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THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

Case No. 94-73386-W

In re: )  
 )  
TJN, Inc., )  
 )  
Debtor, )  
 )  
TJN, Inc., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Superior Container Corporation )  
 )  
and Cal Western, Inc., )  
 )  
Defendants. )  
\_\_\_\_\_ )

JUDGMENT

Chapter 11

96-8108-W

ENTERED

JUL 16 1996

V. A. C.

Based upon the Findings of Fact and Conclusions as recited in the attached Order of the Court, the Motion to Dismiss filed by Cal Western is denied.

  
United States Bankruptcy Judge

Columbia, South Carolina,  
July 15, 1996

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FILED

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

96 JUL 16 AM 10:09

U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:

Chapter 11

TJN, Inc.,

BK No. 94-73386-W

Debtor,

Adv. Proceeding No. ~~8108-W~~ 96-8108-W

TJN, Inc.,

Plaintiff,

ORDER

vs.

Superior Container Corporation  
and Cal Western, Inc.,

Defendants.

ENTERED  
JUL 16 1996  
V. A. C.

This matter comes before me as a result of a Motion to Dismiss (the "Motion") filed by the Defendant, Cal Western, Inc. ("Cal West"), seeking to dismiss the Complaint filed by the Plaintiff, TJN, Inc. ("TJN"). Cal West asserts that the Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6), in that it fails to state a cause of action. It alleges that the guaranty between the parties requires TJN to pursue collection against Superior; obtain judgment against Superior and execute that judgment by pursuing sale of its collateral and any other assets of Superior, before TJN can proceed against Cal West for collection of any remaining balance.

The Motion was heard on July 8, 1996. Based upon the allegations in the pleadings and the matters presented to the court at the hearing, the court announced at the hearing that the Motion would be denied.

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### FINDINGS OF FACT

In evaluating a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court should accept as true all well-pleaded allegations in the Complaint, including all reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff. In re Pointer, 165 B.R. 797 (Bankr. D.Md. 1994). Therefore, for purposes of evaluating the Motion to Dismiss only, the court makes the following findings of fact:

1. TJN is a debtor in the United States Bankruptcy Court for the District of South Carolina as a result of an involuntary petition filed by creditors, to which the debtor consented, on September 19, 1994.

2. On December 15, 1994, this court entered an order authorizing the sale of certain equipment (the "Equipment") to Superior Container Corporation ("Superior"). This sale was financed by TJN (the "Loan") and various loan documents were executed by Superior, including a note and a security agreement.

3. Repayment of the Loan was guaranteed by Cal West, a copy of which guaranty is attached hereto (the "Guaranty").

4. The Loan is in default and demand for payment has been made against Superior. Superior has not made any payments on the Loan since August, 1995.

5. TJN has filed suit against Superior for a declaratory judgment, monetary damages and foreclosure of its security interest. In the same complaint, it also seeks a monetary judgment against Cal West.

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### CONCLUSIONS OF LAW

The issue before the court is whether TJN is legally required to proceed against Superior and the Equipment before it can proceed against Cal West on the Guaranty. In order to meet its burden of proof pursuant to Fed.R.Civ.P. 12(b)(6), Cal West must show that TJN can prove no set of facts which would allow it to prevail in the litigation. Revene v. Charles County Comm'rs, 882 F.2d 870 (4th Cir. 1989).

Although a number of cases have been cited by both TJN and Cal West, the court has been unable to determine that the language in the Guaranty is identical to the language of the guarantees examined in any of the cases cited by either party. While the precedents provided by the parties provide direction, they are not completely determinative on this question. The court must determine for itself whether the language in the Guaranty clearly prohibits TJN from filing suit against the guarantor and the obligor simultaneously.

As a contractual agreement between two parties, the enforcement of a Guaranty will be determined by the language in the document itself.

A guaranty is a contract and is to be construed by the principles governing contracts. The construction of a guaranty calls for a reasonable interpretation of the language used in the instrument, and a court has the duty to ascertain the intention of the parties at the time the contract was made. Bruce v. Blalock, 127 S.E.2d 439, 241 S.C. 155 (1962). The intention of the parties as expressed in the guaranty should guide the court. McGee v. F. W. Poe Mfg. Co., 180 S.E. 48, 176 S.C. 288 (1935).

Peoples v. Myrtle Beach Retirement Group, 387 S.E. 672, 300 S.C. 277 (1989).

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Cal West argues that the Guaranty is clearly and unambiguously one of collection, and that a guaranty of collection requires pursuit of the primary obligor prior to suit against the guarantor. The Guaranty does state that it is a guaranty of collection, but other language in the Guaranty appears to contradict this statement.

Examples of ambiguity in the contract lead to a question of fact which cannot be resolved in a Motion to Dismiss. The Guaranty states that it is absolute, but also that it is a Guaranty of collection. Further, as a condition precedent to pursuing Cal West, the Guaranty requires that TJN take "appropriate steps" against Superior and Cal West, but it does not define what is meant by appropriate steps. It also indicates that such appropriate steps must be taken prior to requiring payment from Cal West, not prior to collection.

TJN asserts that it has done everything required by the Guaranty, and that the court will have to interpret the intentions of the parties in order to determine what the language in the Guaranty means. This court agrees that a Motion to Dismiss is inappropriate where a genuine question of fact exists which, if decided for the plaintiff, would allow the plaintiff to prevail in the litigation.

