IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

VANDALIA CAPITAL, II, LLC, UNITED BANK, INC., RALPH BALLARD, III, STEPHEN B. FARMER, DAVID P. FERRETTI, SHAWN P. GEORGE, MARK A GRIMMETT, ROBERT HUGGINS, ANDREW B. JORDAN, R. SCOTT LONG, ANDREW A. PAYNE, III, ROOKE ASSET PARTNERS, LP, ANDREW K. ROOKE AND TIMOTHY K. WILCOX

Plaintiffs

v.

Civil Action No. 13-C-570
Presiding: Paul T. Farrell
Resolution: Russell M. Clawges Jr.

DAVID P. PRAY, INDIVIDUALLY AND AS TRUSTEE OF THE DAVID P. PRAY REVOCABLE TRUST, DAVID P. PRAY REVOCABLE TRUST, AND JOHN/JANE DOE,

Defendants,

v.

THE WOODS DEVELOPMENT COMPANY, LLC,
Third-Party Defendant.

ORDER NARROWING ISSUES, GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF UNITED BANK'S MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF VANDALIA'S MOTION TO DISMISS COUNTERCLAIMS, AND NOTICE OF TELEPHONIC STATUS AND SCHEDULING CONFERENCE

The Court has received "United Bank, Inc.'s Motion to Dismiss David P. Pray's and the David P. Pray Revocable Trust's Counterclaim and Incorporated Memorandum of Law," the "Vandalia Capital II, LLC's Motion to Dismiss Counterclaims of David P. Pray and the David P. Pray Revocable Trust," and "The Woods Development Company, LLC's Joinder in United Bank, Inc.'s Motion to Dismiss David P. Pray's and The David P. Pray Revocable Trust's Counterclaim." In response to this Court's Order of February 19, 2015, the parties have also submitted briefs setting forth arguments with respect to five issues. The Court has received the

"David P. Pray and the David P. Pray Revocable Trust's Opening Brief on Issues to be Adjudicated by the Court," the "Plaintiffs' Brief in Support of Their Requested Judicial Declarations," the "David P. Pray and the David P. Pray Revocable Trust's Answering Brief in Opposition to Plaintiffs' Issues to be Adjudicated by the Court," and the "Plaintiffs' Brief in Opposition to Opening Brief of David P. Pray and the David P. Pray Revocable Trust."

The Court held a hearing on June 24, 2015, for oral clarification of the matters. The Court instructed the parties to submit findings of facts and conclusions of law to assist with its narrowing of the issues, including the respective motions to dismiss and motion for summary judgment since evidence had been incorporated into some of the motions and briefs. The Court received the Plaintiffs' Proposed Order Ruling on Dispositive Legal Issues as well as a proposed Order Granting David P. Pray and the David P. Pray Revocable Trust's Motion for Summary Judgment and Denying Plaintiffs and Third-Party Defendant's Motion for Summary Judgment. The Plaintiff then filed Objections to the Pray Defendants' Proposed Order Granting David P. Pray and The David P. Pray Revocable Trust's Motion for Summary Judgment and Denying Plaintiffs and Third-Party Defendant's Motion for Summary Judgment.

Plaintiffs objected to the proposed order of David P. Pray and the David P. Pray Revocable Trust (hereafter collectively referred to as "Pray" or "the Pray Defendants") on the grounds, *inter alia*, that it exceeds the case management and scheduling order wherein the Court ordered the parties to brief five legal issues for decision by the Court. However, the Defendants' Opening Brief set forth his request for Summary Judgment and the Court and parties have had reasonable opportunity to present all materials made pertinent to the motion and no litigant should be taken by surprise. Plaintiff also cites dicta from the Court in the last hearing, that the

Court didn't think summary judgment was appropriate at the time, however this was not a ruling and the Court clarified that "I think that's the posture I see it now, and I'm happy to change if you can convince me otherwise." Accordingly, the Court proceeds to adjudicate the matters laid before it seeking to narrow the issues for trial.

Summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. *San Francisco v. Wendy's Int'l Inc.*, 221 W.Va. 734, 750, 656 S.E.2d 485 (2007). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 9, *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.* However, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.*

Before addressing Pray's Counterclaim and Third Party Complaint, this Order will deal with the motions and memorandum regarding Pray's alleged obligations. The Pray Defendants are alleged to have breached two distinct obligations: One to Vandalia and/or its members who allegedly agreed amongst themselves that they would make semiannual interest payments to

United, through Vandalia, for the benefit of the Woods and to prevent the Loan from being called, and two, to United, who entered into an agreement with Pray as a guarantor, allegedly requiring him to keep a letter of credit or equivalent in place.

First the Court will take up the Pray Defendants' argument that Vandalia members cannot be required to contribute additional capital. Pray seeks a determination to the effect that Counts I (Declaratory Judgment Request by Vandalia and Vandalia Members Against the Pray Defendants), II (Claim for Breach of Contract Against the Pray Defendants by Vandalia and the Vandalia Members) and III (Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Against the Pray Defendants by Vandalia and the Vandalia Members) of the Amended Complaint fail as a matter of law and must be dismissed because the Pray Trust, which is a member of Vandalia, cannot be required to provide additional capital under the terms of the Vandalia Operating Agreement. It is without question that the Vandalia Operating Agreement, as drafted, does not require capital calls from its members. However, it has not been established that the members have not, by their joint agreement and actions, created an agreement outside of the Operating Agreement. The operating agreement and tax classification may be presented as evidence for a jury to consider what the parties intended at the time of agreement, but the Court cannot conclude as a matter of law that any such agreement would be unenforceable by virtue of the earlier executed Operating Agreement. Accordingly, the Court cannot dismiss the claims against Pray Defendants on this ground.

Second, the Court will address whether United Bank may look to secondary guarantors, i.e., Pray, without first declaring default against the principal borrower and accelerating the loan at issue. This particular controversy presents two issues: One, whether United may now assert a

breach of contract claim with respect to Pray's Guaranty, even though United has not made a declaration of default and accelerated the Loan, and two, whether Pray's Guaranty requires him to contribute to Loan payments to United given the Woods' inability to make payments, even though United has not declared a default and accelerated the Loan.

"Our traditional rule of contract interpretation is that a valid written agreement using plain and unambiguous language is to be enforced according to its plain intent and should not be construed." *Toppings v. Rainbow Homes, Inc.*, 200 W. Va. 728, 733, 490 S.E.2d 817, 822 (1997). In general, the "function of the court is to interpret and enforce written agreements and not to make, extend or limit the written agreement." *Id.* If on the other hand, the court determines the contract language to be ambiguous, then there may be interpretive facts in genuine issue, requiring deliberation by a jury. *Id.* citing *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir.1993). In Syllabus Point 13 of *State v. Harden*, 62 W.Va. 313, 58 S.E. 715 (1907), the Supreme Court of Appeals of West Virginia gave the following definition of ambiguity:

> Ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.

Here, the contract is unambiguous and the Court may properly interpret the contract as a matter of law and grant summary judgment.

The language of the Guaranty is clear: default of the Principal, The Woods, is not a prerequisite to default of the guarantor. Under the terms of the contract, Pray may be in default under his Guaranty, as opposed to a default under the Loan itself, due to his direct obligations to United.

> 8. DEFAULT. I will be in default if any of the following occur:
>
> ...
>
> K. Property Transfer. I transfer all or a substantial part of my money or property.
>
> L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.
>
> M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

The events that signify a breach of Pray's Guaranty under paragraph eight are specifically calculated to allow United to take action against Pray to protect its interests with respect to the Loan without ever declaring a default and accelerating the Loan. For example, one event of default specified in Pray's Guaranty occurs when Pray "transfer[s] all or a substantial part of [his] money or property." Similarly, another event of default occurs when United "determine[s] in good faith that a material adverse change has occurred in [Pray's] financial condition from the conditions set forth in [his] most recent financial statement before the date of [his] Guaranty." These provisions are clearly designed to enable United to take action against any specific Guarantor, including Pray, to preserve United's ability to recover from him well in advance of any declaration of default and acceleration of the Loan itself. Otherwise, Pray, or any Guarantor, could prejudice United and the other Guarantors by failing to comply with his Guaranty, or siphoning off critical assets, or otherwise failing to comply with its express terms.

