IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DR. BENJAMIN RABINOVICI, Plaintiff : CIVIL ACTION

V. :

JAY H. SOLOMONT, et al., Defendants : No. 01-6594

MEMORANDUM AND ORDER

McLaughlin, J November 3, 2002

The plaintiff in this case, Dr. Benjamin Rabinovici, has brought this suit to enforce a one-million dollar note dated April 29, 1999. The defendant, Ethyl Solomont, has filed a motion to dismiss, arguing that she was an uncompensated surety whose obligations under the note were discharged by material modifications in the terms of the note. The Court grants the motion.

## I. Background

Although this motion was originally filed as a motion to dismiss, it will be treated by the Court as a motion for summary judgment. Both parties have submitted affidavits and have presented facts outside the record. The plaintiff has not

filed an affidavit pursuant to Fed. R. Civ. P. 56(f) and, although given an opportunity to do so, did not inform the Court of any additional discovery he wished to pursue prior to the decision on this motion.

The note at issue was dated April 29, 1999 and was signed by Jay Solomont, the defendant's son, and Debra Weiner, Jay Solomont's wife. Ms. Solomont also signed the note, sometime after April 29, 1999, with the additional notation of "as comaker" written next to her signature. According to the terms of the note, Jay H. Solomont promised to pay the plaintiff one million dollars on or before sixty days from the date of the note. The note stated that the repayment was "for value received." The note was to bear simple interest at the rate of one and one-half percent **(1.5%)** per month. The note states that it is non-negotiable. The note also states that it represents the entire understanding of the parties, supersedes all prior understandings or agreements, and cannot be altered in any way other than by a written agreement between Mr. Solomont and the plaintiff.

In May of 1999, United Mizrahi Bank Ltd., an Israeli bank, extended a loan for one million dollars **to** Ms. Weiner. The collateral for this loan was a one million dollar deposit in the United Mizrahi account of Tzav Limited, a corporation wholly

owned by the plaintiff. The plaintiff argues that provision of collateral by Tzav for this loan was done in exchange for the note at issue and, along with the bank loan by United Mizrahi, was part of the transaction contemplated by the note. The money remained in Tzav's account as collateral, collecting interest, until August 2001. At that time, Ms. Weiner defaulted on the loan made by United Mizrahi bank, and the bank seized the one million dollars from Tzav's account,

The plaintiff originally filed this suit to enforce the note against Ms. Solomont, Mr. Solomont, and Ms. Weiner. Mr. Solomont and Ms. Weiner filed a motion to dismiss them as defendants for lack of subject matter jurisdiction, which was granted after the plaintiff informed the Court that he did not oppose the motion. Mr. Solomont and Ms. Weiner were dismissed from the case, leaving Ms. Solomont as the only remaining defendant.

11. Analysis

There are two questions before this court: 1) whether Ms. Solomont is an uncompensated surety; and 2) if she is, whether there was a material modification to the contract, which would discharge her obligations thereunder.

A, Was Ms. Solomont an Uncompensated Suretv?

Under Pennsylvania law, a surety is a party who agrees to be liable for the default of another. 8 Pa, Cons. Stat. § 1 (2002). One factor to be considered in determining whether a signatory to a contract is signing to answer for the default of another is whether the creditor has notice that the signatory and the person for whom she is signing intend for the signatory to be a surety. E.g., First National Bank & Trust v. Stolar, 130 Pa. Super. 480, 485-86 (1938). See also First Fed. Savings & Loan Ass'n v. Reggie, 376 Pa. Super 346 (1988). A second factor to consider is whether the circumstances and terms **of** the agreement itself indicate that the signatory's role in the transaction was as guarantor. First Fed. Savings & Loan Ass'n, 376 Pa. Super. at 352.

In this case the plaintiff knew that the defendant was signing as a surety only[1]. The plaintiff stated that he required that the defendant sign the note in order to lend her credit to the obligation of her son. Plaintiff's Memorandum of Law in

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'Under Pennsylvania law, a court may review parol evidence regarding allegations that there was a suretyship arrangement where the collateral fact of suretyship does not contradict or vary the terms of the agreement for which suretyship has been alleged. Hull v. Weaver, 48 Pa. Super. 290 (1911). In this case, the defendant's claim of suretyship does not contradict the terms of agreement; parol evidence is therefore admissible.

