

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

DSG ACQUISITION, LLC,

Plaintiff/Third-Party Defendant,

vs.

JAMES T. SCHOLLE; and BRUCE S. SIBLE,

Defendants,

and

WEST MICHIGAN COMMUNITY BANK,

Intervening Third-Party Plaintiff.

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Case No. 16-11902-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER OF DISMISSAL WITHOUT PREJUDICE

Seattle engineer William Beaty has achieved notoriety for devising rules of the road designed to prevent traffic jams. Beaty disdains the tailgating philosophy, which means that you “push ahead, and you think if everybody would just push ahead, then everyone would go faster.” He explains that “it just turns the road into a parking lot.” See Sue Shellenbarger, “One Driver Can Prevent a Traffic Jam,” *The Wall Street Journal* (Oct 12, 2016). That same rule applies when subordinated creditors press forward in hopes of promptly recovering from their debtors: their actions stymie the collection process. Here, Plaintiff DSG Acquisition, LLC (“DSG”) is engaging in that behavior, trying to force guarantors to answer for their obligations to DSG even though Intervening Third-Party Plaintiff West Michigan Community Bank (“WMCB”) has collection rights superior to DSG. Thus, the Court shall dismiss this case without prejudice, forcing DSG to permit WMCB to proceed at its own pace as the creditor with the higher priority.

In 2014, Plaintiff DSG sold its golf-cars business to CCB's, LLC ("CCBs") in a transaction heavily dependent upon seller financing.<sup>1</sup> CCBs paid \$800,000 of the \$2.25 million purchase price, WMCB gave CCBs approximately \$600,000 in commercial lending,<sup>2</sup> and DSG covered the balance. In exchange, DSG and WMCB received promissory notes from CCBs. Additionally, as part of the lending arrangement, CCBs (as the borrower), WMCB (as the lender), and DSG (as a "subordinating creditor") all signed a "Debt Subordination Agreement" on November 3, 2014. See West Michigan Community Bank's Brief in Support of Motion for Summary Disposition, Exhibit E. Just three days earlier, on October 31, 2014, Defendants James Scholle and Bruce Sible had both signed a guaranty for the benefit of DSG as the seller of the assets of its golf-cars business. Id., Exhibit C. The dispute before the Court turns upon the relationship between the "Debt Subordination Agreement" and the guaranty signed by Scholle and Sible.

On December 30, 2016, Plaintiff DSG filed a straightforward collection action against both of the guarantors, Defendants Scholle and Sible, to collect from them in the wake of CCBs's default on its payment obligations to DSG. In the fullness of time, however, the Court learned of the "Debt Subordination Agreement," concluded that WMCB should be given an opportunity to participate in this litigation, and issued an order on March 30, 2017, granting WMCB's motion to intervene. After WMCB joined the fray, the defendants and WMCB moved for summary disposition, interposing the "Debt Subordination Agreement" as an insuperable barrier to DSG's collection efforts until WMCB is paid in full in its capacity as the highest-priority creditor in this dispute. Because DSG's attempt to collect on the guaranty is premature, the Court must dismiss this case without prejudice.

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<sup>1</sup> To be precise, the transaction took the form of an asset-purchase agreement.

<sup>2</sup> WMCB provided \$200,000 for the purchase price and a \$400,000 line of credit.

The “Debt Subordination Agreement,” which is a relatively simple contract, begins with two straightforward propositions: (1) “The Subordinated Debt is all current and future debts, liabilities and obligations that Borrower [*i.e.*, CCBs] owes to Subordinating Creditor,” *i.e.*, DSG; and (2) “The Senior Debt is all current and future debts, liabilities and obligations that Borrower [*i.e.*, CCBs] owes to Lender,” *i.e.*, WMCB. See West Michigan Community Bank’s Brief in Support of Motion for Summary Disposition, Exhibit E. In other words, WMCB is entitled to collect its senior debt in its entirety from CCBs before DSG is entitled to pursue CCBs to collect on its subordinated debt. And if this were a priority contest between WMCB and DSG, then WMCB would surely prevail.

