

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

DENNIS WEISS, as assignee of
Independent Bank,

Plaintiff/Counter-Defendant,

vs.

Case No. 14-05293-CKB

MICHAEL J. GREER,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

vs.

HON. CHRISTOPHER P. YATES

JMO PROPERTIES, INC.; D.K. WEISS
& ASSOCIATES, CERTIFIED PUBLIC
ACCOUNTANT, PLLC; and DENNIS
WEISS,

Third-Party Defendants.

OPINION AND ORDER RESOLVING COMPETING MOTIONS
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

The business of business often outweighs the friendship of friends. In 2005, Plaintiff Dennis Weiss (a certified public accountant) and Defendant Michael Greer agreed to work together buying, developing, and selling property. Weiss and Greer became equal partners and shareholders in Third-Party Defendant JMO Properties, Inc. (“JMO”), which borrowed \$296,000 from Independent Bank based upon personal guaranties executed by Weiss and Greer and then used the loan proceeds to buy property on 15 Mile Road in Cedar Springs. The economic downturn left JMO unable to satisfy its repayment obligation, so Weiss ultimately bought JMO’s debt and then filed this lawsuit in an effort to hold Greer accountable for the loss. Now, the Court must decide where the loss falls.

I. Factual Background

Everyone involved in the suit has moved for summary disposition under MCR 2.116(C)(10), which enables the parties to test “the factual sufficiency of the complaint.” Corley v Detroit Board of Education, 470 Mich 274, 278 (2004). In evaluating the motions, the Court “considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. Fortunately, the parties seem to agree about most of the controlling facts, but they disagree about the legal implications that flow from those facts. Consequently, the Court shall begin by setting forth the uncontested context of this dispute.

In November 2005, JMO borrowed \$296,000 from Independent Bank. See Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 5 (loan agreement). Plaintiff Weiss signed a promissory note as the president of JMO, see id., Exhibit 4, and Weiss and Defendant Greer each signed a commercial guaranty for the loan.¹ See id., Exhibits 6-8. JMO used the loan proceeds to purchase property located at 4951 15 Mile Road in Cedar Springs for \$306,000.² Although Weiss and Greer had intended to develop the property to accommodate mobile homes that would generate rent, the development of the property never came to fruition, the economy fell into recession in 2008, and JMO failed to meet its obligations to Independent Bank. In the meantime, Weiss loaned money to JMO to cover expenses such as property taxes, insurance, and other costs of maintaining the real

¹ Although Plaintiff Weiss’s “guaranty is dated November 9, 2005,” see Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 7, Defendant Greer’s guaranty inexplicably “is dated September 29, 2005.” See id., Exhibit 6. Greer ultimately signed a second guaranty “dated March 31, 2008.” See id., Exhibit 8.

² Plaintiff Weiss and Defendant Greer each provided \$5,000 in cash to make up the difference between the \$296,000 in loan proceeds and the \$306,000 purchase price for the property.

property that JMO owned. Weiss also negotiated loan renewals with Independent Bank that Weiss and Greer both signed. See, e.g., id., Exhibits 9, 12. Ultimately, however, JMO simply could not satisfy its debt to Independent Bank, so Weiss entered into a forbearance and surrender agreement with Independent Bank on behalf of himself, JMO, and D.K. Weiss & Associates (“D.K. Weiss”). See id., Exhibit 14. That agreement was twice amended to extend the forbearance period, see id., Exhibits 15-16, and on December 23, 2013, Weiss bought the JMO loan, promissory note, and other supporting documents from Independent Bank for \$285,942.05, which constituted the principal owed under the JMO promissory note as of that date.³ See id., Exhibit 17.