Opposition to Defendant Ethyl J. Solomont's Motion to Dismiss, p.6. This is a classic example of a suretyship. E.g., Continental Bank v. Axler, 353 Pa. Super. 409, **414 (1986) (a** suretyship customarily arises when a creditor refuses to extend credit unless a third party agrees to provide additional security for repayment if the debtor fails to pay). Because the plaintiff was the one that required Ms. Solomont's guarantee, he knew that her relationship was to be that of a surety, and now he is required to treat her as such.

The terms of the agreement also indicate that Ms. Solomont was a surety. Unlike the other signatories, Ms. Solomont received nothing from the contract and it is undisputed that none of the parties ever intended for her to do so. This serves as further proof that she did not sign the contract for her own benefit, but instead as a guarantor for her son who was the one who actually benefitted from the transactions between the parties.

Additionally, the text of the note itself supports the determination that Ms. Solomont did not play the same role in these transactions as her son, the debtor. The text of the note specifically states that "Jay Solomont promises to pay." In contrast, **Ms.** Solomont's name does not even appear on the note, other than at her signature. This is further indication that Ms.

Solomont was only a guarantor for her son, the primary debtor.

The plaintiff has argued that the defendant should not be treated as a surety because she signed the document as a "co-maker." In First Federal Savings & Loan Ass'n, however, the court held that even if a party signed as a co-maker, they would be a surety if the other circumstances indicate that the parties intended that the alleged surety provide a guarantee for another. 376 Pa. Super. at 352. As already described, in this case, the circumstances indicate that Ms. Solomont is a surety despite her signature as "co-maker."

It is undisputed that the defendant was not compensated for her role in the transaction. Ms. Solomont is the classic example of an uncompensated surety-- a "secondary obligor" who enters into a guaranty arrangement for reasons "involving familial or neighborly affection and who did not profit from the transaction." Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc., 273 F.3d 332, 335 (3d Cir. 2001).

B. Was There a Material Modification to the Note?

In Pennsylvania, a gratuitous surety will be discharged from her obligations under a contract if there is a material modification to the contract between the creditor and the debtor that is made without the surety's consent. E.g., Reliance Ins.

Co., et. al. v. Penn Paving, Inc., et. al., 557 Pa. 439, 450 (1999) (discharge of gratuitous debtor upon material modification is a "longstanding principle") (citations omitted).

A modification is material if it alters the existing relationship between the creditor and debtor. E.g., J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 2002 Pa. Super. 39 (2002). Such a modification in essence substitutes an agreement substantially different from the original agreement on which the surety accepted liability. Continental Bank, 333 Pa. Super. at 416.

The original note on its face contemplated a lending arrangement between Mr. Solomont and the plaintiff, with payment due within sixty days. This would have been a simple lending arrangement between two individuals, including a debtor who was a citizen of, and was to be paid in, the United States.

Subsequent to the signing of the note, the parties engaged in a transaction that: 1) was very different from the transaction contemplated by the note; and 2) did not take place within the 60-day period described in the note.

The actual lending arrangement between the parties was much more complex than the simple transaction contemplated by the note. The new arrangement involved additional parties, including Tzav, a British corporation, and United Mizrahi Bank, an Israeli

bank. Neither of these entities was mentioned in or contemplated by the note. The inclusion of these entities in the lending arrangement is a material modification that affected Ms. Solomont's position as surety. Ms. Solomont was no longer dealing with one individual creditor easily accessible in the United States, but instead two new foreign corporations.

Under the new arrangement, the money provided was not provided by the plaintiff but by these new corporations. The loan money was provided by United Mizrahi, supported by collateral from a foreign corporation, Tzav. As a result, the interest on the note, paid by Mr. Solomont, was paid to Tzav. The plaintiff and Mr. Solomont materially modified the note by giving foreign corporations the rights and duties originally assigned to the plaintiff by the note[2].

