No. 11-1188 – *Beverly v. Thompson*

FILED
November 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting:

In the name of "equity," the Majority confuses well-established guaranty law, reaching a confounding result. Historically, "[t]he purpose of a loan guaranty is to assure the lender that, in the event the borrower defaults, the lender will have someone to look to for reimbursement." 38A C.J.S. *Guaranty* § 161 (2008). "[A] guarantor's liability does not begin until the principal debtor is in default." Black's Law Dictionary 724 (8th ed. 2004). The relationship between a guarantor and lender is collateral to the relationship between the lender and the borrower. *See* Black's Law Dictionary 1482 (8th ed. 2004) ("[T]he contract of the guarantor is his own separate undertaking, in which the principal does not join.").

With its holding, the Majority's opinion now establishes a right by which a guarantor may obtain contribution from a co-guarantor even though there has been no default by the principal on the loan. The Majority relies, I submit, on an inaccurate reading of our law and a selective consideration of the facts.

The Majority begins its analysis by quoting W. Va. Code § 45-1-6 (1923):

> 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 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.

(Italicized emphasis by the Majority, boldface emphasis original to this dissent). The Majority seizes on the "equity" language contained in W. Va. Code § 45-1-6, but gives no effect to the requirement that a judgment or decree must be rendered on the contract, as a result of the principal's default, before a co-guarantor can be found liable in law or equity. By doing so, the Majority overlooks a necessary statutory prerequisite to a consideration of equity which is simply *not* present in this case. Prior to any consideration of equity, the statute specifically sets forth that a co-guarantor has no obligation to pay anything to anyone unless the principal debtor is in default and "a judgment or degree has been rendered on the contract." In the case *sub judice*, the loan was completely repaid. The principal did not default on this loan, and no judgment or decree was entered on the loan.

Throughout its opinion, the Majority describes B & T Services as having numerous debts, including tax liability, making the business insolvent. B & T Services never filed for bankruptcy and was never found, as a matter of law, unable to pay its debts. The Majority's focus on the other debts of B & T Services is completely *irrelevant*. Mr. Beverly cannot be responsible for those debts because he was not a

shareholder of the business. By focusing on B & T Service's other debts, the majority misses the very narrow issue in this case: whether a guarantor can be found liable for contribution to a co-guarantor on a loan that has been completely repaid and was never in default. Prior to the Majority's decision in this case, the answer to that question was, "No."

The Majority's reference to secondary sources and case law regarding contribution is misplaced. Absent from this analysis is a recognition that in each of these sources, there is no right to contribution *unless the principal has defaulted on the loan* and *a judgment or decree has been entered* to that effect. 38A C.J.S. *Guaranty* § 161 (2008) (referring only to cases in which the principal defaulted on a loan); 38 Am. Jur. 2d *Guaranty* § 101 (2010) (referring only to cases in which payments made by co-guarantors were made upon default of the principal); *Estate of Bayliss v. Lee*, 173 W. Va. 299, 303, 315 S.E.2d 406, 410 (1984) (dealing with payment of an unpaid debt following bankruptcy proceedings); *McKown v. Silver*, 99 W. Va. 78, 128 S.E.2d 134 (1925) (dealing with a note upon which the principals had defaulted). There is no support in these sources for the Majority's proposition that a co-guarantor's right to contribution exists where there has been no default.

Prior to this case, a co-guarantor could not be held liable in West Virginia for a debt unless the principal was unable to pay the loan and a judgment or decree was entered such that the lender could collect from the guarantor(s). To the extent that the

Majority opinion now holds otherwise and creates unfortunate new legal precedent in doing so, I dissent.