Armed with the loan documents that he purchased from Independent Bank, Plaintiff Weiss – standing in the shoes of Independent Bank as its assignee – filed this case against Defendant Greer on June 12, 2014. In a straightforward complaint, Weiss sought recovery of the outstanding balance due on the JMO loan, *i.e.*, \$290,425.25, in a claim for breach of contract based on Greer’s guaranty. On July 30, 2014, Greer responded by filing a counterclaim and third-party complaint naming Weiss, JMO, and D.K. Weiss as defendants and asserting a passel of legal theories in support of recovery, dissolution of JMO, an accounting, and declaratory relief. Eventually, all of the parties moved for summary disposition under MCR 2.116(C)(10), so the Court must try to untangle the legal mess left in the wake of JMO’s default. In a nutshell, Weiss has proposed an outcome that would saddle Greer with the whole JMO debt through entry of a judgment for that entire amount. In contrast, Greer has advocated for an order that would completely excuse him from paying the JMO debt and award him a substantial share of the value of JMO’s real property.

³ The “Loan Sale and Assignment Agreement” signed on December 23, 2013, indicates that Plaintiff Weiss had to borrow the money from Independent Bank to purchase the JMO loan from the bank. See Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 17.

II. Legal Analysis

Although several parties have moved for summary disposition under MCR 2.116(C)(8) and (10), the Court necessarily must consider materials outside the pleadings to resolve the motions, so the Court shall address the competing motions under MCR 2.116(C)(10). Silberstein v Pro-Golf of America, Inc., 278 Mich App 446, 457 (2008). Summary disposition should be granted “under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact.” West v General Motors Corp., 469 Mich 177, 183 (2003). “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.” Id. Applying these standards, the Court shall turn to the various arguments presented by the competing parties.

A. Plaintiff Weiss’s Breach-of-Contract Claim.

At the outset, Plaintiff Weiss contends that he is entitled to summary disposition on his claim against Defendant Greer for breach of Greer’s obligation under his guaranty. In Weiss’s estimation, he stepped into the shoes of Independent Bank when he bought the JMO loan, First of America Bank v Thompson, 217 Mich App 581, 587 (1996), so he now possesses the right previously held by the bank to call Greer to account for the JMO loan obligation based upon Greer’s guaranty. In contrast, Greer insists that, when Weiss paid Independent Bank \$285,942.05 for the JMO loan documents that included Greer’s guaranty, Weiss extinguished the debt JMO owed to Independent Bank and created a new debt to Independent Bank in his own behalf. As a result, there no longer exists any obligation on JMO’s part to repay the loan from the bank, so neither Independent Bank nor its assignee, Weiss, can seek recovery on Greer’s guaranty of JMO’s obligation to the bank.

The “Loan Sale and Assignment Agreement” that Plaintiff Weiss and Independent Bank both signed clearly establishes that that transaction did not extinguish the JMO debt. See Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 17. Instead, Weiss purchased the JMO loan from Independent Bank, borrowing money from the bank to do so. Therefore, under the plain terms of the contract executed by Weiss and Independent Bank, JMO’s obligation was not satisfied; it was simply transferred by assignment from the bank to Weiss.⁴ Consequently, Weiss has the same right as Independent Bank to seek repayment of the JMO loan from Greer based on Greer’s guaranty. See First of America, 217 Mich App at 587. Accordingly, the Court shall grant summary disposition to Weiss with respect to Greer’s liability on Weiss’s claim for breach of Greer’s guaranty.

B. Defendant Greer’s Third-Party Claims.

The Court’s resolution of Plaintiff Weiss’s breach-of-contract claim against Defendant Greer does not completely resolve the parties’ dispute. The Court must determine not only the amount of damages that Greer must pay Weiss, but also whether Greer may proceed on his third-party claims.⁵

⁴ Defendant Greer’s reliance upon the Court’s opinion in Wilcox Holdings, LLC v Next Rest, LLC, 17th Cir Ct Case No 13-09300-CKB, is misplaced. There, an obligor under a promissory note paid off the note obligation at a reduced price in exchange for the assignment of the note to an entity the obligor set up to serve as an assignee and, in that capacity, to seek redress from the other obligors under the note. Because the obligor paid off the obligation on the note prior to the assignment of the note, the Court ruled that no obligation on the note remained for the assignee to pursue. In contrast, the transaction between Plaintiff Weiss and Independent Bank took the more familiar form of a bank sale of a note to a debt-collection company, which receives an assignment enabling it to undertake collection efforts. See, e.g., The Cadle Co v City of Kentwood, 285 Mich App 240, 241-242 (2009) (explaining large-scale transactions of this nature).