But Plaintiff DSG points out that its collection effort in this case is directed at the guarantors of Defendant CCBs’s obligations, *i.e.*, Defendants Scholle and Sible, as opposed to CCBs itself, so nothing in the “Debt Subordination Agreement” should hinder the collection effort in this case. Our Court of Appeals confronted a situation strikingly similar to the instant case – where a subordinated creditor attempted to seek recovery from a guarantor over the objection of the bank that obtained the subordination agreement – and adopted the argument that WMCB is making in the instant case. See Damerou v C L Rieckhoff Co, Inc, 155 Mich App 307, 310-313 (1986). Our Court of Appeals noted that the “plaintiff contends that the ‘Subordination Agreement and Assignment’ is nothing more than a subordination agreement and that, as such, it does not affect defendant’s personal obligation as a guarantor of payment of the note.” Id. at 311. Analyzing the terms of the subordination agreement, our Court of Appeals concluded that “the language of the agreement evidences more than an intent to subordinate the note.” Id. at 312. Indeed, the subordinated creditor “did not simply agree to be second in priority of payment; he also agreed to relinquish his rights associated with the note upon the company’s default to the bank – including the right of payment and the right of enforcement.”

Id. Beyond that, “the assignment of these rights included the assignment of the right to turn to the guarantor for satisfaction.” Id. Consequently, the subordinated creditor was unable to enforce the defendant’s personal guaranty because the subordinated creditor’s rights were secondary to those of the bank. Id. at 313. That reasoning fits the instant case like a glove.

Without question, WMCB took all the steps necessary to put itself in a position superior to Plaintiff DSG by obtaining a “Debt Subordination Agreement” signed by DSG, see West Michigan Community Bank’s Brief in Support of Motion for Summary Disposition, Exhibit E, which includes language that completely hems in DSG. First, the “Debt Subordination Agreement” stipulates that DSG “waives the right to receive or enforce any security for the Subordinated Debt.” Id. Second, under the heading of “Security Interest,” DSG “transfers and assigns” to WMCB all of DSG’s “right, title and interest in each instrument representing the Subordinated Debt[.]” Id. Considering these two provisions, the Court necessarily concludes that DSG not only agreed to abstain from collection efforts based upon “any security for the Subordinated Debt” until “the Senior Debt is paid in full,” see id., but also assigned to WMCB its rights under “each instrument representing the Subordinated Debt[.]” See id. Although DSG insists that that assignment refers only to the promissory note that DSG obtained from CCBs, our Court of Appeals has rejected that theory. DSG’s assignment of its rights “included the assignment of the right to turn to the guarantor[s] for satisfaction.” Damerou, 155 Mich App at 312. Thus, DSG cannot proceed against CCBs on the promissory note or against Scholle and Sible on their guaranty until WMCB is paid in full.<sup>3</sup>

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<sup>3</sup> Although Plaintiff DSG complains that WMCB is running interference for CCBs and the guarantors by dragging its feet in its collection efforts, that contention is not borne out by the record, nor does the accusation ring true. It would make no economic sense for any creditor to intentionally delay its collection efforts in order to hinder a subordinated creditor for the benefit of a debtor. Here, such delay would reduce WMCB’s chance at collection and keep the CCBs loan on WMCB’s books.



Having determined that Plaintiff DSG has acted prematurely in pursuing recovery from both of the guarantors, *i.e.*, Defendants Scholle and Sible, before WMCB is made whole, the Court must decide how to reflect that determination in a formal ruling. The guarantors and WMCB have asked for summary disposition under MCR 2.116(C)(7), (8), and (10), but the guarantors and WMCB are not entitled to a final resolution with preclusive effect. Instead, the appropriate outcome is dismissal without prejudice of DSG's claims against Scholle and Sible because the Court has expressly chosen *not* to address those claims on the merits. Therefore, after WMCB has been made whole, DSG may reassert its claims that Scholle and Sible breached the obligations imposed by the guaranty that they both signed.

IT IS SO ORDERED.

**This is a final order that resolves the last pending claim and closes the case.**

Dated: May 1, 2018



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge