Absent Consent or an express reservation of rights against the endorser, a holder will ~~[illegible]~~ discharge any subsequent endorsers who have a right of recourse against a prior party

Those who take as an administrator of a debtor's estate do not become holders in due Course.

A holder is a holder who takes the instrument

Where holder deals with the maker he does not take free of defenses

Personal defense cannot be raised vs. a HDC.

Real defenses may be raised vs: HDC.

3-305

Real defenses

(a) Infancy

(b) Incapacity, duress, illegality

(c) misrepresentation in the inducement

(d) discharge in insolv. or Bank

(e) Any other discharge w/ notice

Fraud in inducement is personal defense

Fraud in the factum is a real defense

C.P. 12.21 Impairment of Recourse or of Collateral Section 3-606(1)

C.P. 12.08

Block v. FDIC
640 F2 699.
12 USC 1823(e) - 5 CA

FDIC v. Waldron
630 F 2d 239. 4 CA.

725 F 2d 639
11 C.A.

FDIC v. Webb
464 F Sup 520

674 F 2d 862

Judge's copies

Eastern District of Kentucky
FILED
OCT 17 1984
AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF

VS. MOTION FOR CORRECTION OF THE RECORD

RED CHIEF, INC. DEFENDANTS

****

Comes the defendant, C.K. Dixon, Jr., who has appealed to the United States Court of Appeals For The Sixth Circuit, and moves the Court pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure to correct the record by modifying same with respect to the Final Judgment entered on July 24, 1984, which incorporates therein by reference a judgment referred to as having been entered in the action on the 7th day of July, 1983, as well as a judgment entered on the 1st day of June, 1984. A search of the record and docket entries fails to reveal any judgment entered on July 7, 1983, and the only judgment incorporated by reference into the judgment of July 24, 1984 should be the judgment of June 1, 1984.

WHEREFORE, the defendant, C.K. Dixon, Jr., respectfully moves the Court to correct the judgment entered by the Court on July 24, 1984.

FROCKT & KLINGMAN

W. David Klingman
Counsel for C.K. Dixon, Jr.
Suite 100 Morrissey Building
310 W. Liberty Street
Louisville, Kentucky 40202
(502) 582-1645

Joseph K. Golden
Counsel for C.K. Dixon, Jr.
Suite 110
Professional Arts Building
730 W. Market Street
Louisville, Kentucky 40202

CERTIFICATE

It is hereby certified that a copy hereof was mailed postage prepaid, this 16th day of October, 1984, to: John A. West, Danny C. Reeves, Greenebaum, Doll & McDonald, 1400 Vine Center Tower, P.O. Box 1808, Lexington, Kentucky 40593; James M. Craft, Polly, Craft, Asher & Smallwood, P.O. Box 786, Whitesburg, Kentucky 41858; and Charles E. Nells, III, Woodward, Fox & Wooten, Seven-O-Seven Building, P.O. Box 12247, Roanoke, Virginia 22247.

W. David Klingman

Eastern District of Kentucky
FILED
OCT 17 1984
AT PIKEVILLE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF

VS. MEMORANDUM

RED CHIEF, INC. DEFENDANTS

****

In support of his Motion For Correction Of The Record, the defendant, C.K. Dixon, Jr., by counsel, states that the Federal Rules of Appellate Procedure, Rule 10(e), entitled Correction Or Modification Of The Record, states in part as follows:

> "If anything material to either party ... is misstated therein, ... the District Court either before or after the record is transmitted to the Court of Appeals, ... may direct that the ... misstatement be corrected, and if necessary that a supplemental record be certified and transmitted."

The controlling final and appealable judgment in this case was entered on July 24, 1984. It apparently incorporates therein two judgments. The judgment incorporated therein entered on June 1, 1984, is in existence, but the judgment incorporated therein entered on July 7, 1983, either does not exist or is misstated.

Because this misstatment or error occurs in the Final Judgment being appealed, it is contended that the mistake is material to the extent that it is misleading and raises a question which cannot be settled by a review of the record.

For the foregoing reasons, it is respectfully urged that the motion of the defendant, C.K. Dixon, Jr., be granted deleting

from the July 24, 1984 judgment entry any mention of an alleged judgment of July 7, 1983.

FROCKT & KLINGMAN

W. David Klingman
Counsel for C.K. Dixon, Jr.
Suite 100 Morrissey Bldg.
310 W. Liberty Street
Louisville, Kentucky 40202
(502) 582-1645

Joseph K. Golden
Counsel for C.K. Dixon, Jr.
Suite 110
Professional Arts Building
730 W. Market Street
Louisville, Kentucky 40202

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF

VS.

RED CHIEF, INC. DEFENDANTS

ORDER

The defendant, C.K. Dixon, Jr., having moved the Court to correct the judgment entered on July 24, 1984, to delete so much of the aforesaid judgment which incorporates therein an alleged judgment entered in this Court on the 7th day of July, 1983; and the Court being otherwise sufficiently advised, the motion of the defendant should be, and the same is, SUSTAINED.

It is therefored ORDERED AND ADJUDGED that the judgment of this Court signed and entered on July 24, 1984, is amended to the extent that the reference therein to the incorporation of a judgment entered in the action on July 7, 1983, is deleted.

Dated this _____ day of October, 1984.

_____
G. WIX UNTHANK, JUDGE

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FDIC vs: Rd. Chief

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of damages should be in accordance with the decision of this Court as set forth in *Hacker*. As the judgment of the trial court is herein reversed and remanded, we do not reach the other issues presented on this appeal.

The judgment of the trial court is hereby reversed and remanded with orders for a new trial to be entered.

All concur.



COWDEN MANUFACTURING CO., INC., Appellant,

v.

SYSTEMS EQUIPMENT LESSORS, INC., Appellee.

Court of Appeals of Kentucky.

May 23, 1980.

Rehearing Denied July 18, 1980.

Discretionary Review Denied Dec. 9, 1980.

Lessor of computer appealed from a judgment rendered by the Fayette Circuit Court, Armand Angelucci, J., in favor of lessee in a breach of contract suit. The Court of Appeals, Howard, J., held that: (1) lease did not permit lessee to withhold delivery and acceptance certificate simply because of dissatisfaction with performance capabilities of leased computer; (2) lessee's sole complaint that capacity of computer was not as high as it had desired did not justify failure to return delivery and acceptance certificate for the machine, which, after correction of a few initial starter problems, did perform its computer function; (3) valid contract existed notwithstanding fact that lessor had not executed the lease; (4) lease did not violate statute of frauds; (5) delivery and acceptance certificate was not a condition precedent to the lease; (6) lease was not abandoned by lessor; (7) lessor's actions did not constitute waiver or basis for estoppel; and (8) evidence did not permit court to find damages based upon speculative testimony.

Judgment affirmed.

1. Contracts ⇐281

Computer lease, which provided that delivery of computer would be deemed complete upon its arrival, installation, and acknowledgement that it was in good operating order, and which specifically excluded any warranties relating to condition of the equipment or its fitness for any particular purpose, provided objective and readily ascertainable standard to determine when delivery and acceptance certificate was due and did not permit lessee to withhold the certificate simply because of dissatisfaction with computer's performance capabilities.

2. Contracts ⇐280(1)

Under computer lease which did not permit lessee to withhold delivery and acceptance certificate simply because of dissatisfaction with computer's performance capabilities, lessee's sole complaint that capacity of the computer was not as high as it had desired did not justify lessee's failure to return to lessor the certificate for the computer, which, after correction of a few initial starter problems, did perform its computer function.

3. Contracts ⇐35

It is not always necessary for both parties to sign contract, particularly where one has signed and both parties thereafter act as if they had binding contract; therefore, fact that lessor of computer had not executed lease at time computer was delivered to lessee did not prevent lease contract from coming into existence.

4. Contracts ⇐177

Where land is not involved, party to be charged is generally held to be party who signs the agreement; it is no ground for objection that agreement was not also signed by party seeking to enforce the contract. KRS 371.010.

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5. Frauds, Statute of ⇐115(3)

Contract for lease of computer, which contract had been executed by lessee, did not violate statute of frauds on ground that lessor, who sought to enforce the lease, had not also executed the agreement. KRS 371.010.

6. Contracts ⇐221(2)

Delivery and acceptance certificate, which was to be signed by lessee of computer upon computer's arrival, installation, and acknowledgement by lessee that computer was in good operating order, was not indicator that lessee had to be completely satisfied with performance of the equipment; ample evidence supported trial court's finding that lessee's liability was in no way conditioned upon return of the certificate and that the certificate was therefore not a condition precedent to the lease agreement.

7. Contracts ⇐303(4)

Where contract is to be performed on occurrence of future event, there is implied agreement that promisor will place no obstacle in way of happening of such event, and if he is himself cause of failure to perform condition, he cannot rely upon condition to defeat his liability.

8. Contracts ⇐256

Sufficient evidence supported trial court's finding that computer lessor, which forebore to enforce computer lease pending possibility of substitution of larger computer for one actually leased and which did so in order to accommodate lessee, who was a good customer, and with hope of handling transaction in regard to larger computer upon which lessor could make more money, acted reasonably under the circumstances and that lessor's conduct did not constitute abandonment of the lease.

9. Estoppel ⇐90(2)

Where lessee of computer was not only advised of lessor's continued reliance upon original lease agreement but was also instructed that lessor would seek its legal remedy in event that lessee purchased larger computer from computer manufacturer, conduct of lessor, which forebore to enforce the lease pending possibility of substitution of larger computer for the one actually leased did not constitute waiver or basis for estoppel of lessor to enforce the lease agreement.

10. Bailment ⇐32

Damages were reasonably ascertainable and cause of the damage was attributable to breach of computer lease contract by lessee; evidence did not permit court to find damages based upon speculative testimony.

B. L. Kessinger, Jr., Harbison, Kessinger, Lisle & Bush, Lexington, for appellant.

James R. Odell, Odell, Stith & Lemaster, Lexington, for appellee.

Before BREETZ, GUDGEL and HOWARD, JJ.

HOWARD, Judge.

This is an appeal from the Fayette Circuit Court from a judgment rendered in favor of the plaintiff/appellee in regards to a breach of contract suit. The issue before this Court is whether or not the findings of the trial court were supported by sufficient evidence. We find that there was sufficient evidence to support the judgment and, pursuant to Rule 52.01, we will therefore not disturb same.

The facts in this case are that the parties entered into a lease, executed February 5, 1973, for a computer. The computer involved was a Honeywell 2050. The appellant, hereinafter called Cowden, had entered into discussions with Honeywell, the manufacturer of the computer, prior to the involvement of the appellee in any of these transactions. The upshot of the discussions was that Honeywell placed the 2050 in the Cowden plant in Lexington, Kentucky, although Cowden was somewhat dubious as to whether or not this particular computer would perform or produce sufficient output for Cowden's needs. After the computer had been installed, discussions began between Cowden and the appellee as to the possibility of Cowden assigning its lease on

the 2050 to the appellee. The advantage to Cowden in making such assignment would be that the appellee would purchase the computer and then rent it to Cowden on terms that were more liberal than that afforded by the lease contract offered to Cowden by the manufacturer, Honeywell.

The appellee was in the business of financing computers and other expensive equipment for businesses and it found it a profitable business, of course, to enter into arrangements such as that offered to Cowden. One of the important reservations in the lease that was executed between Cowden and the appellee, was that the appellee made no warranty whatsoever as to the performance of the computer system and, according to the terms of the agreement, if the equipment did not operate according to representations made by Honeywell, then it was the obligation of Honeywell to set the matter straight with Cowden. It is clear from the evidence, and there is no dispute about this, that the appellee was merely a leasing agency and had nothing to do with the manufacturing or operation of the equipment.

Cowden received the lease from the appellee in February, 1973, and properly executed same and returned it to the appellee. Cowden did not return a Certificate of Delivery and Acceptance, hereinafter referred to as D & A, and Cowden points to this as the single most important fact that would indicate that there was no intention on the part of the parties to have a binding contract. The dispute that culminated in this lawsuit pretty much centers around whether or not this contention of Cowden is correct. The only function of the D & A was to indicate the receipt in operating condition of the equipment under the lease, which in turn served as a "trigger" in determining the starting date for the payment of the rent on the machine. The agents of the appellee testified that it was necessary to produce the D & A to its bank in order for it to arrange its financing for the purchase of the computer. The testimony of the agents of the appellee is clear that after receipt of the D & A, and after whatever arrangements were to be made with the bank, they would have executed the lease and returned same to Cowden. On the other hand, Cowden's position is that they withheld the D & A because they were not satisfied with the 2050 computer and were negotiating with Honeywell to lease or purchase a new computer, 2050A, which was larger and which they felt would be more appropriate for their business. The appellee was fully aware of these discussions and willingly withheld the enforcement of their lease in order that Cowden and Honeywell might settle the matter by the purchase of the larger computer in which the appellee hoped to participate in the same manner as with the 2050 computer. However, Cowden made a separate deal with Honeywell, over the protest of the appellee, and purchased or leased the 2050A computer, leaving the appellee out in the cold. Thereupon, the appellee filed this lawsuit, attempting to enforce its lease.

[1] In an action such as this, where you have a written instrument involved, it would seem that the appropriate place to decide what the parties agreed to would be to look at the lease. Paragraph 3 of the lease notes that the delivery of the equipment shall be deemed complete upon its arrival, installation and acknowledgment that it is in good operating order. Specifically excluded are any warranties relating to the condition of the equipment or its fitness for any particular purpose. It is further provided that in the event the equipment fails to operate as represented by the seller (Honeywell), Cowden is to make any claim on account thereof, solely against the seller and shall pay SEL (appellee) all rental due under the lease. In paragraph 10, Cowden further agreed that its obligations would continue regardless of any inability to use the equipment because of its failure to operate properly, or for any other cause. From this language, it is clear that there was an objective and readily ascertainable standard to determine when the Delivery and Acceptance Certificate (D & A) was due. It is equally clear that this standard did not permit Cowden to withhold the D & A simply because of dissatis-

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faction with performance capabilities. Thus, when the system in question arrived on the premises and was placed in operating condition, it was incumbent upon Cowden to execute and return the D & A.

[2] Here that simply was not done. Cowden's attorney admitted that the equipment was functioning without any defect. Cowden's only complaint was that the capacity of the computer was not as high as it had desired. Jack Hardy, the manager of data processing for Cowden, admitted that after the correction of a few initial start–up problems, not uncommon in any new installation, the machine did perform its computer functions. It appears to us that under these circumstances, Cowden had no option but to return the D & A.

[3] The appellant urges upon this Court, as it did in the trial court, that it was necessary for the appellee to have executed the lease before there was a valid contract. However, we agree with the trial court that it is not always necessary for both parties to sign a contract, particularly where one has signed and both parties thereafter act as if they had a binding contract. The rule is stated in 17 Am.Jur.2d, *Contracts*, Sec. 70, p. 408. "In the absence of a statute requiring a signature or an agreement that the contract shall not be binding until it is signed, parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated." *See* also *Carter v. Hall*, 191 Ky. 75, 229 S.W. 132 (1921).

[4, 5] In this connection, the appellant claims that the Statute of Frauds, K.R.S. 371.010, was violated. However, under the statute, a contract or memorandum must be signed by the party to be charged. Interpreting that requirement, Kentucky has traditionally applied a special and minority rule to transactions for the sale or lease of real estate, requiring such contracts to be signed by the party by whom the lease or sale is to be made. 72 Am.Jur.2d, *Statute of Frauds*, Sec. 365, p. 889. Where land is not involved, the more general rule prevails which is that "the party to be charged" is generally held to be the party who signed the agreement. It is no ground for objection that the agreement was not also signed by the party seeking to enforce the contract. 72 Am.Jur.2d, Sec. 366, p. 890. Therefore, the lease herein does not violate the Statute of Frauds.

[6] Another argument that the appellant urges upon us to reverse this case was that the D & A was a condition precedent which never occurred and therefore there never was a contract. As previously discussed, there is no merit to this contention. We cannot accept that the D & A was an indicator that Cowden had to be completely satisfied with the performance of the equipment. The trial court considered this issue and concluded that Cowden's liability was in no way conditioned upon the return of the D & A and we think his position was amply supported by the evidence.

[7] Before we leave this subject, we should point out that it has long been held that a party to a contract cannot take advantage of his own act or omission to escape liability. 17A C.J.S. *Contracts* § 468, pp. 640–641. Where a contract is to be performed on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event; and if he is himself the cause of failure to perform the condition, he cannot rely upon the condition to defeat his liability. *Id.* at 645.

This Court has taken a similar position in the cases of *Odem Realty Co. v. Dyer*, 242 Ky. 58, 45 S.W.2d 838, 840 (1932), and *Bryant v. Jones*, 255 Ky. 606, 75 S.W.2d 34, 38 (1934).

[8] Cowden argues that this lease was abandoned because of the negotiations between Cowden, the appellee, and Honeywell in regard to the purchase of the 2050A computer. The trial court found that there was no abandonment since SEL, the appellee, forbore to enforce the lease, pending the possibility of the substitution of a larger computer for the one actually leased. The trial court also found that the appellee did so in order to accommodate a good

customer and with the hopes of handling the transaction in regard to the larger computer, upon which it could make more money. The trial court found that this conduct was reasonable under the circumstances and did not constitute an abandonment by the appellee. We cannot say that this was clearly erroneous or not supported by sufficient evidence.

[9] The trial court correctly ruled that there was no waiver or basis for estoppel in regard to the appellee's conduct. Indeed, the testimony of Mr. Kusch, and confirmed by Roger Nolan, appellant's attorney, indicated in unmistakable terms, that Cowden was not only advised of the appellee's continued reliance upon the original lease agreement, but that it was also instructed that the appellee would seek its legal remedy in the event the purchase of the larger computer was made as planned. This was entirely consistent with the appellee's previous conduct, since it had earlier refused to return the lease unsigned, as requested by Cowden, on the ground that it (appellee) had a binding agreement.

[10] Finally, Cowden objects to the measure of damages. We have examined the evidence in regard to this and do not find that such evidence permitted the court to find damages based upon speculative testimony. The testimony indicated that the damages were reasonably ascertainable and that the cause of the damage was attributable to the breach of the contract by the appellant. *Kellerman v. Dedman*, Ky., 411 S.W.2d 315 (1967). *Roadway Express, Inc. v. Don Stohlman and Associates, Inc.*, Ky., 436 S.W.2d 63 (1969).

In summary, the trial court made a decision in this complex case, based upon conflicting evidence, and, under CR 52.01, we are not permitted to disturb the findings of fact unless they are clearly erroneous and not supported by the evidence. In this case, the trial court's findings are amply supported by the evidence and we find no error in the conclusions of law made by the trial court. Therefore, the judgment is affirmed.

All concur.

Earnest HOWARD, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

July 11, 1980.

Discretionary Review Denied Dec. 9, 1980.

Defendant was convicted on a jury verdict before the Fayette Circuit Court, George E. Barker, J., of theft by unlawful taking and was also convicted as a first–degree persistent felony offender, and he appealed, following fixing of his punishment at ten years' imprisonment. The Court of Appeals, Vance, J., held that: (1) defendant, who offered no objection to the jury selection procedure, failed to preserve for review issue of whether trial judge followed improper procedure; (2) defendant was not entitled to an instruction on "claim of right"; and (3) defendant, notwithstanding fact that service of sentence or discharge from parole on one of his prior felony convictions occurred more than five years prior to the commission of the instant offense of theft by unlawful taking could nevertheless be convicted as persistent felony offender.

Judgment affirmed.

1. Criminal Law ⇐1035(6)

Defendant, who offered no objection to jury selection procedure, failed to preserve for review issue of whether trial judge followed improper procedure.

2. Larceny ⇐3(3)

"Claim of right" is an affirmative defense to charge of theft, invoked only when defendant admits the act charged and seeks to justify its commission so as to show lack of criminal intent.

3. Larceny ⇐70(3)

In prosecution for theft by unlawful taking, defendant, who did not testify, did not admit the
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4. Larceny ⇐7

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Before LEST
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contends that the April 11 and July 19 agreements constituted a novation of the original note without his consent, absolving him of liability on the note. See Williams v. Crusader Disc. Corp., 75 Nev 67, 334 P2d 843 (1959).

The April 11 agreement states that Hi-Tide, Inc. "has assumed an obligation to repay to Lowden . . . ." The use of the word "assumed" could be construed as a release, suspension, or novation of Lowden's rights as against C'Rayeh. Lowden argues that he intended the later agreements only to add a second guarantor for the original obligation. Where, as here, the crucial factual dispute concerns characterization of a party's conduct, which in turn involves elusive questions of intent and motive, summary judgment is inappropriate. Feminist Women's Health Center, Inc. v. Mohammad, 586 F2d 530, 548 (5th Cir 1978), cert denied, 444 US 924 (1979). See Poller v. Columbia Broadcasting System, Inc., 368 US 464, 473 (1962). See also Admiralty Funds v. Tabor, 677 F2d 1297, 1298–99 (9th Cir 1982); Prochaska v. Marcoux, 632 F2d 848, 851 (10th Cir 1980), cert denied, 451 US 984 (1981). On the record in the case at bar, summary judgment was not proper on the issues concerning the effect of the April 11 and July 19 agreements on Servaites' contract of guaranty.

. . . . . .

As the district court erred in granting summary judgment and holding that Servaites was barred from contesting the bankruptcy court's findings, we reverse and remand for a full trial on the merits.

BISHOP v. UNITED MISSOURI BANK OF CARTHAGE

Missouri Court of Appeals, Southern District, February 17, 1983
647 SW2d 625

[¶ 1201.29, ¶ 3606.4(1)] **"Any party"—co-maker's right to claim discharge.**
The term "any party" as used in § 3–606 means any party to the instrument, including co-makers. That definition not only encompasses the plain meaning of the words of the statute, but is consonant with the definition of "party" at § 1–201(29). If "any party" were interpreted as being only an accommodation maker or surety for purposes of § 3–606, this would result in a different meaning being applied to § 3–606 than to the other discharge sections of the UCC §§ 3–601 through 3–605, which would create an unacceptable incongruity. Thus, § 3–606 was available as a defense to co-makers of a note.

[¶ 3606.4(5)] **Extent of co-maker's discharge.**
One co-maker's right of contribution with the other co-maker is a right of recourse within the meaning of § 3–606. The release of one co-maker under

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§ 3–606(1)(a) discharges the other co-maker to the extent of only one-half the liability on the note since one co-maker would have the right of recourse against the other co-maker for only one-half the note. Therefore, it was error to totally release one co-maker from obligation on a note from which the bank had totally discharged the other co-maker without the consent of the first and without expressly reserving its rights.

[¶ 3606.2, ¶ 3606.6] **Effect of release, express reservation.**

When a release is executed on an instrument covered by the UCC and that release has the consent of the other co-maker or contains an express reservation of rights against the other co-maker, § 3–606(1)(a) and (2)(c) operate to preserve the right of the other co-maker for payment from the released co-maker of any sum paid by the other co-maker which exceeds his one-half liability on the note. But when such a release is executed without consent or express reservation of rights, § 3–606(1)(a) operates to discharge the other co-maker's liability to the extent of one-half the note since that was the amount of recourse against the discharged co-maker that the other co-maker had if consent had been obtained or rights expressly reserved.

[¶ 3606.2, ¶ 3606.4(5)] **Co-maker's liability following release of other co-maker —effect of impairment of collateral on liability.**

Where the bank holding a note released one set of co-makers from their obligation under the note without the consent of the other set of co-makers and without an express reservation of rights, the unreleased co-makers were discharged from liability on one-half the note, and were entitled to be discharged from their remaining liability on the note to the extent of the value of any impaired collateral under § 3–606(1)(b).

UCC Sections Cited: § 1–201(29), § 3–606.

Appeal from the Circuit Court of Jasper County. Before GREENE, C.J., TITUS and CROW, JJ.

Thomas E. Klinginsmith and Thomas L. Williams, Carthage, for plaintiffs-respondents.

Jerry E. Wells, Joplin, for defendant-appellant.

GREENE, C.J. Defendant, United Missouri Bank of Carthage, appeals from an order and judgment of the trial court sustaining John and Mary Bishop's motion for summary judgment on count II of their first amended petition, and for summary judgment in the Bishops' favor on the bank's counterclaim. Count II of the first amended petition sought a declaratory judgment that the Bishops, as comakers, were discharged under § 400.3–606[1] from any obligation on a promissory note since the other comakers to that note had

[1] All statutory references are to RSMo 1978.

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been released by the bank. The bank's counterclaim was for the unpaid balance of the note.

Summary judgments are authorized only when 1) there is no issue as to any material fact, and 2) the party requesting the summary judgment is entitled to it as a matter of law. Clevenger and Wright Co. v. A.O. Smith Harvestore Products, Inc., 625 SW2d 906, 908 (Mo App 1981). Our review of the record is made in the light most favorable to the defendant bank. Kinder v. Notorangelo, 615 SW2d 433, 434 (Mo App 1980).

Based on the pleadings, affidavits, depositions, and interrogatories, the material facts before the trial court at the time it entered summary judgment were as follows.

On January 31, 1977, John and Mary Bishop and Henry and Elizabeth Mohr executed a promissory note for $115,000 in favor of the United Missouri Bank of Carthage. This note enabled Mr. and Mrs. Mohr to buy a 49% interest in the AirCo Tool Engineering Company owned by the Bishops. Almost $84,500 of the loan proceeds were actually used to pay some of the Bishops' prior loans at the bank, and the remaining $30,500 were credited to the company's account at the bank.

Collateral given to support the loan was 1) an assignment, with power of attorney, to the bank of John Bishop's rights in an assignment of inheritance from the Mohrs to him in Henry Mohr's grandmother's estate; 2) an assignment of a $125,000 life insurance policy on the life of Henry Mohr; 3) a note for $75,000 from the Bishops secured by a deed of trust on the AirCo Tool Building; and, 4) a note for $35,000 secured by a second deed of trust on the Mohr residence which had been assigned to John Bishop.