Count VII of the Amended Complaint alleges a claim based upon fraudulent transfers, a material depletion of assets that jeopardize United's ability to recover from Pray in the event the Loan is declared in default and accelerated. Whether Pray has defaulted on any of these personal obligations to United, are issues of fact reserved for the jury.

A separate issue is whether Pray has been obligated to contribute a *pro rata* share toward each Loan payment since autumn of 2009 as a result of the Woods' inability to pay its loan payments as they become due. United argues that Wood's inability to make Loan payments — and the consequent remittance of Loan payments by others on its behalf — is an "event of default." Section five of the Loan Agreement defines the following as an event of default: "The Borrower does not pay the Bank any interest or principal on the Loan or any other obligation hereunder within 10 days after the date due…" The Loan Agreement also defines an event of default, *inter alia*, as "[t]he Borrower is generally not paying its debts as they become due…" An event of default gives the Bank the option to "accelerate the Loan" and "exercise any or all of the rights of the Bank under the Loan Documents, and/or the Bank's rights as a secured party under the Uniform Commercial Code ("UCC") and applicable laws upon default by a debtor, and/or otherwise available to the Bank at law or in equity…" It is undisputed that United has not exercised the option to accelerate the Loan. Pray's Counterclaim and Third Party Complaint seeks declaration that the Woods is in default but the clear language of the Loan Agreement gives United Bank the *option* of accelerating the loan when the alleged events of default occur, for example, those events described in sections 5(a)(i) and and distinguishes between these

discretionary events and the automatic triggers of default as described in sections 5(a)(viii) and (a)(ix).

> (a) Events of Default. If any of the following events (each, an "Event of Default") shall occur, then the Bank may, without further notice or demand, accelerate the Loan and thereupon the Loan shall become immediately due and payable (except that the Loan shall become automatically due and payable upon the occurrence of an event described in Sections 5(a)(viii) and (a)(ix) below):
>
> (i) The Borrower does not pay the Bank any interest or principal on the Loan or any other obligation hereunder within 10 days after the date due, whether by reason of acceleration or otherwise; or
>
> ...
>
> (vi) The Borrower is generally not paying its debts as they become due; or
>
> ...
>
> (viii) The Borrower applies for the appointment of a trustee or receiver for any part of its assets or commences any proceedings relating to the Borrower under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or other liquidation law of any jurisdiction; or any such application is filed, or any such proceedings are commenced, against the Borrower, and the Borrower indicates its approval, consent or acquiescence thereto; or an order is entered appointing such trustee or receiver, or adjudicating the Borrower bankrupt or insolvent, or approving the petition in any such proceedings, and such order remains in effect for 30 days; or
>
> (ix) Any order is entered in any proceedings against the Borrower decreeing the dissolution of the Borrower, or

Instead, United has allowed Vandalia Members to pay the interest payments as they become due for the benefit of the Borrower. Furthermore, it is undisputed that United has received full payment of the loans from the Vandalia members even once Defendants ceased contributing to the payments. In other words, with respect to loan payments, United Bank has not been damaged.

Under the terms of the Guaranty, United is granted wide discretion from whom to collect the debt. Pray agrees that he is "unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower... You may sue me alone, or anyone else who is obligated on this Guaranty or any number of us together, to collect the Debt." However, the Debt has yet to become overdue. The only amount due has been the interest payments, which Vandalia members have paid. Therefore, regardless of whether an event of default has occurred as related to the Wood's inability to pay, United itself has not been damaged with regard to the loan payments. While the contributing Vandalia Members/Co-Guarantors may have a right of contribution against Pray, United cannot recover on this ground and dismissal of Count IV (Declaratory Judgment Request by United Bank Against the Pray Defendants) of the Amended Complaint is appropriate. For the same reasons, neither can this Court declare the Woods in default as the Defendant Pray has not alleged an act which triggers non-discretionary default and acceleration.

The third issue before the Court also concerns Pray's obligations under the Guaranty, but allegedly stems from Pray's duty to *perform* the terms of the Loan in the event of the Borrower's inability to do so. United asserts that Pray has a contractual duty to provide it with a letter of credit in the amount of $1,088,000. United does not claim that the signed Guaranty explicitly

requires Pray to keep this collateral in place; that obligation has already expired. Instead, United argues that in allowing his letter of credit to expire as allowed in the guaranty the Borrower had the duty to replace the collateral. Because the Borrower was unable to do so, that duty then transfers to the Guarantors.