⁵ Defendant Greer cannot possibly succeed on any counterclaims against Plaintiff Weiss, who initiated this lawsuit solely in his capacity as the assignee of Independent Bank. Greer has no viable claim against Independent Bank, so he likewise has no claim against the bank’s assignee. Therefore, Weiss is entitled to summary disposition on all of the counterclaims. But Greer has also presented third-party claims against Weiss in his individual capacity, and two of those claims may have merit.

On these points, the unpublished decision of our Court of Appeals in Evangelista v Evangelista, No 297575 (Mich App June 9, 2011), provides valuable guidance. In that case, parents loaned money to their son and daughter-in-law, who jointly signed a promissory note to repay the loan. After the son and daughter-in-law divorced, the parents filed suit against the daughter-in-law, demanding the full amount due under the promissory note. Our Court of Appeals concluded that the “parents were entitled to a judgment against [the daughter-in-law] for the full amount of the promissory-note debt.” See id., slip op at 1. In reaching this result, our Court of Appeals held that, because the daughter-in-law “was jointly and severally liable” for the debt, “there was no authority for reducing the judgment against her based on the outcome of the third-party action” by the daughter-in-law against the son. Id. at 2. Nevertheless, our Court of Appeals permitted the daughter-in-law to proceed on her third-party claim against the son for contribution because the daughter-in-law and son “were jointly and severally liable for the promissory-note debt[,]” id. at 3, so the daughter-in-law “clearly was entitled to contribution from” the son. Id. Applying the legal principles from Evangelista to the instant case, the Court concludes that Greer may proceed on his third-party claim against Weiss, JMO, and D.K. Weiss on the theory of contribution set forth in Count Seven of Greer’s third-party complaint.⁶

⁶ Citing Kalamazoo Trust Co v Merrill, 159 Mich 649 (1910), Weiss, JMO, and D.K. Weiss insist that Defendant Greer cannot demand contribution unless he has paid more than his fair share of the JMO debt. Id. at 655. That principle, however, applies only in suits brought by one obligor against another. A different rule applies when a bank “maintain[s] a suit at law upon the notes.” See id. In that situation, “[i]t is not necessary that this defendant should first pay the notes, and then have recourse to a suit for contribution against his co-obligors. . . . It is his right to have the equities, as between himself and his co-obligors, adjusted in the action upon the instrument[.]” Id. Here, Weiss – standing in the shoes of Independent Bank – filed suit against Greer on the JMO note and Greer’s guaranty of that obligation. Therefore, Greer has the right to seek contribution from his co-obligors in this case even if he has not paid more than his fair share of the JMO debt. See id. For that reason, the Court shall permit Greer to seek contribution from Weiss, JMO, and D.K. Weiss through a third-party claim, notwithstanding Greer’s complete failure to pay the JMO obligation on the promissory note pursuant to Greer’s personal guaranty of that obligation.