The note matured on January 31, 1979. Attempts by the bank to secure payment on the note failed, and in July 1979, the bank began foreclosure proceedings on the Mohr residence under a first deed of trust held by the bank. The Mohrs then filed a petition in bankruptcy. Subsequent negotiations between the bank and the Mohrs resulted in releases being prepared and executed by both sides on February 27 and March 2, 1981. In these releases, the Mohrs pledged to dismiss their petition in bankruptcy, transfer the title of their residence to the bank, and pay the bank $2,500 within 15 days after the receipt by them of any inheritance of $2,500 or more from Mr. Mohr's grandmother's estate. The bank, in exchange for those promises by the Mohrs, released the Mohrs from the $115,000

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note and two other notes, and also released any interest it may have had against the estate of Henry Mohr's grandmother.

Prior to the execution of the releases, the Bishops were advised by the bank at various times as to the status of its legal proceedings against the Mohrs and the Bishops' liability on the note for any balance it was unable to collect from the Mohrs. The Bishops, however, were not informed by the bank about the possibility of the Mohrs being released from the note, nor were they informed about the releases at the time of the actual execution of the releases. The bank never sought or received the consent of the Bishops to release the Mohrs from the note. Also, the bank never expressly reserved its rights on the note against the Bishops prior to or contemporaneous with the execution of the releases.

The Bishops promptly filed suit for a declaratory judgment that they were no longer obligated on the note, when they eventually discovered that releases had been executed by the bank and the Mohrs. After amending their pleadings, the Bishops moved for summary judgment on count II in which they contended that as comakers they were discharged from obligation on the note under § 400.3–606. In its judgment on count II, the trial court 1) found that the releases executed by the bank and the Mohrs were for the purpose of fully and forever compromising, discharging and releasing all claims of every kind, character, and description; 2) found that the releases were executed without notice to, or the consent of, the Bishops and without an express reservation of rights by the bank against the Bishops; 3) ordered the return or release of the collateral the Bishops had pledged with regard to the note; and 4) sustained the Bishops' motion for summary judgment against the bank on its counterclaim for the balance due on the note.

On appeal, the defendant bank claims that the trial court erred in granting the summary judgment because 1) material facts were at issue on whether the Bishops were comakers or sureties, on whether the Bishops consented to the releases, and on whether the bank expressly reserved its rights; 2) comakers are not covered by § 400.3–606; and, 3) it failed to make a finding on the extent of the impairment of the Bishops' right of recourse against the Mohrs on the note, and failed to determine the value of any impaired collateral.

Our review of these allegations of trial court error is limited to determining whether the trial court's judgment is supported by substantial evidence, is not against the weight of the evidence, and is

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a correct declaration or application of law. Murphy v. Carron, 536 SW2d 30, 32 (Mo banc 1976).

In applying that standard of review to the bank's first issue, we find that there were no material facts at issue, and that there were only questions as to the legal effect of certain facts upon the question of what was the Bishops' status on the note (comaker, surety, etc.) and upon whether there was consent or an express reservation of rights. We also find, without an extensive review at this point of the facts already presented above, that that part of the trial court's judgment finding that the Bishops were comakers on the note, that there was no consent, and that there was no express reservation of rights satisfies the review standards of Murphy v. Carron, supra.

The bank's second issue on appeal regarding the application of § 400.3–606 to comakers raises a novel question of law in Missouri. No other Missouri appellate court has been forced to directly confront the issue of whether § 400.3–606 applies to comakers as well as to sureties and accommodation makers.[2]

Section 400.3–606 provides that:

> "(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
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> "(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or
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> "(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.
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> "(2) By express reservation of rights against a party with a right of recourse the holder preserves
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> "(a) all his rights against such party as of the time when the instrument was originally due; and
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> "(b) the right of the party to pay the instrument as of that time; and
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> "(c) all rights of such party to recourse against others."

[2] In Wirth v. Heavey, 508 SW2d 263, 266 [14 UCC Rep 873] (Mo App 1974), the Kansas City Court of Appeals refused to discharge a comaker under § 400.3–606 by ruling that even if that section applied to comakers, there had not been a release making that defense available.

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The bank contends that the comments to this section clearly indicate that this defense is available only to "any party" who is an accommodation maker or surety.[3] However, in order for us to reach the bank's conclusion, we would have to violate the ordinary rules of statutory construction.

It is well-settled law that in ascertaining the meaning of the statute, we must look to the express language of the law irrespective of what may have been intended. State ex rel. Degraffenreid v. Keet, 619 SW2d 873, 876 (Mo App 1981). We cannot alter the plain, ordinary and natural meaning of words used in a statute and we must determine the meaning of the words by applying the plain and natural meaning of the language. Bethel v. Sunlight Janitor Service, 551 SW2d 616, 619 (Mo banc 1977). An unambiguous statute should be taken to mean what it says, for the General Assembly is presumed to have intended what the law states directly, and courts have no leave to impose another meaning. State ex rel. Degraffenreid v. Keet, supra. We hold that the term "any party" as used in § 400.3–606 means any party to the instrument, including comakers. See Rushton v. U.M. & M. Credit Corp., 245 Ark 703, 434 SW2d 81, 83 [5 UCC Rep 1078] (1968); Deese v. Mobley, 392 So2d 364, 368 [30 UCC Rep 1314] (Fla Dist Ct App 1981); Southwest Florida Production Credit Association v. Schirow, 388 So 2d 338, 339–40 [30 UCC Rep 268] (Fla Dist Ct App 1980); Beneficial Finance Co. of New York, Inc. v. Husner, 82 Misc 2d 550, 369 NYS2d 975, 977–78 [17 UCC Rep 477] (Sup Ct Wayne County 1975); W. Hawkland, Commercial Paper 99, 121 (1959); White & Summers, Uniform Commercial Code, 434 n 121, § 13–14 (1972).[4] Not only is

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[3] § 400.3–606, VAMS, Missouri Code Comment says that "[t]he words 'any party to the instrument' are used to make it clear that the suretyship defenses provided herein are available to any party who is in the position of a surety and not just to parties secondarily liable."

§ 400.3–606, VAMS, Uniform Commercial Code Comment 1 states that:

"The words 'any party to the instrument' remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are 'secondarily liable,' but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so."

[4] We recognize the cases cited by the bank for the position that a comaker is not included as "any party" under UCC 3–606, but those cases ignore the plain, unambiguous meaning of the statute and proceed to look at the UCC Comments. See United States v. Unum, Inc., 658 F2d 300, 304 [32 UCC Rep 646] (5th Cir 1981); Wohlhuter v. St. Charles Lumber & Fuel Co., 62 Ill 2d

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this result mandated by a plain reading of this unambiguous section, but there are also two other good supporting reasons.

First, this definition is consonant with the definition of "party" listed in the code. See § 400.1–201(29). Second, adopting the bank's construction would result in a different meaning being applied to "any party" in § 400.3–606 compared to the term "any party" used in the remaining discharge sections of 400.3–601 through 400.3–605. We refuse to adopt this incongruity which would result from following the bank's approach.

A final argument raised by the bank under this issue is that even if § 400.3–606 applies to the Bishops as comakers, the Bishops are still liable on the note under § 431.150.[5] We find, however, that while § 431.150 was not expressly repealed by § 400.3–606, the § 400.3–606 requirements must be met in a case such as this. Since the bank failed to obtain consent or expressly reserve its rights, it cannot claim any benefit of § 431.150.

The bank's last issue on appeal is that the trial court erred in totally releasing the Bishops as comakers since it failed to place a value on either the Bishops' impaired right of recourse or impaired collateral. The trial court's judgment does not expressly state why it totally released the Bishops. Apparently, the trial court believed that under § 400.3–606(1)(a) the Bishops were totally released from obligation on the note since the bank totally discharged the Mohrs from liability on the note without the consent of the Bishops and without expressly reserving its rights against the Bishops. If this was the trial court's belief, it was wrong.

One co-maker's right of contribution from the other comaker is a right of recourse within the meaning of § 400.3–606. See Beneficial Finance Co. of New York, Inc. v. Husner, supra, 369 NYS2d at 978; 3 Anderson, Uniform Commercial Code 128, § 3–606:5 (2d ed

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16, 338 NE2d 179, 181 [18 UCC Rep 174] (1975); Farmers State Bank of Oakley v. Cooper, 227 Kan 547, 608 P2d 929, 933–34 [28 UCC Rep 733] (1980); Peoples Bank of Point Pleasant v. Pied Piper Retreat, Inc., —— W Va ——, 209 SE2d 573, 578 [14 UCC Rep 1398] (1974); Hooper v. Ryan, 581 SW2d 237, 238–39 [26 UCC Rep 982] (Tex Civ App 1979).

[5] "It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released; provided, that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his co-debtors, as is by law now secured to him." § 431.150.

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1971 & Cum Supp 1982). The release of one comaker under § 400.3–606(1)(a) discharges the other comaker to the extent of only one-half the liability on the note since one comaker would have the right of recourse against the other comaker for only one-half the note. Deese v. Mobley, supra; Provident Bank v. Gast, 57 Ohio St 2d 102, 368 NE2d 1357, 1360–61 n 4 [26 UCC Rep 114] (1979); White & Summers, supra. This result is in accord with our case law which recognizes that comakers of a promissory note are equally liable. Wright v. Wright, 567 SW2d 371, 374 (Mo App 1978). Also, when a release is executed on an instrument covered by the Uniform Commercial Code and that release has the consent of the other comaker or contains an express reservation of rights against the other comaker, §§ 400.3–606(1)(a), (2)(c) and 431.150 operate to preserve the right of the other comaker for payment from the released comaker of any sum paid by the other comaker which exceeds his one-half liability on the note. But when such a release is executed without consent or express reservation of rights, as in the case at bar, §§ 400.3–606(1)(a) and 431.150 operate to discharge the other co-maker's liability to the extent of one-half the note since that was the amount of recourse against the discharged comaker that the other comaker had if consent had been obtained or rights had been expressly reserved. See §§ 400.3–606(1)(a), 431.150. We hold that that part of the trial court's judgment which totally released the Bishops from liability on the note under § 400.3–606(1)(a) was an erroneous declaration and application of the law and we therefore reverse it.

We need not address the valuation problem raised by the bank under § 400.3–606(1)(b) in great detail now since the trial court failed to expressly grant its judgment on that ground and since it failed to place a value on any impaired collateral. It suffices to say that the Bishops, being only half liable on the note under § 400.3–606(1)(a), are also entitled to be discharged from their remaining liability on the note to the extent of the value of any impaired collateral under § 400.3–606(1)(b). We remand the case for a determination by the trial court of the value of any impaired collateral, and a determination of the Bishops' remaining liability, if any, on the note once the value of one-half the note and of any impaired collateral are subtracted from the amount due on the note.

That part of the judgment which found the Bishops, as comakers, to be totally discharged under § 400.3–606(1)(a) from liability on the note is reversed, and the cause is remanded for the trial court

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to determine the Bishops' liability on the note for one-half the note minus the value of any impaired collateral as found by the trial court on remand. We recognize that this will involve the trial court hearing additional testimony. In all other respects, the judgment of the trial court is affirmed.

TITUS and CROW, JJ., concur.

FLANIGAN, P.J., recused.

FIRST ARLINGTON NATIONAL BANK v. STATHIS

Illinois Appellate Court, First District, Fifth Division, May 27, 1983
115 Ill App 3d 402, 450 NE2d 833

[¶ 5114.2(3)] **Letters of credit—duty to honor draft complying with terms of credit.**

In providing exceptions to an issuer's duty to honor a demand on a letter of credit, UCC § 5–114(2)(b) does not include within its scope warranties other than those specifically mentioned in the subsection (warranties under §§ 7–507 and 8–306). Therefore, the trial court did not err in holding that § 5–114(2)(b) did not permit issuer of letter of credit to refuse to honor a demand which complied on its face with the terms of the letter of credit and to which the warranties specifically mentioned in § 5–114(2)(b) did not apply.

[¶ 5111, ¶ 5114.2(4)] **Letters of credit—distinguished from guaranty.**

A letter of credit is to be distinguished from a guaranty, since a guaranty, as a secondary obligation, is based on the rights and obligations of the parties to the underlying contract, while a letter of credit, as a primary obligation, is independent of the underlying transaction. Therefore, an agreement between the beneficiary (seller of real estate) and the buyers, releasing one buyer, did not affect the beneficiary's right to demand payment on the irrevocable letter of credit. The basic warranties under UCC § 5–111(1) are that the documents comply on their face with the terms of the letter of credit, and that none of the exceptions set forth in UCC § 5–114(2)(b) are present.

[¶ 3417.1, ¶ 5111] **Warranties on presentment and transfer—applicability to letters of credit.**

Although UCC § 3–417 warranties are applicable to any person who transfers an instrument and receives consideration, the obligations of a bank which had issued a letter of credit were unrelated to the underlying note, and alleged breach of warranties applicable to the note did not affect the issuer's obligation to pay on the draft presented under the letter of credit. If § 3–417 was applicable at all, it was applicable to the draft, not to the underlying note, and the issuer did not allege any breach of warranty related to the presentment of the draft under the letter of credit.

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terial alteration. . . ." In Franco v. Bank of Forest Park, 118 Ga App 700, 705 [5 UCC Rep 1252] (165 SE2d 593), this court pointed out that certain notations on the note did not alter or change "the obligations of the note itself, and absent that, the alteration does not operate to discharge the parties from their obligations."

In the case sub judice, in the "Guaranty of Payment" the defendant agreed that the plaintiff bank could "surrender, compromise, substitute or exchange any property in which you [the bank] may have a *security interest* securing repayment of the note . . ." See Dunlap v. C. & S. DeKalb Bank, 134 Ga App 893, 896 (216 SE2d 651). Therefore, the deletion of the words "listed below" could not possibly have materially altered the terms of the contract since the defendant had already yielded to the plaintiff bank any rights regarding the security which this language might refer to. Since we have determined that this was not a material alteration within the purview of Code Ann § 109A–3–407, the defendant failed to raise an issuable defense and the trial judge did not err in granting plaintiff's motion for summary judgment.

Judgment affirmed. McMURRAY, P.J., and POPE, J., concur.

FALL RIVER SAVINGS BANK v. LEBEL

Massachusetts District Courts, Appellate Division, February 10, 1982
No. 294

[¶ 3606.2] **Effect of release of one joint and several maker of note.**
Where defendants A and B jointly and severally executed and delivered to plaintiff bank a promissory note and after default and foreclosure sale the bank released defendant B from her obligation and agreed not to seek further payment on the note from her upon the payment of $500, the conduct of the bank did not discharge defendant A as a matter of law under § 3–606 where there was no evidence to show that A's right to obtain contribution or indemnity was impugned or that the bank unjustifiably impaired any collateral for the underlying obligation. There was no evidence that A stood as surety for B, or that the bank knew or had reason to know of any right of recourse by A against B. The burden was on A to offer such evidence. In the absence of proof, the agreement not to look to B did not entitle A to be deemed discharged.

UCC Section Cited: § 3–606.

Appeal from the Fall River District Court. Before RIDER, P.J., WELSH and SILVA, JJ.

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Edwin A. Macy, Fall River, for plaintiff.
Gilbert E. Poisson, Fall River, for defendant.

WELCH, J. This is a civil action in contract for the recovery of a deficiency alleged to be due on a promissory note after foreclosure sale of a mortgage on certain real estate in which the defendants owned the equity of redemption. Both defendants were comakers of the promissory note which was secured by the mortgage.

The defendants answered by way of a general denial. No other defenses were pleaded in the answer.

The court found in favor of the plaintiff against the defendant Armand Lebel in the sum of $4300.00 and dismissed the complaint as to the defendant Janet Lebel.

Neither party filed requests for rulings of law, but the trial court sua sponte reported the case to the appellate division for determination. General Laws Chapter 231 § 108.

. . . . . .

2. We proceed to a consideration of the questions raised by the report. The memorandum of decision which was adopted by the trial judge as his voluntary report indicated the following:

The defendants jointly and severally executed and delivered to the plaintiff a promissory note in the principal sum of $18,500.00 on January 5, 1972. The note was secured by a mortgage on certain real estate. After a default, a foreclosure sale was conducted, leaving a deficiency of $4,758.32. This action was commenced by the bank as holder of the note to recover the deficiency.[5] As a result of negotiations between the agent of the plaintiff and the defendant Janet Lebel, the bank executed and delivered to the defendant Janet Lebel a release of attachment of real estate standing in her sole name and orally agreed not to seek further payment on the note from her. Although the report does not so indicate, the brief of the defendant Armand Lebel indicates that Janet paid the sum of $500.00 for the release of attachment and promise not to pursue her for the balance due on the note.[6] The trial judge awarded the sum of $4300.-00 to the plaintiff against the defendant Armand Lebel and dismissed the action as to the defendant Janet Lebel.

[5] There is no indication in the report that a notice of intent to sue for deficiency was given pursuant to GL c 244 § 17B. We shall assume that such a notice was given, since it was a condition precedent to recovery.

[6] The brief of the appellant is not part of the record on appeal. We shall assume this is true for purposes of this appeal.

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We reiterate that the defendant answered by way of a general denial and was not entitled as of right to raise the issue of discharge at trial. Discharge is an affirmative defense which ought to have been set up by the defendant in his answer if he intended to rely on it. Shapiro v. Lyon, 254 Mass 110, 116 (1925); Belli v. Forsyth, 301 Mass 203, 206 (1938). The burden was on the defendant to prove that he was discharged. See Abrain v. Pereira, 336 Mass 460, 462 (1957). Since the case was tried on that theory, we choose not to disregard it on appeal. Baker v. Commercial Union Ins. Co., —— Mass —— (1981).

The issue presented is whether or not the conduct of the bank as described in the report released and discharged the Defendant Armand as a matter of law. We shall assume in favor of the defendant that he neither knew of nor consented to the bank's actions as regards Janet nor ratified the same afterwards.

The general rule is that payment of a lesser sum than the amount due on a liquidated or undisputed obligation will not afford consideration for a promise not to look to the obligor paying such sum for payment of the balance due. Smith v. Bartholomew, 1 Metc 276 (1840); Foakes v. Beer, LR 9 AC 605 (1884). The bargained for release of real estate attachment by the creditor in addition to the payment would afford sufficient consideration for such a promise. We therefore pass the question of the enforceability of the promise of the creditor by the defendant Janet Lebel.

The rule at common law was that the release of one or more joint or joint and several obligors without an effective reservation of rights or without the consent of the remaining obligors constituted a discharge of the underlying obligation and consequently the remaining obligors. Hale v. Spaulding, 145 Mass 482 (1888). This principle was recognized in the common law of this Commonwealth from the earliest times. See Ruggles v. Patten, 8 Mass 480, 482 (1812). There were certain formal requirements: To be effective, the release had to be written and under seal. Hale v. Spaulding, supra, p 483. The writing had to manifest an unequivocal intention to discharge the obligor from an existing or an assumed duty. Corbin, Contracts, (One Volume ed 1952) § 1238, p 993. An oral statement by a creditor to one of the debtors that the debt was discharged was not legally operative as such. Corbin, supra, § 1240, p 993. Of equal importance was the requirement that the release be a sealed instrument. Shaw v. Pratt, 22 Pick 305 (1837); Gold Medal Sewing Machine v. Harris, 124 Mass 206, 208 (1878). Understandably, courts have disfavored the common law rule relating to dis-

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charge restricting its operation within narrow limits where discharge was effected only by formal release under seal. The main cause for disenchantment is that the rule generally operates directly contrary to what may be supposed to be the actual intent of the parties.

In the real world of commerce, it is neither unusual nor unreasonable for a creditor to release one of several joint obligors in exchange for something less than or different from performance of the underlying obligation, with the expectation to look to the remaining obligors for satisfaction of the balance. Yet, a written release under seal by the creditor to one joint debtor extinguished the obligation, thereby frustrating the reasonable expectation of the creditor and giving an unearned windfall to the remaining debtors, a result none of the parties contemplated. Painfully aware of the gap between judicial conceptualization and the realities of the market place, courts resorted to a number of legal fictions and similar devices to avoid the inexorable operation of the inflexible rules as to discharge. Among these is the venerable "covenant not to sue" and a release with an express reservation of rights, the latter of these being first conceived as a contradiction in terms. The principal objection to this approach is that the result in a given case turned rather upon the form of the instrument used (usually a function of the legal astuteness of the parties or their attorneys) than the actual intent of the parties. The assumption underlying the common law rule as to discharge of joint or joint and several obligors was an erroneous application of the law of contradiction. It was thought impossible that at the same time an obligation might be deemed discharged as to one joint obligor but not as to others, due to the unitary nature of the performance due. There were a number of other reasons offered for the existence of the rule, none of which were entirely satisfactory. Corbin, supra, § 931, p 897.

The point of departure for modern jurisprudence on this issue is markedly different. Instead of focusing on the indivisibility of the obligation itself and the fact that a single performance is due, it concerns itself primarily with the jural relations among the joint obligors, as impacted by the conduct of the obligee towards the one relieved of his obligation. Concepts from the law of suretyship originally developed in equity were found to be well suited to the task. Instead of examining the form of the instrument, the crucial question for judicial inquiry now became to what degree, if at all, does the release, forbearance or covenant not to sue impede the

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rights of the joint obligors to exoneration, reimbursement and subrogation from one another. The rights to obtain contribution or indemnity from joint obligors was early recognized in the law of contracts, and afforded an equitable basis for adjusting the losses among such obligors. Courts under this approach undertake to examine whether the actions of the creditor in excusing one joint obligor have prejudiced the rights of the others to obtain indemnification, exoneration or subrogation, or impaired collateral for the obligation. Stanley v. Ames, —— Mass —— (1979) Mass Adv Sh 1612, 1615–1617 [26 UCC Rep 978]; see Rose v. Homsey, 347 Mass 259, 261 [2 UCC Rep 129] (1964); Priggen Steel Buildings Co. v. Parsons, 350 Mass 62, 64 [3 UCC Rep 89] (1966); Restatement of Contracts, Second, § 294.

The Uniform Commercial Code adopts this modern approach. GL c 106, § 3–606 provides, in part, as follows:

> "§ 3–606. Impairment of recourse or of Collateral. (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
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> "(a) without any express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person . . . ; or
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> "(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse. . . ."

The report does not contain any evidence tending to show that Armand's right to obtain contribution or indemnity was impugned, or that the plaintiff unjustifiably impaired any collateral for the underlying obligation. There is no evidence or other indication that Armand stood as surety for Janet, and more importantly, that the plaintiff knew or had reason to know of any right of recourse by Armand against Janet. The burden was on Armand to offer evidence on these issues. See Palumbo v. DiMare, 299 Mass 212 (1938); Nashua Savings Bank v. Abbott, 181 Mass 531 (1902). In the absence of proof, the agreement not to look to the defendant Janet does not entitle the defendant Armand to be deemed discharged.

We have deliberately eschewed the mire of technicalities long associated with the form of instrument to effect the release. We observe that the defendant Armand might have had his rights against Janet determined in the instant case by filing an appropriate crossclaim, thereby avoiding circuity of action. Since such crossclaims are per-

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missive and not mandatory, a separate action would seem to be open if Armand has any claim against Janet.

We determine that there was no prejudicial error in the entry of judgment for the plaintiff against the defendant Armand Lebel and dismissing the action as to the defendant Janet Lebel. An order is to enter dismissing the report.

VAN BALEN v. PEOPLES BANK & TRUST CO.

Arkansas Court of Appeals, December 9, 1981;
rehearing denied January 20, 1982
3 Ark App 243, 626 SW2d 205

[¶ 3606.4] **Impairment of collateral—burden of proof.**

While the guarantors of a note, in showing that the holder failed to perfect its security interest in part of the collateral, met their UCC § 3–606 burden of proving that the collateral was impaired, they did not meet the second burden imposed by that Code section—a showing of the extent to which the collateral was impaired. Since the release of guaranty is only pro tanto—a release only to the extent by which the security has been impaired—the failure of the guarantors to meet the second burden precluded them from exercising their rights to pro tanto release. Two judges dissent, contending that the guarantors should have been discharged because (1) Arkansas case law has always favored guarantors; (2) if a guarantor, under UCC § 3–606(1)(a), is fully discharged where a modification or extension in payments is made in the underlying written obligation, then the guarantor, under UCC § 3–606(1)(b), should be fully discharged when the collateral has been impaired; and (3) the guarantors did not have access to the information necessary to prove the extent of the impairment of the collateral since the debtor had filed for bankruptcy and the secured party had never perfected its security interest, thereby giving the trustee in bankruptcy priority and possession of the collateral.

UCC Section Cited: § 3–606.

Appeal from Johnson Chancery Court.

Rose Law Firm, by Thomas P. Thrash and Herbert C. Rule, III, Little Rock, for appellants.

Young & Finley, Russellville, for appellee.

CRACRAFT, J. Appellants, Frank G. Van Balen and Betty A. Van Balen, appeal from a decree of the Chancery Court of Johnson County in which judgment was entered against them as guarantors of de-

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contends that the April 11 and July 19 agreements constituted a novation of the original note without his consent, absolving him of liability on the note. See Williams v. Crusader Disc. Corp., 75 Nev 67, 334 P2d 843 (1959).

The April 11 agreement states that Hi-Tide, Inc. "has assumed an obligation to repay to Lowden . . . ." The use of the word "assumed" could be construed as a release, suspension, or novation of Lowden's rights as against C'Rayeh. Lowden argues that he intended the later agreements only to add a second guarantor for the original obligation. Where, as here, the crucial factual dispute concerns characterization of a party's conduct, which in turn involves elusive questions of intent and motive, summary judgment is inappropriate. Feminist Women's Health Center, Inc. v. Mohammad, 586 F2d 530, 548 (5th Cir 1978), cert denied, 444 US 924 (1979). See Poller v. Columbia Broadcasting System, Inc., 368 US 464, 473 (1962). See also Admiralty Funds v. Tabor, 677 F2d 1297, 1298–99 (9th Cir 1982); Prochaska v. Marcoux, 632 F2d 848, 851 (10th Cir 1980), cert denied, 451 US 984 (1981). On the record in the case at bar, summary judgment was not proper on the issues concerning the effect of the April 11 and July 19 agreements on Servaites' contract of guaranty.

. . . . . .

As the district court erred in granting summary judgment and holding that Servaites was barred from contesting the bankruptcy court's findings, we reverse and remand for a full trial on the merits.

