STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO. BCD-WB-CV-07-23

MACHIAS SAVINGS BANK

Plaintiff,

v.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THOMAS REILLY,

Defendant/Third-Party Plaintiff,

v.

SUNSHINE SEAFOOD VENTURES, LLC, ET AL.

Third-Party Defendants

This matter is before the court on (a) the motion of Defendant and Third-Party Plaintiff Thomas Reilly ("Reilly") for summary judgment on Plaintiff Machias Savings Bank's ("MSB") Complaint; (b) the motion of MSB for summary judgment on its Complaint and for summary judgment on Reilly's Counterclaim; and (c) the motion of Third-Party Defendants Sunshine Seafood Ventures LLC, Sunshine Seafood Incorporated, Maritime Trucking, James Eaton, Jennifer Eaton, Webb Cove LLC and Armageddon LLC ("Third-Party Defendants") for summary judgment on Reilly's Third-Party Complaint.

UNDISPUTED FACTS

Reilly and James Eaton ("Eaton") were co-owners of a seafood business called Nova Lobster, Ltd. ("Nova"). On June 19, 2002, MSB entered into an agreement to advance Nova a line of credit in the amount of $1,500,000 ("Nova Loan"). This amount was subsequently increased to $2,100,000.

As part of the Nova Loan transaction, Reilly executed an Unlimited Guaranty of Payment and Performance ("Guaranty") on June 19, 2002. The Guaranty provided that it was "an absolute, unconditional and continuing guaranty" and that, if Nova defaulted on the loan, the amount owed by Reilly would "become immediately due and payable to [MSB], without demand or notice of any nature, all of which are expressly waived by [Reilly]." The Guaranty also contained language broadly waiving a variety of possible defenses Reilly might have against enforcement of his obligations under the Guaranty, including but not limited to "presentment, demand, protest, notice of acceptance, notice of Obligations incurred and all other notices of any kind . . . ." Finally, the Guaranty provided for a wide range of situations that would not extinguish Reilly's obligations under the Guaranty including "any . . . amendments or modifications of any of the terms or provisions of any agreement evidencing, securing or otherwise executed in connection with any Obligation . . . [or] the substitution or release of any entity primarily or secondarily liable for any Obligation."

Over time, Reilly and Eaton had a falling out and Reilly began exploring options for cutting his ties with Nova. To this end, in 2003 representatives for Reilly and Eaton met with a business entity known as the Barry Group to discuss and negotiate the purchase of Nova by the Barry Group. During the period of these negotiations, Nova was encountering financial difficulties.

On June 19, 2003, MSB sent written notice to Nova, Reilly and Eaton that the Nova Loan was due and payable in full. After sending this notice, MSB was informed that, pursuant to the Barry Group's burgeoning deal to purchase Nova, the Barry Group would agree to take primary responsibility for the amount due under the Nova Loan and that, as a necessary component of that deal, Reilly would completely withdraw from Nova.

In tandem with the acquisition of Nova by the Barry Group, MSB agreed to reduce Reilly's liability under the Guaranty upon his exit from Nova. On July 31, 2003 Reilly signed an agreement with the bank ("Letter Agreement") that included the following:

> The Bank anticipates a Deficiency Note in the approximate amount of $1.3 million dollars will be executed by an entity controlled by the Barry Group; . . . The Bank will limit Thomas Reilly's obligations under the aforementioned Guaranty from August 1 2003 until April 1, 2004 in the amount of $500,000 and from April 1, 2004 through December 31, 2004 in the amount of $250,000 . . . .
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> In order to finalize this agreement, it will be necessary that Thomas Reilly, Maryanne [sic] Eaton, James Eaton, the Bank, and all other Guarantors and makers execute and deliver the documents that are required by the respective parties.

Thereafter, MSB and Reilly executed a First Amendment to Unlimited Guaranty of Payment of Performance ("First Amendment") , which amended the Guaranty. The First Amendment noted that the Nova Loan was being modified pursuant to a "Restructure Agreement", amended Reilly's liability under the Guaranty, and reiterated the above-described terms of the Letter Agreement regarding the reduction of Reilly's liability under the Guaranty.