> [A]lthough the Loan Agreement informs the identification and interpretation of Pray's duties, he was not a party to it. As a result, the requirements and obligations mandated in the Loan Agreement ultimately fall on WDC. Thus, when Pray's letter of credit lapsed, the ultimate duty to replace it fell on WDC. To the extent WDC was unable to make Loan payments, it obviously could not have posted a letter of credit to replace Pray's letter of credit. Given WDC's inability to perform this obligation, the responsibility to post a letter of credit would have fallen upon Pray in his capacity as a Guarantor of the "payment and performance' of the Loan.

While a reduction of collateral may well be considered "damage" in a banking breach of contract claim, here, United Bank has not been damaged. It has been alleged and not disputed that Vandalia Members and/or Co-Guarantors bolstered the Loan Agreement with additional collateral, including letters of credit, when Pray allowed his letter of credit to lapse. Pray has also alleged the Loan is actually secured by more collateral than before Pray withdrew his financial support by virtue of the other guarantors rescue. The Plaintiffs did not respond to this allegation and rested only on the Loan's requirements and points to Pray's prior performance for five years. When evaluating contractual breaches, Courts look to put the innocent non-breaching party in the position it would have been in but for the breach. If United has been adequately secured, it has no grounds to assert a breach of contract claim on this particular obligation. Therefore, the contributing Vandalia Members/Co-Guarantors may have a right of contribution against Pray, but United cannot recover on this ground at this time. If United had presented evidence to the

contrary, that it has not been adequately secured, or that it would have obtained the additional collateral regardless of Pray's withdrawal of support, then the issue of damages would have been appropriate for review by a jury. Because United Bank has not, there are now no genuine issue of material fact in dispute and this Court must grant summary judgment on Count V of the Amended Complaint.

Fourth, this Court examines Defendants' assertion that the Co-Guarantors' contribution claims lack merit because Vandalia paid the loan payments, not the individual guarantors. However, there is no appreciable difference between the members of Vandalia and the Co-Guarantors. Defendants' argument puts too much emphasis upon the mechanism chosen to continue funding the Project, rather than on the intent and understanding of the parties regarding the nature and purpose of the underlying agreement as well as the necessity of continuing such funding so as to forestall a payment default and potential call upon the Guaranties. Defendant's Opening Brief points to evidence such as meeting minutes and tax returns to argue what the parties intentions were at the time of the agreement's formation. While this evidence is appropriate for a jury, the court cannot determine intent from these ambiguous documents. At the very least, additional discovery is warranted on the intent and understanding of the parties regarding the nature of the agreement to continue funding the Project. Because this point focuses on what the parties agreed to at the time of agreement, an issue of fact, not law, the Court is not in the position to conclude that the parties intended to limit future claims of contribution to Vandalia alone. Consequently, the Court at this juncture denies the request of the Pray Defendants to dismiss Count VIII on the basis that the subject interest and tax payments were treated as capital contributions for tax purposes.

The fifth issue this Court will address is whether the Co-Guarantor Plaintiffs' claims of contribution are ripe. Defendants argue that a clause in the identical guaranties require the Co-Guarantors to withhold any contractual right of contribution until after the Debt has been completely and finally satisfied. Plaintiffs argue that this language is misinterpreted by the Defendants and supports the Plaintiffs' current claims for contractual contribution and restitution. The Pray Defendants also argue that Count VIII makes reference only to an equitable claim for contribution, and does not expressly rely upon the contractual rights set forth in the guaranties. Plaintiffs respond that the Court must liberally construe pleadings at this stage and that an equitable right to contribution also arises under the facts plead.

At this juncture, it is only necessary to determine if the identical guaranties exclude all claims of contribution until the debt is completely satisfied. The Court concludes that the Guaranties do not impose such a limitation even as to the contractual contribution rights created by the Guaranties. A review of the entire paragraph shows that the guaranty seeks to bolster the right of contribution, and does not give a non-contributing co-guarantor an extended grace period.

