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Recommended Citation
Brief of Respondent, *Diamond T Utah v. Travelers Indemnity*, No. 10951 (1967).
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IN THE SUPREME COURT OF THE STATE OF UTAH

DIAMOND T UTAH, INC., a Utah corporation,
Plaintiff-Appellant,

vs.

TRAVELERS INDEMNITY COMPANY, a corporation authorized to do business in the State of Utah,

PACIFIC FINANCE CORPORATION, a corporation authorized to do business in the State of Utah,
Defendant-Respondents.

Case No. 10951

BRIEF OF RESPONDENT, PACIFIC FINANCE CORPORATION

Appeal from a Summary Judgment
of the Third District Court
for Salt Lake County
Honorable Stewart M. Hanson, *Judge*

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FILED
SEP 28 1967
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BRIEF OF RESPONDENT, PACIFIC FINANCE CORPORATION

STATEMENT OF KIND OF CASE

Respondent, Pacific Finance Corporation, agrees with appellant's statement of the case.

DISPOSITION IN LOWER COURT

In the pretrial order, R. 38, it is stated:

> "In addition to the agreements set forth in the deposition of Mr. Wilkinson the plaintiff will further contend that as far as Pacific Finance is concerned that the past dealings

and past conduct on the part of both the plaintiff and Pacific will have some effect on construing the agreements in question."

Appellant then made a motion for summary judgment, which is recognized in the Addendum to Pretrial Order, R.37, upon the ground that there is no substantial question of fact, there is only a question of law.

Since appellant's assertion concerning the past conduct of the parties was not a matter put in issue in the pleadings and was in the form of an offer of proof in the event of trial, its motion for summary judgment can only be regarded as an abandonment of the claim to present extraneous evidence to aid in the interpretation of the agreements. It is noteworthy that appellant presented no affidavits or evidentiary facts in any form whatsoever to support this assertion.

Aside from the foregoing matter, respondent, Pacific Finance Corporation agrees with appellant's statement except that the trial court granted a summary judgment in favor of both respondents.

RELIEF SOUGHT ON APPEAL

Respondent, Pacific Finance Corporation, seeks affirmation of the trial court's grant of summary judgment in its favor.

STATEMENT OF FACTS

Respondent, Pacific Finance Corporation, believes the facts as presented by appellant need fur-

ther clarification, although respondent agrees with the facts insofar as appellant has presented them.

The continuing unconditional guarantee agreement, R.144,145, was a blanket type contract that was intended by the parties to cover all of the Diamond T sales that would subsequently be turned over to Pacific Finance. R.154. The conditional sales contract, R.146,148, between one David Scott and appellant was assigned to Pacific pursuant to this blanket agreement. R.157.

The president of appellant corporation, who executed the guarantee agreement in response to a question as to whose responsibility it was to collect the amounts due and owing under the conditional sales contract stated that he had given an unconditional guarantee and if they (Pacific) don't collect from him, then I have to pay it. R.161. When queried further about the guarantee agreement, he stated that there is a continuing guarantee agreement separate from the assignment. R.161.

It should be further pointed out that the so called Assignment and Repurchase Agreement were simply provisions contained in the standard conditional sales contract used by appellant in the sale of the trailer and tractor to one David Scott.

STATEMENT OF POINTS

POINT I

THE DOCTRINE OF PRACTICAL CONSTRUCTION CANNOT BE INVOKED BY APPELLANT BECAUSE THE CONTINUING UNCON-

DITIONAL GUARANTEE CONTRACT IS UNAMBIGUOUS AND THERE IS NO EVIDENCE OF ANY CONDUCT BY THE PARTIES WHICH CREATES AN APPARENT CONFLICT WITH THE TERMS OF THE GUARANTEE.

POINT II

UNDER THE TERMS OF THE CONTINUING UNCONDITIONAL GUARANTEE AGREEMENT, APPELLANT IS LIABLE UPON DEMAND OF PAYMENT BY PACIFIC FINANCE, WITHOUT LIMITATION.

ARGUMENT

POINT I

THE DOCTRINE OF PRACTICAL CONSTRUCTION CANNOT BE INVOKED BY APPELLANT BECAUSE THE CONTINUING UNCONDITIONAL GUARANTEE CONTRACT IS UNAMBIGUOUS AND THERE IS NO EVIDENCE OF ANY CONDUCT BY THE PARTIES WHICH CREATES AN APPARENT CONFLICT WITH THE TERMS OF THE GUARANTEE.

