JEROME G. TERRACINO ET AL. *v.* GORDON AND HILLER ET AL.
(AC 29837)

Flynn, C. J., and Lavine and Peters, Js.*

Argued October 27, 2009—officially released June 22, 2010

(Appeal from Superior Court, judicial district of Danbury, Shaban, J.)

Michael S. Lynch, for the appellants (plaintiffs).

Robert W. Cassot, with whom, on the brief, were *Cristin E. Sheehan* and *Kristine R. Jones*, for the appellees (defendants).

PETERS, J. This case lies at the intersection of two principles of the law of suretyship. One principle permits a guarantor expressly to waive common-law defenses to his liability for the debt of another. *Connecticut National Bank* v. *Douglas*, 221 Conn. 530, 544–45, 606 A.2d 684 (1992). The other principle presumes that, between coguarantors for the same debt, each coguarantor is liable only for a contributive share of the total outstanding debt. Restatement (Third), Suretyship and Guaranty §§ 55 through 57 (1996); *Collins* v. *Throckmorton*, 425 A.2d 146, 151–52 (Del. 1980); *Albrecht* v. *Walter*, 572 N.W.2d 809, 812–13 (N.D. 1997). The plaintiffs are guarantors who, in a prior action, have been held liable for the total amount of the debt that they underwrote. Invoking the second principle, they have brought a malpractice action against the defendants, their former attorneys, for failing to discover, in a timely fashion, that a coguarantor was an intermediate transferee of the guaranteed debt. Relying on the broad language of the guarantees executed by the plaintiffs, the trial court granted the defendants' motion for summary judgment. The plaintiffs have appealed. We affirm the judgment of the trial court.

In a two count complaint filed February 22, 2006, the plaintiffs, Jerome G. Terracino and Guardian Systems, Inc. (Guardian), sued their former attorneys, the defendants, Gordon and Hiller and A. Reynolds Gordon, for monetary damages for legal malpractice. They alleged that the defendants had failed to exercise due diligence in discovering evidence that would have altered the outcome in litigation that resulted in a judgment in favor of Fairway Asset Management, Inc. (Fairway), in the amount of $324,631.08, postjudgment interest now exceeding $100,000 and attorney's fees of $7500.[1] In addition to denying many of the plaintiffs' factual allegations, the defendants moved for summary judgment on the ground that the newly discovered evidence would not have altered the outcome of the underlying action because of the guarantees signed by the plaintiffs. The court, *Shaban, J.*, granted the motion, and the plaintiffs have appealed.

Largely relying on the facts of record in related prior court opinions, the trial court made the following findings. "In July of 1991, Mutual Communications Associates (Mutual) borrowed $270,000 from Brookfield Bank pursuant to a mortgage, promissory note and commercial agreement of guarantee. Jerome Terracino, Robert Rossman and Richard DeMarsico, the corporate officers of Mutual, all signed as guarantors on the note. Terracino and Rossman also signed an additional guarantee as the principals and officers of Guardian Systems, Inc., an alarm company.

"On May 8, 1992, the Federal Deposit Insurance Corporation (FDIC) took possession of the assets of Brookfield Bank, including the promissory note, mortgage and [guarantees].'' When Mutual defaulted on the loan, ''the FDIC . . . foreclosed against Mutual, Guardian, Terracino, Rossman and DeMarsico, and a judgment of strict foreclosure entered in February of 1997.[2] Thereafter, the FDIC sold the note to JLM Corporation [JLM], [which] filed a motion for deficiency judgment against the guarantors.''

The note, the guarantees and the deficiency claim were then assigned to various successive takers. JLM assigned them to Andrew Buzzi, Jr., as trustee,[3] who then assigned them to Consolidated Asset Management, LLC (Consolidated), which, in October, 1998, assigned them to Fairway. Following this assignment, Fairway was substituted as a party to JLM's motion for deficiency judgment.

Defending against Fairway's action for a deficiency judgment, the present plaintiffs argued that, because they were coguarantors with Rossman, their liability was limited to that of a proportionate contribution toward funds actually paid on behalf of Rossman for the note. The court, *DiPentima*, *J*., rejected this argument and rendered judgment in favor of Fairway. This court affirmed the judgment in *Federal Deposit Ins. Corp*. v. *Mutual Communications Associates*, *Inc*., 66 Conn. App. 397, 400, 784 A.2d 970 (2001), appeal dismissed, 262 Conn. 358, 814 A.2d 377 (2003) (certification improvidently granted).

