Thomas Reynolds to present that claim at trial.

In his indemnity claim, Thomas Reynolds alleges that Howard and Carol Reynolds “agreed, promised, and otherwise assured [him] that they would indemnify him for any amount that he paid on the Note.” See Third-Party Counterclaim and Crossclaim, ¶ 24. “An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation.” Miller-Davis Co v Ahrens Construction Co, 495 Mich 161, 173 (2014). “An indemnity contract is to be construed in the same fashion as other contracts[,]” Zahn v Kroger Co of Michigan, 483 Mich 34, 40 (2009), but an indemnity contract can only be enforced if such a contract exists between the parties. See Miller-Davis, 495 Mich at 174 (courts must “give effect to the parties’ intention at the time they entered into the contract”). Thomas Reynolds has offered no evidence to support the existence of an indemnity contract with Howard and Carol Reynolds, so the Court must award summary disposition under MCR 2.116(C)(10) to Howard and Carol Reynolds on Thomas Reynolds’s indemnity claim.

Thomas Reynolds’s claim for contribution from Howard and Carol Reynolds likewise cannot withstand a challenge pursuant to MCR 2.116(C)(10). “Contribution is an equitable remedy based on principles of natural justice.” Tkachik v Mandeville, 487 Mich 38, 47 (2010). Under Michigan law, “[t]he general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.” Id. Indeed, the concept of contribution

rests “upon the simple proposition that equality is equity.” Id. If Thomas Reynolds were seeking contribution from Next Rest, he surely would be entitled to proceed with his claim because he was a mere co-signer of the note on which Next Rest bore principal responsibility. But instead, Thomas Reynolds seeks contribution from Howard and Carol Reynolds, who simply guaranteed payment on the note. Because Thomas Reynolds accommodated Next Rest, as opposed to Howard and Carol Reynolds, by co-signing the note, see MCL 440.3419, and the proceeds of the loan were disbursed to Next Rest, rather than Howard and Carol Reynolds in their individual capacities, the Court cannot recognize a claim for contribution by Thomas Reynolds against Howard and Carol Reynolds. Thus, the Court must grant summary disposition under MCR 2.116(C)(10) to Howard and Carol Reynolds on the contribution claim.

Thomas Reynolds’s promissory-estoppel claim stands on much firmer footing. According to an affidavit, Howard Reynolds’s entreaty to his brother included an express assurance that Howard and his wife, Carol Reynolds, would satisfy the obligation on the note with money from a retirement account, if necessary. See Affidavit of Thomas D. Reynolds, ¶ 5(a). Carol Reynolds also promised Thomas Reynolds that she “would cash in her retirement account to pay off the loan if needed.” See id., ¶ 5(b). Moreover, Thomas Reynolds has furnished a statement from Carol Reynolds’s retirement account, which he claims Carol Reynolds sent to him to assuage his concerns. Id., Exhibit A. And according to Thomas Reynolds’s affidavit, the assurances and documentation caused him to co-sign the note. See id., ¶ 5(d). “Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions.” See Crown Technology Park v D&N Bank, FSB, 242 Mich App 538, 548 n4 (2000). To support a claim for promissory estoppel, Thomas Reynolds must demonstrate “(1) a promise, (2) that the promisor should reasonably have

expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided.” Novak v Nationwide Mutual Ins Co, 235 Mich App 675, 686-687 (1999). Although Carol Reynolds vehemently denies making any promise to Thomas Reynolds, the record contains ample evidence that Howard and Carol Reynolds both made a promise to Thomas Reynolds about cashing in the retirement account, and “[t]he existence and scope of the promise are questions of fact[.]” State Bank of Standish v Curry, 442 Mich 76, 84 (1993). Thus, the Court must deny the requests by Howard and Carol Reynolds for summary disposition pursuant to MCR 2.116(C)(10) on Thomas Reynolds’s promissory-estoppel claim.

III. Conclusion

For all of the reasons set forth in this opinion, the Court must grant summary disposition to Howard and Carol Reynolds on the one remaining claim of Wilcox, as well as Thomas Reynolds’s claims for indemnity and contribution. But the Court must deny summary disposition with respect to Thomas Reynolds’s promissory-estoppel claim against Howard and Carol Reynolds. That claim must be resolved at trial.⁵

IT IS SO ORDERED.

Dated: October 8, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁵ The Court has yet to consider the contribution claim in the “Third Party Complaint of Carol A. Reynolds” against Thomas Reynolds, so that claim shall also be addressed at trial.