The "Contribution Among Member Guarantors" paragraph provides, in pertinent part, that

> (a) Each Member Guarantor shall promptly contribute his 100% proportion of any and all Debt due hereunder to Beneficiary and shall deal with all other Member Guarantors in good faith, in order to ensure that all liability for Debt hereunder shall be shared equally among the Member Guarantors.
> (b) This Section of the Guaranty provides to Member Guarantors the benefits and obligations of contractual contribution and restitution as to all future payments made by Member Guarantors, or any of them, to Beneficiary by reason of this Guaranty, and each Member Guarantor shall have a cause of

> action against every other Member Guarantor to enforce his or its rights hereunder. Member Guarantors hereby waive any right to assert in any manner against the other Member Guarantors any claim, defense, counterclaim and off-set of any kind or nature, whether legal or equitable, that the Member Guarantors, or any of them, may now or at any time hereafter have against one or more of the other Member Guarantors.
>
> (c) Each of the Member Guarantors agrees to pay, forthwith and on demand made after the Debt has been completely and finally satisfied, all amounts rightfully owing pursuant to the terms hereof to the demanding Member Guarantors.

Language relied upon by the Pray Defendants, which speaks of a waiver of "any claim, defense, counterclaim and setoff of any kind or nature that the Member Guarantors, or any of them, may now or at any time hereafter have against one or more of the other Member Guarantors," is clearly intended to bolster the right of contribution created by the Guaranties by prohibiting the various Guarantors from evading such obligations by interjecting matters that lay outside the scope of the respective Guaranties. Pray Defendants assert that subsection (c) of the Guaranty should be interpreted to preclude a demand until after the Debt has been completely and finally satisfied. However, subsection (c) does not provide the requested delay. The clause gives contributing members contractual right but does not limit equitable right to contribution. Defendants' proposed interpretation would clearly frustrate the requirement that "[e]ach Guarantor shall promptly contribute his 100% portion of any and all Debt due hereunder to Beneficiary [United] and shall deal with all other Guarantors in good faith, in order to ensure that all liability for Debt hereunder shall be shared equally among the Guarantors."

Neither does paragraph nine of the Guaranty limit the instant claims of contribution against Defendants Pray. The "Waivers and Consent" paragraph states in pertinent part, that

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

...

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or any other guarantor or as to any Property.

An overview of the purpose of the "Waivers and Consent section" shows that the "Additional Waivers" are drafted to protect United Bank from a guarantor's defenses to collection. The temporary waiver of contribution is limited to that temporary waiver of contribution to enforce the bank's remedy: "any other right I may have to enforce any remedy which you [,United Bank,] now have or in the future may have..." Here, the Co-Guarantors seek to enforce their own right of contribution against the Pray Defendants. Therefore, section nine is inapplicable to the current claims between the Co-Guarantors

Consequently, the language of the identical guaranties simply do not support the Pray Defendants' argument that the contractual right of contribution ripens only after the Debt owed United has been fully satisfied.

This leaves the question of whether the Co-Guarantors may now assert a right of contribution against Pray for the interest payments each has provided in order to prevent the Loan from being declared in default and accelerated.

The doctrine of contribution is rooted in equitable principles. *Beverly v. Thompson*, 229 W. Va. 684, 735 S.E.2d 559 (2012). "The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." *Id.* quoting Syl. pt. 4, in part, *Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982). In Beverly v. Thompson, two co-guarantors on promissory note signed to pay the debts of parties' failed corporation brought action against third co-guarantor seeking contribution following their payment of note with their personal funds. *Beverly*, 229 W. Va. at 685. However, West Virginia case law does not require a judgment before a right to contribution arises among co-guarantors.

In *Beverly*, it was undisputed that the corporation could not pay its debts. *Id.* The two guarantors made monthly payments from their personal funds until the loan was satisfied. *Id.* The third guarantor contended that the judgment entered against him should be set aside because, as a guarantor, his liability was to the lender, not to the respondents. *Id.* The Supreme Court of Appeals of West Virginia found that equitable contribution was warranted. *Id.* Although the respondents paid the promissory note without a judgment having been entered against the corporation or against them personally, the Court found grounds for contribution in Code and case law. *Id.* [1] The Court noted that the insolvency of the principal borrower was undisputed. *Id.*

---

[1] W.Va.Code, 45 1–6 [1923]. "Suretyship and Guaranty," provides:
If the principal debtor be insolvent, any surety or guarantor (or his committee, personal representative or heir) against whom a judgment or decree has been rendered on the contract in which he was surety or guarantor, may

Rather than waiting to be personally sued, "the respondents acted in a timely manner and began repaying the debt from their own funds." *Id.* [2] "Thus, under the facts herein, the [two guarantors] who have paid the entire debt, have a cause of action for contribution against [the third]." *Id.* Accordingly, under the law of West Virginia, co-guarantors who personally pay loan payments prior to default, acceleration, and law suit, may seek contribution from their co-guarantors. This paired with a guaranty that bolsters the co-guarantors rights of contribution requires this court to reject Defendants Pray's request to dismiss the Plaintiffs claims.