Thereafter, the present plaintiffs filed a motion for a new trial in which they alleged that newly discovered evidence demonstrated that Rossman in fact had acquired the promissory note from JLM, and that this evidence demonstrated that their liability was limited to that of coguarantors. Judge DiPentima denied this motion as well, concluding that even if such evidence had been presented earlier, it would not have affected the outcome of the case. This court again affirmed the judgment. *Terracino* v. *Fairway Asset Management*, *Inc*., 75 Conn. App. 63, 815 A.2d 157, cert. denied, 263 Conn. 920, 822 A.2d 245 (2003).[4]

Relying on the defendants' presentation of uncontroverted documentary evidence containing the plaintiffs' guarantees, Judge Shaban granted the defendants' motion for summary judgment in the malpractice action. The court based its judgment on the plain language of the guarantee agreements, which provide that ''[t]he liability of the [g]uarantor hereunder is direct, absolute and unconditional without regard to the liability of any other person'' and that ''[the] obligations and liabilities hereunder shall in no way be released . . . by reason of the release of, or unenforceability of any agreement or undertaking by any other guarantor or other party liable . . . .''

The plaintiffs' appeal raises two issues. They maintain that (1) their guarantees were no longer enforceable once their coguarantor, Rossman, acquired the promissory note and (2) unresolved issues of material fact made it inappropriate to grant the defendants' motion for summary judgment. We are not persuaded.

"We apply a well settled standard of review to the [plaintiffs'] claim that the court improperly rendered summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 556–58, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009).

I

THE ENFORCEABILITY OF THE PLAINTIFFS' GUARANTEES

The plaintiffs' principal claim on appeal is that the court improperly relied on the guarantees that they had executed in support of Mutual's indebtedness to Brookfield Bank and its assignees. In their view, once Rossman acquired the note,[5] the only enforcement rights that Rossman or subsequent assignees were entitled to exercise against the plaintiffs were pro rata rights of contribution for the amount paid by Rossman to acquire the note. In the absence of disagreement about the text of the relevant guarantees, the plaintiffs are entitled to plenary review of this claim. See *Trugreen Landcare, LLC* v. *Elm City Development & Construction Services, LLC*, 101 Conn. App. 11, 13–14, 919 A.2d 1077 (2007).

The undisputed record at trial contained two guarantees signed by Terracino. One was an agreement that was part of the loan note executed by Mutual, and the other was a commercial agreement of guarantee.

In conjunction with the loan note, Terracino agreed: "Even if I'm signing this Note with another person or persons, I am obligated to pay the entire amount owing under it. You may require that I pay this amount without asking any other person to pay. You don't have to notify me that the loan made under this Note hasn't been paid by any other person. You and any person signing this Note can repeatedly agree to renew or extend it for any length of time, revise its terms, release any of the security or release anyone from liability under this Note without notifying me or releasing me from my responsibility on this Note. My obligation to pay is absolute and not conditioned on anything."

In the guarantee agreement, which Terracino executed for himself and as a corporate officer of Guardian, he agreed that (1) "this [g]uaranty is irrevocable . . . until the indebtedness has been fully and finally paid to the [b]ank," (2) "[t]he [g]uarantor expressly agrees that its obligations and liabilities hereunder shall in no way be released, lessened, or impaired by reason of the release of, or unenforceability of any agreement or undertaking by any other guarantor or other party liable, whether primarily or secondarily, for the repayment of all or any part of the indebtedness," and (3) "[i]f there is more than one [g]uarantor of all or any portion of the [i]ndebtedness, their liability shall be joint and several." Rossman signed an identical guarantee agreement.