BISHOP v. UNITED MISSOURI BANK OF CARTHAGE

Missouri Court of Appeals, Southern District, February 17, 1983
647 SW2d 625

[¶ 1201.29, ¶ 3606.4(1)] **"Any party"—co-maker's right to claim discharge.**
The term "any party" as used in § 3–606 means any party to the instrument, including co-makers. That definition not only encompasses the plain meaning of the words of the statute, but is consonant with the definition of "party" at § 1–201(29). If "any party" were interpreted as being only an accommodation maker or surety for purposes of § 3–606, this would result in a different meaning being applied to § 3–606 than to the other discharge sections of the UCC §§ 3–601 through 3–605, which would create an unacceptable incongruity. Thus, § 3–606 was available as a defense to co-makers of a note.

[¶ 3606.4(5)] **Extent of co-maker's discharge.**
One co-maker's right of contribution with the other co-maker is a right of recourse within the meaning of § 3–606. The release of one co-maker under

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§ 3–606(1)(a) discharges the other co-maker to the extent of only one-half the liability on the note since one co-maker would have the right of recourse against the other co-maker for only one-half the note. Therefore, it was error to totally release one co-maker from obligation on a note from which the bank had totally discharged the other co-maker without the consent of the first and without expressly reserving its rights.

[¶ 3606.2, ¶ 3606.6] **Effect of release, express reservation.**

When a release is executed on an instrument covered by the UCC and that release has the consent of the other co-maker or contains an express reservation of rights against the other co-maker, § 3–606(1)(a) and (2)(c) operate to preserve the right of the other co-maker for payment from the released co-maker of any sum paid by the other co-maker which exceeds his one-half liability on the note. But when such a release is executed without consent or express reservation of rights, § 3–606(1)(a) operates to discharge the other co-maker's liability to the extent of one-half the note since that was the amount of recourse against the discharged co-maker that the other co-maker had if consent had been obtained or rights expressly reserved.

[¶ 3606.2, ¶ 3606.4(5)] **Co-maker's liability following release of other co-maker —effect of impairment of collateral on liability.**

Where the bank holding a note released one set of co-makers from their obligation under the note without the consent of the other set of co-makers and without an express reservation of rights, the unreleased co-makers were discharged from liability on one-half the note, and were entitled to be discharged from their remaining liability on the note to the extent of the value of any impaired collateral under § 3–606(1)(b).

UCC Sections Cited: § 1–201(29), § 3–606.

Appeal from the Circuit Court of Jasper County. Before GREENE, C.J., TITUS and CROW, JJ.

Thomas E. Klinginsmith and Thomas L. Williams, Carthage, for plaintiffs-respondents.

Jerry E. Wells, Joplin, for defendant-appellant.

GREENE, C.J. Defendant, United Missouri Bank of Carthage, appeals from an order and judgment of the trial court sustaining John and Mary Bishop's motion for summary judgment on count II of their first amended petition, and for summary judgment in the Bishops' favor on the bank's counterclaim. Count II of the first amended petition sought a declaratory judgment that the Bishops, as comakers, were discharged under § 400.3–606[1] from any obligation on a promissory note since the other comakers to that note had

[1] All statutory references are to RSMo 1978.

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been released by the bank. The bank's counterclaim was for the unpaid balance of the note.

Summary judgments are authorized only when 1) there is no issue as to any material fact, and 2) the party requesting the summary judgment is entitled to it as a matter of law. Clevenger and Wright Co. v. A.O. Smith Harvestore Products, Inc., 625 SW2d 906, 908 (Mo App 1981). Our review of the record is made in the light most favorable to the defendant bank. Kinder v. Notorangelo, 615 SW2d 433, 434 (Mo App 1980).

Based on the pleadings, affidavits, depositions, and interrogatories, the material facts before the trial court at the time it entered summary judgment were as follows.

On January 31, 1977, John and Mary Bishop and Henry and Elizabeth Mohr executed a promissory note for $115,000 in favor of the United Missouri Bank of Carthage. This note enabled Mr. and Mrs. Mohr to buy a 49% interest in the AirCo Tool Engineering Company owned by the Bishops. Almost $84,500 of the loan proceeds were actually used to pay some of the Bishops' prior loans at the bank, and the remaining $30,500 were credited to the company's account at the bank.

Collateral given to support the loan was 1) an assignment, with power of attorney, to the bank of John Bishop's rights in an assignment of inheritance from the Mohrs to him in Henry Mohr's grandmother's estate; 2) an assignment of a $125,000 life insurance policy on the life of Henry Mohr; 3) a note for $75,000 from the Bishops secured by a deed of trust on the AirCo Tool Building; and, 4) a note for $35,000 secured by a second deed of trust on the Mohr residence which had been assigned to John Bishop.

The note matured on January 31, 1979. Attempts by the bank to secure payment on the note failed, and in July 1979, the bank began foreclosure proceedings on the Mohr residence under a first deed of trust held by the bank. The Mohrs then filed a petition in bankruptcy. Subsequent negotiations between the bank and the Mohrs resulted in releases being prepared and executed by both sides on February 27 and March 2, 1981. In these releases, the Mohrs pledged to dismiss their petition in bankruptcy, transfer the title of their residence to the bank, and pay the bank $2,500 within 15 days after the receipt by them of any inheritance of $2,500 or more from Mr. Mohr's grandmother's estate. The bank, in exchange for those promises by the Mohrs, released the Mohrs from the $115,000

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note and two other notes, and also released any interest it may have had against the estate of Henry Mohr's grandmother.

Prior to the execution of the releases, the Bishops were advised by the bank at various times as to the status of its legal proceedings against the Mohrs and the Bishops' liability on the note for any balance it was unable to collect from the Mohrs. The Bishops, however, were not informed by the bank about the possibility of the Mohrs being released from the note, nor were they informed about the releases at the time of the actual execution of the releases. The bank never sought or received the consent of the Bishops to release the Mohrs from the note. Also, the bank never expressly reserved its rights on the note against the Bishops prior to or contemporaneous with the execution of the releases.

The Bishops promptly filed suit for a declaratory judgment that they were no longer obligated on the note, when they eventually discovered that releases had been executed by the bank and the Mohrs. After amending their pleadings, the Bishops moved for summary judgment on count II in which they contended that as comakers they were discharged from obligation on the note under § 400.3–606. In its judgment on count II, the trial court 1) found that the releases executed by the bank and the Mohrs were for the purpose of fully and forever compromising, discharging and releasing all claims of every kind, character, and description; 2) found that the releases were executed without notice to, or the consent of, the Bishops and without an express reservation of rights by the bank against the Bishops; 3) ordered the return or release of the collateral the Bishops had pledged with regard to the note; and 4) sustained the Bishops' motion for summary judgment against the bank on its counterclaim for the balance due on the note.

On appeal, the defendant bank claims that the trial court erred in granting the summary judgment because 1) material facts were at issue on whether the Bishops were comakers or sureties, on whether the Bishops consented to the releases, and on whether the bank expressly reserved its rights; 2) comakers are not covered by § 400.3–606; and, 3) it failed to make a finding on the extent of the impairment of the Bishops' right of recourse against the Mohrs on the note, and failed to determine the value of any impaired collateral.

Our review of these allegations of trial court error is limited to determining whether the trial court's judgment is supported by substantial evidence, is not against the weight of the evidence, and is

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a correct declaration or application of law. Murphy v. Carron, 536 SW2d 30, 32 (Mo banc 1976).

In applying that standard of review to the bank's first issue, we find that there were no material facts at issue, and that there were only questions as to the legal effect of certain facts upon the question of what was the Bishops' status on the note (comaker, surety, etc.) and upon whether there was consent or an express reservation of rights. We also find, without an extensive review at this point of the facts already presented above, that that part of the trial court's judgment finding that the Bishops were comakers on the note, that there was no consent, and that there was no express reservation of rights satisfies the review standards of Murphy v. Carron, supra.

The bank's second issue on appeal regarding the application of § 400.3–606 to comakers raises a novel question of law in Missouri. No other Missouri appellate court has been forced to directly confront the issue of whether § 400.3–606 applies to comakers as well as to sureties and accommodation makers.[2]

Section 400.3–606 provides that:

> "(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> "(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or
>
> "(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.
>
> "(2) By express reservation of rights against a party with a right of recourse the holder preserves
>
> "(a) all his rights against such party as of the time when the instrument was originally due; and
>
> "(b) the right of the party to pay the instrument as of that time; and
>
> "(c) all rights of such party to recourse against others."

[2] In Wirth v. Heavey, 508 SW2d 263, 266 [14 UCC Rep 873] (Mo App 1974), the Kansas City Court of Appeals refused to discharge a comaker under § 400.3–606 by ruling that even if that section applied to comakers, there had not been a release making that defense available.

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The bank contends that the comments to this section clearly indicate that this defense is available only to "any party" who is an accommodation maker or surety.[3] However, in order for us to reach the bank's conclusion, we would have to violate the ordinary rules of statutory construction.

It is well-settled law that in ascertaining the meaning of the statute, we must look to the express language of the law irrespective of what may have been intended. State ex rel. Degraffenreid v. Keet, 619 SW2d 873, 876 (Mo App 1981). We cannot alter the plain, ordinary and natural meaning of words used in a statute and we must determine the meaning of the words by applying the plain and natural meaning of the language. Bethel v. Sunlight Janitor Service, 551 SW2d 616, 619 (Mo banc 1977). An unambiguous statute should be taken to mean what it says, for the General Assembly is presumed to have intended what the law states directly, and courts have no leave to impose another meaning. State ex rel. Degraffenreid v. Keet, supra. We hold that the term "any party" as used in § 400.3–606 means any party to the instrument, including comakers. See Rushton v. U.M. & M. Credit Corp., 245 Ark 703, 434 SW2d 81, 83 [5 UCC Rep 1078] (1968); Deese v. Mobley, 392 So2d 364, 368 [30 UCC Rep 1314] (Fla Dist Ct App 1981); Southwest Florida Production Credit Association v. Schirow, 388 So 2d 338, 339–40 [30 UCC Rep 268] (Fla Dist Ct App 1980); Beneficial Finance Co. of New York, Inc. v. Husner, 82 Misc 2d 550, 369 NYS2d 975, 977–78 [17 UCC Rep 477] (Sup Ct Wayne County 1975); W. Hawkland, Commercial Paper 99, 121 (1959); White & Summers, Uniform Commercial Code, 434 n 121, § 13–14 (1972).[4] Not only is

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[3] § 400.3–606, VAMS, Missouri Code Comment says that "[t]he words 'any party to the instrument' are used to make it clear that the suretyship defenses provided herein are available to any party who is in the position of a surety and not just to parties secondarily liable."

§ 400.3–606, VAMS, Uniform Commercial Code Comment 1 states that:

"The words 'any party to the instrument' remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are 'secondarily liable,' but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so."

[4] We recognize the cases cited by the bank for the position that a comaker is not included as "any party" under UCC 3–606, but those cases ignore the plain, unambiguous meaning of the statute and proceed to look at the UCC Comments. See United States v. Unum, Inc., 658 F2d 300, 304 [32 UCC Rep 646] (5th Cir 1981); Wohlhuter v. St. Charles Lumber & Fuel Co., 62 Ill 2d

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this result mandated by a plain reading of this unambiguous section, but there are also two other good supporting reasons.

First, this definition is consonant with the definition of "party" listed in the code. See § 400.1–201(29). Second, adopting the bank's construction would result in a different meaning being applied to "any party" in § 400.3–606 compared to the term "any party" used in the remaining discharge sections of 400.3–601 through 400.3–605. We refuse to adopt this incongruity which would result from following the bank's approach.

A final argument raised by the bank under this issue is that even if § 400.3–606 applies to the Bishops as comakers, the Bishops are still liable on the note under § 431.150.[5] We find, however, that while § 431.150 was not expressly repealed by § 400.3–606, the § 400.3–606 requirements must be met in a case such as this. Since the bank failed to obtain consent or expressly reserve its rights, it cannot claim any benefit of § 431.150.

The bank's last issue on appeal is that the trial court erred in totally releasing the Bishops as comakers since it failed to place a value on either the Bishops' impaired right of recourse or impaired collateral. The trial court's judgment does not expressly state why it totally released the Bishops. Apparently, the trial court believed that under § 400.3–606(1)(a) the Bishops were totally released from obligation on the note since the bank totally discharged the Mohrs from liability on the note without the consent of the Bishops and without expressly reserving its rights against the Bishops. If this was the trial court's belief, it was wrong.

One co-maker's right of contribution from the other comaker is a right of recourse within the meaning of § 400.3–606. See Beneficial Finance Co. of New York, Inc. v. Husner, supra, 369 NYS2d at 978; 3 Anderson, Uniform Commercial Code 128, § 3–606:5 (2d ed

16, 338 NE2d 179, 181 [18 UCC Rep 174] (1975); Farmers State Bank of Oakley v. Cooper, 227 Kan 547, 608 P2d 929, 933–34 [28 UCC Rep 733] (1980); Peoples Bank of Point Pleasant v. Pied Piper Retreat, Inc., —— W Va ——, 209 SE2d 573, 578 [14 UCC Rep 1398] (1974); Hooper v. Ryan, 581 SW2d 237, 238–39 [26 UCC Rep 982] (Tex Civ App 1979).

[5] "It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released; provided, that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his co-debtors, as is by law now secured to him." § 431.150.

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1971 & Cum Supp 1982). The release of one comaker under § 400.3–606(1)(a) discharges the other comaker to the extent of only one-half the liability on the note since one comaker would have the right of recourse against the other comaker for only one-half the note. Deese v. Mobley, supra; Provident Bank v. Gast, 57 Ohio St 2d 102, 368 NE2d 1357, 1360–61 n 4 [26 UCC Rep 114] (1979); White & Summers, supra. This result is in accord with our case law which recognizes that comakers of a promissory note are equally liable. Wright v. Wright, 567 SW2d 371, 374 (Mo App 1978). Also, when a release is executed on an instrument covered by the Uniform Commercial Code and that release has the consent of the other comaker or contains an express reservation of rights against the other comaker, §§ 400.3–606(1)(a), (2)(c) and 431.150 operate to preserve the right of the other comaker for payment from the released comaker of any sum paid by the other comaker which exceeds his one-half liability on the note. But when such a release is executed without consent or express reservation of rights, as in the case at bar, §§ 400.3–606(1)(a) and 431.150 operate to discharge the other co-maker's liability to the extent of one-half the note since that was the amount of recourse against the discharged comaker that the other comaker had if consent had been obtained or rights had been expressly reserved. See §§ 400.3–606(1)(a), 431.150. We hold that that part of the trial court's judgment which totally released the Bishops from liability on the note under § 400.3–606(1)(a) was an erroneous declaration and application of the law and we therefore reverse it.

We need not address the valuation problem raised by the bank under § 400.3–606(1)(b) in great detail now since the trial court failed to expressly grant its judgment on that ground and since it failed to place a value on any impaired collateral. It suffices to say that the Bishops, being only half liable on the note under § 400.3–606(1)(a), are also entitled to be discharged from their remaining liability on the note to the extent of the value of any impaired collateral under § 400.3–606(1)(b). We remand the case for a determination by the trial court of the value of any impaired collateral, and a determination of the Bishops' remaining liability, if any, on the note once the value of one-half the note and of any impaired collateral are subtracted from the amount due on the note.

That part of the judgment which found the Bishops, as comakers, to be totally discharged under § 400.3–606(1)(a) from liability on the note is reversed, and the cause is remanded for the trial court

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to determine the Bishops' liability on the note for one-half the note minus the value of any impaired collateral as found by the trial court on remand. We recognize that this will involve the trial court hearing additional testimony. In all other respects, the judgment of the trial court is affirmed.

TITUS and CROW, JJ., concur.

FLANIGAN, P.J., recused.

FIRST ARLINGTON NATIONAL BANK v. STATHIS

Illinois Appellate Court, First District, Fifth Division, May 27, 1983
115 Ill App 3d 402, 450 NE2d 833

[¶ 5114.2(3)] **Letters of credit—duty to honor draft complying with terms of credit.**

In providing exceptions to an issuer's duty to honor a demand on a letter of credit, UCC § 5–114(2)(b) does not include within its scope warranties other than those specifically mentioned in the subsection (warranties under §§ 7–507 and 8–306). Therefore, the trial court did not err in holding that § 5–114(2)(b) did not permit issuer of letter of credit to refuse to honor a demand which complied on its face with the terms of the letter of credit and to which the warranties specifically mentioned in § 5–114(2)(b) did not apply.

[¶ 5111, ¶ 5114.2(4)] **Letters of credit—distinguished from guaranty.**

A letter of credit is to be distinguished from a guaranty, since a guaranty, as a secondary obligation, is based on the rights and obligations of the parties to the underlying contract, while a letter of credit, as a primary obligation, is independent of the underlying transaction. Therefore, an agreement between the beneficiary (seller of real estate) and the buyers, releasing one buyer, did not affect the beneficiary's right to demand payment on the irrevocable letter of credit. The basic warranties under UCC § 5–111(1) are that the documents comply on their face with the terms of the letter of credit, and that none of the exceptions set forth in UCC § 5–114(2)(b) are present.

[¶ 3417.1, ¶ 5111] **Warranties on presentment and transfer—applicability to letters of credit.**

Although UCC § 3–417 warranties are applicable to any person who transfers an instrument and receives consideration, the obligations of a bank which had issued a letter of credit were unrelated to the underlying note, and alleged breach of warranties applicable to the note did not affect the issuer's obligation to pay on the draft presented under the letter of credit. If § 3–417 was applicable at all, it was applicable to the draft, not to the underlying note, and the issuer did not allege any breach of warranty related to the presentment of the draft under the letter of credit.

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Red Chief

Deposition of Joe Ford III

Objection #1. - (page 7). Exhibits 1-2-3.

— ground - not previously identified in discovery proceedings ~~should be overruled~~ purpose to avoid surprise; however the documents are so fundamental that Counsel could hardly be surprised What is the prejudice?

Objection #2 - (page 26) attorney's fees - pt by FDIC added in adjustment costs

Should be sustained this is something which is to be allowed by Court and added on the final calculation.

Objection #3. (page 33) as to opinion of Witness about whether jury ought to know significance of Bluston Mining & Rodney Taylor

Should be sustained — this would be a conclusion ~~and an issue~~ not factual.

1/27/82

Complaint -

8/8/80 - Missouri State Bank went under

Red Chief - inactive

Bluston - not recognized to do business in Ky

Count 1 G.C. Kincer, Albert Kincer, & Richard Kincer - C. K. Dyer, Jr.

individually executed note

272,500. + int. 30,648.98.

@ 17 monthly payments 16,841.91 + .91

beginning 3/30/78

Security interest in

D-9 Dozer (Cat.)

Gardner Air drill & Compressor.

988 Cat Loader.

M-30 Mack End Dump

M-30 Mack End Dump

1970 Mack 20 yd Dump

1970 Mack 20 yd Dump

2 payments and default

Count 2. after default Taylor & Bluston must assumed $240,000 & principal w/ interest at 13.5% per annum @ payments $45,589.68

Count 3. G.C. Kincer, Albert Kincer and Richard Kincer

G.C. - note 4,862.89

Albert & Richard note 9,725.78

int. 13.5%

Judgment -

Count 1 Kincers - Dixon & Red Trip

313,111.45 w/ Int - 97.81 per day
from 1/14/82 rate of 8%

Count 2
Bluston & Taylor

256,136.64 w/ Int. 81.61
1/14/82 to date at rate of 8%

Count 3
Kincers
256,136.64 w/ Int. 81.61
from 1/14/82 until pd at 8%

Count 1
G.C. Kincer 5,886.30 w/ Int. 180.00
per da. from 1/14/82

Alber Kincer & Richard Kincer.
11,772.59 w/ Int. 3.60 per da
from 1/14/82

Answer

Red Chief - Kincer Bros
General Denial ; 3/4/82

Dixon
General Denial

Affirmative defense
Kincers - Taylor & Bluston
entered into separate agreement which
released his client, Dixon
estoppel, laches, release, S/T
waiver

3/10/83.
Report of sale

Golden

jury issue on discharge & release by Sub agreement
Gannon v. Bronston
55 SW 2d 358

Craft

Kincers understood they were to be
exonerated of liability

Amended Answer & Cross Claim
Kincaid & Red Chief

(1) Fraud in obtaining their name on the Guaranty Agreement.

Cross Claim vs. Taylor & Bluston

20 May 83

Default judgment vs. Bluston mining and Rodney Taylor
243,006.69 w/ costs

Was the entering of this 2nd agreement w/o Dixon a release?

11 – F.D.I.C.

Robert G. Koester
Lake Shore Bank

worked for Mission State Bank
1/2/77
8/80

7/8/80 – Bank declared insolvent
FDIC appointed as receiver.

He was used by Bank to
Collect loans in Eastern Kentucky
where money had been advanced
to purchase equipment

Red Chief
Loan in default for a substantial
period.

11 "D" for ident (1st promissory note)
11 – Ex 1 for trial.
2/24/78
Red Chief
Kenard
Dupon

In 1980 participated in meeting
at Winchester, Ky March 1980
He for Bank – Bob Patton
Albert Kenard N.A.P. Corp.
Dr. Dupon
Lasted 2 hrs

(1) Next Meeting
Airport London, Ky
Rodney Taylor & his pilot
Bluestone Mining Co.
Only He (Koester) and Taylor
were at this meeting.

(2) 6 weeks later 1st quarter 1980

He — Kincer and Taylor
met at Wise County, Va.

Red Chief made 1 or 2
payments on note.

(3) Meeting at Doll - Greenbaum,
June 1980

G. C. Albert - Richard Kincer
Rodney Taylor - Koester - present.

Agreement

Taylor to assume $240,000
Kincer & Dixon to sign
individual notes for difference
Parties to guarantee Taylor's
payment.

Exhibits - (Collectively) - Lexington
17 June 1980

Ident -

		Trial
J	Loan Assumption & Sec. agreement	2 - No obj.
K	promissory Note Rodney Taylor Bluestone	3 - No obj.
L	Guaranty Agreement	4 - obj - O/R
M	Promissory Note 4.8 62	5 - No obj.
N	Promissory Note 9.9 25.78	6 - No obj.
O	8 - UCC 1 - financing Statement to perfect Security Int	7 - No obj

Red Chief, Albert Richard G.C.

G.C.

Albert Richard

Bank would not release anyone until obligation paid in full.

Paragraph - 2 - page 2 -
Exhibit 2.

Transferee - Bluestone & Rodney Taylor
Transferor - Kincer Bros & Pr

Ident 20 June 1980

	Trial
Q - Letter from Banks to Kincer -	8
R	9

Cross — "Craft."

Gary Frazier - sold packages of equipment — and Bank of Kansas did financing 1978 - 80 — no action taken to collect

For approximately a yr and ½ no efforts made to collect

He has no memory about Kincers objecting to any guaranteeing of Taylor and Bluestone —

He can neither affirm nor deny this !!

If Kincer said they did he can neither agree nor disagree

Bank closed before ~~they~~ it could sign the ~~Taylor Documents~~ guaranty agreement executed by the Kincers.

Cross - Golden

Dr Dixon signed promissory note 2/24/78 - TT Ex 1.

Rights of Secured Parties 355-3-606 —

355.9-501 Sub (3)

9-504 Sub (11)

Att. — 7 March 83 "on or about"

Trans — 1 June 80

Never asked Dr. Dixon if he knew of Transaction

— letting someone else have possession of Security — — —

II Whitney Wallingford

Attorney-at-Law

Assisted in preparation of documents

II Ex - II

2 - Loan Assumption Sec agreement

Koester
Atty Banks
Kincers Bros
absent Dr. Dixon
Witness explained the provisions of documents.
discussed w/ Kincers their positions under original note
that if Taylor defaulted Kincers were liable

II — T. Ex 8
6-20-80 Letter to Kincers
mailed

II — T. Ex 9
6-20-80 Letter to Dixon
mailed

Cross

Name

No Notice of Meeting

Agreement — Clearly made

Koester

Taylor

Kenders

Banks

G. C. Kincaid (as-of-or-Cross)

Box 716 – Whitesburg

Latter part of 70's he was an officer of Red Chief – owned 25%
His two Bros owned 25% each
Pr. Dyson owned 25%
Kincaids parents owned mineral rights in Ky & Tenn. they stripped on them tracts

Gary Frazier – used Brash in Kansas as financing agent

Ex ~~1~~ note

1 or 2 payments made on note.

used equipment 3 or 4 months set idle until (for a period of 1 yr & ½)
Rodney Taylor came into scope –
(Taylor had to make repairs)

~~Ghost Wrote~~

He attended meeting in Lexington – June 1980
Purpose of
He thought meeting was to release the Kincaids.

Taylor made proposal to purchase - $240,000
Agreed -

Ex 5 - sent to him in Mail he signed and returned.

$ 4

Ex 4 - Signed at meeting in Lexington.

Ex 8 - Letter from Banks to Kincir

~~(He didn't receive~~)

he doesn't recall receiving but he did sign and return a promissory note which accompanied the letter.

He made no payments on promissory note.

Cross - Golden

Craft

Had equipment $160,000

Frazier - sold better equip
arranged financing w/ Kansas Bank
old equipment traded in.

Coal in slump - couldn't
make payments - $16,000 per mo.

1 or 2 payments shut down

equipment sat idle for
approximately 2 years.

Want to ~~Lexington~~

Banks - Koester - Kansas Bank
2 Bros -
himself.

Signed it because he thought it was a way out.

Wasn't present when Bross had Conversation.

Owed $4,800 on

Albert Kenner

after equipment purchased
in business 4-5 months.
Shut down.
Maintained equipment
+ security. (on his front yard)
Taylor made repairs but
no major repairs.

He signed note

Dr. Dupon Capitalized
Red Chief.
Maintained Contract
with Dr. Dupon on telephone
generally advised him of operations.

He and Eastern Energy
Rodney landed at site
in helicopter. Wanted - mineral rights.
He flew back two or
two w/ Engineer -
proposition - he had to
purchase equipment and mortgage
Taylor got in touch w/ Kansas
Bank.

Koester called him ~~note~~ before
and advised him of meeting.

Koester represented that if they signed Notes - they would never be Confronted with them.

Koester said they would not be held liable on the guaranty.

Trial Draft -

Rod Taylor to be on Note and Kincer Bros would be released except for Notes executed by them

Add note liability on 2nd promissory Note

Taylor used the equipment on the property for approximately 1 - 2 years

Richard L. Kinser

Worked for Bluestone for approximately 2 years.