On October 15, 2003, MSB entered into the above-referenced Restructure Agreement with Nova and several other parties, referred to as "Borrowers".[1] Relevant to the Restructure Agreement, MSB's internal records describe the Nova Loan as Note 3040020948. The Restructure Agreement expressly provides that, as of October 15, 2003, $2,100,000 remained outstanding on Note 3040020948; that, upon execution of the Restructure Agreement, the principal balance of that loan would be reduced to $2,000,000; and that restructured Note 3040020948 would thereafter be referred to as Loan No.1. (Fitzpatrick Aff. Exh. 35, pg. 3-4.) The Restructure Agreement also restructured several other loan obligations of the Borrowers

[1] The parties described as "Borrowers" in the Restructure Agreement are Maritime Trucking, Sunshine Foods, Inc., Armageddon, LLC, Sunshine Seafood Ventures, LLC, Webb Cove, LLC, Nova Lobster, Ltd., Nova Lobster USA, Inc., James Eaton and Marianne Eaton. The Restructure Agreement also identified Sunshine Seafood-Maine, LLC and Sunshine Seafood Group, LLC, as "Guarantors".

having an outstanding combined total balance of more than $1,400,000. Under the Restructure Agreement, the total balance of these loans was reduced to $1,300,000 in principal and collectively referred to as Loan No. 2. (*Id.*)

In November 2004, Nova defaulted on its obligations to MSB under the restructured Nova Loan and the bank demanded $250,000 from Reilly pursuant to the First Amendment to Reilly's Guaranty. Reilly refused to pay and MSB commenced this lawsuit.

DISCUSSION

I. Reilly and MSB's Cross Motions for Summary Judgment

Reilly argues that he is not liable to MSB because the Nova Loan has been fully paid. In support, Reilly points to MSB's own internal records describing the Nova Loan as Note 3040020948 and reciting that the loan was paid in full as of October 15, 2003. This internal file notation is the only record evidence supporting Reilly's proposition. MSB counters that it was merely a bookkeeping entry made at the time of and to account for the restructuring of the Nova Loan. Other record evidence tends to support the bank's characterization.

Concurrent with the Restructure Agreement, MSB began maintaining internal payment account records for a Note 2040011096 with terms identical to those of Loan No. 1 (Note 3040020948) in the Restructure Agreement.[2] In parallel with the foregoing, the bank also began maintaining internal payments account records for a Note 3040023367 with terms identical to

[2] The Restructure Agreement states that the Nova Loan, described as Loan No. 1, would be subject to an initial 6% rate of interest, that it would be subject to monthly principal payments of $11,111.11 beginning on January 15, 2004, and that payments of interest only would be due on November 15, 2003 and December 15, 2003. (Fitzpatrick Aff. Exh. 35, pg. 4.) In fact, the record of payments and terms for Note 2040011096 are consistent with these terms (Fitzpatrick Aff. Exh. 107.)

those of Loan No. 2 in the Restructure Agreement.[3] Nova is among the entities identified on the bank's records in connection with both Notes 2040011096 and 3040023367.

Thus, while it appears that Note 2040011096 embodies the terms of Loan No. 1 (Nova Loan) under the Restructure Agreement and Note 3040023367 embodies the terms of Loan No. 2, it is a matter of some confusion that the parties in their summary judgment arguments consistently refer to the Nova Loan as if it was reorganized under the latter Note 3040023367 and reduced to an outstanding balance of $1,300,000 at the time of the Restructure Agreement.[4]

This confusion over what should seemingly be a simple issue of establishing which note number represented the Nova Loan following the Restructure Agreement prevents the court from granting summary judgment for either Reilly or MSB.

II. Third-Party Defendants' Motion for Summary Judgment

All Third-Party Defendants, other than Jennifer Eaton,[5] became co-guarantors of the Nova Loan, along with Reilly, at or about the same time Reilly executed the Guaranty. Reilly's third-party complaint seeks contribution from them on his obligations to MSB under the First Amendment to his Guaranty of the Nova Loan.

Because it is unclear on this record whether Note 2040011096 or Note 3040023367, or either of them, represents the restructured Nova Loan, summary judgment in favor of Third-

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[3] The Restructure Agreement states that the initial rate of interest for Loan No. 2 would be 7%, that it would be subject to monthly principal payments of $21,666.67 beginning on January 15, 2004 and that payments of interest only would be due on November 15, 2003 and December 15, 2003. (Fitzpatrick Aff. Exh. 35, pg. 5.) The record of payments and terms for Note 3040023367 are consistent with what the Restructure Agreement describes for Loan No. 2. (Fitzpatrick Aff. Exh. 91.)

[4] Curiously, MSB has never itself directly stated which note number represented the Nova Loan following the Restructure Agreement.

[5] As will noted later in this decision, Marianne Eaton, who is the daughter of James and Jennifer Eaton, was also a co-guarantor of the Nova Loan. However, she is not a Third-Party Defendant and has not been joined in this action in any respect.

Party Defendants is only appropriate if they can not be held responsible for contribution related to the debt owed on either note. MSB claims that, at the time of default, there remained an outstanding debt of $1,899,944.13 on Note 2040011096 and $1,090,346.17 on Note 3040023367.