It is useful to start our analysis of the plaintiffs' claims on appeal by identifying the claims the plaintiffs do *not* make. The plaintiffs do not take issue with the breadth of the text of these guarantees. They do not argue that they subscribed to these guarantees without having had the opportunity fully to comprehend their contents. They do not claim that the guarantees are in any respect patently or latently ambiguous. They do not refer to anything in the guarantees that manifests any intention on the part of the subscribers thereto that the conduct of any one of them, short of payment, would discharge the others, in whole or in part.[6]

Instead, the plaintiffs argue here, as they did at trial, that the obligations memorialized therein substantially were diminished, as a matter of law, by Rossman's acquisition of the promissory note, regardless of whether subsequent takers of the note and the guarantees had notice that Buzzi, as trustee, was acting on Rossman's behalf. Their argument that, with proper legal representation, Fairway's recovery should have been limited to that of contribution between coguarantors relies on a number of out-of-state cases that explain and apply the equitable principles that govern contribution between coguarantors. See, e.g., *Collins* v. *Throckmorton*, supra, 425 A.2d 151–52; *Albrecht* v. *Walter*, supra, 572 N.W.2d 812–13; see also Restatement (Third), supra, § 55.[7]

The plaintiffs' argument requires us to assume that Fairway has no greater rights to enforce the underlying obligation to the FDIC than did Rossman. Although Fairway was not a holder in due course,[8] the court found that it had been substituted as a party to JLM's motion for a deficiency judgment. As such, it was the assignee of the original obligee, Brookfield Bank.

As an obligee, Fairway's rights were not limited to those of a coguarantor. The first comment to Restatement (Third), supra, § 55, states that with respect to the *obligee*, each coguarantor is liable "in accordance with the terms of its secondary obligation." Id., comment (a); see *Green Leaves Restaurant, Inc.* v. *617 H Street Associates*, 974 A.2d 222, 234–35 (D.C. App. 2009). The law of suretyship therefore does not preclude reliance on the principle enunciated in *Connecticut National Bank* v. *Douglas*, supra, 221 Conn. 544–45, that a guarantor expressly may waive his rights to the protection that the common law or statutory law presumptively affords him.

Even if we were to assume, however, that Rossman's intermediary ownership of the rights at issue affected Fairway's status as obligee, the plaintiffs still cannot prevail. The rights that the law of suretyship confers on coguarantors are not immutable. Section 57 (1) of the Restatement (Third), p. 243, expressly recognizes that contributive rights are "[s]ubject . . . to any express or implied agreement between or among the [coguarantors]." None of the cases on which the plaintiffs rely address this issue.

To prevail in their appeal to this court, therefore, the plaintiffs would have to establish that the trial court improperly relied on the provisions of the guarantees that they executed. They have not brought to our attention any effort on their part to raise such a claim at trial. To the contrary, they concede in their reply brief that the language of the guarantees, absent acquisition of the note by a coguarantor, would afford the noteholder full enforcement rights against the plaintiffs.

The fundamental flaw in the plaintiffs' appeal is their failure to recognize that, like other aspects of the law governing guarantees, the consequences of acquisition of a note by a coguarantor are subject to contractual modification. The defendants based their motion for summary judgment on their allegation that the guarantees signed by the plaintiffs "acted as a waiver of the very defenses that the new evidence would have allegedly supported." The court granted the defendants' motion for summary judgment on this basis. Neither in their opposition to the defendants' motion, nor in their motion to reargue the court's decision to grant the defendant's motion did the plaintiffs ever address, in any fashion, the terms of the guarantees to which they had subscribed.

On this state of the record, the plaintiffs have presented no persuasive argument in support of their contention that the court's decision on the merits of the defendants' motion for summary judgment was flawed. On the record before the court, the guarantees executed by the plaintiffs were fully enforceable according to their own terms.

II

The plaintiffs' alternate claim on appeal is that the court prematurely granted the defendants' motion for summary judgment because there were unresolved issues of fact. We disagree.

First, the plaintiffs maintain that the court was presented with unresolved questions of fact about a fiduciary relationship between the guarantors in this case. Relying on statements of fact in prior appellate decisions adjudicating some of the rights of the parties, the plaintiffs opine that "the extent of the fiduciary duties owed to each other based on those relationships, could not be decided by summary adjudication . . . ."