Signed promissory note and admits liability thereon

Cross – Golden

Taylor used equipment for approximately 1½ to 2 years.
equipment sat idle for approximately 1 yr.

If you sign the warranty you will be released from the original note —

he signed but he wasn't released —
??? so he is not liable on subsequent but is not released from prior ???

C.K. Dixon, Jr.
M.D.
Louisville, Ky.

Patient and friend introduced him to relative of Kencera

executed a promissory note

Ex 1.

Gary Frazier brought Note to his office

executed note recognize liability

note in default

discussed w/ associates

Koester, Kincera & Dixon went to Winchester to meet w/ NAP.

Wasn't notified of meeting in Lexington did not attend after meeting

He did not talk to Attorney Wallingford.

Ex 9 - Letter - Lawrence Banks

did not receive

Letter - Dick

Never told by Bank or Representative that he was released.

Kencir told him that he was off the hook

As Co-signed obligated for 25% of Note

Ex 9 - - He never received $303,148.00

$269,000.00 25%

~~29~~ 25%

Collateral given to Mr. Taylor

no Notice, input or objection.

What is effect of giving collateral to Taylor

Carl Wilkes

F.D.I.C.
Liquidation Asst.
Mission City, Kansas

II Ex

A declaration of Insolvency
cpt of receivership — T.E. 10

B — F.D.I.C. acceptance of receivership — T.E. 11

C — order of Court approving transfer of assets of Bank — T.E. 12

III Ex

Summary — T.E. 13.

312,557.69

$312,557.69 Principal.
5/29/84

per diem @ $90.51

Loan
272.500

payments
1. 16,841.91

balance payment

Taylor:
2.15,589.68

303,148.98

Amount of Note

$45,275.
net proceeds of sale.

Rodney Taylor
$281,532.37
@ per day 5/29/84
$81.61 per day

C. C. Kincer
4,862.89
7,443.89.

per day - 1.80

alber

9,725.78
14,887.77 5/29/84
per diem - $3.60

QUESTION FOUR

Does the jury believe and find by a preponderance of the evidence that at the time of the Rodney Taylor-Bluston Mining, Inc., assumption transaction was entereinto between the parties, that an agent or representative of the Mission State Bank represented to defendants, Albert Kincer, and Richard Kincer, which was transmitted to G. C. Kincer, that if they assisted in inducing Rodney Taylor-Bluston Mining, Inc to execute documents incurring liability for the equipment and also co-signed the papers they would be released from liability by reason of their signatures.

Does the jury believe and find by a preponderance of the evidence, at the time and place of the execution of the Rodney Taylor-Bluston Mining, Inc., assumption transaction, an agent or representative of the Mission State Bank induced the defendants, Albert Kincer, Richard Kincer and G. C. Kinder, into executing said documents by representing to them, that if they ~~would~~ executed such documents they would be released from liability; that such representation was false and knowingly made by the representative to induce the defendants to execute such documents and that in reliance upon such representation the defendants ~~to their detriment~~ executed such documents?

(a) for the equipment (b) detriment to Rodney Taylor-Bluston Mining, Inc (c) to their detriment ?

_____Yes _____NO.

_____
Date

_____
Foreperson

Question Five

Does the jury find by a preponderance of the evidence that the Rodney Taylor - Bluston Mercy d.r.c. Assumption transaction was intended by the mission State Bank as a new obligation to fully release ~~[illegible]~~ the following named defendants from liability under the original promissory note.

a. E. C. Kercer	yes ___	No ___
b. albert Kercer	yes ___	No ___
c. Richard Kercer	yes ___	No ___
d. C. K. Dixon Jr.	yes ___	No ___

Date ___

___
Foreperson

QUESTION FIVE

Does the jury find by a preponderance of the evidence that the Mission State Bank intended that the Rodney Taylor-Bluston Mining Inc., assumption transaction be a new obligation and it was to fully release the following defendants from liability under the original promissory note executed by the defendants with the Mission State Bank on or about the _____ day of _____ 19_____.

(a) G. C. Kincer Yes_____ No._____.

(b) Albert Kincer Yes_____ No. _____

(c) Richard Kincer Yes_____ No. _____

(d) C. K. Dixon, Jr. Yes_____ No. _____.

Date_____.

_____

Foreperson.

QUESTION FOUR

Do you believe by a preponderance of the evidence that at the time the Rodney Taylor/Bluston Mining, Inc. Loan Assumption was entered into between the parties, it was the intention of the FDIC to release Red Chief Coal, Inc., Albert Kincer, Richard Kincer, G. C. Kincer and C. K. Dixon from their obligation under the promissory note executed in February 1978.

_____ Yes _____ No

_____ _____
(date) (Foreperson)

(Proceed to Question Five)

INSTRUCTION NO. 8

VIDEOTAPED DEPOSITION-USE AS EVIDENCE

During the trial of this case, testimony has been presented to you by way of a videotaped deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in this manner under oath, in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

(2 Devitt & Blackmar, § 73.02)

FDIC

U. Rest Chief

606 231-NW

Alamy Reeve

① 0 0 0 2

312 +

1 on

2 nd

U.C.C. § 3-606.

One who becomes obligated on a negotiable instrument, such as a promissory note, does so upon the assumption - that if called upon to pay -- he will have minimally the rights he had - at the time he became obligated.

These may include

(1) Recourse against other parties on their obligations

(2) Recourse against collateral given to secure performance or payment by a prior party

Cf. 13.15

Engd

If Koester

Released ~~[illegible]~~ - Kencers

~~He, accordingly released Dixon.~~

W/O Knowledge and Consent of

Dixon — He was accordingly

released. ?

Only released to extent he could

get contribution.

Pom. Notes

5, 05

A Summary of the

Contentions of 1).

After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under KRS 355.9-403, a termination statement under KRS 355.9-404, or a statement of release under KRS 355.9-406.

CROSS REFERENCES

See Kentucky Legal Forms, Text 509(6); Form 509.19 to 509.21

Financing statement affecting vehicle, notations showing security interest, 186.045

Assignment of security interest. 69 Am Jur 2d, Secured Transactions § 431 to 433

OAG 82-432. A secured party may assign his security agreements under KRS 355.9-405(2) and (3). The clerk's fee for filing such assignment is covered in KRS 64.012.

OAG 82-220. A financing statement to be filed with the Kentucky county clerk must contain the actual, physical and manual signatures of the debtor and secured party.

OAG 76-312. The county clerk, as fee for filing assignment of security interest, is entitled to seventy-five cents for each security agreement interest assigned, regardless of whether the assignments are collected in one or more instruments.

OAG 62-822. An instrument which transfers the debtor's equity may be considered an amendment to a financing statement and the filing fee is two dollars and fifty cents. Where a creditor assigns his interest to another creditor, the filing fee is seventy-five cents.

355.9-406 Release of collateral; duties of filing officer; fees

A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be as provided for in KRS 64.012.

HISTORY: 1978 H 247, § 20, eff. 6-17-78
1962 c 83, § 20; 1958 c 77, § 9-406

KENTUCKY COMMENTARY

(1983)

Similar to KRS 355.9-405, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (Cf. KRS 355.9-404 on termination statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries have to be made by persons who consult the files and is in accordance with former KRS 383.680.

CROSS REFERENCES

See Kentucky Legal Forms, Text 509(7)(8); Form 509.20, 509.22

Necessity of filing or recording of assignments, generally. 6 Am Jur 2d, Assignments § 95

Statement of release of collateral. 69 Am Jur 2d, Secured Transactions § 434

PART 5. DEFAULT

355.9-501 Default; procedure when security agreement covers both real and personal property

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in KRS 355.9-207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this Part, those provided in the security agreement and those provided in KRS 355.9-207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (1) of KRS 355.9-505) and with respect to redemption of collateral (KRS 355.9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) Subsection (2) of KRS 355.9-502 and subsection (2) of KRS 355.9-504 insofar as they require accounting for surplus proceeds of collateral;

(b) Subsection (3) of KRS 355.9-504 and subsection (1) of KRS 355.9-505 which deal with disposition of collateral;

(c) Subsection (2) of KRS 355.9-505 which deals with acceptance of collateral as discharge of obligation;

(d) KRS 355.9-506 which deals with redemption of collateral; and

(e) Subsection (1) of KRS 355.9-507 which deals with the secured party's liability for failure to comply with this Part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this Part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

HISTORY: 1962 c 83, § 14, eff. 6-14-62
1958 c 77, § 9-501

KENTUCKY COMMENTARY

(1983)

The protection of a secured party's rights in collateral after the debtor's default is a fundamental purpose of a security transaction under this Article. These are the rights which distinguish the secured from the unsecured lender. Part 5 of this Article states the rights of a secured party upon default as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but also of other creditors.

Subsection (1) provides that, in addition to the rights granted under this part (which do not exclude other remedies provided by agreement of the parties) a secured party may also reduce his claim to judgment where the debtor is in default. See generally KRS Chapter 426.

In this Part, there is no general distinction drawn between the rights of a non-possessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to seek possession of the collateral under KRS 355.9-503. Subsection (2) is a cross-reference to KRS 355.9-207 regarding the rights and duties of a secured party while in possession of the collateral. Agreements permitted under KRS 355.9-207 cannot waive or modify the rights of the debtor contrary to subsection (3) of this section.

Except as expressly provided therein, subsection (3) does not permit a waiver or variation of rights and duties of the respective parties, but does permit the parties to agree as to the standards by which the fulfillment of the rights and duties is to be measured if that standard is not manifestly unreasonable. See KRS 355.1-102 (3).

Subsection (4) provides that, in instances where the security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or under applicable real estate mortgage law (KRS Chapter 426), but not both. It should be noted that, in appropriate instances, a secured party may proceed first as against personal property under KRS 426.130 and if it should prove insufficient, then as against a debtor's real property under KRS 426.140 to satisfy a judgment.

Subsection (5) provides that when a secured party has reduced his claim under the security agreement to a judgment, that judgment relates back to the date of perfection of the security interest in the collateral. This section also provides that a judicial sale pursuant to execution on a judgment is a foreclosure of a security interest to which the requirements of Part 5 of this Article do not apply. Thus, a secured party may purchase the collateral at the judicial sale free of the restrictions which this Article imposes on the right of a secured party to buy in the collateral at a sale under KRS 355.9-504.

CROSS REFERENCES

See Kentucky Legal Forms, Text 513(9); Form 507.29, 507.33, 511.08

Financing statement affecting vehicle, notations showing security interest, 186.045

Default and enforcement of security interest, generally. 69 Am Jur 2d, Secured Transactions § 551 to 562

Title and interest of parties. 10 ALR2d 758

Purchase by pledgee of subject of pledge. 37 ALR2d 1381

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452 SW(2d) 375 (Ky 1970), Nelson v Monarch Investment Plan of Henderson, Inc. Anticipatory express waivers are prohibited; but waivers may be made as to subsequent transactions of the parties.

496 FSupp 1289 (1980), Ingersoll-Rand Financial Corp v Electro Coal, Inc. Once a partial recovery is made by repossession, the amount recoverable on judgment is limited to any deficiency.

355.9-502 Collection rights of secured party

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under KRS 355.9-306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

HISTORY: 1958 c 77, § 9-502, eff. 7-1-60

KENTUCKY COMMENTARY

(1983)

The assignee of accounts, chattel paper, contract rights or instruments holds as collateral property which is not only the most liquid asset of the debtor's business but also property which may be collected without any interruption of the business, if in existence after default. Such a situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, the problems of valuation and identification do not arise so sharply on the assignment of intangibles. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "non-notification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

In one form of accounts receivable financing, which is found in "factoring" arrangements common to the textile industry, the assignee assumes the credit risk —e.g., he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse or charge-back for uncollectible accounts. In such a case, both debtor and creditors have a right that the assignee not "dump" the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

Subsection (1) permits a secured party to take necessary steps to take over collection of accounts upon the debtor's default by notifying account debtors to make payments directly to the assignee/secured party. See KRS 371.040.

Where an assignee has a right of charge-back or recourse, subsection (2) provides that liquidation must be made with due regard to the interests of the assignor (debtor) and of the assignor's other creditors in a "commercially reasonable manner" (see KRS 355.9-504; 355.9-507 (2)) and the proceeds allocated to the expenses of realization and to the indebtedness. If the charge-back provisions of the assignment arrangement provide only for charge-back of bad accounts against a reserve, the debtor's claim

to surplus and liability for a deficiency are limited to the amount of the reserve.

Since financing arrangements of the type dealt with by this section generally occur between persons active in business, subsection (2) preserves the parties' freedom of contract regarding a debtor's right to surplus and liability for deficiency. Subsection (2) also recognizes that there may be a true sale of accounts, chattel paper, or contract rights even though a right to recourse exists. The question of whether a particular assignment constitutes a sale or security transfer is left to judicial determination. It should be noted that, under KRS 355.9-102, this Article applies both to sales and security transfers of such intangibles.

CROSS REFERENCES

See Kentucky Legal Forms, Form 505.18

Rights of secured party to collect or enforce interest in collateral. 69 Am Jur 2d, Secured Transactions § 227

Collection of accounts or instruments by secured party. 69 Am Jur 2d, Secured Transactions § 580 to 582

355.9-503 Secured party's right to take possession after default

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under KRS 355.9-504.

HISTORY: 1958 c 77, § 9-503, eff. 7-1-60

KENTUCKY COMMENTARY

(1983)

Under this Article a secured party's right to possession of the collateral (apart from a pledgee) accrues on default unless otherwise agreed in the security agreement. This Article allows a secured party to take possession, in most cases, without the issuance of judicial process if doing so will not result in a breach of the peace. In the case of collateral such as heavy equipment, the physical removal from the debtor's place of business and storage of the equipment pending resale may be expensive and in some cases impractical. Therefore, this section provides that, in lieu of removal, the lender may render the equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of the collateral without removal would not justify unreasonable action by a secured party, since, under KRS 355.9-504 (3) the actions of a secured party in connection with the disposition must be taken in a "commercially reasonable manner."

CROSS REFERENCES

See Kentucky Legal Forms, Form 507.30, 507.31

Taking possession of collateral by secured party. 69 Am Jur 2d, Secured Transactions § 583 to 601

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like. 72 ALR2d 342

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503. 75 ALR3d 1061

17 Jour of Family Law 29 (1978). Repossession Under the U.C.C.: The Rights of the Creditor and Debtor, Robert E. Harrison.

37 Ky Bar Jour 22 (January 1973). Repossessions Endangered, Barry Benton.

385 SW(2d) 196 (Ky 1964), Fort Knox National Bank v Gustafson. Where the acceleration clause is properly invoked, possession of the property may be taken.

407 US 67, 92 SCt 1983, 32 LEd(2d) 556 (1972), Fuentes v Shevin. The secured party cannot take possession of the collateral without a prior hearing.

OAG 75-243. Repossession of a motor vehicle under a standard installment contract and nonjudicial sale without a judicial hearing would not violate the 14th amendment of the US Constitution, since no state action is involved.

Annotations from former section

361.200 RESERVATION OF RIGHT OF POSSESSION OR PROPERTY WHEN GOODS ARE SHIPPED

293 Ky 637, 169 SW(2d) 820 (1943), C. I. T. Corp v Thompson. On repossession under a conditional sales contract, seller cannot resell the article repossessed at private sale but only at a public sale of which the buyer shall have reasonable notice and after reasonable advertisement.

239 Ky 312, 39 SW(2d) 507 (1931), Brown v Woods Motor Co. In a conditional sales contract, title to the goods may by the terms of the contract remain in the vendor with a right on his part on default of vendee to repossess said goods.

382.730 FORECLOSURE BY FEDERAL AGENCIES

2 FSupp 406 (1932), White v General Motors Acceptance Corp. Chattel mortgagee has absolute right to possession of the mortgaged personalty upon default of the mortgagor, particularly where the mortgage so provides. But mortgagee does not thereby become the owner. Within a reasonable time, unless redeemed by mortgagor, he must dispose of the property at a fair sale on adequate notice, returning to the mortgagor any surplus above the indebtedness.

355.9-504 Secured party's right to dispose of collateral after default; effect of disposition

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is

entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

HISTORY: 1958 c 77, § 9-504, eff. 7-1-60

KENTUCKY COMMENTARY

(1983)

This section follows the provisions of the Uniform Trust Receipts Act and recognizes that following default a secured party may sell collateral at a public or private sale with a right to claim deficiency and a duty to account for any surplus. Although a public sale is recognized, private sales are encouraged where, as is frequently the case, private sales through commercial channels will result in higher realization on the collateral to the benefit of all parties. The only restriction placed on a secured party's method of disposition is that it must be commercially reasonable. In this respect the section follows KRS 355.2-706 regarding resale by a seller following a buyer's rejection of goods. Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of —subject of course to the general requirement of subsection (2) that all aspects of the disposition be "commercially reasonable." KRS 355.9-507 (2) states some tests as to what constitutes a "commercially reasonable" disposition.

Under subsection (1) (c) a secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished, on request, reasonable proof of his interest. This provision is necessary since under subsection (4) the junior interest is also discharged by the disposition. Since the requirement is conditioned on written demand it should not result in undue burden on the secured party making the disposition. It should also be noted that under KRS 355.9-112 where the secured party knows that the collateral is owned by a person other than the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

Subsection (2) provides that the debtor is entitled to any surplus realized upon disposition of the collateral and, unless otherwise agreed, is liable for any deficiency. Since this Article covers sales of certain intangibles as well as transfers for security, the subsection also provides that, in the absence of agreement, the right to surplus or liability for deficiency does not accrue where the transaction between the debtor and secured party was a sale and not a security transaction.

Subsection (4) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has failed to comply with the requirements of this Part or the requirements of KRS Chapter 426 regarding judicial proceedings. Where the purchaser for value has bought at a public sale, the purchaser is protected under subsection (4) (a) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser has bought at a private sale he must, in order to receive the protection of subsection (4) (b), qualify in all respects as a purchaser in good faith. Thus, while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at a public sale is protected so long as he is not acting actively in bad faith, and is under no duty to inquire into the circumstances of the sale.

Under subsection (3) the secured party is required in most cases to give reasonable notification of disposition to both the debtor and (except for consumer goods) to other secured parties who may have filed in this State or are otherwise known to the secured party undertaking the disposition. "Reasonable notification" is not defined in this Article; at a minimum it contemplates notice sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire. Under this Article, no period of time is set within which the disposition must be made, except in the case of consumer goods, which in certain instances under KRS 355.9-505 (1) must be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in compliance with the policy adopted in this Article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when an entire market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Nonetheless, under subsection (3) every aspect of the sale or other disposition must be "commercially reasonable," including the method, manner, time, place and terms of disposition. See KRS 355.9-507 (2) and KRS 355.1-203 on the general obligation of good faith.

CROSS REFERENCES

See Baldwin's Kentucky Practice, Vol. 1, Forms 3.14

See Kentucky Legal Forms, Form 511.01 to 511.04, 511.06 to 511.08, 511.11

Judicial sale of collateral. 69 Am Jur 2d, Secured Transactions § 574 to 579

Nonjudicial sale or other disposition of collateral. 69 Am Jur 2d, Secured Transactions § 602 to 638

What constitutes a "public sale." 4 ALR2d 575

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 ALR2d 539

Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 ALR2d 15

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation. 5 ALR4th 1291

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 ALR4th 308

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 ALR4th 552

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17 Jour of Family Law 29 (1978). Repossession Under the U.C.C.: The Rights of the Creditor and Debtor, Robert E. Harrison.

603 SW(2d) 916 (Ky App 1980), Riley v West Kentucky Production Credit Assn. A creditor is not entitled to recover attorneys' fees for the collection of a note and the enforcement of a mortgage and security agreement securing the note. In contrast, in disposing of collateral following default, a creditor as a secured party is entitled to reasonable attorneys' fees and legal expenses.

603 SW(2d) 916 (Ky App 1980), Riley v West Kentucky Production Credit Assn. The enactment of the Uniform Commercial Code has not superseded the rule that those provisions of a note purporting to agree that an attorney's fee may be recovered against the debtor are invalid as against public policy.

599 SW(2d) 773 (Ky App 1980), Bank Josephine v Conn. A secured party who holds and subsequently sells collateral has the burden of showing that he acted with commercial reasonableness.

551 SW(2d) 5 (Ky App 1977), Mammoth Cave Production Credit Assn v Geralds. This section of KRS does not approve or allow the enforcement of a provision in a promissory note or real estate mortgage that the debtor pay the attorney fee arising as a result of debtor's default.

511 SW(2d) 680 (Ky 1974), Diaz v Goodwin Bros Leasing, Inc. Notice to guarantors is not required where there is no security agreement.

452 SW(2d) 375 (Ky 1970), Nelson v Monarch Investment Plan of Henderson, Inc. Notification of the proposed sale of a repossessed automobile may be waived by the original purchaser.

452 SW(2d) 375 (Ky 1970), Nelson v Monarch Investment Plan of Henderson, Inc. Reasonable notification must be given of the proposed sale of a repossessed automobile.

452 SW(2d) 375 (Ky 1970), Nelson v Monarch Investment Plan of Henderson, Inc. The sale of a repossessed automobile at a private sale to the highest bidder is "commercially reasonable."

452 SW(2d) 375 (Ky 1970), Nelson v Monarch Investment Plan of Henderson, Inc. There is not a recognized market for repossessed automobiles as a class.

385 SW(2d) 196 (Ky 1964), Fort Knox National Bank v Gustafson. The fact that a better price could have been obtained by a sale at another place, time or manner does not establish that the sale was not commercially reasonable.

OAG 79-362. An auction of repossessed collateral does not require a licensed auctioneer to be present for the conduct of the sale.

OAG 79-63. Sales of repossessed property pursuant to KRS 355.9-504 must be conducted by a licensed auctioneer.

OAG 73-732. Interest on expenses of retaking and selling of a security must be in the security agreement subject to provisions of KRS 355.9-201.

OAG 71-490. Where a holder of a first lien on a car repossesses for default, the clerk, on sale of the vehicle, must issue a transfer receipt without any mention of such lien or any subordinate lien.

OAG 61-1098. Where a vehicle has been sold to satisfy the first secured party's lien all subordinate secured interests are discharged and are not noted on the transfer certificate.

OAG 60-1220. A county clerk has no authority to omit a discharged lien on a motor vehicle from the registration receipt when it has not been formally released by the secured party, even though the vehicle has been sold to satisfy a prior lien.

355.9-505 Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation

(1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this Part a secured party who has taken possession of collateral must dispose of it under KRS 355.9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under KRS 355.9-507 (1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or is known by the secured party in possession to have a security interest in it. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under KRS 355.9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

HISTORY: 1958 c 77, § 9-505, eff. 7-1-60

KENTUCKY COMMENTARY

(1983)

This section sanctions an alternative to resale since experience has shown that the parties are frequently better off without a resale of the collateral. In lieu of resale or other disposition, the secured party may propose under subsection (2) that he keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency. The secured party may not exercise this optional right in the case of consumer goods where the debtor has paid 60% of the price or obligation and thus has a substantial equity, and may be exercised in other cases only on notification to the debtor and other secured parties who have filed in this state or are otherwise known to the secured party exercising this optional right and on failure of anyone receiving the notification to object within thirty days.

When an objection is received by the secured party he must then proceed to dispose of the collateral in accordance with KRS 355.9-504, and on failure to do so would incur the liabilities set out in KRS 355.9-507. In the case of consumer goods where 60% of the price or obligation has been paid, the disposition must be made within 90 days after possession is taken. For failure to make the sale within the 90 day period, the secured party is liable in conversion or alternatively may incur the liabilities set out in KRS 355.9-507. However, it should be noted that, after default (but not before) a consumer-debtor who has paid 60% of the cash price may sign a written renunciation of his right to require a resale of the collateral.

CROSS REFERENCES

See Kentucky Legal Forms, Form 511.10, 511.11

Taking the collateral as payment. 69 Am Jur 2d, Secured Transactions § 625 to 627

Rights and duties of parties to conditional sales contract as to resale of repossessed property. 49 ALR2d 15

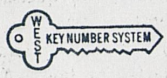
and (h) of the Act. If so excluded, it would be appropriate to keep such documents in a separate file.

We find that to be entirely in keeping with both Kentucky statutory and case law, and there was no error in so holding.

Having affirmed the trial court's judgment allowing the Courier-Journal access to the appropriate records, we need not address the Courier-Journal's argument that the Board did not satisfy the statutory burden of proof to sustain its denial of access.

The judgment of the trial court is hereby affirmed.

All concur.



CENTRAL BANK AND TRUST COMPANY, Appellant,

v.

Evelyn METCALFE, Individually and as Administratrix of the Estate of Herbert Metcalfe, Sr., Appellee.

Court of Appeals of Kentucky.

Feb. 3, 1984.

Secured party brought action against debtor and debtor's stepmother in her individual capacity and in her capacity as administratrix of estate of debtor's father, for deficiency judgment following public sale of repossessed automobile for which the father and stepmother had cosigned purchase contract. The Circuit Court, Ohio County, Carmol D. Cook, J., entered order denying secured party's motion for summary judgment and granting summary judgment in stepmother's favor in both her capacities, and secured party appealed. The Court of Appeals, Dunn, J., held that: (1) secured party did not give "reasonable notification" of the public sale to the stepmother by mailing notice in one envelope addressed to "Mr. & Mrs." followed by the father's name, at the address indicated on the contract, where the father and stepmother had not signed the document as "Mr. & Mrs.," but had signed with their individual names with no indication in the instrument that they were married to each other, and (2) such notice did constitute "reasonable notification" to the father, absent any indication that he had moved.

Affirmed in part and remanded in part.

1. Appeal and Error ⇐934(1)

On appeal from entry of summary judgment, all considerations are loaded in favor of the nonmovant.

2. Secured Transactions ⇐240

In order to recover deficiency judgment resulting from sale of collateral, all of provisions of statute which governs secured party's right to dispose of collateral after default must be complied with, and burden is on secured party to prove it acted with commercial reasonableness in accomplishing the sale, including notification to the debtor of the sale. KRS 355.1–201, 355.9–504.

3. Secured Transactions ⇐230

Secured party did not give "reasonable notification" of time and place of public sale of repossessed automobile to stepmother of debtor, who had cosigned the purchase contract with debtor's father, by mailing notice in one envelope addressed to "Mr. & Mrs." followed by the father's name, at the address indicated on the contract, where the cosigners had not signed the document "Mr. & Mrs.," but had signed their individual names with no indication in the instrument that they were married to each other; reasonable conduct for secured party would have been to mail two separate notices to each cosigner at the address indicated. KRS 355.1–201, 355.9–504.

