

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

RCG LONGVIEW II, L.P.,	:	JUNE TERM, 2008
	:	
Plaintiff,	:	NO. 03586
	:	
v.	:	COMMERCE PROGRAM
	:	
UMAN REALTY, LLC and YEHUDA	:	Control No. 09042160, 09041808
LIEB PURETZ,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 3rd day of September, 2009, upon consideration of plaintiff's Motion for Summary Judgment, the response thereto, the briefs in support and opposition, and all other matters of record, it is **ORDERED** that said Motion is **GRANTED**. **JUDGMENT** is **ENTERED** against Yehuda Lieb Puretz and in favor of plaintiff in the amount of \$2,103,916.46, plus interest per diem from June 1, 2008, together with late charges, costs of suit, and reasonable attorneys' fees. Defendant Puretz's Motion to Amend is **DISMISSED** as **MOOT**.

BY THE COURT:

ARNOLD L. NEW, J.

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OPINION

Plaintiff, RCG Longview II, L.P. (“RCG”), made a mortgage loan of \$2 million (the “Loan”) to defendant Uman Realty, LLC (“Uman”). At the first closing on the Loan, Uman’s principal, Shraga Liebb (“Liebb”), and his uncle, defendant Yehuda Lieb Poretz (“Poretz”) executed a guaranty of the Loan in favor of RCG (the “Original Guaranty”). The first closing was aborted, and the Original Guaranty never became effective. Several days later, Poretz was asked to, and did, sign a guaranty that did not include Liebb (the “Poretz Guaranty”), and the loan to Uman closed. Liebb never signed another guaranty. Poretz claims he was not informed that Liebb would not be personally guaranteeing the Loan.

Uman defaulted on the Loan, and RCG filed the present action against Uman and Poretz. RCG has filed a Motion for Summary Judgment on its claim against Poretz seeking to recover the Loan amounts from Poretz under the Poretz Guaranty. In opposition to the Motion, Poretz claims the Poretz Guaranty is unenforceable against him for several reasons: 1) it is not supported by adequate consideration; 2) it was discharged due to impairment of collateral; and 3) he was induced to sign it by fraudulent omission. His arguments are unavailing.

The Puretz Guaranty recites: “in consideration of love and affection for [Liebb], [Puretz] desires to give such guaranty to [RCG] in order to induce [RCG] to make the Loan.” Puretz argues that “love and affection” is not adequate consideration. However, a loan of \$2 million is adequate consideration.

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.¹

As with most, if not all, guarantees, the guarantor in this instance did not receive the loan money directly. Instead, a guaranty serves as a necessary inducement to the lender to make the loan to the borrower. By giving the Guaranty, Puretz exchanged his promise to reimburse RCG in the future for RCG’s promise to pay \$2 million to Liebb. The Puretz Guaranty is supported by adequate consideration.

Puretz claims the Guaranty is voidable by him because he signed it under the mistaken belief that Liebb was giving a similar guaranty. He claims RCG had a duty to inform him that the security for the loan had changed and RCG’s failure to do so amounts to a fraudulent omission.

The elements of intentional misrepresentation are as follows: (1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. The tort of intentional non-disclosure has the same elements as

¹ Restatement (Second) Contracts, § 71 (1981).

intentional misrepresentation except in the case of intentional non-disclosure, the party intentionally conceals a material fact rather than making an affirmative misrepresentation.²

Puretz does not claim that his consent to the Original Guaranty was procured by fraud; he claims only the Puretz Guaranty was. Both Guarantees contain the following relevant terms:³

[F]or the purpose of inducing [RCG] to make the Loan to [Uman], the Guarantor:

1. Unconditionally and absolutely guarantees the due and punctual payment of the principal required to be paid pursuant to the Loan Documents, the interest thereon and any other monies due or which become due thereon . . .

2. Waives diligence, presentment, protest, notice of dishonor, demand for payment, extension of time for payment, notice of acceptance of this Guaranty, non-payment at maturity and indulgences and notices of every kind, and consents to any and all forbearances and extensions of the time of payment as set forth in the Loan Documents and Mortgage, to any and all changes in the terms, covenants and conditions thereto hereafter made or granted and to any and all substitutions, exchanges or releases of all or any part of the collateral therefor . . .⁴

* * *

4. Agrees that this Guaranty may be enforced by [RCG] without first resorting to or exhausting any other security or collateral or without first having recourse to the note(s) executed by [Uman] in favor of [RCG] or any of the property covered by the Loan Documents through foreclosure proceedings or otherwise . . .

5. Agrees that in the event this Guaranty is placed in the hands of an attorney for enforcement, the Guarantor will reimburse the Mortgagee for all expenses incurred, including without limitation, reasonable attorneys' fees.

* * *

8. If more than one person executes this Guaranty, the obligations of those persons under this Guaranty shall be joint and several. [RCG], in its sole and absolute discretion, may (a) bring suit against the Guarantors, or any one or more of the individuals constituting Guarantors, and any Other Guarantor, jointly and severally, or against any one or more of them; (b) compromise or settle with any

² Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

³ The two Guarantees contain the same terms, except in some, but not all, places in the Puretz Guaranty the word "Guarantors" was changed to "Guarantor." The use of both the plural and the singular does not, as Puretz argues, make the Puretz Guaranty ambiguous since it is clear from a reading of the entire Guaranty that he is the only guarantor covered by it.

⁴ By consenting to these terms, Puretz expressly waived the defense of impairment of collateral, so he cannot raise it here. *See* 13 Pa. C. S. § 3605 (a surety may waive its defense of impairment of collateral).

one or more of the individuals constituting Guarantors for such consideration as [RCG] may deem proper; (c) release any one or more of the individuals constituting Guarantors, or any other Guarantor, from liability; and (d) otherwise deal with Guarantor and any Other Guarantor, or any one or more of them, in any manner, and no such action shall impair the rights of [RCG] to collect from Guarantor any amount guaranteed by Guarantor under this Guaranty. . . .

Under the express terms of the Original Guaranty, RCG could release Liebb as guarantor and RCG could proceed against Puretz alone for the full Loan amount. Under the Puretz Guaranty, Puretz is clearly the only guarantor; he is the only person defined as “Guarantor” in the opening paragraph and there is only one signature line, with his name on it, at the end of the document.⁵ Therefore, under either Guaranty, Puretz agreed to be solely liable to RCG for the entire amount due from Uman. Liebb’s failure to execute a second guaranty of the Loan did nothing to change Puretz’s obligations to RCG. Since Puretz’s liability to RCG did not increase under the Puretz Guaranty, RCG’s failure to inform Puretz that Liebb would not be signing a guaranty was not an omission of a material term.

Furthermore, RCG had no duty to inform Puretz the terms of the deal had changed. “[M]ere silence without a duty to speak will not constitute fraud.”⁶ Puretz gave his Guaranty for Liebb’s benefit, so that Liebb’s company, Uman, could get the Loan. Puretz’s rights of contribution, indemnity, and subrogation, if any, are against Liebb/Uman. If anyone had a duty to inform Puretz that Liebb would not be guaranteeing the Loan, it was Liebb.

⁵ The elimination of Liebb as a signatory to the Puretz Guaranty should have put Puretz on notice that the guaranty terms of the Loan would be different than originally contemplated.

⁶ Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. 2003).

For all the foregoing reasons, RCG's Motion for Summary Judgment against Puretz is granted. As set forth above, Puretz's defense of fraud has no merit even if all the facts he alleges in his proposed Amended New Matter are true. Therefore, his Motion to Amend is moot.

BY THE COURT:

ARNOLD L. NEW, J.