The doctrine of practical construction cannot be invoked by appellant because the continuing unconditional guarantee contract is unambiguous and there is no evidence of any conduct by the parties which creates an apparent conflict with the terms of the guarantee.

There are two contracts in evidence before the court, one is a continuing unconditional guarantee agreement which incorporates an assignment with unconditional guarantee. R.144,145. The other is a conditional sales contract, providing for the sale of a trailer and tractor to one David Scott, which contains an assignment and repurchase agreement.

R.146,148. Appellant contends that there is substantial uncertainty and ambiguity as to which of these contracts is the agreement between the parties. In essence, appellant argues that by the conduct of the parties they have demonstrated their meaning and intent to be bound by the provisions in the conditional sales contract. The alleged past conduct which appellant claims supports its contention is not verified by appellant by any reference to the record, and as previously noted is merely an unsubstantiated assertion by counsel. Respondent, Pacific Finance vigorously disagrees with appellant's argument and asserts that appellant is attempting to nullify a continuing unconditional guarantee agreement between the parties, which by its express terms states that notwithstanding any assignments appearing on any conditional sales contract, the appellant's assignment shall be deemed an unconditional guarantee assignment.

Appellant does not contend that the unconditional guarantee has been terminated or altered, but on the contrary appears to admit it is a presently existing agreement. Appellant simply contends that every significant term in the contract has been abrogated by some form of conduct, of which appellant has not presented a scintilla of evidence to substantiate.

Appellant has cited *Bullough vs. Sims*, 16 Utah 2d 304,400 P.2d 20, 22-23 (1965) and the cases cited therein as its authority for its argument. Pa-

cific contends that the Bullough case with its rule of practical construction is inapplicable in the instant action. The Bullough case states that where the terms of an agreement are unambiguous, parol evidence cannot alter or change its plain meaning. However, there are exceptions to this rule, "* * * one of which is that when the parties place their own construction on it and so perform, the court may consider this persuasive evidence of what their true intention was."

In the Bullough case, the court observed that the parties had demonstrated by their conduct for twenty eight years their interpretation of the agreement. The court stated:

> " 'Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. This is undoubtedly a correct general statement of the law. (Citations omitted). But the question involved in such cases is ambiguous to whom? . . . Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent should be enforced. In such a situation the parties by their actions have created the "ambiguity" required to bring the rule into operation. * * *' "

Another factor involved in the doctrine is:

> "A practical construction of the terms of

a contract by the parties thereto implies a mutual and identical interpretation." *Hodges Irr. Co. vs. Swan Creek Canal Co.* 111 Utah 405, 181 P2d 217, 220 (1947).

The doctrine of practical construction is inapplicable in the instant case. In the Bullough case the court simply found that the parties by their actions had created an ambiguity and therefore the court adopted their interpretation of the agreement as demonstrated by the conduct of the parties over a period of twenty eight years. Appellant under the guise of this doctrine is asking the court to hold that both parties have demonstrated through their conduct that they intended the unconditional guarantee agreement to be a nullity.

In the instant action, even if Pacific had previously repossessed and delivered the vehicles prior to seeking recourse on the assignment, this conduct does not alter the meaning and intent of the parties as expressed in the unconditional guarantee.

The Assignment With Unconditional Guarantee, R.145, provides: "* * * I guarantee and will pay assignee or holder *upon demand* all amounts due and to become due by the terms of said contract, * * *" (Emphasis added).

The conduct of repossession and delivery alone is not significant if respondent had simply not elected to make a demand previously; for appellant was not obligated to pay prior to demand. However, if the parties' interpretation of the guarantee agree-

ment as demonstrated by their conduct were that as a condition precedent to a demand for payment, respondent must repossess and deliver the vehicle, there might be an ambiguity, since the guarantee is unconditional. Appellant has not made this contention; instead it has in effect asserted that the parties have through their conduct abandoned the guarantee agreement and intended to be bound in their future business transactions by the provisions contained in a single conditional sales contract of one tractor and trailer. The evidence of such conduct being an unsubstantiated assertion by counsel for appellant at the pretrial.