See publication Words and Phrases for other judicial constructions and definitions.

4. Husband and Wife ⇐21, 25(3)

Notice is not imputed from one spouse to another.

5. Secured Transactions ⇐230

Secured party gave "reasonable notification" of time and place of public sale of repossessed automobile to father of debtor, who had cosigned purchase contract, where secured party sent notice in one envelope addressed to "Mr. & Mrs." followed by the father's name at address indicated on the contract which debtor's father and stepmother cosigned with their individual names without indication that they were married to each other. KRS 355.1–201, 355.1–201(26, 38), 355.9–504.

Deborah L. Bolt, Hagan & Bolt, Hartford, for appellant.

Henry E. Hayden, Hayden & McKown, Hartford, for appellee.

Before MILLER, COOPER and DUNN, JJ.

DUNN, Judge.

The appellant, Central Bank and Trust Company, sued Herbert Metcalfe, Jr. and the appellee, Evelyn Metcalfe, individually and as administratrix of the estate of Herbert Metcalfe, Sr., for a deficiency judgment.

The three Metcalfes had contracted with Tapp Motor Sales for the purchase of a 1979 Ford Bronco. The principal purchaser was Metcalfe, Jr., his father, Herbert Sr., and his stepmother, Evelyn, were cosigners. After execution, the contract was assigned to the appellant bank. The instrument granted the bank a security interest in the Bronco and, pursuant to its terms, when payments were not paid, the bank repossessed and sold the vehicle, crediting the account with the proceeds of the sale. This suit for the deficiency followed.

The bank was granted default judgment against Herbert Jr. for $6,610.68 plus attorney fees and court costs. It moved for summary judgment against Evelyn in both her individual and fiduciary capacities, after the pleadings had been amended substituting her as a defendant in her capacity as administratrix of the estate of Herbert Sr., deceased. The trial court on April 1, 1983, entered an order denying the bank's motion for summary judgment and granting summary judgment in Evelyn's favor in both her capacities against the bank and dismissed its claims against her. This appeal is prosecuted from that order.

The only question on this appeal is did the bank give reasonable notification to Herbert Sr. and Evelyn of the time and place of the sale of the vehicle in question.

[1] As in all summary judgment cases we must consider two questions: 1) Are there any genuine issues as to material facts; and, 2) is there entitlement to judgment as a matter of law. All considerations are loaded in favor of the non-movant. *Maggard v. McKelvey*, Ky.App., 627 S.W.2d 44 (1981); *Shah v. American Synthetic Rubber Corp.*, Ky., 655 S.W.2d 489 (1983).

The law with which we are concerned is primarily statutory. KRS 355.9–504 governs a secured party's right to dispose of collateral after default and in pertinent part (3) provides:

> . . . reasonable notification of the time and place of any public sale . . . shall be sent by the secured party to the debtor. . . .

KRS 355.1–201 provides definitions for the chapter. It in pertinent parts provides:

> (26) A person notifies or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when
>
> (a) it comes to his attention; or
>
> (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications. . . .

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances ....

[2] In order to recover a deficiency judgment resulting from sale of collateral, all of the provisions of KRS 355.9–504 must be complied with. The burden is on the secured party to prove it acted with commercial reasonableness in accomplishing the sale. *Bank Josephine v. Conn*, Ky.App., 599 S.W.2d 773 (1980). This includes notification to the debtor of the sale.

[3, 4] Here there is no dispute concerning the facts. The bank mailed the notice in one envelope addressed to "Mr. and Mrs. Herbert H. Metcalfe, Sr." at the address indicated on the contract. However, they did not so sign the document. They signed it:

Herbert H. Metcalfe, Sr.
Evelyn Metcalfe

There was no indication in the instrument that they were married to each other. Appellants contend that addressing the notice in this manner was commercially reasonable and was reasonable notice. We disagree with respect to Evelyn individually.

Evelyn's affidavit that she did not reside at that address at the time of the notice and that she did not receive it nor was it forwarded to her, is not contradicted in the record. There is, however, nothing in the record to this effect concerning Herbert Sr.

We do not quarrel with the bank's argument that the fact that whether she did not actually live at that address or received the notice are immaterial, but the fact that she did not live at that address, coupled with the fact that there was only 1 envelope addressed to one address with 2 addressees, rendered it unlikely that such a notice to her would be forwarded to her in the mail as would have been the case if a separate notice and envelope had been addressed to her. We do not think it reasonable for the bank to assume that appellant and her husband were husband and wife, or that they would remain married or residents at the same address. The reasonable conduct for the bank to take would have been to mail 2 separate notices to Evelyn and Herbert Sr. By so doing, the appellant could then have reasonably assumed that, if one of these two persons was no longer living at the address appearing on the notice, the postal service would, by forwarding, transmit the correspondence to that person at his or her new address. Further, as pointed out by the appellee, notice is not imputed from one spouse to another. Compare, *Burton v. Dowell, Division of Dow Chemical Company*, Ky., 471 S.W.2d 708 (1971).

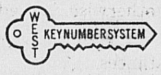
There being no genuine issue of material fact regarding the fact that the appellant bank did not meet its burden as to the commercial reasonableness of notice to Evelyn individually, the summary judgment in her behalf is affirmed.

[5] The same is not true as to the notice to Herbert Metcalfe, Sr. There is no proof in the record to contradict that the notice was reasonably sent to him at his proper address, as defined in KRS 355.1–201(26) and (38), whether he actually received it or not. The crucial point to the issue of a notice being "reasonably sent" under the statute is the reasonable expectation that, if the notice is deposited in the mail, it could reasonably be anticipated it would be transmitted to the addressee even if the addressee had moved to a different address. As noted above, where the notice is sent to two addressees in one envelope to one address and one addressee has moved to a different address, the reasonable expectation of the usual forwarding transmission of the notice as contemplated by the statute is destroyed, but only as to the addressee who has moved. It could be reasonably anticipated that delivery would be made to the

addressee who remained at the address on the envelope. Since there was no evidentiary indication that Herbert Sr. had moved, the summary judgment entered in favor of Evelyn as administratrix of his estate was erroneous.

The summary judgment entered by the Ohio Circuit Court in favor of Evelyn Metcalfe, individually, is affirmed, and the summary judgment in favor of Evelyn Metcalfe as administratrix of the estate of Herbert Metcalfe, Sr. is stricken, and this case, with respect to the claim against the estate, is remanded to the Ohio Circuit Court for proceedings consistent with this opinion.

All concur.



CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff Federal Deposit Insurance Corporation's Proposed Jury Instructions was served by mailing same, postpage prepaid, to Joseph J. Golden, Esq., Golden & Cantor, Suite 450, 730 W. Main Street, Louisville, KY 40202, James M. Craft, Esq., Polly, Craft, Asher & Smallwood, P. O. Box 786, Whitesburg, KY 41858 and to Charles E. Mills, III, Esq., 116 Parc-Monceau, Palm Beach, Florida 33480 on this 13th day of May, 1984.

ATTORNEY FOR PLAINTIFF
FEDERAL DEPOSIT INSURANCE
CORPORATION

QUESTION FIVE

Do you believe, by clear and convincing evidence, that the Mission State Bank fraudulently induced Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer to execute the guaranty agreement referred to in Question Two.

_____ Yes _____ No

_____ _____
(date) (Foreperson)

Judge's Copy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF VS. RED CHIEF COAL, INC., et al. DEFENDANTS	NO. 82-08 G. WIX UNTHANK, JUDGE

PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION'S PROPOSED JURY INSTRUCTIONS

Pursuant to Rule 51 of the Federal Rules of Civil Procedure, plaintiff Federal Deposit Insurance Corporation, by counsel, tenders the following proposed jury instructions to be used at the trial of this action.

Respectfully submitted,

John A. West
Danny C. Reeves

GREENEBAUM DOLL & McDONALD
1400 Vine Center Tower
P. O. Box 1808
Lexington, Kentucky 40593
(606) 231-8500

COUNSEL FOR PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION

Rex Chief

1st Judgment
272,500.00 with interest & costs

2nd Credit - for sum equal to net proceeds
payments made on note

356 US 227.

net proceeds received in credit on note.

312,557.69

~~Interest~~ Int can be calculated w/o problem.

not satisfied w/ net proceeds

Int upon Interest

Final judg. specify the amount awarded or the means of determining that amount.

Award - susceptible of being made certain or definite by proper construction or mathematical computation

Amount

(1) Payments

(2) Interest

(3) Net proceeds from sale.

ASSIGNED FOR HEARING ON MOTION TO AMEND JUDGMENT AT PIKEVILLE JUDGE UNTHANK

DATE SEPTEMBER 6, 1984 AT 3:30 P.M.

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO	DAY	YEAR	J	N/S	D	D PTF	D DEF	R 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
0643	7	82	08	01	27	82	3	190	1				Nearest $1,000	J 4308 M	21133	D	82	08

PLAINTIFFS

FEDERAL DEPOSIT INSURANCE CORPORATION

DEFENDANTS

RED CHIEF COAL, INC.
BLUSTON MINING, INC. Default granted
G. C. KINCER, ALBERT KINCER,
RICHARD KINCER, C. K. DIXON, JR.,
RODNEY TAYLOR - Default Granted

Plff's Exhibit #13 located in Vault beside cabinet

CROSSCLAIM fil 3/24/83

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

12 U.S.C. §1819; 28 U.S.C. §1345 - ALLEGED BREACH OF CONTRACT - plff seeks money judgment & recovery of certain heavy equipment in which corporate has security interest. GS

ATTORNEYS

Sheldon S. Mirkin
GUINANE, MIRKIN & PENICK
Greyhound Bldg.
P. O. Box 1388
Hazard, KY 41701
606/436-5747 MASTEN CHILDERS
John A. West DANNY C. REEVES
John S. Sawyer & ~~Pattie Reeves~~
GREENBAUM, DOLL & MCDONALD
~~600 Merrill Lynch Plaza~~ P.O. 1808
~~P. O. Box 1808~~
Lexington, KY 40507 1400 Vine Center Tower
606/231-8500 Lexington, Ky. 40593

(LETCHER)

~~Fred M. Goldberg~~
~~GOLDBERG & SIMPSON, P.S.C.~~
~~2000 First National Tower~~
~~Louisville, KY 40202~~
~~502/589-4440~~ dism. per Order (Agreed
Counsel for C. K. Dixon REF#13
Joseph J. Golden
GOLDEN & CANTOR
730 West Main Street
Louisville, KY 40202

James W. Craft
POLLY, CRAFT, ASHER & SMALLWOOD
P. O. Box 786
Whitesburg, KY 41858
Counsel for Red Chief Coal, G. C. Kincer, Albert Kincer, & Richard Kincer

$3121

~~46,670.00~~

$45,275.00 →

Payments 32,431.59

77,706.59

→

Title 28 U.S. 1961

272,500

Sale

7/28/82

Credit

2/24/78 Note 272,500.00 - 01

3/30/78 = 1st payment $16,841.91

8/1/80 = 2nd payment 15,589.68

7/28/82 — Sale 45,275.00

INSTRUCTION NO. 1

PROVINCE OF THE COURT

MEMBERS OF THE JURY:

Now that you have heard the evidence and arguments of counsel, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

(2 Devitt & Blackmar, Federal Jury Practice Instruction, § 71.01, Third Edition) Hereinafter cited as " _____Devitt & Blackmar, § _____."

INSTRUCTION NO. 2

PROVINCE OF THE JURY

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Federal Deposit Insurance Corporation, or FDIC, and the answer thereto of the defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer, G. C. Kincer and C. K. Dixon, Jr. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

(2 Devitt & Blackmar, § 71.02)

INSTRUCTION NO. 3

ALL PERSONS EQUAL BEFORE THE LAW

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

(2 Devitt & Blackmar, § 71.05).

INSTRUCTION NO. 4

DISCONTINUANCE AS TO SOME DEFENDANTS

You have heard testimony in this case concerning a transaction involving the parties currently before the Court and Rodney Taylor and Bluston Mining, Inc. Although Taylor and Bluston were originally parties to this action, the case has been terminated as to them. You should not concern yourself with the disposition as to Taylor and Bluston Mining, Inc., but should consider the issues between the FDIC and the remaining defendants in accordance with the court's instructions and the evidence in the case.

(2 Devitt & Blackmar, § 71.08)

INSTRUCTION NO. 5

EVIDENCE IN THE CASE----STIPULATIONS---JUDICIAL NOTICE---INFERENCES PERMITTED

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, the jury must, unless otherwise instructed, accept the Court's declaration as evidence, and regard as proved the fact or event which has been judically noticed.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts and events which may have been judicially noticed.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

(2 Devitt & Blackmar, § 71.09)

INSTRUCTION NO. 6

PREPONDERANCE OF THE EVIDENCE

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

As to certain affirmative defenses which will be discussed later in these instructions, however, the burden of establishing the essential facts is on the defendant, as I will explain.

(2 Devitt & Blackmar, § 71.14)

INSTRUCTION NO. 7

EVALUATION OF EVIDENCE

As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it. At times during the trial I may sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, may instruct that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissable.

The law does not, however, require you to accept all of the evidence I shall admit, even though it be competent. In determining what evidence you will accept you must make your own evaluation of that testimony given by each of the witnesses, and determine the degree of weight you choose to give to his testimony. The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a falsehood, because he did not accurately see or hear that about which he testifies, because

his recollection of the event is faulty, or because he has not expressed himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests that you use in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness' testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determinng the weight, if any, you will assign to that witness' testimony. If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fittng the two stories together. If, however, that is not possible, you will then have to determine which of the conflicting versions you will accept.

(2 Devitt & Blackmar, § 72.01)

INSTRUCTION NO. 9

The claims asserted in this matter by the FDIC arise out of its capacity as receiver of the Mission State Bank. The first claim asserted against defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer and C. K. Dixon is based on a promissory note which was executed by these defendants on or about February 24, 1978. You shall find for the FDIC and against defendants Red Chief Coal, Inc. if you find the FDIC has established the following by a preponderance of the evidence:

1. That Red Chief Coal, Inc., Albert Kincer, Richard Kincer, G. C. Kincer and C. K. Dixon, Jr. borrowed the sum of $272,500.00 from the Mission State Bank in February 1978 and signed a promissory note for such indebtedness;

2. That the FDIC acquired this promissory note in its capacity as receiver of the Mission State Bank; and

3. That the promissory note was not paid according to its terms and is in default;

The second claim asserted by the FDIC affects the liability of defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer and is based upon these defendants' execution of the Guaranty Agreement executed in or about

June 1980. You shall find for the FDIC and against defendants Red Chief Coal, Inc. if you find the FDIC has established the following by a preponderance of the evidence:

1. That, in conjunction with a Promissory Note executed by Rodney Taylor and Bluston Mining, Inc., defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer executed a Guaranty Agreement whereby they promised to pay the amount of indebtedness assumed by Taylor and Bluston Mining in the event of a default.

2. That the FDIC, in its capacity as receiver of the Mission State Bank, acquired the promissary note executed by Taylor and Bluston Mining and Guaranty Agreement executed by Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer.

3. That the promissory note executed by Taylor and Bluston Mining was not paid according to its terms and is not in default.

In connection with this second claim, the FDIC asserts a claim based upon individual promissory notes executed by Albert Kincer, Richard Kincer and G. C. Kincer. You shall find for the FDIC and against defendants Albert Kincer, Richard Kincer and G. C. Kincer if you find the FDIC has established the following by a preponderance of the evidence:

1. That Albert Kincer, Richard Kincer and G. C. Kincer signed these individual promissory notes;

2. That the FDIC, in its capacity as receiver of th Mission State acquired the individual promissory notes executed by Albert Kincer, Richard Kincer and G. C. Kincer.

3. That these promissory notes were not paid according to their terms and are now in default.

INSTRUCTION NO. 10

It is the position of defendants Albert Kincer, Richard Kincer and G. C. Kincer that they were frauduently induced to sign the guaranty agreement upon which their liability under the Rodney Taylor/Bluston Mining, Inc. transaction is based. In order for this alleged fraud to constitute a valid defense to the claims asserted by the FDIC, the defendants must establish the following:

1. That agents or representatives of the Mission State Bank represented to the defendants present at the June 17, 1980 that they would be released from liability by their execution documents concerning the Rodney Taylor/Bluston Mining, Inc. transaction.

2. That this alleged representation was false;

3. That when this alleged representation was made, it was known to be false by agents or representatives of the Mission State Bank or made recklessly, without knowledge of its truth;

4. That the alleged representation was made with the intention of inducing the defendants to act;

5. That the defendants acted in reliance upon the alleged representation; and

6. That the defendants thereby suffered injury.

In addressing this issue you are instructed that fraud is never presumed but must be proven by the defendants by clear and convincing evidence, a standard greater than the preponderance of evidence test discussed above.

If you find that defendants Albert Kincer, Richard Kincer and G. C. Kincer have failed to establish any one of these elements by clear and convincing evidence, you should return a verdict for the FDIC.

Keck v. Wacker, 413 F. Supp. 1377, 1383 (E.D. Ky. 1976); Sanford Const. Co. v. S. & H. Contractors, Inc., 443 S.W.2d 227 (Ky. 1969); 3 Devitt & Blackmar, § 83.02 - .03.

INSTRUCTION NO. 11

It is further the position of all defendants that the Bluston Mining, Inc./Rodney Taylor transaction with the Mission State Bank had the effect of releasing them from liability on the original promissory note dated February 24, 1978.

In order for the defendants to be released of liability on this original note, you must find by a preponderance of the evidence that a new obligation was substituted for the original note and that the Mission State Bank intended to fully release the defendants from liability under the old obligation. Unless you find both the creation of a new obligation and an intention by the Mission State Bank to release the defendants from their liability under the original promissory note, you must find the defendants liable under the original note.

Cantrill Const. Co. v. Carter, 418 F.2d 705, 707 (6th Cir. 1969); cert. denied sub. nom. 397 U.S. 990 (1970). Truscon Steel Co. v. Thirlwell Electric Co., 96 S.W.2d 1023 (Ky. 1936); Corbin on Contracts, § 1297.

INSTRUCTION NO. 12

VERDICT-UNANIMOUS-DUTY TO DELIBERATE

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

(2 Devitt & Blackmar, § 74.01)

INSTRUCTION NO. 13

COMMUNICATIONS BETWEEN COURT AND JURY
DURING JURY'S DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreman or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a verdict.

(2 Devitt & Blackmar, § 74.08).

INSTRUCTION NO. 14

ELECTION OF FOREPERSON-SPECIAL VERDICT

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in Court. A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

(Form of special verdict read.)

You will note that each of the five interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question.

(2 Devitt & Blackmar, § 74.05)

QUESTION ONE

Do you believe by a preponderance of the evidence that in February 1978, Red Chief Coal, Inc., Albert Kincer, Richard Kincer, G. C. Kincer and C. K. Dixon, Jr. borrowed the sum of $272,500.00 from the Mission State Bank and signed a promissory note for such indebtedness, that this promissory note was not paid according to its terms and that the FDIC acquired the promissory note in its capacity as receiver of the Mission State Bank.

_____ Yes _____ No

If your answer is yes, what amount is currently due and owing to the FDIC under this promissory note.

$ _____
(Amount)

_____ _____
(date) (Foreperson)

(Proceed to Question Two)

QUESTION TWO

Do you believe by a preponderance of the evidence that in or around June 1980 Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer signed a guaranty agreement whereby they promised to pay the amount of indebtedness assumed by Rodney Taylor and Bluston Mining, Inc. should a default in payments occur, that the Taylor/Bluston note was not paid according to its terms and that the FDIC acquired this guaranty agreement and promissory note in its capacity as receiver of the Mission State Bank.

_____ Yes _____ No

If your answer is yes, what amount is currently due and owing to the FDIC under this guaranty agreement.

$ _____
(Amount)

_____ _____
(date) (Foreperson)

(Proceed to Question Three)

QUESTION THREE

Do you believe by a preponderance of the evidence that, in conjunction with the guaranty agreement, Albert Kincer, Richard Kincer and G. C. Kincer signed individual promissory notes in or around June 1980, that these promissory notes were not paid according to their terms and that the FDIC acquired these promissory notes in its capacity as receiver of the Mission State Bank.

_____ Yes _____ No

If your answer is yes, what amount is currently due and owing to the FDIC under this guaranty agreement by the following defendants:

Albert Kincer and Richard Kincer: $ _____
(amount)

G. C. Kincer: $ _____
(amount)

_____ _____
(date) (Foreperson)

(Proceed to Question Four)

QUESTION FOUR

Does the jury find by a preponderance of the evidence that, at the time and place of the execution of the Rodney Taylor-Bluston Mining, Inc., assumption transaction documents, an agent or representative of the Mission State Bank, Robert G. Koester, induced the defendants, Albert Kincer, Richard Kincer and G. C. Kincer into executing said documents by:

(a) representing to them that if they executed said documents they would be released from liability for the equipment delivered to Rodney Taylor-Bluston Mining, Inc.;

(b) that such representation was false and knowingly made by such representative to induce the said defendants to sign such documents;

(c) that but for such representation and in reliance thereon the said defendants executed said documents to their detriment?

Yes_____ No _____

Date_____,

_____

(Foreperson)

QUESTION FIVE

Does the jury find by a preponderance of the evidence that the Mission State Bank intended that the Rodney Taylor-Bluston Mining Inc., assumption transaction be a new obligation and it was to fully release the following defendants from liability under the original promissory note executed by the defendants with the Mission State Bank on or about the _____day of _____19_____.

(a) G. C. Kincer Yes_____ No._____.

(b) Albert Kincer Yes_____ No. _____

(c) Richard Kincer Yes_____ No. _____

(d) C. K. Dixon, Jr. Yes_____ No. _____.

Date_____.

_____

Foreperson.

Judge's copy

Eastern District of Kentucky
TENDERED
Date 5/25/84
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF VS. RED CHIEF COAL, INC., et al. DEFENDANTS	NO. 82-08 G. WIX UNTHANK, JUDGE

PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION'S OBJECTION TO MOTION FOR CONTINUANCE

Comes plaintiff Federal Deposit Insurance Corporation ("FDIC"), by counsel, and objects to the Motion for Continuance filed in this action by counsel for defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer. In support, the FDIC states:

1. This case was originally set for trial February 6, 1984 but was continued because of schedule conflicts of the Court.

2. Trial of this action was rescheduled on January 27, 1984 for May 29, 1984 at 9:00 A.M.

3. On May 24, 1984 counsel for FDIC was advised pursuant to a telephone conversation that counsel for defendants Red Chief Coal, Inc., Albert Kincer, Richard Kincer and G. C. Kincer would move the Court to continue the trial of this matter which is scheduled to begin May 29, 1984.

4. Counsel for FDIC has been advised that this Motion for Continuance is based upon a conflicting state action which is scheduled for trial in the Letcher Circuit Court on May 29, 1984. Counsel for FDIC has been further advised that this state action was scheduled for trial after the January 27, 1984 pre-trial conference and prior to the final pre-trial conference held in this matter on May 11, 1984. This conflict was not raised during this final pre-trial conference.

5. Counsel for FDIC have a jury trial scheduled to begin in the Fayette Circuit Court on May 31, 1984. Further, counsel for FDIC have previous commitments which require them to be out of the country during the entire month of June 1984.

6. Arrangements have been made for out-of-state witnesses to travel to Pikeville for the purpose of testifying in this action on May 29 and 30, 1984. The FDIC will be ready to try this case on May 29.

7. Continuance of this action will prejudice the FDIC and counsel express strong objection to a continuance.

John A. West
Danny C. Reeves

GREENEBAUM DOLL & McDONALD
1400 Vine Center Tower
P. O. Box 1808
Lexington, Kentucky 40593
(606) 231-8500

ATTORNEYS FOR PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff Federal Deposit Insurance Corporation's Objection to Motion for Continuance was served by mailing same, postpage prepaid, to Joseph J. Golden, Esq., Golden & Cantor, Suite 450, 730 W. Main Street, Louisville, KY 40202, James M. Craft, Esq., Polly, Craft, Asher & Smallwood, P. O. Box 786, Whitesburg, KY 41858 and to Charles E. Mills, III, Esq., 116 Parc-Monceau, Palm Beach, Florida 33480 on this 15th day of May, 1984.

ATTORNEY FOR PLAINTIFF
FEDERAL DEPOSIT INSURANCE
CORPORATION

ASSIGNED FOR FINAL PRE-TRIAL CONFERENCE AT PIKEVILLE JUDGE UNTHANK

DATE MAY 11, 1984 AT 9:00 A.M.

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO	DAY	YEAR	J	N/S	O	D	R 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
0643	7	82	08	01	27	82	3	190	1			Nearest $1,000	J 4308 M	21133	D	82	08

PLAINTIFFS

FEDERAL DEPOSIT INSURANCE CORPORATION

DEFENDANTS

RED CHIEF COAL, INC.
BLUSTON MINING, INC.
G. C. KINCER, ALBERT KINCER,
RICHARD KINCER, C. K. DIXON, JR.,
RODNEY TAYLOR

Trial By Jury
5-29-84

CROSSCLAIM fil 3/24/83

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

12 U.S.C. §1819; 28 U.S.C. §1345 - ALLEGED BREACH OF CONTRACT - plff seeks money judgment & recovery of certain heavy equipment in which corporate has security interest.

GS

ATTORNEYS

Sheldon S. Mirkin
GUINANE, MIRKIN & PENICK
Greyhound Bldg.
P. O. Box 1388
Hazard, KY 41701
606/436-5747

John A. West
John S. Sawyer & Daniel Reeves
GREENBAUM, DOLL & MCDONALD
~~600 Merrill Lynch Plaza~~ P.O. 1808
~~P. O. Box 1808~~ 1400 Vine Center Tower
Lexington, KY 40507 Lexington, Ky. 40593
606/231-8500

(LETCHER)

~~Fred M. Goldberg~~
~~GOLDBERG & SIMPSON, P.S.C.~~
~~2800 First National Tower~~
~~Louisville, KY 40202~~
~~502/589-4440~~ dism. per Order (Agreed)
Counsel for C. K. Dixon REF#13

Joseph J. Golden
GOLDEN & CANTOR
730 West Main Street
Louisville, KY 40202

James W. Craft
POLLY, CRAFT, ASHER & SMALLWOOD
P. O. Box 786
Whitesburg, KY 41858
Counsel for Red Chief Coal, G. C. Kincer, Albert Kincer & Richard Kincer

TRIAL, BY JURY, RE-SCHEDULED FOR
May 29, 1984 at 9:00 A.M.

1/24/84	#53	NOTICE & MOTION, of deft, C. K. Dixon, Jr. for S/J.
	#54	MEMORANDUM OF LAW, of deft, C. K. Dixon, Jr. in suppt of mot for S/J
1/27/84	#55	AMENDED PRE-TRIAL CONF. MEMO., of plff w/add'l witness list & list of exhibits incl.
5/1/84	#62	MOTION, of plff for partial S/J
	#63	MEMORANDUM, of plff in suppt of mot. for partial S/J

FDIC

vs

Red Chief

vs

Bluston Mining

vs

J. C. Kincier, Albert Kincier,
Richard Kincier & C. K. Dixon

vs

Rodney Taylor.

Ct 1 — Red Chief; Kincier Bros - Dixon
313,111.45

Ct. 2 - Bluston & Taylor
Wrongful detention of equipment
256,136.64

Sale 46,670.00

motion for S/J - FDIC - Bluston & Taylor

motion for S/J - FDIC - Red Chief Kincier - Dixon

(1) Dixon or Kincier did not sign note or agreement of Bluston & Taylor

Answer of Red Chief - Kincier
alleging fraud.

Depositions do not reflect any fraud - Cross-tabulation he was lead to believe others did he believe

Judge,

At the pre-trial conf. on 1-30-84, the Court took under advisement the motion of C.K. Dixon, Jr., for S/J. - overruled

Subsequently, the plff has moved for S/J against the three Kincer brothers (G.C., Albert & Richard), on the grounds that there is no genuine issue as to any material fact. - overruled

It appears that these are the only pending motions to be considered at the final pre-trial conference.

does whether a not fraud? did nt plead mistake

Donald

Default Judgment entered
vs: Rodney E. Taylor & Bluston

Issue:

Craft has pleaded fraud, may present evidence on this issue. — otherwise they would be bound by what they signed

TO: Judge
FROM: Donald
DATE: 1-26-84
RE: FDIC v. Red Chief Coal, Inc., et al.
82-08

PTC, Friday, 1-27-84, at 11:30.

Synopsis: This is another one of those infamous Rodney Taylor cases. It seems that this case has been partially disposed of; the Court has granted summary judgment against Rodney Taylor and Bluston Mining, Inc.; however, there remains the Kincer brothers (G.C., Albert, and Richard), C.K. Dixon, and Red Chief Coal, Inc.

It seems that the Kincer brothers and Dixon obtained an equipment loan from Mission State Bank in Kansas in the amount of $272,500. Subsequently, the equipment was purchased by Taylor and Bluston Mining; however, the bank became insolvent and the FDIC is trying to collect what it can.

Pending Motions:

1. The attorney for C. K. Dixon has moved for summary judgment in favor of Dixon, dismissing him from this action.

2. None of the parties have filed PTC memos.

UNITED STATES GOVERNMENT

memorandum

DATE: MAY 26, 1983- 2:00 P. M.

REPLY TO ATTN OF: BE

SUBJECT: CIVIL 82-08 FDIC VS: RED CHIEF COAL,INC.

TO: DON S.

Office of atty JOSEPH J. GOLDEN, 730 W. Main St. Louisville called per above time & date, and ask that we note that on Motion filed 5/9/83 that Court not consider same.

I told him we would pass along the information and that if Judge decided to OVERRULE AS MOOT on the above information, that he would receive an Order to that effect, HOWEVER, if Judge wanted him to make a Motion to withdraw the above motion in writing for the record, that you would call & inform him of same. Please advise if you do not have Vol.II containing this motion.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-113
☆ GPO : 1981 0 - 341-526 (6331)

Rec'd 11-8-84

GREENEBAUM
DOLL & McDONALD
(A PARTNERSHIP INCLUDING PROFESSIONAL SERVICE CORPORATIONS)
1400 VINE CENTER TOWER
P.O. BOX 1808
LEXINGTON, KENTUCKY 40593
TELEPHONE (606) 231-8500
TELECOPIER (606) 255-2742
TELEX 218353

S. L. GREENEBAUM (1902-1973)
ANGUS W. McDONALD (1912-1980)
W. VAN METER ALFORD (1916-1981)

A. ROBERT DOLL*
ROBERT F. MATTHEWS
WILLIAM C. BOONE, JR.
LARAMIE L. LEATHERMAN*
EDWIN H. PERRY
IRWIN J. EISINGER
DONALD H. BALLEISEN
THOMAS A. BROWN
MARVIN J. HIRN
MICHAEL G. SHAIKUN*
MARTIN S. WEINBERG*
IVAN M. DIAMOND
MICHAEL M. FLEISHMAN*
ELLEN M. PEDLEY
LAWRENCE K. BANKS
PHILLIP D. SCOTT
R. VAN YOUNG
EDWARD B. WEINBERG*
CHARLES FASSLER
RICHARD S. HOLT
JOHN A. WEST
MICHAEL L. ADES
JERRY E. ABRAMSON
W. PLUMER WISEMAN, JR.
ERIC L. ISON
JOHN S. REED, II
JOHN H. STITES, III
RICHARD A. GETTY
ROBERT C. STILZ, JR.
JOHN R. CUMMINS
JAMES E. MILLIMAN

P. RICHARD ANDERSON, JR.
LLOYD R. CRESS
CHARLES J. LAVELLE
MARK S. AMENT
DAVID M. ROTH
JAMES A. KEGLEY
MARCUS P. McGRAW
DOROTHY M. PITT
DAVID W. HARPER
JAMES R. COX
JOHN S. SAWYER
HIRAM ELY, III
JOHN V. WHARTON
C. JUNE NALLEY
GARY R. WEITKAMP
PEGGY B. LYNDRUP
PATRICIA W. BALLARD
SCOTT W. BRINKMAN
LISABETH H. ABRAMSON
HENRY C. T. RICHMOND, III
LOIS T. CALVERT
PAULA J. SHIVES
ALAN C. PARSONS
JOHN E. SELENT
SCHUYLER J. OLT
PATRICK A. NEPUTE
BARRY J. SOBERING
BARBARA R. HARTUNG
FORREST W. RAGSDALE, III
JANE I. TUDOR
RICHARD S. CLEARY

NICHOLAS R. GLANCY
HARTWELL P. MORSE, III
MICHAEL C. SLONE
KATHLEEN A. McDONOUGH
MARGARET E. KEANE
ELOISE D. BRADSHAW
ELIZABETH A. GALLOWAY
RICHARD T. BROIDA
CARMIN D. GRANDINETTI
WILLIAM L. MONTAGUE
JANET P. JAKUBOWICZ
DANNY C. REEVES
SAMUEL H. FRITSCHNER
VICKI L. BROOKS
LISA R. PORTA
STEPHEN I. WOLFF
RICHARD J. EMMETT
I. JAY KATZ
DANIEL M. GRAY
MARK S. RIDDLE
MASTEN CHILDERS, II
HOWARD S. STURM

OF COUNSEL
LILLIAN M. FLEISCHER
W. BRUCE LUNSFORD

LOUISVILLE OFFICE
3300 FIRST NATIONAL TOWER
LOUISVILLE, KENTUCKY 40202

November 7, 1984

Honorable G. Wix Unthank
Judge, United States District Court
P. O. Box 278
Room 201-B
United States Courthouse
Pikeville, Kentucky 41501

Re: Federal Deposit Insurance Corporation v. Red Chief Coal, Inc., et al., Civil Action No. 82-08

Dear Judge Unthank:

Enclosed please find the copy of the Memorandum of the Federal Deposit Insurance Corporation in opposition to defendant Dixon's motion for a protective order and disqualification of Greenebaum Doll & McDonald. The original will be filed with the Clerk prior to the hearing which has been scheduled for November 9, 1984 in Pikeville.

Very truly yours,

John A. West

/aco
Enclosures
cc: Counsel of Record

*A PROFESSIONAL SERVICE CORPORATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Civil Action No. 82-08
VS.	)	
	)	G. WIX UNTHANK, JUDGE
RED CHIEF COAL, INC., et al.	)	
Defendants.	)	

* * * * *

MEMORANDUM OF FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION TO DEFENDANT DIXON'S MOTION FOR A PROTECTIVE ORDER AND DISQUALIFICATION OF GREENEBAUM DOLL & McDONALD

I. INTRODUCTION

This matter is before the Court on Defendant C. K. Dixon's motion for a protective order with respect to certain discovery and to disqualify the firm of Greenebaum Doll & McDonald from further representation of the Federal Deposit Insurance Corporation in this action. For the reasons set forth herein, this motion must be overruled because Dixon has not carried, and cannot carry, his burden of showing that the continued representation of the FDIC by the Greenebaum firm represents a conflict of interest. Indeed, Dixon's counsel

concedes that there is no conflict of interest except, it is argued, for the commencement of post judgment discovery under Rule 69, Fed. R. Civ. P. (Dixon Memorandum, p. 2).

The consideration of the subject motion requires an understanding of the representation of the FDIC by the Greenebaum firm in this action (hereinafter the "Red Chief Action") and the representation afforded by this firm to Green Bay Fuels, Inc. and its shareholders, including Dixon, in December 1983 (hereinafter the "Green Bay Transaction").

II. STATEMENT OF FACTS

(A) The Red Chief Action

This action, styled FDIC v. Red Chief Coal, Inc., et al., Pikeville Civil Action No. 82-08, was filed January 27, 1982 naming Dixon, among others, as a defendant. An answer was filed on behalf of Dixon on March 15, 1982. Dixon was represented through the trial of this action by Joseph J. Golden. At all times relevant to the issues currently before the Court, the FDIC has been represented by John A. West and Danny C. Reeves who practice in the Lexington office of the Greenebaum firm as a part of the Litigation Section.[1/]

1/ The Greenebaum firm is comprised of 85 attorneys with offices located in Lexington and Louisville, Kentucky. The firm consists of five sections which include: Tax, Real Estate/Finance, Litigation, Corporate and Business and Estate Planning.

Following the trial of the Red Chief Action and the consideration of several post-trial motions, a final judgment was entered on September 11, 1984 in favor of the FDIC against Dixon and the other defendants. Thereafter, Dixon filed a notice of appeal to the Sixth Circuit and, because the judgment was not superceded, the FDIC noticed the deposition of Dixon in aid of enforcing its judgment. Shortly before this deposition was scheduled to be taken, the motion currently before the Court was filed on behalf of Dixon.

(B) The Green Bay Transaction

In support of the motion to disqualify the Greenebaum firm in this case, Dixon asserts that in December 1983 he was a party to an transaction involving the sale of all the outstanding stock of Green Bay Fuels, Inc. In conjunction with this transaction, Dixon claims that "sensitive information" was disclosed to the Greenebaum firm concerning his personal financial affairs because the firm had agreed to represent Green Bay Fuels and the selling shareholders in this transaction. As a result, it is argued that the Greenebaum firm should be disqualified from proceeding with the representation of the FDIC in this case. It is important that the Court understand that at the time of the representation in the Green Bay Transaction the Red Chief Action had been pending for almost two years.

The Green Bay Transaction was handled by the Real Estate/Finance Section of the Greenebaum firm's Louisville office. Although Dixon was obviously aware of the pending Red Chief Action, he failed to disclose this information to the attorneys involved in the Green Bay Transaction. Knowledge of the Red Chief Action was neither discovered nor made known to the attorneys in the Real Estate/Finance Section until the present motion was filed. Likewise, Messrs. West and Reeves were unaware that the Green Bay Transaction had taken place until the pending motion was filed. (See Affidavits of Messrs. Stites, West and Reeves, filed as Exhibits A, B and C). The documents relating to the Green Bay Transaction have not been reviewed by the attorneys representing the FDIC in the Red Chief Action and will be tendered to the Court for review if the Court so requests.

III. DISCUSSION OF POINTS AND AUTHORITIES

(A) Disclosure of "Sensitive" Information

At the outset, it must be noted that Dixon does not claim a conflict of interest on the part of the firm prior to the commencement of the discovery to be taken pursuant to Rule 69 of the Federal Rules of Civil Procedure. The claim Dixon makes is simply that the attorneys from the Greenebaum firm involved in the Green Bay Transaction obtained information

about the transaction itself and this is sufficient to warrant disqualifying the entire Greenebaum firm from further representation of the FDIC in the Red Chief Action.

As Exhibit A to Dixon's memorandum indicates, the Greenebaum firm represented both the First National Bank of Louisville and Green Bay Fuels, Inc. and its shareholders in the Green Bay Transaction. This representation was undertaken after the consent of all the parties was obtained. In relevant part, the letter of consent signed by Dixon provides:

> Each addressee of this letter [including Dixon] hereby irrevocably and conclusively waives any and all claims, now or hereafter arising, which any one of them may have against Greenebaum Doll & McDonald as a result of its representation of more than one of the parties to the transaction described herein.

Thus, irrespective of the representation of Green Bay Fuels, Inc. and its shareholders (including Dixon), the information which Dixon now claims to be "sensitive" would have been revealed to the Greenebaum attorneys in the course of the representation of the First National Bank of Louisville. Accordingly, Dixon may not assert that the information disclosed during the course of the Green Bay Transaction was either confidential or sensitive. Apart from the fact that Dixon waived any potential claim of confidentiality to the information disclosed during the Green Bay Transaction, Dixon

has the obligation to give truthful testimony and produce all documents in his possession concerning this transaction regardless of whether the Greenebaum firm or another firm represents the FDIC during the course of Rule 69 discovery.

(B) Standard Applied For Disqualification Motions

In determining whether an attorney should be disqualified from representing a client with interests adverse to a former client, the Court must first determine if a "substantial relationship" exists between the subject matter of the prior representation and the present representation. General Electric Co. v. Valeron Corp., 608 F.2d 265 (6th Cir. 1979); LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983). As set forth in LaSalle, a three-level inquiry should be undertaken by the Court to determine if a substantial relationship exists.

> First, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Third, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client. (citations omitted).

Id. at 255-256.

The burden of proof is upon Dixon to establish the facts necessary to support a finding that a substantial relationship exists between the Green Bay Transaction and the Red Chief Action. Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2d Cir. 1978). An order of disqualification should not be entered where, as in the present case, the grounds are vague or tenuous. Instead, such an order should be entered only upon a showing that the relationship between the issues in the prior and present matters is patently clear and when the issues involved are identical or essentially the same. Williamsburg Wax Museum v. Historic Figures, Inc., 501 F. Supp. 326 (D.D.C. 1980).

Applying these standards to the present motion, it must be concluded that Dixon has failed to establish that a substantial relationship exists between issues involved in the Green Bay Transaction and the Red Chief Action. Unlike the Red Chief Action, the Green Bay Transaction was nonadversarial. The issues involved in the Red Chief Action are not even remotely related in the Green Bay Transaction. Based upon the information contained in Dixon's memorandum, it cannot be inferred that confidential information was disclosed by Dixon during the course of this transaction. Inasmuch as Dixon waived any conflict which "might arise" resulting from the Greenebaum firm's representation of the parties to the Green

Bay Transaction, he may not now argue that the information disclosed during the course of this Transaction was confidential. Conversely stated, Dixon may not disclose information to a number of third parties, execute an express waiver and later be heard to claim that the information is privileged.

More importantly, however, the information disclosed during the course of the Green Bay Transaction is in no way relevant to the issues involved in the Red Chief Action. The issues concerning the Red Chief Action have been adjudicated by this Court and are the subject of Dixon's appeal to the Sixth Circuit. These issues do not include the facts concerning the assets of Dixon upon which the FDIC will seek to execute in order to satisfy its judgment. Thus, it may not be concluded that any relationship, let alone a substantial relationship, exists between the matters involved in the Green Bay Transaction and the issues raised in the Red Chief Action.

Dixon argues that, if a "substantial relationship" is established, (i) disqualification automatically follows and (ii) every member of the Greenebaum firm is disqualified. Both assertions are incorrect. If, after evaluating the facts and circumstances according to the above-referenced three-level inquiry, the Court finds that a substantial relationship exists, the Court is entitled to presume that confidential information was disclosed during the prior representation.

This presumption, however, is rebuttable. City of Cleveland v. Cleveland Ele. Illuminating Co., 440 F. Supp. 193, 209 (N.D. Ohio 1977); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975); LaSalle National Bank v. County of Lake, supra at 256. The affidavits attached hereto clearly establish that no confidential information was disclosed to the Greenebaum firm during the course of the Green Bay Transaction. Accordingly, any presumption of confidential information which may be found to exist has been rebutted.

Apart from the Court's decision regarding whether a presumption that confidential information has been established and rebutted, the attorneys prosecuting the Red Chief Action may not be disqualified from taking Dixon's deposition or taking any other actions in an effort to satisfy the judgment obtained by the FDIC. Contrary to Dixon's assertions, disqualification of one member of a law firm does not necessitate disqualification of the firm's remaining members. See City of Cleveland v. Cleveland Elec. Illuminating, supra at 210-211 (holding that, absent direct proof to the contrary, the doctrine of vertical responsibility cannot be used to impute knowledge of confidential information beyond the subdivision or section in which the "tainted" attorney practices). See

also ABA, Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) at 11. (DR 5-105(D) should not be interpreted to require disqualification of an entire law firm if the attorney with knowledge of confidential information is screened from any direct or indirect participation in the subsequent matter). Thus, even if the Court finds that a substantial relationship exists between issues involved in the Green Bay Transaction and those involved in the Red Chief Action, the Court must allow the FDIC to continue to be represented by Messrs. West and Reeves in the firm's Lexington office.[2/]

In considering the propriety of "screening" an attorney, the Court may consider a number of factors, including, among others, the size of the law firm involved, the areas of specializaton and the respective attorneys' position within the firm. Applying these factors in the present matter, the Court must conclude that an order effectively screening individuals with knowledge of the Green Bay Transaction from those involved in the Red Chief Action could be entered in the present action. This will not only prevent any potential adverse consequences

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2/ If the Court makes such a finding, it may prevent disclosure of all materials contained in the firm's files regarding the Green Bay Transaction by adopting a screening procedure similar to those discussed in LaSalle Nat. Bank v. County of Lake, supra at 258.

from being suffered by Dixon but will also avoid any prejudice to the FDIC. See Williamsburg Wax Museum v. Historic Figures, Inc., supra at 328 (recognizing the potential adverse consequences which result when an order of disqualification is entered, especially if it occurs late in the course of the proceedings).

(C) Dixon Is Estopped From Asserting That The Greenebaum Firm Should Be Disqualified From Further Representation Of The FDIC In The Red Chief Action

During the period December 1983 through the filing of the pending motion, Dixon, and possibly his attorney Joseph Golden were the only individuals with knowledge of both the Green Bay Transaction and the ongoing Red Chief Action. In February 1984, Dixon's deposition was taken by counsel representing the FDIC in the Red Chief Action. At no time during the couse of this deposition did Dixon reveal any information relating to the Green Bay Transaction. Based upon this failure to reveal information concerning the Red Chief Action to the individuals involved in the Green Bay Transaction and his subsequent and repeated failure to reveal information concerning the Green Bay Transaction to the attorneys representing the FDIC in the Red Chief Action, Dixon is estopped from arguing that GDM should now be disqualified from representing the FDIC and taking his deposition pursuant to Rule 69 of the

Federal Rules. See City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193, 204 (N.D. Ohio 1977) (applying the estoppel doctrine in attorney disqualification proceedings). Notwithstanding Dixon's argument to the contrary, he may not now claim naivete to prevent application of this doctrine. Having requested the Greenebaum firm to represent him in the Green Bay Transaction, Dixon cannot be permitted to argue that that representation requires the disqualification of the Greenebaum firm in the Red Chief case. This is especially so since the Red Chief Action had been pending for almost two years at the time the Green Bay Transaction.

CONCLUSION

The motion for a protective order and disqualification of the Greenebaum firm should be overruled.

John A. West
Danny C. Reeves

GREENEBAUM DOLL & McDONALD
1400 Vine Center Tower
P. O. Box 1808
Lexington, Kentucky 40593
(606) 231-8500

COUNSEL FOR DEFENDANT
FEDERAL DEPOSIT INSURANCE
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Federal Deposit Insurance Corporation in Opposition to Defendant Dixon's Motion for a Protective Order and Disqualification of Greenebaum Doll & McDonald was served by mailing same, postage prepaid, to Joseph J. Golden, Esq., Golden & Cantor, Suite 450, 730 W. Main Street, Louisville, Kentucky 40202, W. David Klingman, Esq., Frockt & Klingman, Suite 101, 310 West Liberty Street, Louisville, Kentucky 40202, James M. Craft, Esq., Polly, Craft, Asher & Smallwood, P. O. Box 786, Whitesburg, Kentucky 41858 and upon Charles E. Mills, III, Esq., 116 Parc-Monceau, Palm Beach, Florida 33480 on this 7th day of November, 1984.

ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION Plaintiff, vs. RED CHIEF COAL, INC., et al. Defendants.	)	Civil Action No. 82-08 G. WIX UNTHANK, JUDGE

* * * * *

AFFIDAVIT OF
JOHN H. STITES, III

COMMONWEALTH OF KENTUCKY)
) SS
COUNTY OF JEFFERSON)

Now comes John H. Stites, III, who, being first duly sworn, deposes and says:

1. I have been a licensed and practicing attorney in the Commonwealth of Kentucky since 1974 and have been a partner in the law firm of Greenebaum Doll & McDonald (the "firm") in the firm's Louisville office since 1979. My practice with the firm is concentrated in the area of real estate and general corporate law, with a speciality in the

EXHIBIT A

area of energy law. I am a member of the firm's Real Estate and Finance Department. I submit this affidavit in opposition to the motion of Defendant C.K. Dixon to disqualify the firm from further representation of the Federal Deposit Insurance Corporation in this case.

2. In December 1983, the firm was requested to furnish legal representation in connection with the sale of all of the outstanding stock of Green Bay Fuels, Inc., a Kentucky corporation ("Green Bay Fuels"). In connection with this transaction, the firm was requested to represent both First National Bank of Louisville (the "Bank"), which was providing the buyers a portion of the financing for the transaction, and also Green Bay Fuels and its selling shareholders, including Dr. C.K. Dixon.

3. At the time of the transaction, the firm had also represented from time to time the persons buying the stock of Green Bay Fuels on matters unrelated to the subject transaction. The firm did not represent them in connection with the purchase of the stock of Green Bay Fuels.

4. The parties were advised that the firm's representation of both the Bank and the selling shareholders of Green Bay Fuels constituted a conflict of interest for the firm. Because of the severe time constraints imposed by the parties upon the consummation of the transaction, all parties,

including the purchasers, consented to the firm's representation of the Bank and of Green Bay Fuels and its selling shareholders. A copy of a letter confirming this agreement, signed by Dr. Dixon, is attached hereto as Exhibit A. It provides, among other things, that:

> Each addressee of this letter hereby irrevocably and conclusively waives any and all claims, now or hereafter arising, which any one of them may have against Greenebaum Doll & McDonald as a result of its representation of more than one of the parties to the transaction described herein.

5. The representation furnished by the firm in connection with the sale of the stock of Green Bay Fuels was carried out as follows:

> Affiant represented the interests of Green Bay Fuels and its selling shareholders, including Dr. C.K. Dixon.
>
> Edward B. Weinberg, a partner in the firm, represented the interest of the Bank in connection with the loans the Bank was furnishing to the purchasers.

6. At no time did Dr. Dixon advise the Affiant or, to Affiant's knowledge, any one in the firm that he (Dr. Dixon) was a defendant in this case. The Affiant was not aware of the pendency of this case and it had no bearing on the sale of the stock of Green Bay Fuels.

7. At no time during the course of the Affiant's representation of Green Bay Fuels and its selling share-

holders, including Dr. Dixon, did Dr. Dixon or anyone else provide any information to Affiant about Dr. Dixon's personal financial affairs. Affiant's knowledge of Dr. Dixon's financial affairs is limited to the contents of the documents accomplishing the sale of the stock of Green Bay Fuels. These documents were provided to all parties to the transaction at the closing on February 10, 1984.

8. The Affiant's representation of Green Bay Fuels and the selling shareholders, including Dr. Dixon, ended shortly after this closing, when the small amount of additional work necessary to conclude the transaction was completed.

Further Affiant sayeth not.

John H. Stites, III

Subscribed and sworn to before me, a Notary Public, by John H. Stites, III, this 7th day of November, 1984.

My commission expires: March 10, 1987.

Notary Public

(SEAL)

XHIBIT A

GREENEBAUM
DOLL & McDONALD
(A PARTNERSHIP INCLUDING PROFESSIONAL SERVICE CORPORATIONS)
3300 FIRST NATIONAL TOWER
LOUISVILLE, KENTUCKY 40202
TELEPHONE (502) 589-4200
TELECOPIER (502) 589-4412
TELEX 215029

S. I. GREENEBAUM (1902-1973)
A. W. McDONALD (1912-1980)
W. METER ALFORD (1916-1981)

A. ROBERT DOLL*
ROBERT F. MATTHEWS
WILLIAM C. BOONE, JR.
LARAMIE L. LEATHERMAN*
EDWIN H. PERRY
IRWIN J. EISINGER
DONALD H. BALLEISEN
THOMAS A. BROWN
MARVIN J. HIRN
MICHAEL G. SHAIKUN*
MARTIN S. WEINBERG*
IVAN M. DIAMOND
MICHAEL M. FLEISHMAN*
ELLEN M. PEDLEY
LAWRENCE K. BANKS
PHILLIP D. SCOTT
R. VAN YOUNG
EDWARD B. WEINBERG*
RONALD D. RAY
CHARLES FASSLER
RICHARD S. HOLT
JOHN A. WEST
MICHAEL L. ADES
JERRY E. ABRAMSON
W. PLUMER WISEMAN, JR.
ERIC L. ISON
JOHN S. REZO, II
JOHN H. STITES, III

RICHARD A. GETTY
ROBERT C. STILZ, JR.
JOHN R. CUMMINS
JAMES E. MILLIMAN
P. RICHARD ANDERSON, JR.
LLOYD R. CRESS
CHARLES J. LAVELLE
MARK S. AMENT
DAVID M. ROTH
JAMES A. KEGLEY
MARCUS P. McGRAW
DAVID W. HARPER
DOROTHY M. PITT
JAMES R. COX
JOHN S. SAWYER
JOHN V. WHARTON
C. JUNE MALLEY
GARY E. WEITKAMP
PATRICIA W. BALLARD
SCOTT W. BRINKMAN
LISABETH H. ABRAMSON
HIRAM ELY, III
ANNE A. CHESNUT
HENRY C. T. RICHMOND, III
LOIS T. CALVERT
PAULA S. HOSKINS
ALAN C. PARSONS
JOHN E. SELENT

SCHUYLER J. OLT
PATRICK A. NEPUTE
BARRY J. SOBERING
BARBARA R. HARTUNG
FORREST W. RUGSDALE, III
JANE L. TUDOR
RICHARD S. CLEARY
NICHOLAS R. GLANCY
HARTWELL P. MORSE, III
MICHAEL C. SLONE
KATHLEEN A. McDONOUGH
MARGARET E. KENNE
ELOISE D. BRADSHAW
ELIZABETH A. GALLOWAY
RICHARD T. BROIDA
CARMIN D. GRANDINETTI
WILLIAM L. MONTAGUE
JANET P. JAKUBOWICZ
DANNY C. REEVES
SAMUEL H. FRITSCHNER

OF COUNSEL
LILLIAN M. FLEISCHER
LEXINGTON OFFICE
1400 VINE CENTER TOWER
P.O. BOX 1808
LEXINGTON, KENTUCKY 40593

December 14, 1983

First National Bank
of Louisville
Attn: Mr. C. T. LaFollette
First National Tower
101 South Fifth Street
Louisville, KY 40202

Green Bay Fuels, Inc.
Attn: Mr. John J. Siegel, Jr.
1230 Starks Building
Louisville, KY 40202

Mr. John J. Siegel, Jr.
1230 Starks Building
Louisville, KY 40202

C. K. Dixon, Jr. M.D.
1230 Starks Building
Louisville, KY 40202

Mr. Eric Newman
1230 Starks Building
Louisville, KY 40202

New Green Bay Fuels, Inc.
95 White Bridge Road
Suite 404
Nashville, TN 37205

Mr. John W. Rich
95 White Bridge Road
Suite 404
Nashville, TN 37205

Mr. Samuel S. Francis
95 White Bridge Road
Suite 404
Nashville, TN 37205

RE: Acquisition of the Stock of Green Bay Fuels, Inc. by New Green Bay Fuels, Inc. and Loans by First National Bank of Louisville to Green Bay Fuels, Inc. and New Green Bay Fuels, Inc.

Gentlemen:

This law firm is employed by First National Bank of Louisville (the "Bank") on a continuing basis in connection with the bank's loans in the energy field and otherwise. This law firm is employed by Green Bay Fuels, Inc. ("Green Bay") in connection with a general representation of Green Bay. This law firm has on past occasions been employed by John W. Rich and Samuel S. Francis and by entities owned or controlled by them or with which they are affiliated on a variety of matters.

We have been requested by Green Bay and its shareholders to represent Green Bay and its affiliates and their shareholders' interests in connection with the proposed acquisition (the "Purchase") of the stock of Green Bay and certain other corporations by New Green Bay Fuels, Inc. ("New Green Bay"), a corporation owned or controlled by Messrs. Rich and Francis. We have further been requested by the Bank to represent its interests in proposed loans (the "Loans") to Green Bay and New Green Bay contingent upon the closing of the Purchase.

In retaining this law firm, Green Bay and its shareholders have requested John H. Stites, III and such other individuals as he may deem necessary, to represent them in connection with negotiating the precise terms of and preparing the documents necessary to consummate the Purchase. With respect to the contents of any documents so prepared, however, Green Bay and Mr. Siegel, Dr. Dizon and Mr. Newman and New Green Bay, Mr. Rich and Mr. Francis, each represent that they have made their own independent determination as to the economic feasibility of the Purchase (according to their own particular interests) and have relied upon such experts as they deem necessary or appropriate.

In retaining this law firm, the Bank has requested Michael G. Shaikun, Edward B. Weinberg, W. P. Wiseman, Jr. and such individuals as they deem necessary to represent the Bank in connection with financing the Purchase and the operating capital needs of Green Bay and New Green Bay. The Bank represents to Greenebaum Doll & McDonald that it has made its own independent credit decisions relative to Green Bay, New Green Bay, Mr. Rich and Mr. Francis and to their ability to service the debt to be incurred in connection with the Loans.

All addressees of this letter recognize and agree that this law firm may represent (i) the Bank in connection with the financing of the Purchase and the continuing capital needs of Green Bay and New Green Bay, as well as in connection with the Bank's exercising its rights and remedies in administering and enforcing its loan and security instruments and interests, and (ii) Green Bay and certain other corporations and their shareholders in connection with the Purchase. All addressees of this letter further recognize and acknowledge that the interests of these persons and entities may be

adverse to and diverse from one another and from the interests of New Green Bay, Mr. Rich, Mr. Francis and the other addressees of this letter.

Notwithstanding the separate employment of this law firm by Green Bay and the Bank, all parties to this letter recognize that severe time constraints exist in consummating the Purchase within the time allowed and that the background of this firm in connection with the parties makes this form of representation expeditious and desirable to all of the parties.

Each addressee of this letter hereby irrevocably and conclusively waives any and all claims, now or hereafter arising, which any one of them may have against Greenebaum Doll & McDonald as a result of its representation of more than one of the parties to the transaction described herein.

Very truly yours,

GREENEBAUM DOLL & McDONALD

By: _____
Michael G. Shaikun

/klr

CONSENTED AND AGREED TO BY:

FIRST NATIONAL BANK OF LOUISVILLE

By: _____

Title: _____

GREEN BAY FUELS, INC.

By: _____

Title: _____

John J. Stegel, Jr.

C. K. Dixon, Jr., M.D.

Eric Newman

NEW GREEN BAY FUELS, INC.

By: _____

Title: _____

John W. Rich

Samuel S. Francis

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Civil Action No. 82-08
VS.	)	
	)	G. WIX UNTHANK, JUDGE
RED CHIEF COAL, INC., et al.	)	
Defendants.	)	

* * * * *

AFFIDAVIT OF JOHN A. WEST

Now comes John A. West, who, being first duly sworn, deposes and says:

1. I am an attorney at law licensed to practice in the Commonwealth of Kentucky and before the United States District Court for the Eastern District of Kentucky. I am a partner in the firm of Greenebaum Doll & McDonald (the "firm") and chairman of the firm's Litigation Section in the Lexington, Kentucky office. At all times relevant to the issues being raised in the motion for protective order and for disqualification, I have been principal trial counsel for the Federal Deposit Insurance Corporation ("FDIC") in this matter. This Affidavit is submitted in opposition to the motion of

EXHIBIT B

defendant C. K. Dixon, Jr. ("Dixon") to disqualify the firm from further representing the FDIC in this case.

2. On October 29, 1984, I became aware that Dixon was claiming that the Real Estate/Finance Section of the firm's Louisville office allegedly had in its files certain confidential information which had been disclosed during the course of a financial transaction (the "transaction") involving the sale of certain stock of Green Bay Fuels, Inc.

3. Prior to the receipt of Dixon's motion and the accompanying materials, I was unaware that the firm had represented Green Bay Fuels, Inc. in the above-referenced transaction or that Dixon was a stockholder of the Green Bay corporation.

4. With the exception of the information contained in the materials filed by Dixon in support of his motion, I have no knowledge of the facts or circumstances underlying this transaction. Further, neither I nor anyone in the Litigation Section of the Lexington office has reviewed the firm's file regarding this transaction.

5. Following the receipt and review of the materials filed by Dixon, I contacted John H. Stites, III of the Real Estate/Finance Section of the Louisville office for the purpose of confirming the firm's representation of Green Bay Fuels, Inc. and its stockholders in the above-referenced transaction.

I did not review the file for this representation and know only the general nature of the transaction.

6. Prior to the motion which is currently before the Court neither Dixon nor his attorney revealed or in any way indicated that the firm had represented Dixon either in his individual capacity or as a shareholder of Green Bay Fuels, Inc.

John A. West

COMMONWEALTH OF KENTUCKY)
) Sct.
COUNTY OF FAYETTE)

Subscribed and sworn to before me by John A. West, this 7th day of November, 1984.

My commission expires: October 28, 1986.

Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Civil Action No. 82-08
VS.	)	
	)	G. WIX UNTHANK, JUDGE
RED CHIEF COAL, INC., et al.	)	
Defendants.	)	

* * * * *

AFFIDAVIT OF DANNY C. REEVES

Now comes Danny C. Reeves, who, being first duly sworn, deposes and says:

1. I am an attorney at law licensed to practice in the Commonwealth of Kentucky and before the United States District Court for the Eastern District of Kentucky. I am a member of the firm of Greenebaum Doll & McDonald (the "firm") and practice in the firm's Litigation Section of its Lexington, Kentucky office. Along with John A. West, I have represented the Federal Deposit Insurance Corporation ("FDIC") in this matter since January 1984. This Affidavit is submitted in opposition

EXHIBIT C

to the motion of defendant C. K. Dixon, Jr. ("Dixon") to disqualify the firm from further representing the FDIC in this case.

2. On October 29, 1984, I became aware that Dixon was claiming that the Real Estate/Finance Section of the firm's Louisville office allegedly had in its files certain confidential information which had been disclosed during the course of a financial transaction (the "transaction") involving the sale of certain stock of Green Bay Fuels, Inc.

3. Prior to the receipt of Dixon's motion and the accompanying materials, I was unaware that the firm had represented Green Bay Fuels, Inc. in the above-referenced transaction or that Dixon was a stockholder of the Green Bay corporation.

4. With the exception of the information contained in the materials filed by Dixon in support of his motion, I have no knowledge of the facts or circumstances underlying this transaction. Further, neither I nor anyone in the Litigation Section of the Lexington office has reviewed the firm's file regarding this transaction.

5. Following the receipt and review of the materials filed by Dixon, I participated in a telephone conversation involving John A. West and John H. Stites, III. This conversation was initiated for the purpose of confirming the

firm's representation of Green Bay Fuels, Inc. and its stockholders in the above-referenced transaction. During the course of this conversation, no information was sought or disclosed which could be claimed to be sensitive or confidential.

6. Prior to the motion which is currently before the Court neither Dixon nor his attorney revealed or in any way indicated that the firm had represented Dixon either in his individual capacity or as a shareholder of Green Bay Fuels, Inc.

Danny C. Reeves

Danny C. Reeves

COMMONWEALTH OF KENTUCKY)
) Sct.
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Danny C. Reeves, this 7th day of November, 1984.

My commission expires: October 28, 1986.

Priscilla C. Fox

Notary Public

11-16-84

after file

GREENEBAUM
DOLL & McDONALD
(A PARTNERSHIP INCLUDING PROFESSIONAL SERVICE CORPORATIONS)
1400 VINE CENTER TOWER
P.O. BOX 1808
LEXINGTON, KENTUCKY 40593
TELEPHONE (606) 231-8500
TELECOPIER (606) 255-2742
TELEX 218353

S. L. GREENEBAUM (1902-1973)
ANGUS W. McDONALD (1912-1980)
W. VAN METER ALFORD (1916-1981)

A. ROBERT DOLL*
ROBERT F. MATTHEWS
WILLIAM C. BOONE, JR.
LARAMIE L. LEATHERMAN*
EDWIN H. PERRY
IRWIN J. EISINGER
DONALD H. BALLEISEN
THOMAS A. BROWN
MARVIN J. HIRN
MICHAEL G. SHAIKUN*
MARTIN S. WEINBERG*
IVAN M. DIAMOND
MICHAEL M. FLEISHMAN*
ELLEN M. PEDLEY
LAWRENCE K. BANKS
PHILLIP D. SCOTT
R. VAN YOUNG
EDWARD B. WEINBERG*
CHARLES FASSLER
RICHARD S. HOLT
JOHN A. WEST
MICHAEL L. ADES
JERRY E. ABRAMSON
W. PLUMER WISEMAN, JR.
ERIC L. ISON
JOHN S. REED, II
JOHN H. STITES, III
RICHARD A. GETTY
ROBERT C. STILZ, JR.
JOHN R. CUMMINS

P. RICHARD ANDERSON, JR.
LLOYD R. CRESS
CHARLES J. LAVELLE
MARK S. AMENT
DAVID M. ROTH
JAMES A. KEGLEY
MARCUS P. McGRAW
DOROTHY M. PITT
DAVID W. HARPER
JAMES R. COX
JOHN S. SAWYER
HIRAM ELY, III
JOHN V. WHARTON
C. JUNE NALLEY
GARY R. WEITKAMP
PEGGY B. LYNDRUP
PATRICIA W. BALLARD
SCOTT W. BRINKMAN
LISABETH H. ABRAMSON
HENRY C. T. RICHMOND, III
LOIS T. CALVERT
PAULA J. SHIVES
ALAN C. PARSONS
JOHN E. SELENT
SCHUYLER J. OLT
PATRICK A. NEPUTE
BARRY J. SOBERING
BARBARA R. HARTUNG
FORREST W. RAGSDALE, III
JANE I. TUDOR
RICHARD S. CLEARY

NICHOLAS R. GLANCY
HARTWELL P. MORSE, III
MICHAEL C. SLONE
KATHLEEN A. McDONOUGH
MARGARET E. KEANE
ELOISE D. BRADSHAW
ELIZABETH A. GALLOWAY
RICHARD T. BROIDA
CARMIN D. GRANDINETTI
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JANET P. JAKUBOWICZ
DANNY C. REEVES
SAMUEL H. FRITSCHNER
VICKI L. BROOKS
LISA R. PORTA
STEPHEN I. WOLFF
RICHARD J. EMMETT
I. JAY KATZ
DANIEL M. GRAY
MARK S. RIDDLE
MASTEN CHILDERS, II
HOWARD S. STURM

OF COUNSEL
LILLIAN M. FLEISCHER
W. BRUCE LUNSFORD

LOUISVILLE OFFICE
3300 FIRST NATIONAL TOWER
LOUISVILLE, KENTUCKY 40202

November 15, 1984

JUDGE -
according to my interpretation these findings are not required. If you still want to do them, either ① tell me what you want based on the sealed portions of the record or ② give it back to me to allow time for the defendant →

*

ation v. Red
Action No. 82-

earing held in
1984, it is the
position of the plaintiff Federal Depos[illegible] Insurance Corporation that detailed findings of fact and conclusions of law are not necessary regarding defendant Dixon's motion for a protective order and for the disqualification of Greenebaum Doll & McDonald. However, in order to expedite this matter, we have prepared for your consideration such findings and conclusions to be entered in the event you find them to be necessary.

Very truly yours,

John A. West

JAW:jq
Enclosure
cc: James W. Craft, Esq.
W. David Klingman
Joseph J. Golden, Esq.

*A PROFESSIONAL SERVICE CORPORATION

JUDGE -

according to my interpretation these findings are not required. If you still want to do them, either (1) tell me what you want based on the sealed portions of the record or (2) give it back to me to allow time for the defendant →

11-16-84

GREENEBAUM
DOLL & McDONALD
(A PARTNERSHIP INCLUDING PROFESSIONAL SERVICE CORPORATIONS)
1400 VINE CENTER TOWER
P.O. BOX 1808
LEXINGTON, KENTUCKY 40593
TELEPHONE (606) 231-8500
TELECOPIER (606) 255-2742
TELEX 218353

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HOWARD S. STURM

OF COUNSEL
LILLIAN M. FLEISCHER
W. BRUCE LUNSFORD

LOUISVILLE OFFICE
3300 FIRST NATIONAL TOWER
LOUISVILLE, KENTUCKY 40202

November 15, 1984

Hon. G. Wix Unthank
United States District Judge
United States District Court
P.O. Box 278
Room 201-B
United States Courthouse
Pikeville, Kentucky 41501

Re: Federal Deposit Insurance Corporation v. Red Chief Coal, Inc., et al. - Civil Action No. 82-08

Dear Judge Unthank:

As stated during the course of the hearing held in the above-reference matter on November 9, 1984, it is the position of the plaintiff Federal Deposit Insurance Corporation that detailed findings of fact and conclusions of law are not necessary regarding defendant Dixon's motion for a protective order and for the disqualification of Greenebaum Doll & McDonald. However, in order to expedite this matter, we have prepared for your consideration such findings and conclusions to be entered in the event you find them to be necessary.

Very truly yours,

John A. West

JAW:jq
Enclosure
cc: James W. Craft, Esq.
W. David Klingman
Joseph J. Golden, Esq.

*A PROFESSIONAL SERVICE CORPORATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Civil Action No. 82-08
VS.	)	
RED CHIEF COAL, INC., et al.	)	G. WIX UNTHANK, JUDGE
Defendants.	)	

* * * * *

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter is presently before the Court on defendant C. K. Dixon's ("Dixon") motion for a protective order and for the disqualification of Greenebaum Doll & McDonald (the "Greenebaum firm") as counsel for plaintiff Federal Deposit Insurance Corporation ("FDIC"). After considering the materials filed by the parties and having heard arguments of counsel, the Court files the following findings and conclusions:

FINDINGS OF FACT

1. This action was instituted by the FDIC on January 27, 1982 against Defendants Dixon, Red Chief Coal, Inc., G. C. Kincer, Richard Kincer, Albert Kincer, Bluston Mining,

Inc. and Rodney Taylor. At all times relevant to the motion presently before the Court, the FDIC was represented by the Greenebaum firm through attorneys who are administratively a part of the firm's Litigation Section.

2. Following the trial of this action and consideration of several post-trial motions, a final judgment was entered September 11, 1984 against all the above-named defendants. Thereafter, a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed by Defendant Dixon.

3. During the period December 1983 through February 1984, Dixon was involved in a matter unrelated to the present action which involved the sale of all the common stock of Green Bay Fuels, Inc., a Kentucky corporation. Defendant Dixon was one of the selling shareholders. In connection with this transaction, the Real Estate/Finance Section of the Louisville office of the Greenebaum firm was employed to represent both First National Bank of Louisville, which was supplying a portion of the financing for the transaction, and Green Bay Fuels, Inc. and its selling shareholders, including Dixon.

4. The parties to this transaction were advised that, under the circumstances, the Greenebaum firm's representation of both the Bank and the selling shareholders constituted an impermissible conflict of interest for the firm which, if not

waived, prohibited the firm from undertaking the requested representation. Upon receiving such advice, the parties to the transaction executed a letter which, in relevant part, waived any and all claims which might arise as a result of the conflict of interest and consented to the dual representation of the Greenebaum firm. The Court specifically finds that (i) Defendant Dixon requested the Greenebaum firm represent Green Bay Fuels and the selling shareholders, including himself and (ii) that Dixon waived any conflict of interest arising out of the Greenebaum firm's dual representation described above, and (iii) that Dixon benefited from such representation.

5. The Court finds that, although the present action had been ongoing for almost two years at the time of the Green Bay transaction, Dixon failed to disclose the attorneys in the Real Estate/Finance Section of the Greenebaum firm that he was a defendant in this action. The Court further finds that the Litigation Section attorneys who had, and have, responsibility for this case did not know about the firm's representation of Dixon in the Green Bay transaction until the pending motion was filed by Dixon.

6. The Court finds that, with the exception of the information disclosed in the materials filed by Dixon in support of his motion, the Litigation Section attorneys

representing the FDIC in this action have no knowledge of the facts or circumstances underlying the Green Bay transaction. Further, the materials contained in the Greenebaum firm's files concerning this stock transaction have been filed with the Court under seal.

7. The Court finds that there is no substantial relationship between the Greenebaum firm's representation of Green Bay Fuels and its selling shareholders and the firm's representation of the FDIC in this action.

8. The Court finally finds the Real Estate/Finance Section attorneys of the Greenebaum firm obtained no information about Defendant Dixon's financial or personal affairs other than as disclosed by the documents which confirm the Green Bay transaction, which the Court finds were not confidential attorney-client communications.

CONCLUSIONS OF LAW

Upon the findings set out above, the Court makes the following conclusions of law:

1. Dixon effectively waived any potential conflict which might arise as a result of his representation by the Greenebaum firm during the course of the Green Bay stock transaction. Further, by virtue of his failure to object or raise this issue until shortly before his deposition was

scheduled to be taken in this case pursuant to Rule 69, Fed. R. Civ. P., he is estopped to claim that the Greenebaum firm has a conflict of interest. City of Cleveland v. Cleveland Ele. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1977).

2. The nature of the Greenebaum firm's representation of Dixon during the Green Bay transaction was unrelated to the firm's representation of the FDIC in this action. The Court specifically concludes that Dixon has failed to establish that a substantial relationship exists between the Green Bay transaction and this action. See Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2d Cir. 1978) (the burden of proof is on movant to establish the facts necessary to support a finding that a substantial relationship exists between the two matters in issue); LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983) (setting forth a three-level inquiry when considering whether a substantial relationship exists which would give rise to an order of disqualification). Alternatively, if a substantial relationship between the two matters does exist, then the presumption that confidential information was disclosed by Dixon to the Greenebaum firm has been rebutted by the affidavits filed in opposition to the subject motion. City of Cleveland v. Cleveland Ele. Illuminating Co., supra; Silver Chrysler

Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975).

3. Although this Court concludes that no conflict of interest has been presented which would prevent the Greenebaum firm from further representing the FDIC in this action, to avoid any appearance of impropriety, the firm shall not participate nor furnish information in the collection or enforcement of the judgment heretofore entered. The Greenebaum firm may, however, continue to represent the FDIC during the course of the appeal presently pending.

This _____ day of November, 1984.

_____
JUDGE, UNITED STATES DISTRICT COURT

PARCHMENT DIED
SOUTHWORTH CO. U.S.A.
100% COTTON FIBER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION
NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION, PLAINTIFF,

-V-

RED CHIEF COAL, INC., ET. AL., DEFENDANTS.

ORDER

The Plaintiff having moved for an order directing the clerk of this court to enter the default of the Defendants Bluston Mining, Inc., and Rodney E. Taylor in this action and granting to the Plaintiff judgment against the said Bluston Mining, Inc., and Rodney E. Taylor, jointly and severally, in the amount of $243,006.69.

The Plaintiff presented this motion to the court on May 20, 1983. The court having heard the argument of counsel for Plaintiff, and noting that no one appeared for the Defendants Bluston Mining, Inc., and Rodney E. Taylor, and due deliberation having been had, the court having rendered its order dated May 20, 1983, granting the relief requested by Plaintiff, it is

ORDERED, that the clerk of this court enter the default of the Defendants Bluston Mining, Inc., and Rodney

E. Taylor in this action, and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff recover of Defendants Bluston Mining, Inc., and Rodney E. Taylor the sum of $243,006.69, together with their costs herein expended.

This the 7th day of June, 1983.

G. WIX UNTHANK, JUDGE

TENDERED BY:

WILLIAM R. PENICK
P.O. Box 1388
Hazard, Kentucky 41701

Local Counsel for
Federal Deposit Insurance Corporation

9-11-84

GREENEBAUM
DOLL & McDONALD
(A PARTNERSHIP INCLUDING PROFESSIONAL SERVICE CORPORATIONS)
1400 VINE CENTER TOWER
P.O. BOX 1808
LEXINGTON, KENTUCKY 40593
TELEPHONE (606) 231-8500
TELECOPIER (606) 255-2742

DANNY C. REEVES

September 10, 1984

Hon. G. Wix Unthank
United States District Judge
Room 201-B
United States Courthouse
P. O. Box 278
Pikeville, Kentucky 41501

Re: Federal Deposit Insurance Corporation v. Red Chief Coal, Inc., No. 82-08

Dear Judge Unthank:

Enclosed please find an Amended Judgment which has been prepared pursuant to your direction.

Very truly yours,

Danny C. Reeves

Danny C. Reeves

/aco
Enclosure
cc: Joseph Golden, Esq.
James W. Craft, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION, PLAINTIFF,

VS. AMENDED JUDGMENT

RED CHIEF COAL, INC., et al., DEFENDANTS.

* * * * *

Plaintiff Federal Deposit Insurance Corporation having moved the Court to amend the Final Judgment previously entered in this matter and having heard arguments of counsel and being sufficiently advised, it is hereby

ORDERED AND ADJUDGED that the judgment entered July 24, 1984 be and is amended as follows:

Judgment be and is entered in favor of the plaintiff against defendants Red Chief Coal, Inc., G. C. Kincer, Albert Kincer, Richard Kincer and C. K. Dixon, Jr., jointly and severally, upon the promissory note executed February 24, 1978 in the principal amount of $272,500.00. This sum shall be reduced by payments in the amount of $16,841.91, credited March 30, 1978, and $15,589.68, credited August 1, 1980. This amount shall also be reduced by $45,275.00, representing

the net proceeds received by the plaintiff upon sale of the collateral securing the promissory note. This amount shall be credited as received July 28, 1982.

Interest shall accrue on this judgment, subject to the aforementioned credits, from February 24, 1978 until July 24, 1984 at the rate set forth in the promissory note (13.76%). Thereafter, the rate of interest on the unpaid principal shall be reduced to 12.17% pursuant to 28 U.S.C. § 1961. Plaintiff shall also be entitled to recover its costs.

This is a Final Judgment and there is no just cause for delay.

This 14th day of September, 1984.

JUDGE, UNITED STATES DISTRICT COURT

(EDky-111)

United States District Court
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL MINUTES — GENERAL

Case No. 82-08 At PIKEVILLE Date SEPTEMBER 6, 1984

Style FEDERAL DEPOSIT INSURANCE CORPORATION VS: RED CHIEF COAL, INC., ET AL

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins
Deputy Clerk

S. Lindstrom
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Danny C. Reeves

ATTORNEYS PRESENT FOR DEFENDANTS:

Joseph J. Golden
James W. Craft

PROCEEDINGS: HEARING ON MOTION TO AMEND JUDGMENT

The matter was called for proceeding with counsel present as noted. The Court heard counsel and being sufficiently advised,

IT IS HEREBY ORDERED:

(1) Motion of the plaintiff to amend judgment be, and hereby is, SUSTAINED. The plaintiff shall prepare and submit a proposed Amended Judgment for consideration of the Court on or before the 24th day of Sept, 1984;

(2) Oral motion of the defendants, Red Chief Coal, Inc., G. C. Kincer, Albert Kincer, and Richard Kincer for judgment on their cross-claim against the defendants, Rodney E. Taylor and Bluston Mining, Inc., be, and hereby is, SUSTAINED. Honorable James W. Craft, counsel for the above defendants, shall prepare a proposed judgment on the cross-claim and submit for consideration of the Court on or before the 24th day of Sept, 1984.