When a guaranty does not specifically identify a condition precedent which must be met, it is improper for the court to impose such a condition. Tri-South v. Fountain, 221 S.E.2d 861, 266 SC 141 (1976) (over-ruled on other grounds). Further, the mere

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existence of an unspecified condition precedent does not require specific collection activities by the creditor. Conditions in guaranties may require nothing more than a default by the obligor or demand upon the obligor without payment. Without specific terms, it is impossible to determine, as a matter of law, exactly what steps are required by the Guaranty.

When a conditional contract is not specific in its details, the liability of the guarantor has been held to be conditioned upon the exercise of diligence by the creditor to promote payment by the debtor. Reasonable diligence requires that the creditor demand payment from the debtor and give notice of default to the guarantor; and if the creditor fails to do so, he may be barred from recovery.

38 Am Jur 2d 1114, §108.

Moreover, in South Carolina, ambiguity is generally construed against the guarantor. "...a guarantor cannot claim only conditional responsibility from ambiguous language, as such language is usually construed most strongly against the guarantor." McGee v. F.W. Poe Mfg. Co., 180 S.E. 48, 50, 176 SC 288 (1935).

As noted hereinabove, in considering a Motion to Dismiss, the motion can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts to support its allegations." Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). The allegations in the Complaint must be construed favorably to the pleader.

...when a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is

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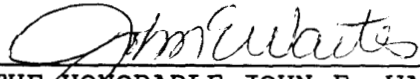
very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss... for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

In this case, the ambiguity in the Guaranty makes a successful Motion to Dismiss impossible. If the court assumes, solely for purposes of its consideration of the Motion, that the allegations in the Complaint are true, then it must assume that the ambiguity in the Guaranty will be construed in favor of TJN, and therefore that the actions taken by TJN are sufficient to comply with the requirements of the Guaranty.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss is hereby denied.

DONE AND ORDERED on this the 15<sup>th</sup> day of July, 1996, at Columbia, South Carolina.

  
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THE HONORABLE JOHN E. WAITES  
UNITED STATES BANKRUPTCY JUDGE

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SUBORDINATED GUARANTY

December 14, 1994

IN CONSIDERATION, that TJN, Inc. a debtor in possession in the United States Bankruptcy Court for the District of South Carolina (herein called "Seller") has herewith loaned purchase money to Superior Container Corporation, an Iowa Corporation (herein called "Debtor"), in connection with Debtor's purchase from Seller of certain equipment pursuant to a Purchase Agreement of even date herewith, the undersigned, in consideration of the premises and other good and valuable consideration, hereby absolutely guarantees to TJN, Inc. collection of any and all indebtedness, liability or obligation set forth in the Purchase Agreement and the Promissory Note made pursuant to Paragraph 8 of the Purchase Agreement (herein called "Indebtedness"), due and owing from the Debtor, its successors or assigns, to TJN, Inc., in the event that Seller's default on the Indebtedness, on the condition that the Lender shall take appropriate steps to recover the Indebtedness from the Debtor and the collateral of the Debtor before requiring payment of any part of the Indebtedness by the undersigned pursuant hereto.

The indebtedness of the undersigned evidenced by this Subordinated Guaranty shall be junior and subordinate to the all other liabilities and debts of the undersigned, whether outstanding at the date of this Subordinated Guaranty or incurred after this date. (excepting only that indebtedness owing by the undersigned to its affiliates, officers, directors or shareholders of the undersigned, hereafter the "Insider Debt"), but prior to the provision of formal notice of enforcement of this Guaranty against the undersigned. Such indebtedness is hereinafter referred to as the Senior Debt. The Senior Debt, whether secured or unsecured shall be paid in full before any payment on account of the Indebtedness that TJN, Inc. is unable to collect from Debtor. In the event of insolvency, bankruptcy, liquidation or other similar proceedings relative to the undersigned or its property, then all of the Senior Debt shall be first paid in full, or such payment shall have been provided for before any payment on account of the Indebtedness is made pursuant to this Guaranty.

The undersigned agrees to pay all costs, expenses and attorneys' fees paid or incurred by TJN, Inc. in endeavoring to collect such Indebtedness, or any part thereof, and in enforcing this Subordinated Guaranty, on the conditions set forth for payment of the Indebtedness.

The undersigned waives presentment, demand, protest, notice to the undersigned and all other persons of protest and dishonor as to each of all items of Indebtedness and the collateral thereto; waives notice of the acceptance hereof by TJN, Inc. and of the creation and existence of said Indebtedness; and agrees that this shall be a continuing, absolute subordinated guaranty of collection and shall be in force and be binding upon the undersigned until the Indebtedness is fully paid or this guaranty is revoked.

If this guaranty be executed by more than one signer, all agreements and promises herein shall be construed to be and are hereby declared to be joint and several in each and every

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EXHIBIT A  
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particular and shall be fully binding upon and enforceable against either, any or all of such signers and neither the death, release of or revocation by one or more signers shall affect or release the liability of any other signer, either as to Indebtedness then existing or thereafter incurred.

The undersigned may revoke this guaranty by written notice delivered or mailed by registered mail by the undersigned to TJN, Inc. but such revocation shall not affect or release the liability of the undersigned for the then existing Indebtedness, or any renewals thereof, theretofore or thereafter made and, if there be more than one signer upon the guaranty, such revocation shall be effective only as to the one so revoking.

This guaranty and every part thereof shall be binding upon the undersigned and upon the successors and assigns of the undersigned, and shall inure to the benefit of TJN, Inc., its successors and assigns.

CAL WESTERN, INC.

  
By: Jimmy Phelps, its President

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EXHIBIT A  
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