Pursuant to the First Amendment, Reilly's liability, excluding reasonable attorney's fees and costs of collection, cannot exceed $250,000. Under Maine law, "[a]s a general rule, co-guarantors must bear, among themselves, a ratable proportion of the amount for which they are liable under the contract of guaranty." *Spottiswoode v. Levine*, 1999 ME 79, ¶ 17, 730 A.2d 166, 172. Therefore, when a co-guarantor is forced to pay more than his share of a debt, he is entitled to seek contribution from his fellow co-guarantors in the amount of the excess. *Id.* The general rule, however, is merely a rebuttable presumption premised on the proposition that "[a]bsent proof to the contrary, the law presumes that each co-guarantor received equal benefit from the guaranty . . . . " *Id.* ¶ 19, 730 A.2d at 172.

Third-Party Defendants essentially argue that, because Reilly's ratable share of the Nova Loan debt cannot be greater than the $250,000 cap on MSB's recovery against him under the First Amendment, Reilly has no right to contribution from them. The court agrees.

All of the corporate Third-Party Defendants are either insolvent or dissolved. [6] Thus, the only remaining guarantors are Reilly, Eaton and Marianne Eaton.[7] Under the presumption of

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[6] Although Reilly disputes in his brief whether the corporate defendants are insolvent or dissolved, he not only failed to deny the relevant statements of material fact supporting these propositions, but also explicitly adopted them as his own.

[7] One final example of the confusion sown by the parties throughout this case is that, although Reilly named Jennifer Eaton as a Third-Party Defendant by virtue of her purported status as a guarantor of the Nova Loan, she is never mentioned by either Reilly or Third-Party Defendants in their briefs on summary judgment. Rather, Marianne Eaton has, without explanation, taken Jennifer Eaton's place in these briefs. In the absence of any aid from the parties, the court was able to deduce that Marianne Eaton was one of eight parties who guaranteed the Nova Loan, while Jennifer Eaton was not. (*See* Eaton Aff. Exhs. 1-8.)

equal division of debt among guarantors, those individual guarantors would each owe more than $633,000 if Note 204001096 is the Nova Loan and more than $363,000 if it is Note 3040023367 instead. *See* RESTATEMENT (3rd) SURETYSHIP & GUARANTY § 57. Either of these totals is exceeds Reilly's $250,000 cap under the First Amendment.

Reilly argues that Eaton reaped a larger benefit from the guarantee of the Nova Loan than Reilly and therefore the presumption of equal shares of the present debt could be rebutted in favor of holding Eaton liable for the entirety of the debt owing under the Nova Loan.

Although it might be argued on this record that Eaton and Reilly benefited from the Guarantee more than some of the other Third-Party Defendants, this does not aid Reilly because there is no evidence that Eaton benefited more than Reilly in any significant way. Both stood to benefit financially from the success of Nova, which all of the guaranties made more likely. At most then, it is possible that Marianne Eaton could be liable for a smaller share of the debt than Reilly and Eaton. This, however, would still leave Reilly owing far more than he could be forced to pay by virtue of the First Amendment.

Reilly additionally asserts that the First Amendment did not actually cap his guaranty at $250,000, but rather states that his "liability, *excluding reasonable attorney's fees and costs of collection* with respect to any default by [Reilly] pursuant to his . . . Guaranty" cannot be greater than $250,000. He argues that any attorney's fees related to the present case, which could be substantial, must be shared ratably among the Third-Party Defendants. Reilly's contention is without merit.

As a procedural matter, the failure to rectify this mistake may mean that Reilly could still sue Marianne Eaton separately under the same theory as that supporting his suit against the Third-Party Defendants. If he were to do so, however, it is possible that the same rationale supporting Third-Party Defendants summary judgment against Reilly in the present case would support a judgment in favor of Marianne Eaton.

The guaranties signed by the Third-Party Defendants all state that they are "guarantees to [MSB of] the full and punctual payment when due . . . [of the] obligations of [Nova] to [MSB]." (Eaton Aff. Exh. 1-7.) From this and other language in the guaranties it is clear that Third-Party Defendants' guaranties relate to any default of Nova and any costs associated with pursuing payment from Nova under the Nova Loan. Those documents cannot be fairly read to have obligated the Third-Party Defendants to reimburse a co-guarantor like Reilly for that party's costs expended in an attempt to avoid his obligations as a guarantor of the Nova Loan.

Based on the foregoing, there is no genuine issue of material fact as to whether Reilly may be liable to MSB for damages for which compensation can be sought from Third-Party Defendants in an amount greater than Reilly's $250,000 cap under the First Amendment. It is clear on this record that Third-Party Defendants do not have a contributory liability to Reilly. As a result, summary judgment in favor of Third-Party Defendants is appropriate.

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order On Motions for Summary Judgment on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Reilly's motion for summary judgment is DENIED;

B. MSB's motion for summary judgment is DENIED; and

C. Third-Party Defendants' motion for summary judgment is GRANTED. Judgment for Third-Party Defendants on Reilly's Third-Party Complaint

Dated: May 8, 2008

Justice, Superior Court

C. C.
all - ltr
5/12/08