Another factor of significance that militates against appellant's strained interpretation is the provision "This unconditional guarantee is continuing in nature until terminated by five days prior written notice served upon Pacific Finance Corporation. * * *" R.144.

Appellant has asserted that the language appearing in a single conditional sales contract between appellant and David Scott was intended by the parties to be the determinative document in controlling their extended business relations, although the parties had entered into a master agreement to regulate their future business transactions, and Diamond T could have terminated such master agreement merely by serving a written notice on Pacific.

Respondent, Pacific's strongest argument is the Continuing Unconditional Guarantee Agreement, itself. R. 144,145.

> "I (or we), hereby agree that, *notwithstanding any assignments appearing on any conditional sales contract* or any other existing agreements between myself and Pacific Finance Corporation, *my assignments shall be deemed an unconditional guarantee assignment on any contract of conditional sale hereafter assigned to and purchased by Pacific Finance Corporation from me,* * * *
>
> "The terms and provisions of this unconditional guarantee assignment shall be the same as those which * * * appear on the reverse side of this agreement and by this reference is made a part hereof.
> * * *" (Emphasis added)

Appellant has asserted that there is a conflict in the provisions of the two contracts, and therefore, the court must determine by which contract the parties are bound. The foregoing emphasized language of the guarantee agreement clearly indicates that the parties realized that there might be language in the assignment clauses of individual conditional sales contracts which would be at variance with the unconditional guarantee and therefore they expressly stated their intent as to the agreement by which they should be bound.

The statement in *Ephraim Theatre Company vs. Hawk*, 7 Utah 2d 163, 321 P2d 221, 223 (1958) is applicable in the instant case:

"In considering the controversy here it is well to keep in mind the fundamental concepts in regard to contracts; that their purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. The intent so expressed is to be found, if possible, within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used. Unless there is ambiguity or uncertainty in the language so that the meaning is confused, or is susceptible of more than one meaning, there is no justification for interpretation or explanation from extraneous sources. It would defeat the very purpose of formal contracts to permit a party to invoke the use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist. Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced 'in accordance with the intention as * * * manifested by the language used by the parties to the contract'."

Although it is respondent, Pacific's contention that there is no uncertainty or ambiguity which would justify an interpretation from extraneous sources as to the intent of the parties to the guarantee agreement; there is significant testimony as to the intent of Oral J. Wilkinson, the President of appellant, who executed the guarantee.

"Q. I take it then you have had an agreement with Pacific Finance for some time to purchase your contracts?

A. Since about 1959 or '8, along in there.

Q. You mentioned to me a few minutes ago that this was under a contract which you had with Pacific Finance, which I understand it is a blanket type contract that would cover almost all of your sales that you would subsequently turn over to Pacific Finance?

A. Yes. It is a guarantee by the corporation and then a guarantee by myself to repurchase the paper if it is not paid out by the individual.

Q. That is the contract that you are trying to locate here now, is it?

A. Yes." R.154, lines 18-30; R.155, line 1.

* * *

"Q. Do you recall if this conditional sales contract was subsequently assigned or sold to Pacific Finance?

A. Yes, it was.

Q. And was this pursuant to this contract that you had with them?

A. You mean following that contract, was it under that agreement?

Q. Yes, under that agreement.

A. Yes." R.157, lines 15-23.

* * *

"Q. I noticed on the conditional sale contract that there is no assignment as such.

Would it be correct to state that there was a separate assignment agreement that was entered into?

A. Yes. That was part of this agreement that I am trying to locate." R.160, lines 19-23.

* * *

"Q. I take it from what you have indicated to me that if the Pacific Finance gets the contract, gets the conditional sale contract, and I suppose they receive the title too, it is their responsibility to collect the amounts due and owing under the contract?

A. I give them an unconditional guarantee and if they don't collect from him, then I have to pay it.

Q. Do you have a copy of that guarantee agreement?

A. That is all in one agreement.

Q. Is it still in the same agreement we are talking about?

A. Yes. There is a personal continuing guarantee agreement separate from the assignment; but there are two, one corporate and one personal." R.161, lines 8-20.