We note, at the outset, that the plaintiffs presented no affidavits or other documentary evidence to demonstrate the existence of a genuine issue of *any* material fact. See Practice Book §§ 17-45 and 17-46. "[D]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . [U]nadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact." (Internal quotation marks omitted.) *Martin* v. *Westport*, 108 Conn. App. 710, 721, 950 A.2d 19 (2008). We note further that, in their motion to reargue the court's decision granting the defendants' motion for summary judgment, the plaintiffs briefed only two issues of law. None of the briefed issues alerted the court to the claim they now make on appeal, namely, that summary judgment was premature because of the existence of unresolved disputes of material fact.

Even if we were to overlook these procedural defaults, the plaintiffs have not explained the relevance of the unresolved factual claims that, in their view, made it premature for the court to grant the defendants' motion for summary judgment. They point to disputes about the defendants' exercise of due diligence in their defense of the plaintiffs in the Fairway litigation and to uncertainty about the precise nature of the relationship between Rossman and Terracino.[9] They have not endeavored to explain, however, how these unresolved issues of fact relate to the court's ruling that the sweeping terms of the guarantees signed by the plaintiffs bar them from a recovery from the defendants.

In sum, we conclude that the court properly exercised its authority to address the merits of the defendants' motion for summary judgment. On the merits, we conclude that the court properly granted the motion in light of the breadth of the guarantees to which the plaintiffs had unconditionally agreed.

The judgment is affirmed.

In this opinion LAVINE, J., concurred.

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

[1] The first count contained the substantive allegations against the defendants. The second count alleged that Gordon and Hiller was vicariously liable for the negligence of A. Reynolds Gordon, an attorney in the firm.

[2] *Federal Deposit Ins. Corp.* v. *Mutual Communications Associates, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-95-0067158 (October 20, 1999) (*DiPentima, J.*), aff'd, 66 Conn. App. 397, 408, 784 A.2d 970 (2001), appeal dismissed, 262 Conn. 358, 814 A.2d 377 (2003).

[3] Buzzi represented Rossman as his attorney.

[4] The opinion of the Appellate Court does not address the guarantee issue. The plaintiffs have not proffered any explanation for why that issue was not pursued at that time.

[5] The defendants question the validity of Judge Shaban's finding that Buzzi was acting for Rossman when he acquired the note at issue. In the absence of a cross appeal by the defendants, we decline to address this issue.

[6] We recognize that the plaintiffs claim, in their appellate brief, that they were improperly precluded from presenting to the court, as an issue of fact, questions relating to the interpretation of the guarantees to which they had subscribed. This claim is not reviewable because the plaintiffs have not satisfied their burden of identifying where in the trial record they raised this issue. See *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 250, 618 A.2d 506 (1992); *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 129, 968 A.2d 956 (2009). They filed no counteraffidavits at trial to support their opposition to the defendants' motion for summary judgment. They did not raise it in their motion for reargument.

[7] Restatement (Third), supra, § 55, p. 236, provides "(1) As between [coguarantors] for the same underlying obligation, each [coguarantor] is a principal obligor to the extent of its contributive share . . . and a secondary obligor as to the remainder of its duty pursuant to its secondary obligation.

"(2) To the extent that, as between themselves, one [coguarantor] is a secondary obligor and the other is a principal obligor, the former has rights of contribution against the latter. The rights of contribution are the same as the rights of a secondary obligor against a principal obligor as set forth in §§ 21-31." (Citation omitted.)

[8] Under General Statutes § 42a-3-302 (a) (2) (iii), a holder in due course must take an instrument "without notice that the instrument . . . has been dishonored . . . ."

[9] The plaintiffs also rely on a dissenting opinion in *Federal Deposit Ins. Corp.* v. *Mutual Communications Associates, Inc.*, supra, 66 Conn. App. 408, that concluded that Rossman had a fiduciary duty to the plaintiffs. The plaintiffs fail to note, however, that, after our Supreme Court granted a petition for certification to appeal in that case to consider whether, "under the applicable equitable principles, the plaintiff was entitled to the full amount of the deficiency judgment in this case"; (internal quotation marks omitted); *Federal Deposit Ins. Corp.* v. *Mutual Communications Associates, Inc.*, 262 Conn. 358, 360 n.1, 814 A.2d 377 (2003); the court dismissed the appeal on the ground that certification had been improvidently granted. Id., 360.