Copies: This 7th day of September, 1984.

Danny C. Reeves
John A. West
Joseph J. Golden
James W. Craft

G. Wix Unthank
G. WIX UNTHANK, JUDGE

Initials of Deputy Clerk MB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

C. A. NO. 82-08

FEERAL DEPOSIT INSURANCE
CORPORATION PLAINTIFF

VS: ORDER

RED CHIEF COAL, INC., ET AL DEFFENDANTS

* * * * * *

Plaintiff's motion to amend judgment entered July 24, 1984, is assigned at 3:30 P. M. on the 6th day of September, 1984, in the courtroom of the United States Courthouse, Pikeville, Kentucky for the purpose of determining the amount owed by the defendants.

August 22, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF,

VS: FINAL JUDGMENT

RED CHIEF COAL, INC., et al DEFENDANTS.

* * * * * * * * *

The judgment entered in this action on the 7th day of July, 1983, and the judgment entered on the 1st day of June, 1984, are **AFFIRMED** and made a part of this judgment by reference.

It is further ORDERED AND ADJUDGED that the defendants be and are entitled to credit for a set-off in a sum equal to the net proceeds derived from the sale of security in July, 1982.

The liability for the first and second transactions sued upon isn't cumulative but is an alternative liability.

This is an action between multi-parties involving multiple issues.

This is a **FINAL JUDGMENT** upon all issues as to all parties.

This 24th day of July, 1984.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION PLAINTIFF,

VS: MEMORANDUM OPINION AND ORDER

RED CHIEF COAL, INC., et al DEFENDANTS.

* * * * * * * * *

On the 31st day of May, 1984, this Court entered judgment, upon the acceptance of several special interrogatories returned by the jury and denied the return of others. The defendants have moved the Court to alter or amend such judgment and the Court having considered same and being advised is of the opinion:

(a) 12 U.S.C. 1823(e) was not unfairly raised by the Court for the first time. The attention of the parties is directed to paragraph 6 of the plaintiff's complaint.

(b) The alleged and controverted oral agreement of Koester was not a part of the writings of the first or second transaction. It is an alleged and controverted "side agreement".

(c) The second transaction was not a novation.

(d) The sale of some of the security was not without notice and was not an impairment of security.

(e) Plaintiff is not entitled to double recovery nor are defendants subject to double liability.

(f) The defendants are entitled to credit or set-off for the net proceeds derived from the sale of the said security.

IT IS THEREFORE ORDERED that the Motions to Alter or Amend the judgment entered on the 31st day of May, 1984, be **DENIED.** It is further ORDERED that FINAL JUDGMENT be entered pursuant to this Memorandum Opinion and Order.

This 24th day of July, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION — PLAINTIFF

VS:

RED CHIEF COAL, INC., G. C. KINCER; ALBERT KINCER; RICHARD KINCER; and C. K. DIXON, JR. — DEFENDANTS

- J U D G M E N T -

The Court declines to accept the special verdict of the jury, Number 5, by reason of 12 United States Code 1823 (e). The Court accepts the special verdict of the jury, Number 4, that Robert G. Koester, agent and representative of the Mission State Bank, made fraudulent representations in the second transaction, the subject matter of Counts 2 and 3.

The Court grants judgment notwithstanding the special verdicts of the jury, for the plaintiff, Federal Deposit Insurance Corporation, against the defendants, Red Chief Coal, Inc., Albert Kincer,

Richard Kincer, G. C. Kincer and C. K. Dixon, Jr., jointly and severally upon the promissory note executed February 24, 1978, in the sum of $ 272,500.00, with interest and costs.

The defendants are granted thirty (30) days, to and including July 2, 1984, in which to file memorandum of points and authorities as to why the judgment of the Court should not become final. The plaintiff is granted fifteen (15) days thereafter, on or before July 17, 1984, in which to file responsive memoranda, at which time the matter shall stand submitted for consideration by the Court.

This 31st day of May, 1984. G. Wix Unthank

G. WIX UNTHANK, JUDGE

(EDky-112)

United States District Court
EASTERN DISTRICT OF KENTUCKY

Pikeville

CIVIL MINUTES — TRIAL

Case No. 82-08 At Pikeville Date May 31, 1984

Style Federal Deposit Insurance Corporation vs. Red Chief Coal, Inc. Et al

DOCKET ENTRY ORDER: Out of the presence of the jury the Rule 51 Conference was continued and concluded. Oral renewed motion of the plaintiff for directed verdict against the defendants, be, and hereby is, TAKEN UNDER ADVISEMENT. The jury returned a special verdict by way of interrogatories finding for the plaintiff and defendants. WHEREUPON, the Court declined to accept the finding by way of special verdict of the jury, and orally rendered judgment which shall be forthcoming by way of separate order.

PRESENT:

HON. G. Wix Unthank, JUDGE

M. Bevins — Deputy Clerk

S. Lindstrom — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
John A. West
Danny C. Reeves

ATTORNEYS PRESENT FOR DEFENDANTS:
James W. Craft
Coy Holstein, Jr.
Joseph J. Golden

____ Case called and continued to ____ for trial.

____ COURT TRIAL ✓ JURY TRIAL The Jury impaneled and sworn is as follows:

(1) Marcus Wells (3) Sharlene Mosley Jacobs on May 29, 1984 (5) Rhoda Eson

(2) Carolyn Sandlin (4) James S. Mooney (6) Deborah Smith

(1st Alternate) ____ (2nd Alternate) ____

____ Introduction of evidence for ____ plaintiff ____ defendant ____ begun, ____ resumed, not and concluded;

____ Rebuttal evidence; ____ Surrebuttal evidence ____ Continued to ____ further trial.

✓ Jury retires to deliberate at 10:50 A.M.; Jury returns at 1:13 P.M.

____ JUDGMENT BY COURT ✓ JURY VERDICT. SEE VERDICT OR ANSWERS TO INTERROGATORIES

____ Jury polled.

____ Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by ____ plaintiff; ____ defendant.

____ Submitted. ____ BRIEFS to be filed 7/2/84 (Plaintiff) 7/17/84 (Defendant) ____ (Reply)

within ____ days following the filing of transcript by Official Court Reporter.

Copies: This 31st day of May, 1984.

G. Wix Unthank
G. WIX UNTHANK, JUDGE

Initials of Deputy Clerk mb

(EDKy-112)

United States District Court
EASTERN DISTRICT OF KENTUCKY

Pikeville

CIVIL MINUTES — TRIAL

Case No. 82-68 At Pikeville Date May 30, 1984

Style Federal Deposit Insurance Corporation vs. Red Chief Coals, Inc., et al

DOCKET ENTRY ORDER: By agreement of the parties, Alternate Juror #51, Sharlene Jacobs Mosley shall be seated in place of Juror #58, Rufus Irl Ingle, who shall be excused. Out of the presence of the jury, by agreement of the parties, the hand written stipulation, with deletions of the Court, is FILED this date and made a part of the record. Oral motions of the defendant, C. K. Dixon for directed verdict, OVERRULED. Oral motions of the plaintiff for directed verdict, OVERRULED in part, TAKEN UNDER ADVISEMENT as to liability regarding the promissory notes in the amounts of $4,862.89 executed by the defendants, G. C. Kincer, Richard Kincer and Albert Kincer. A conference pursuant to Rule 51 was begun.

PRESENT:

HON. G. Wix Unthank, JUDGE

M. Levins, Deputy Clerk

S. Lindstrom, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

John A. West
Danny C. Reeves

ATTORNEYS PRESENT FOR DEFENDANTS:

James W. Craft
Joseph D. Golden
Coy Holstein, Jr.

____ Case called and continued to _____ for trial.

____ COURT TRIAL __✓__ JURY TRIAL The Jury impaneled and sworn is as follows:

(1) Marcus Wells (3) Rufus Irl Engle on 5-29-84. (5) Rhoda Dixon

(2) Carolyn Sandlin (4) James S. Mooney (6) Deborah Smith

(1st Alternate) ~~Sharlene~~ Mosley Jacobs (2nd Alternate) _____

✓ Introduction of evidence for ✓ plaintiff X defendant ✓ begun, ✓ resumed, and concluded; as to direct examination of defendants.

✓ by defendant, C. K. Dixon, only.

✓ Rebuttal evidence; __ Surrebuttal evidence __ Continued to May 31, 1984 at 8:30 AM further trial.

✓ The tendered instructions of defendants filed in the record are OVERRULED

____ Jury retires to deliberate at _____; Jury returns at _____.

____ JUDGMENT BY COURT ____ JURY VERDICT. SEE VERDICT OR ANSWERS TO INTERROGATORIES

____ Jury polled.

____ Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by ____ plaintiff; ____ defendant.

____ Submitted. ____ BRIEFS to be filed _____ Plaintiff; _____ Defendant; _____ Reply

within ____ days following the filing of transcript by Official Court Reporter.

~~Copies~~ By agreement of the parties, the original Exhibits 1 through 7 shall be substituted for copies entered into evidence for purposes of going to the jury and, upon completion of the case, copies may, again, be substituted therefor.

This 31st day of May, 1984. Initials of Deputy Clerk mb

G. WIX UNTHANK, JUDGE

(EDky-112)

United States District Court
EASTERN DISTRICT OF KENTUCKY

Pikeville

CIVIL MINUTES — TRIAL

Case No. 82-08 At Pikeville Date May 29, 1984

Style Federal Deposit Insurance Corporation vs. Red Chief Coal, Inc., Et al

DOCKET ENTRY ORDER: The matter was called for trial, by jury, with the jury being selected and sworn. This matter be, and hereby is, CONTINUED to Wednesday, May 30, 1984, at 9:00 A.M. for the parties with the jury to report at 9:30 A.M.

This 30th day of May, 1984

G. Wix Unthank

G. WIX UNTHANK, JUDGE

PRESENT:

HON. G. Wix Unthank, JUDGE

M. Bevins
Deputy Clerk

S. Lindstrom
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
John A. West
Daniel Kiener

ATTORNEYS PRESENT FOR DEFENDANTS:
Joseph D. Golden
James W. Craft
Coy Holstein, Jr.

____ Case called and continued to _____ for trial.

____ COURT TRIAL ✓ JURY TRIAL The Jury impaneled and sworn is as follows:

(1) Marcus Wells (3) Lufus Lee Engle (5) Rhoda Olson
(2) Carolyn Sandlin (4) James S. Mooney (6) Deborah Smith
(1st Alternate) Sharlene Mosley Jacobs (2nd Alternate) _____

✓ Introduction of evidence for ✓ plaintiff ____ defendant ✓ begun, ____ resumed, not concluded;

____ Rebuttal evidence; ____ Surrebuttal evidence ____ Continued to _____ further trial.

____ Jury retires to deliberate at _____; Jury returns at _____.

____ JUDGMENT BY COURT ____ JURY VERDICT. SEE VERDICT OR ANSWERS TO INTERROGATORIES

____ Jury polled.

____ Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by ____ plaintiff; ____ defendant.

____ Submitted. ____ BRIEFS to be filed _____ Plaintiff _____ Defendant _____ Reply

within ____ days following the filing of transcript by Official Court Reporter.

Copies:

Initials of Deputy Clerk mb

(EDky-111)

United States District Court
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE — CIVIL MINUTES — GENERAL

Case No. 82-08 At PIKEVILLE Date MAY 11, 1984

Style FEDERAL DEPOSIT INSURANCE CORPORATION VS: RED CHIEF COAL CO., INC.; G. C. KINCER, ALBERT KINCER, RICHARD KINCER, C. K. DIXON, JR.

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins
Deputy Clerk

S. Lindstrom
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

John A. West
Danny C. Reeves
Masten Childers

ATTORNEYS PRESENT FOR DEFENDANTS:

Joseph J. Golden
James W. Craft

PROCEEDINGS: FINAL PRE-TRIAL CONFERENCE

The matter was called for proceeding with counsel present as noted.

The Court heard counsel and being sufficiently advised,

ORDERED HEREIN:

(1) The parties shall have filed with the Clerk all depositions in this matter at least one week prior to the date of trial, on or before May 22, 1984;

(2) Motion of plaintiff for partial summary judgment against the defendants, G. C. Kincer, Albert Kincer and Richard Kincer, be, and hereby is, OVERRULED;

(3) Motion of defendant, C. K. Dixon, Jr. for summary judgment, previously taken under advisement, be, and hereby is, OVERRULED;

(4) The parties shall tender to the Court proposed instructions to the jury at least three (3) days prior to date of trial, on or before May 24, 1984;

Copies: (5) This matter be, and hereby is CONTINUED to Tuesday, May 29, 1984, at 9:00 A.M. for TRIAL, BY JURY.

This 14 day of May, 1984.

G. Wix Unthank

Initials of Deputy Clerk MB

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION, PLAINTIFF,

VS: ORDER

RED CHIEF, INC., DEFENDANT.

* * * * * * *

The defendant, C.K. Dixon, has filed a motion for correction of the record; the grounds for said motion are that the final judgment entered in the above-styled action on July 24, 1984 contained an incorrect reference to "the judgment entered on the 7th day of July, 1983". The defendant has filed a response thereto. Accordingly,

IT IS HEREBY ORDERED that the final judgment entered in the above-styled action on July 24, 1984 be AMENDED to read in the first sentence:

> The judgment entered in this action on the 7th day of June, 1983, and the judgment entered on the 1st day of June, 1984, are AFFIRMED and made a part of this judgment by reference.

This the 23rd day of October, 1984.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION, PLAINTIFF,

VS: ORDER

RED CHIEF COAL, INC., ET AL., DEFENDANTS.

* * * * * * * * *

Currently before the Court is the matter raised in the memorandum of the defendant C. K. Dixon, filed pursuant to the Court's minute order of November 9, 1984. Based upon its own reading of Fed. R. Civ. P. 52 and the interpretative caselaw, the Court is of the opinion that findings of fact are not required in connection with the Court's ruling on the defendant's motion for an order disqualifying the firm of Greenbaum, Doll and Mc Donald from continuing to represent Federal Deposit Insurance Corporation in other phases of the case. Accordingly,

IT IS HEREBY ORDERED that the defendant's motion for findings of fact and conclusions of law be DENIED and that the defendant's motion for an extension of time in which to respond to the findings prepared by the plaintiff be DENIED.

This the 27th day of November, 1984.

G. WIX UNTHANK, JUDGE

(EDky-111)

United States District Court

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE — CIVIL MINUTES — GENERAL

Case No. 82-08 At PIKEVILLE — Date November 9, 1984

Style FEDERAL DEPOSIT INSURANCE CORPROATION VS: RED CHIEF COAL, INC., ET AL

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins — Deputy Clerk

S. Lindstrom — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

John A. West
Danny C. Reeves

ATTORNEYS PRESENT FOR DEFENDANTS:

W. David Klingman

PROCEEDINGS: HEARING ON MOTION FOR PROTECTIVE ORDER

The matter was called for proceeding with counsel present as noted.

The Court heard counsel and being sufficiently advised,

IT IS HEREBY ORDERED:

(1) Motion, of the defendant, C. K. Dixon, Jr., for protective order, OVERRULED in part, SUSTAINED in part. The Law Firm of Greenbaum, Doll & McDonald shall not participate nor furnish information in the collection and/or enforcement of the judgment heretofore entered in this matter. The Law Firm of Greenbaum, Doll & McDonald, will be allowed to represent plaintiff on the appeal presently pending matter;

(2) The sealed file, entitled "Documents from file of Greenbaum, Doll & McDonald evidencing Green Bay Transaction" tendered in open Court by Honorable John A. West, shall be placed under additional and separate seal of this Court.

xCopies:

CONTINUED ON PAGE TWO

Initials of Deputy Clerk MB

(EDky-111)

United States District Court

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE — CIVIL MINUTES — GENERAL

Case No. 82-08 At PIKEVILLE — Date November 9, 1984

Style FEDERAL DEPOSIT INSURANCE CORPORATION VS: RED CHIEF COAL, INC., ET AL

DOCKET ENTRY

CONTINUATION PAGE TWO

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins — Deputy Clerk

S. Lindstrom — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: CONTINUED FROM PAGE ONE

(3) The defendant, C. K. Dixon, Jr., shall file a memoranda of points and authorities on "why the Court should make a finding of fact and memorandum opinion with regard to its ruling on the motion for protective order" within one week, on or before November 16, 1984, at which time the matter will be submitted;

IT IS FURTHER ORDERED:

The Clerk is directed to retain this record for a period of seven (7) days from the date of the filing of this order.

This 14th day of November, 1984.

G. WIX UNTHANK, JUDGE

Copies:

Initials of Deputy Clerk MB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORP., PLAINTIFF,

v. MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER

RED CHIEF COAL, INC., et al., DEFENDANTS.

* * * * * * * * * * * * *

Come the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., by counsel, and move the Court for leave to file their First Amended Answer herein, which is attached hereto and made a part hereof.

WHEREFORE, the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., move the Court for an appropriate Order on their Motion herein.

POLLY, CRAFT, ASHER & SMALLWOOD

Attorneys for Defendants
G. C. Kincer, Albert Kincer
Richard Kincer, and Red Chief Coal, Inc.
P. O. Box 786
Whitesburg, Kentucky 41858
606/633-4469

CERTIFICATION

I do hereby certify that a true copy of the foregoing Motion for Leave to File First Amended Answer was served by handing same to Hon. Raymond F. Brown, GREENEBAUM, DOLL & McDONALD, 3300 First National Tower, Louisville, Kentucky, 40202, Counsel for Plaintiff; Hon. Joseph J. Golden, GOLDEN & CANTOR, Suite 450, 730 W. Main Street, Louisville, Kentucky, 40202, and by mailing same to Hon. Charles E. Nells, III, WOODWARD, FOX & WOOTEN, Seven-O-Seven Building, P. O. Box 12247, Roanoke, Virginia, 22247, and Bluston Mining, Inc., c/o Rodney E. Taylor, 2025 Deyerle Road, S. W., Roanoke, Virginia, 24015, this 24 day of March, 1983.

James M. Craft

Attorney for Defendants
G. C. Kincer, Albert Kincer,
Richard Kincer, and Red Chief Coal, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE CORP., PLAINTIFF,

V. FIRST AMENDED ANSWER AND CROSS-CLAIM

RED CHIEF COAL, INC., et al., DEFENDANTS.

* * * * * * * * * * *

Come the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., by counsel, and for their First Amended Answer state as follows:

(1) That they readopt, restate and reallege each and all the defenses, denials and statements contained in their original Answer filed herein.

(2) That these answering Defendants specifically deny they are indebted to the Plaintiff in any amount whatsoever and further state they have fully and adequately performed all obligations imposed upon them by their financial arrangements with Mission State Bank of Kansas, Missouri.

(3) For further answer and defense herein these answering defendants state that their signatures on the Guaranty Agreement, if any such Agreement there was, were obtained by fraud perpetrated upon them by agents of the Plaintiff's predecessor, Mission State Bank, in that they were each led to believe that an assumption of the indebtedness owed by them to Mission State Bank by the defendants, Bluston Mining, Inc., and Rodney Taylor, would completely and totally absolve them from any further liability thereon. Further, the document upon which the Plaintiff relies to impose liability upon these defendants is not signed by the Plaintiff's predecessor, Mission State Bank, and therefore, this Agreement would fail due to a lack of mutality.

WHEREFORE, these answering defendants demand that the Plaintiff's Complaint herein be dismissed and nothing recovered thereby; for their costs herein expended and all other relief which the Court, in its discretion, shall deem proper.

CROSS-CLAIM

Come the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., by counsel, and for their Cross-Claim againstthe defendants, Rodney E. Taylor and Bluston Mining, Inc., a Virginia Corporation, state as follows:

(1) That these answering defendants and Bluston Mining, Inc., and Rodney E. Taylor entered into an Agreement whereby the said Rodney E. Taylor, individually, and Bluston Mining, Inc., jointly and severally, assumed the indebtedness owed by Red Chief Coal, Inc., Mission State Bank and Trust Company of Mission, Kansas; that on or about June 1, 1980, Rodney E. Taylor, individually, and Bluston Mining, Inc., entered into a loan assumption with Mission State Bank and Trust Company of Kansas, the subject matter and purpose of which was the assumption by Taylor and Bluston of the debts of Red Chief Coal, Inc., to said bank.

(2) That if and in the event Judgment is granted to the Plaintiff against these defendants, then the said defendants are entitled to a Judgment of indemnity over and against the defendants, Bluston Mining, Inc., and Rodney E. Taylor, for the amount of any such Judgment granted the Plaintiff against G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc.

WHEREFORE, the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., demand judgment against the defendants Bluston Mining, Inc., and Rodney E. Taylor, jointly and severally, on their cross-claim herein as follows:

(a) That the defendants, G. C. Kincer, Albert Kincer, Richard Kincer, and Red Chief Coal, Inc., be indemnified over

and against the defendants, Bluston Mining, Inc., and Rodney E. Taylor, jointly and severally, to the extend of any recovery had herein by the Plaintiffs against these cross-claiming defendants.

(b) For their costs herein expended and all other relief which the Court, in its discretion, shall deem proper.

POLLY, CRAFT, ASHER & SMALLWOOD

Attorneys for Defendants
G. C. Kincer, Albert Kincer,
Richard Kincer and Red Chief Coal, Inc.

CERTIFICATION

I do hereby certify that a true copy of the foregoing First Amended Answer and Crossclaim was served by handing same to Hon. Raymond F. Brown, GREENEBAUM, DOLL & McDONALD, 3300 First National Tower, Louisville, Kentucky, 40202, Counsel for Plaintiff; Hon. Joseph J. Golden, GOLDEN & CANTOR, Suite 450, 730 W. Main Street, Louisville, Kentucky, 40202, and by mailing same to Hon. Charles E. Nells, III, WOODWARD, FOX, & WOOTEN, Seven-O-Seven Building, P. O. Box 12247 Roanoke, Virginia, 22247, and Bluston Mining, Inc., c/o Rodney E. Taylor, 2025 Deyerle Road, S. W., Roanoke, Virginia, 24015, this 24 day of March, 1983.

Attorney for Defendants
G. C. Kincer, Albert Kincer,
Richard Kincer, and Red Chief Coal, Inc.

TO: Judge
FROM: Donald
DATE: 3-23-83
RE: 82-08
FDIC v. Red Chief Coal, Inc., et al,

PC, Thurs., 3-24-83, at 2:00 p.m.

Synopsis: This is one of those well-known songs, "Someone took the money and ran", written in part by our long-lost friend Rodney E. Taylor.

Facts:

1. The FDIC is involved because it purchased the notes around which this action centers from Mission State Bank in Kansas that became insolvent in 1980.

2. The NOTES:

RED CHIEF NOTE a. The bank loaned $272,500 to Red Chief Coal (the principals of which were C. K. Dixon, Jr., G.C. Kincer, Albert Kincer and Richard Kincer). The note was to have been paid in monthly installments of $16,841.91 for 17 months, beginning on 3-30-78. Final payment of $16,836.51 due in 18th month.

Red Chief and principals granted the bank a security interest in certain heavy equipment, which the bank perfected.

The debtors made 2 payments and defaulted.

PLff says aggregate due now is $313,111.45, plus interest of 97.81 per diem after 1-14-82.

BLUSTON & TAYLOR NOTE b. Bluston Coal Company & Rodney E. Taylor agreed to assume part of the debt in default. on 6-1-80 they executed a $240,000. promissory note, to be repaid in monthly installments of $15,589.68 for 16 months, final payment of $15,589.60 to be made in the 17 month.

Bluston & Taylor received Red Chief's equipment, subject to the bank's security interest.

Bluston & Taylor defaulted. Plff says aggregate due is $256,136.64, plus interest of $81.61 per diem from 1-14-82.

KINCERS' NOTES c. The three Kincer Brothers individually executed a guaranty agreement to the bank:

1. G. C. Kincer - $4,862.89 + interest (a 6-month note)

2. Albert Kincer & Richard Kincer - $9,725.78 + interest (6 mos.

They all defaulted.

Pending Motions:

1. Plff has moved for summary judgment w/ supporting memo.

Comments:

1. #19 - the PC Memo of C. K. Dixon, Jr. raises an interesting question. If Mr. Dixon was not a party to the 2nd or 3rd note negotiations, was there a novation as to him? He cites two cases from the Bankruptcy Reporter (1982) which he says hold that "in Kentucky, the rule is that a renewal note does not extinguish the original obligation unless there is a novation".

2. #20 - Plff's Report of Sale. Some of the equipment has been found and sold at an auction in Corbin, Ky. Plff says the aggregate now owed is $220,638.12.

3. The only parties who have filed their PC memos are plff and C.K. Dixon, Jr.

4.

(1) Kansas Bank ~~Loan~~ Red Chief Coal Co
Dixon & Kincus
Personal guarantee
$\boxed{\text{default}}$. 222,500

(2) Bluston Coal & Rodney Taylor.
assumed 240,000
$\boxed{\text{default}}$

(3) Kansas Bank went under & FDIC purchased notes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-08

FEDERAL DEPOSIT INSURANCE
CORPORATION PLAINTIFF,

VS: ORDER

RED CHIEF COAL, INC.,
ET AL DEFENDANTS.

* * * * * * * * * * *

All responsive pleadings having been filed, the above-styled action is hereby set for preliminary conference to be held in the Courtroom of the United States Courthouse, Pikeville, Kentucky, on the 24th day of March, 1983, at the hour of 2:00 P.M.

On or before the 10th day of March, 1983, each party shall prepare and file with the Court a preliminary trial memorandum as set forth by standing order of this Court, dated the 22nd day of September, 1980, a copy of which is attached hereto.

The Court suggests the presence of both party and counsel at the preliminary conference, but same is not mandatory if inconvenient to the party.

Failure to comply with the terms of this order will result in appropriate sanctions.

ORDERED this 9th day of November, 1982.

G. WIX UNTHANK, JUDGE