Appellant has shown no grounds upon which to invoke the doctrine of practical construction in the instant case. The facts of *Bullough vs. Sims* are entirely different for there the court simply admitted evidence of the conduct of the parties to determine what they meant and intended their agreement to be. In the instant action, the appellant has attempt-

ed to use the doctrine to interpret the continuing guarantee out of existence. The guarantee agreement is clear and unambiguous and has by its express terms stated in case of a conflict such as here which contract provisions are controlling. There is no basis for appellant to introduce extraneous evidence in the interpretation of the guarantee contract. Respondent contends that in the instant case the language of *Clyde vs. Eddington Canning Co.*, 10 Utah 2d 14, 347 P2d 563 (1959) is controlling.

> "* * * Under the clear language of the writing we are not impressed with such contention, particularly since intentions cannot vary the terms of clear, concise, unambiguous language employed by him who says he did not intend what he said."

POINT II

UNDER THE TERMS OF THE CONTINUING UNCONDITIONAL GUARANTEE AGREEMENT, APPELLANT IS LIABLE UPON DEMAND OF PAYMENT BY PACIFIC FINANCE, WITHOUT LIMITATION.

Under the terms of the continuing unconditional guarantee agreement, appellant is liable upon demand of payment by Pacific Finance, without limitation.

The continuing unconditional guarantee agreement between Diamond T and Pacific Finance, under which the conditional sales contract of David Scott was assigned, constitutes an absolute undertaking on the part of appellant to pay all amounts due or to become due under the contract, together

with all costs and attorneys' fees incurred in enforcing said contract on collecting or attempting to collect money thereunder. R.145. The agreement further provides:

> "* * * and I agree to delay or indulgence in enforcing payment, and to the release, surrender or substitution of collateral; diligence, presentment, protest and demand notice of sale and notice of every kind are hereby waived, all without affecting the liability of the undersigned hereunder. * * *"

There was also in effect at the time of the assignment of the conditional sales contract to Pacific, an insurance agreement. (R.147), whereby appellant agreed that all conditional sales contracts purchased by Pacific from appellant would be covered for the term thereof with insurance in such types and amounts as set forth. Under the terms and conditions of this insurance agreement, Pacific did not have a duty to purchase insurance.

It is Pacific's position that since it had no duty to furnish insurance, and under the unconditional guarantee agreement, the appellant remained liable to Pacific, even if Pacific completely released the collateral securing the conditional sales contract assigned to respondent, Pacific was entitled to judgment as a matter of law.

The nature of a guaranty was described by the court in *Rucker vs. Republic Supply Company*, Okla., 415 P2d 951, 953, 954 (1966) in the following language:

"A guaranty is deemed continuing if it contemplates a future course of dealings, not limited to a single transaction for an indefinite period of time, * * * or until it is revoked * * *. A continuing guaranty is deemed a repetition of the extension of credit so long as it is enforced. Liability under a continuing guarantee will be deemed to have continued until revoked where it contains no express limitation as to duration of Guarantor's responsibility, 24 Am. Jr. Guaranty, Sec. 63 and 38 C.J.S. Guaranty, §53. A guaranty is deemed unconditional unless its terms import a condition precedent to liability, (Citations Omitted).

"The intent of the parties to a guaranty is to be collected from the whole instrument, (Citations Omitted). Where the language of a contract of guaranty is clear and explicit, its purpose and meaning must be ascertained therefrom, without resort to extrinsic evidence, (Citations Omitted).

* * *

"* * * this court has frequently held that in *construing a guarantee to determine the intent of the parties, it should be taken most strongly against the Guarantor and in favor of the Creditor,* (Citations Omitted)." (Emphasis added).

Also see *Hallstrom vs. Buhler*, 14 Utah 2d 111, 114, 378 P2d 355 (1963).

In the *United States vs. Anderson*, 366 F2d 569,571 (1966, C.A. 10th), the court observed:

" 'The law is well settled that a guaranty is a collateral agreement to pay a debt or perform a duty for another in case of default

> which may be enforced separately from the primary obligation. It is not necessary to proceed against the primary debtor. An unconditional guaranty is one whereby the guarantor agrees to pay or perform a contract upon default of the principal without limitation. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform. * * *"

In the instant action appellant has attempted to engraft all types of limitations upon its unconditional guarantee agreement. Appellant has contended that Pacific must first proceed against the primary debtor by obtaining possession and delivery of the security, before seeking payment. Appellant has further disclaimed liability under the guarantee because Pacific did not procure insurance on the vehicle or store it properly. As respondent Pacific has already contended, since it was empowered to release completely the security under the guarantee agreement, appellant's contentions that Pacific was compelled to fulfill these other obligations prior to seeking payment is without merit.