Sixth, this Court will address Count II of the Counterclaim, a "lender liability" claim, asserted as a derivative claim on behalf of Vandalia. This claim is premised on the assertion that "United Bank knew or should have known that its first appraisal was inaccurate and overvalued." Pray alleges that Vandalia would not have agreed to the transaction if it knew that the Property was worth less than $26 million. However, Count II must fail as a matter of law because United owed neither Vandalia nor Pray any duty with respect to any appraisal.

A Lender is not required to inform borrowers or guarantors of inspection or appraisal information without the existence of a special relationship. According to the Supreme Court of Appeals of West Virginia, its rulings:

> should not be taken to mean that a traditional lender is in any way the insurer of the property that is the subject of the loan.

---

obtain a judgment or decree by motion, in the court in which such judgment or decree was rendered, against any cosurety or coguarantor (or his committee, personal representative or heir) for his share, in law or equity, of the amount for which the first-mentioned judgment or decree may have been rendered; and if the same has been paid, for such share of the amount so paid, with interest thereon from the time of such payment.

[2] "*See, Estate of Bayliss v. Lee*, 173 W.Va. 299, 303, 315 S.E.2d 406, 410 (1984) (Ordinarily, where two parties are co-obligors on a note and one party pays a disproportionate share of the joint obligation, he is entitled to contribution from his co-obligor.); syl. pt. 1, in part, *McKown v. Silver*, 99 W.Va. 78, 128 S.E. 134 (1925) (As a general rule, where one joint endorser pays off and discharges the obligation of all, he may enforce contribution against the others)." *Id.*

> Nor is the lender an insurer of the work performed or of an inspection or appraisal conducted on its behalf.

Glasscock v. City Nat'l Bank of West Virginia, 213 W. Va. 61, 67, 576 S.E.2d 540, 546 (2002). Instead, the imposition of a tort duty requires far more than the normal lender-borrower-guarantor relationship. In particular, there must be circumstances that give rise to a "special relationship" between the lender and its borrower. *Id.* at 15. The Supreme Court of Appeals of West Virginia has not delineated a clear, black-letter rule for when a special relationship does or does not exist, but has given guidelines for the courts to follow.

> The existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general. It may be evident from the defendant's knowledge or specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered. Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus.

White v. AAMG Const. Lending Ctr., 226 W. Va. 339, 347, 700 S.E.2d 791, 799 (2010), quoting *Eastern Steel Constructors*, 209 W.Va. 392, 549 S.E.2d 266. In *Glassock,* the bank was significantly involved in the construction project- wherein the borrowers had to present receipts or bills to the bank before the bank would disburse each installment of funds. Here, United Bank was a traditional lender only. Vandalia and its members were not treated any differently from any other guarantor. There are no allegations that would establish that United (or anyone else) had any reason to know that Vandalia or Pray would be receiving and relying upon any appraisal report. Syl. Pt. 1, *First Nat'l Bank of Bluefield v. Crawford*, 182 W. Va. 107, 386 S.E.2d. 310 (1989). In fact, all of the guarantors represented and warranted that they had not relied on any

statements or other information provided by United Bank when signing their guaranties. For these reasons, it is clear to this Court, as a matter of law, that there was no special relationship between the parties sufficient to create a special duty upon United Bank. Accordingly, Count II of the counterclaim fails as a matter of law.

The seventh issue before this Court requires an examination of Count III of the Counterclaims. Pray alleges fraud against Vandalia through one its members, David Ferretti. Ferretti purportedly knew that Pray did not want to further contribute to the project unless the Woods or an individual affiliated therewith posted similar security for the loan. Pray Defendants do not allege that Ferretti instructed Pray that security had been posted but simply complain that "Vandalia, through Ferretti or its managers, had an obligation to inform Pray and the Trust that Woods [Development] or an individual affiliated with Woods failed or was relieved of posting similar security for the loan." Pray does not cite any legal basis for such an obligation. Pray's initial objection to participation did not place any duty recognized in law upon Vandalia to advise Pray what other security would be posted.

Under West Virginia law, "[t]he essential elements in an action for fraud are: `(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; [3] that plaintiff relied on it and was justified under the circumstances in relying upon it; and [4] that he was damaged because he relied on it.'" *Folio v. City of Clarksburg*, 221 W. Va. 397, 404, 655 S.E.2d 143, 150 (2007) (citing *Horton v. Tyree*, 104 W. Va. 238, 139 S.E. 737 (1927)). These elements must be proven by clear and convincing evidence. See, e.g., *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992). Admittedly, West Virginia law recognizes that "`an action for fraud can

arise by the concealment of truth.' " *Teter v. Old Colony Co.*, 190 W. Va. 711, 717, 441 S.E.2d 728, 734 (1994) (quoting *Thacker v. Tyree*, 171 W. Va. 110, 113, 297 S.E.2d 885, 888 (1982)). "Fraud is the concealment of the truth just as much as it is the utterance of a falsehood." *Frazer v. Brewer*, 52 W.Va. 306, 310, 43 S.E. 110, 111 (1903); see also *Smith v. First Community Bancshares, Inc.*, 212 W. Va. 809, 822, 575 S.E.2d 419, 432 (2002). However, to go forward with a claim of fraudulent concealment, a plaintiff must allege and prove that the defendant's silence was motivated by an intent to mislead or defraud: "Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002) (citing *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852, 857 (1991)).

In this case, the Pray Defendants have not alleged that Vandalia or its agents made any affirmative misrepresentations upon which they relied, that any fraudulent promises were made by Vandalia concerning the structure of the transaction, or that the purported silence regarding the security being offered by Woods Development or persons affiliated with it was accompanied by an intention to mislead or defraud. Likewise, nowhere have the Pray Defendants alleged that Vandalia or anyone affiliated with it has ever attempted to intentionally conceal the persons or entities that would be providing security for the loan. Rather, these defendants simply allege that Vandalia, through one its members, David Ferretti, purportedly knew that their involvement in the subject transaction was contingent upon Woods Development or an individual affiliated therewith posting "similar security" for the loan, and that Pray and the Trust relied upon Mr. Ferretti's and Vandalia's "understanding of their conditions when they [the Pray Defendants]

agreed to move forward with the transaction." Based upon this alleged "understanding" on the part of Vandalia, the Pray Defendants aver that "Vandalia, through Ferretti or its managers, had an obligation to inform Pray and the Trust that Woods [Development] or an individual affiliated with Woods failed or was relieved of posting similar security for the loan," and that such purported obligation was not fulfilled.

Count III is at best attempting to state a claim for fraud by omission or non-disclosure, since the Pray Defendants are in essence asserting that Vandalia, having purportedly been made aware of their requirements for entering into the transaction, had a duty to inform them that such conditions were not being satisfied. While active concealment may constitute fraud, mere silence is not sufficient in the absence of a legal duty to disclose information. See *Wilson v. Donegal Mutual Insurance Co.*, 598 A.2d 1310, 1315-16 (Pa. Super. 1991); *Matter of Estate of Evasew*, 526 Pa. 98, 105, 584 A.2d 910, 913 (1990) (fraud by omission is actionable "only where there is an independent duty to disclose the omitted information."); see also *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W. Va. 169, 175, 503 S.E.2d 258, 264 (1998) ("In a circumstance in which a person has a duty to speak, his failure to disclose material information is equivalent to a fraudulent concealment.") (citation omitted) (Workman, J. concurring).

The allegations made by the Pray Defendants, even if assumed as true, simply do not support an actionable claim of fraud by omission. In essence, the Pray Defendants are asserting that because they voiced their insistence that the subject transaction should be structured in a certain way, they were entitled to express and independent notice of any deviation therefrom. Under the circumstances evident in this case, particularly where information regarding the

concerns purportedly voiced by Pray and the Trust were readily ascertainable from a review of the documents executed in connection with the transaction, there is simply nothing supporting a contention that Vandalia owed a legal duty to the Pray Defendants to expressly make sure that they were aware of how the deal was being collateralized. Accordingly, Count III of the Counterclaim fails as a matter of law. Therefore, Vandalia's request to dismiss Pray's third counterclaim should be granted.

Eighth and finally, the Court examines the Count V of the Counterclaim wherein the Pray Defendants assert a cause of action for set-off and recoupment based upon their prior claims of fraud. However, the fraud claim fails to state a viable claim based upon the lack of any duty on the part of Vandalia to provide notification regarding the security being provided by Woods Development and/or persons or entities affiliated with it. Consequently, the failure of the underlying fraud claim on grounds other than statute of limitation necessitates dismissal with regard to any claim or defense asserted against Vandalia under Count V of the Counterclaim.

THEREFORE, the Court ORDERS, that the following narrowing of issues is appropriate: Defendants request to dismiss Counts I (Declaratory Judgment Request by Vandalia and Vandalia Members Against the Pray Defendants), II (Claim for Breach of Contract Against the Pray Defendants by Vandalia and the Vandalia Members) and III (Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Against the Pray Defendants by Vandalia and the Vandalia Members) of the Amended Complaint are DENIED; Defendants request to dismiss Count IV (Declaratory Judgment Request by United Bank Against the Pray Defendants) and Count V (Breach of Contract/Third-Party Beneficiary Asserted by United Bank Against the Pray Defendants) of the Amended Complaint are GRANTED; Defendants request to dismiss Count

VIII (Equitable Contribution Against Pray Defendants Asserted by the Vandalia Co-Guarantors) of the Amended Complaint is DENIED; Plaintiffs' request to dismiss Count II (Lender Liability Against United Bank), Count III (Fraud Against Vandalia), and Count V (Set-off or Recoupment Against United Bank and Vandalia) of the Counterclaim and Third Party Complaint are GRANTED. The objections and exceptions of the parties are noted for the record.

In summation, the following claims are hereby DISMISSED:

- Count IV of the Amended Complaint- Declaratory Judgment Request by United Bank Against the Pray Defendants;
- Count V of the Amended Complaint- Breach of Contract/Third-Party Beneficiary Asserted by United Bank Against the Pray Defendants;
- Count II of the Counterclaim and Third Party Complaint- Lender Liability Against United Bank;
- Count III of the Counterclaim and Third Party Complaint- Fraud Against Vandalia; and
- Count V of the Counterclaim and Third Party Complaint- Set-off or Recoupment Against United Bank and Vandalia.

Hence, the following claims remain before the Court:

- Count I of the Amended Complaint- Declaratory Judgment Request by Vandalia and Vandalia Members Against the Pray Defendants;
- Count II of the Amended Complaint- Claim for Breach of Contract Against the Pray Defendants by Vandalia and the Vandalia Members;
- Count III of the Amended Complaint- Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Against the Pray Defendants by Vandalia and the Vandalia Members;

- Count VI of the Amended Complaint- Malicious Conduct and Common Law Bad Faith;
- Count VII of the Amended Complaint- Fraudulent Transfers Involving David Pray and Jane/John Doe;
- Count VIII of the Amended Complaint- Equitable Contribution Against Pray Defendants Asserted by the Vandalia Co-Guarantors;
- Count I of the Counterclaim and Third Party Complaint- Declaratory Judgment Against United Bank and the Woods; and
- Count IV of the Counterclaim and Third Party Complaint- Indemnification/Contribution Against Woods.

The Court further provides NOTICE that a Telephonic Status and Scheduling Conference shall be held on May 5, 2016 at 2:00 p.m. Participants will call 1-877-278-2734 and will use participant code 318815.

The Clerk is instructed to forward attested copies of this Order to all counsel of record; resolution judge, the Honorable Russell M. Clawges Jr. at the Monongalia County Courthouse, 243 High Street, Morgantown, West Virginia 26505; and the Business Court Division Central Office at 380 W. South Street, Suite 2100, Martinsburg, West Virginia.

4/5/16
✓ SS
MS
✓ JC
SK
L Allen BM

ENTER: March 31, 2016

PAUL T. FARRELL
BUSINESS COURT DIVISION