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[2]Although the plaintiff has argued that he provided the money because the corporation was wholly owned by him, it is uncontested that Tzav was properly incorporated. As such, it is a separate legal entity from its shareholder, the plaintiff. Pennsylvania law does not allow the plaintiff to pierce his own corporate veil to state that he and Tzav are one and the same. Sams v. Redevelopment Authority, 431 Pa. 240 (1968). Counsel for the plaintiff posited at oral argument that, after the note was signed, the plaintiff made a transfer of funds to Tzav's account from his own personal funds. However, this appears to contradict the statement made in the plaintiff's Opposition to this motion, wherein he stated that the loan was guaranteed by Tzav which "had funds on deposit" at the bank. The plaintiff has provided the court with an affidavit regarding the disbursement of funds by United Mizrahi, but the affidavit does not clarify whether the funds used as collateral for the loan were already present in

In addition to the material modifications created by this complex lending arrangement, the plaintiff and Mr. Solomont made another material modification by extending the note beyond the sixty-day period. The plaintiff did not try to collect on the note until well past the sixtieth day. The plaintiff is correct that a mere forbearance on collection is insufficient to discharge an uncompensated surety from payment of a debt that had already matured prior to the forbearance. See Land Title Bank & Trust v. Freas, 334 Pa. 26 (1939). In this case, however, the obligation under the note had not yet matured.

Neither the plaintiff nor Tzav gave up any funds prior to the end of the sixty-day period. Ms. Weiner received funds from United Mizrahi within that time period, but was not yet in default on that loan. The plaintiff has conceded that, had Ms. Weiner paid back the full amount on the United Mizrahi loan, leaving Tzav's money in its United Mizrahi bank account, the plaintiff would not have been able to collect on the note. It was not until Ms. Weiner defaulted on her loan to United Mizrahi that the note matured, after the sixty-day period had expired.

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Tzav's accounts or whether they were deposited there by the plaintiff in contemplation of the United Mizrahi loan. However, even if the plaintiff did transfer his personal funds to Tzav, it does not change the legal reality that the plaintiff and Tzav are different entities.

The note, and Ms. Solomont's obligations thereunder had not matured as of the end of the sixty-day period. The plaintiff's actions in continuing to have Tzav provide collateral for Deborah Weiner's loan was an extension of the note, without Ms. Solomont's consent, and is thus a material modification.

These material modifications discharge Ms. Solomont of her liability, even if the complex lending arrangement was anticipated by the plaintiff and Mr. Solomont. The note stated on its face that it embodied the parties' entire agreement and that it superseded any prior arrangments or agreements. Even if Mr. Solomont and the plaintiff had previously agreed to the complex lending arrangement and all of its various aspects, that prior agreement was specifically not incorporated into the note and was superseded thereby. The subsequent use of the complex lending arrangement was a modification of the original terms of the note.

The material modifications created by the substitution of the complex lending arrangement for the simple loan arrangement contemplated by the note are sufficient to discharge an uncompensated surety. Accordingly, summary judgment is granted in this case for the defendant against the plaintiff.

An appropriate order follows.

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| DR. BENJAMIN RABINOVICI,<br>Plaintiff | : | CIVIL ACTION |
| V. | : | |
| JAY H. SOLOMONT, et al.,<br>Defendants | : | No. 01-6594 |

ORDER

AND NOW, this 4th day of November, 2002, upon consideration of the defendant's Motion to Dismiss (Docket **#10** ), the plaintiff's response thereto, the defendant's reply, affidavits presented by both parties, and after having heard oral argument on the motion on September 24, 2002, IT **IS** ORDERED that the motion shall be treated as a motion for summary judgment and that said motion is GRANTED for the reasons set forth in the memorandum of today's date. Judgment shall be entered for the defendant, Ethyl Solomont and against the plaintiff.

BY THE COURT:

Mary A. McLaughlin, J.

11/4/02
faxed to: C. Sinclair, Esq
H. Yarger, Esq
K. Sickles, Esq.

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**ORDER**

**AND NOW, this** 6th **day of** November, **2002, judgment is** entered **for** the **defendant, Ethyl Solomont,** and **against** the **plaintiff.**

**BY THE COURT:**

Mary A. McLaughlin, J.