Where the guaranty is an absolute one, it is not a defense to the guarantor that the creditor has been negligent in regard to protecting and enforcing collateral security. 38 CJS Guaranty, §81, p. 1251; *Nation Wide Inc. vs. Scullin*, 256 F. Supp. 929, 932, 933 (1966 D.C.D. N.J.); *A. & T. Motors, Inc. vs. Roemelmeyer*, Florida, 158 So. 2d 567, 570 (1964); *United States vs. Klebe Tool & Die Co.*, 5 Wis. 2d 392, 92 NW2d 868, 871 (1958).

The reasoning supporting this rule is that the rights and liabilities are fixed by the contract of guaranty. The risk of the guarantor is not increased where the obligation is absolute and unconditional; and by its terms the creditor may make an entire release of the security and still recover from the guarantor. Therefore, regardless of any negligence on the part of the creditor, he is entitled to recover on an absolute guaranty; for upon default of the principal, the guarantor is immediately liable.

There are two cases from the Tenth Circuit which clearly illustrate this point:

Joe Heaston Tractor & Imp. Co. vs. Securities Acceptance Corp., 243 F2d 197 (1957, CA 10th).

In this case, Securities Acceptance, a finance company sued Heaston, the guarantor upon a contract which guaranteed payments due to the finance company from one Claussen, the debtor. The guarantor sold an appliance store, along with certain indebtedness of the guarantor to the finance company. The debtor needed financing in order to complete the transaction. To induce the finance company to furnish the necessary financing, the guarantor "unconditionally guaranteed" the payments of all accounts then owed by the debtor to the finance company and those to be incurred in the future. The finance company made loans to the debtor and took back chattel mortgages, which were never filed. The debtor was adjudicated bankrupt. The finance company demanded payment from the guarantor in ac-

cordance with the guaranty agreement. The guarantor pleaded that since the finance company failed to perfect the liens, the subrogation rights of the guarantor were lost, and the guarantor was released from its obligation.

The court stated:

> "The contract of guaranty makes reference to secured loans but it does not specifically require the taking of mortgages or that the same, if taken, be recorded. Relying upon the law of suretyship as propounded in Stearns on Law of Suretyship, 5th Ed., 188, §6.49, and 50 Am. Jur., Suretyship, §118, the Guarantor contends that the contract contemplates that security for loans will be taken and that in such cases there is an implied agreement that the lien of the security will be preserved by proper filing or recording, a failure of which relieves a guarantor to the extent of the loss sustained. We are of the opinion that the guaranty agreement is an absolute and unconditional guaranty and the foregoing rule of law has no application.
>
> "It is quite clear that the agreement covered every kind of retail sale upon which the Finance Company advanced money. It specifically guarantees, without limitation or condition, the prompt performance by the Debtor of all obligations and commitments to the Finance Company with respect to all retail paper by endorsement, or otherwise. Full power was granted to the Finance Company to modify or change the terms of any of the liabilities and to release any collateral thereto. Under the broad terms of this guaranty

agreement, the Debtor and the Finance Company were free to handle their commercial paper as they saw fit. We think the guaranty was intended to cover, without condition, all good-faith loans made to the Debtor by the Finance Company in connection with the Debtor's appliance business in which commercial paper was taken. Otherwise there would have been no reason to include in the contract the provision that the Guarantor 'unconditionally guarantees * * *, the due and punctual payment' of all notes evidencing floor plan financing transactions and 'further guarantees the prompt performance' of all obligations and commitments of the Debtor under any 'endorsement to or repurchase agreement executed by the Dealer to the Finance Company with respect to any retail paper. * * *' The record does not disclose what the security requirements are or what the custom is under general floor plan arrangements. Presumably they would differ in individual cases.