In addition, the Court shall permit Defendant Greer to pursue his third-party claim for unjust enrichment based upon Plaintiff Weiss's apparent sale of JMO's real property on 15 Mile Road in Cedar Springs on a land contract. After Weiss borrowed money from Independent Bank to finance his purchase of the JMO loan and its supporting documents for \$285,942.05, Weiss apparently sold JMO's real property on 15 Mile Road for \$180,000 in a land-contract transaction. See Defendant/Counter-Plaintiff Michael Greer's Motion for Summary Disposition, Exhibit 11 (land contract for sale of 4951 15 Mile Road, NE, Cedar Springs, MI 49319). Although Weiss and Independent Bank signed a letter agreement on September 28, 2014, providing "that all land contract amounts [Weiss] receive[s] from JMO shall be credited against JMO's obligations to you under the JMO Loan[,]” id., Exhibit 12, Weiss's breach-of-contract claim against Greer provides no allowance for amounts paid on the land contract in demanding a judgment against Greer for the full amount of JMO's obligation. "Our Supreme Court 'has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another.'" Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193 (2006). Weiss's retention of the land-contract payments for the JMO property without any reduction in his claim against Greer for the JMO obligation would be a textbook example of unjust enrichment. Based upon the record developed thus far, however, the Court cannot conclusively find that Weiss is taking such an audacious position, so the Court cannot award summary disposition to Greer on the unjust-enrichment claim. Instead, the Court shall simply allow Greer to proceed further on the claim for unjust enrichment set forth in Count Six of Greer's third-party complaint.

Having found potential merit in Defendant Greer's third-party claims for unjust enrichment and contribution, the Court must dismiss the balance of Greer's third-party claims without prejudice. Counts One, Two, Three, and Four of Greer's third-party complaint present theories that fall outside

the scope of permissible third-party claims. Under MCR 2.204(A)(1), “a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim.” Accordingly, a third-party claim is not an option unless the third-party defendant may be “liable to defendant for any part of plaintiff’s claim.” Tanielian v Brooks, 202 Mich App 304, 308 (1993). The various claims in the first four counts of Greer’s third-party complaint all involve allegations about the manner in which Plaintiff Weiss operated JMO. Because those claims for breach of contract, breach of fiduciary duty, dissolution of JMO, and an accounting have nothing to do with the breach-of-guaranty claim Weiss presented in his complaint as an assignee of Independent Bank, Greer must pursue those four claims in a separate lawsuit, rather than as third-party claims in the instant case. See id.

Count Five of Defendant Greer’s third-party complaint demands declaratory relief regarding the rights and responsibilities of the guarantors of JMO’s obligation to Independent Bank. Although that third-party claim relates directly to the breach-of-guaranty theory in Plaintiff Weiss’s complaint, and therefore satisfies the standards of MCR 2.204(A)(1), that third-party claim cannot stand in light of Greer’s existing demand for contribution in Count Seven of his third-party complaint. “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” See MCR 2.605(A)(1). Such an “‘actual controversy’ under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff’s *future* conduct in order to preserve legal rights.” UAW v Central Michigan University Trustees, 295 Mich App 486, 495 (2012) (emphasis added). In this case, Weiss’s complaint and Greer’s third-party claim seeking contribution have framed an existing dispute about the parties’ obligations for the JMO debt, so the

Court need not issue declaratory relief to guide future conduct when the present dispute has ripened into a live conflict concerning the parties' rights and responsibilities. Accordingly, the Court shall dismiss Count Five of Greer's third-party complaint, which requests declaratory relief.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall award summary disposition to Plaintiff Weiss under MCR 2.116(C)(10) with regard to liability on the breach-of-guaranty claim set forth in his complaint, but the Court shall leave the question of damages for resolution at a later date. The Court shall also grant summary disposition to Weiss pursuant to MCR 2.116(C)(10) on each of the counterclaims advanced by Defendant Greer, who has no basis for asserting any claims against Independent Bank. Because Weiss has assumed the role of the plaintiff in his capacity as assignee of Independent Bank, the inability of Greer to assert claims against Independent Bank forecloses all of the counterclaims. In contrast, the Court shall deny summary disposition to both sides with regard to Greer's third-party claims for unjust enrichment and contribution, which are presented as Counts Six and Seven in his third-party complaint. Finally, the Court shall dismiss without prejudice all of the remaining third-party claims set forth as Counts One through Five of the third-party complaint filed by Greer. In other words, the Court has dramatically simplified – but not finally resolved – the parties' dispute about the JMO debt on its promissory note and the supporting guaranties.

IT IS SO ORDERED.

Dated: December 31, 2015



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