". . . A definition of conditional and unconditional contracts of guaranty and the liability of guarantors under them is well stated by this Court in *Pavlantos vs. Garoufalis*, 89 F2d 203, 206, where it is said:

> 'Contracts of guaranty are divided into two kinds. One is absolute or unconditional and the other is conditional. An absolute guarantee is an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or perform, and such guarantor is liable immediately upon default of the principal without notice. A conditional guaranty is an undertaking to pay

> or perform if payment or performance cannot be obtained from the principal obligor by reasonable diligence. * * * (Citing cases) An absolute guaranty unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor. (Citations omitted) Both presuppose default by the principal.'
>
> "The guaranty was not gratuitous. The Trial Court found the guaranty was necessary to enable the Debtor to finance the purchase of the business. At the time the Guarantor sold the appliance business to the Debtor, there was owing to the Finance Company approximately $35,000. As an integral part of the sale, the Guarantor, by its guaranty, induced the Finance Company to extend floor plan financing to the Debtor and to continue loans which had been assumed by the Debtor on the purchase of the business. Considering the contract as a whole, the purpose for which it was given, together with all the surrounding circumstances existing at the time the guaranty was executed, we think it was the intention of the contracting parties that upon default the Guarantor was unconditionally bound to pay the liabilities of the Debtor as described in the guaranty instrument."

The second case is precisely in point and deals with the issue of whether it was negligent of the creditor not to procure insurance on the security after the debtor had allowed the policy to lapse.

United States vs. Newton Livestock Auction Market, Inc., 336 F2d 673 (1964, CA 10th).

In this case the Small Business Administration (S.B.A.), an agency of the United States, lent money to Newton Livestock Auction Market, Inc., (Newton) which was secured by mortgages on Kansas real and chattel property and by three separate guaranty agreements. The government sued to foreclose the mortgage and joined as defendants Newton and the guarantors. After the judgment of foreclosure, but prior to the sale, the property was damaged by a severe windstorm.

The mortgages required Newton to insure the property. After the foreclosure action was brought Newton notified the insurance carrier that it could not pay a premium due. The insurer notified the S.B.A., who replied by letter that the policy should lapse. The termination of the policy occurred more than six months before the storm damage. The mortgage provided that if the mortgagor did not keep the property insured, the United States as mortgagee had the option to effect insurance, and the cost incurred was an additional lien against the property. The trial court credited against the judgment obtained by the S.B.A. the $30,000 storm damage. The appellate court observed that the positions of the mortgagor and guarantors are different and require different treatment.

Newton asserted that the United States undertook to insure the property and thereby became liable to it. The court stated that all the S.B.A. did

was to elect to bear the risk of possible loss of its security. The court stated at page 677:

> "The statutory power of S.B.A. to insure and charge the cost to the mortgagor did not require S.B.A. to insure for the benefit of the mortgagor. The policies lapsed when Newton failed to pay the premiums; the S.B.A. was under no obligation to insure; and it did nothing more than assume the hazard of impairment in value of its collateral. Newton, the mortgagor, is entitled to no credit on the judgment because of the storm loss.
>
> "On the theory of increased risk the guarantors contend that they were released, either fully or to the extent of the storm damage, by the action of the United States in permitting the insurance to lapse. Their reliance on 'equities' and general principles of law are unpersuasive because their rights and liabilities are fixed by the contracts of guaranty. The risk of the guarantors was not increased because their obligations were absolute and unconditional. By the terms of the guaranty contracts S.B.A. could have made an entire release of the security for the loan and still have recovered from the guarantors. Lack of notice of mortgagor's default in its obligation to insure is important because the guarantors expressly waived notice of any default by the mortgagor. The guarantors have failed to show the breach of any duty owed to them. They have no right to a credit because of the storm damage."

The foregoing cases clearly illustrate the nature of an unconditional guarantee, and the appellant cannot under the terms of the guarantee agreement

it executed impose conditions or duties upon Pacific in order to disclaim liability.

CONCLUSIONS

Appellant has claimed in its conclusion that if Pacific had the ownership interest when the vehicle was stolen, Diamond T had no liability prior to the return of the vehicle. Under the continuing unconditional guarantee agreement the ownership would be irrelevant, since Pacific was empowered to release the security completely. The trial court properly interpreted a clear, concise, unambiguous document, the guarantee agreement, without the aid of extrinsic evidence. Furthermore, there was no relevant evidence of record before the court indicating any ambiguity demonstrated by the conduct of the parties. On the other hand, there were statements of record by the president of appellant that the conditional sales contract of David Scott was assigned to Pacific pursuant to the guarantee agreement. Appellant by its execution of the guarantee agreement undertook an absolute obligation to pay upon default of the principal without limitation. The trial court properly concluded that appellant had not stated a cause of action against Pacific Finance Corporation.

Respectfully submitted,

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