FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
****

MOE CHEVROLET-OLDS-CADILLAC,
INC., a Montana Corporation,
Plaintiff/Appellant,

vs.

Appeal No. 044

WILLIAM A. BAROS and GLORIA DISERLY,
Defendants/Appellees.

THIS APPEAL is from a judgment entered by Tribal Court wherein Appellant was granted judgment solely against the Appellee William A. Baros. On January 25, 1985, Appellees executed and delivered to Appellant their Retail Installment Sale Contract as co—buyers. The Honorable Judge Violet E. Hamilton, presided in open court on September 2, 1987

FOR APPELLANT: Laura Christoffersen, Attorney for Plaintiff, P. 0. Box 997, Wolf Point, Montana 59201.

APPELLEE DISERLY was present with Lewellyn J. "Rusty" Cantrell, Lay Counselor, P. 0. Box 1442, Poplar, Montana 59255. APPELLEE BAROS was not present or represented by counsel.

Appellant filed a brief with the Clerk of the Fort Peck Court of Appeals. Appellee filed no brief. At the time of oral arguments January 8, 1988, Appellant and Appellee Diserly presented oral arguments.

OPINION by Arnie A. Hove, Chief Justice, joined by Daniel R. Schauer, Justice, and Gary James Melbourne, Justice.

HELD: REVERSED AND REMANDED TO TRIBAL COURT WITH INSTRUCTIONS TO THE TRIBAL COURT (1) TO ENTER JUDGMENT FOR APPELLANT AGAINST APPELLEE GLORIA DISERLY AND (2) TO PERMIT APPELLEES TO FILE ANY CROSS-CLAIMS THEY MIGHT HAVE AGAINST EACH OTHER OR TAKE ACTION IN ACCORDANCE WITH THIS OPINION TO DETERMINE ULTIMATE RESPONSIBILITY FOR THE DEBT AND OBTAIN REIMBURSEMENT OR CONTRIBUTION FROM EACH OTHER.

This matter was heard in open court before the Honorable Violet E. Hamilton on September 2, 1987. The Plaintiff was present and was represented by Laura Christoffersen. Appellee Diserly was present and was represented by Lewellyn J. Cantrell. Appellee Baros was not present or represented by counsel. The Tribal Court, after hearing the testimony of the

parties, entered judgment solely against the Appellee Baros.

Appellant's Brief in Support of Appeal (hereinafter brief) did not set forth a specific issue, however, Appellant asserted that Appellees are equally responsible for payment of the debt owing to Appellant and that the Tribal Court erred in entering judgment solely against Appellee Baros. Appellant also contends that the Tribal Court erred in not allowing Appellees to continue any cross-claims they might have against each other to determine ultimate responsibility for the debt. Those two (2) issues will be addressed.

I.

Whether the Tribal Court erred in failing to enter judgment against both Appellees.

As discussed in the facts above, on January 25, 1985, Appellee Diserly, as co-buyer, executed and delivered to Appellant the contract which required thirty (30) monthly payments of $243.12 for a total of $7,293.60 for the purchase of a used 1981 Chevrolet 3/4 Ton Pickup (hereinafter pickup). This pickup was subsequently repossessed and sold by GMAC. The deficiency between the sale price of the pickup at the time it was repossessed and the balance that was owed on the contract was taken out of Appellant's GMAC account [Tr.P.4,L.l-17] . Appellant brought an action to recover the deficiency from Appellees..

Appellee Diserly, as co—buyer, and Appellee Baros, as buyer, executed and delivered to the Appellant the Retail Installment Sale Contract (hereinafter contract) dated January 25, 19%. Under Appellee's signature, the contract delineates the responsibilities of a co—buyer and states:

> "Co-buyers and Other Owners--A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The co-buyer or other owner knows that the Creditor has a security interest in the vehicle and consents to the security interest."

Appellant contends that the Tribal Court erred in failing to enter judgment against both Appellees as joint debtors. In support of this contention, Appellant's brief cites Montana law and suggests this Court be guided thereby. The contract giving rise to this cause of action was signed in Montana. In this case, this Court is permitted by IV CCOJ 501 to look at the Montana law on the issue of joint debtors. This section reads in part as follows:

> "In determining any case over which it has jurisdiction, the Court shall give binding effect to
>
> "....
>
> "(d) where appropriate, the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place."

In addition to IV CCOJ 501 specifically authorizing this Court to be guided by statutes, common law, or rules of decision

pointed out that the Tribal code is silent on contract law. Therefore, this Court must be guided as suggested to render an opinion in this case. In discussing Issue No. 2, this opinion will look to Montana law to guide parties and the Tribal Court in addressing subsequent issues involving joint debtors, determining ultimate responsibilities for an obligation and establishing appropriate procedures for obtaining reimbursement or contribution from a joint debtor.

The following is an overview of the law on the types of liability of joint debtors under a contract:

> "Two or more parties to a contract may bind themselves jointly, severally, or jointly and severally. The intention of the contracting parties, as revealed by the language of their contract and the subject matter to which it relates, determines whether a contract is joint or several, and whether contract rights or duties are joint, several, or joint and several, depends upon the meaning of the contract as ascertained by a proper interpretation thereof. Contracts by property owners uniting in the execution of an obligation in respect of property severally owned by them, form no exception to this rule, and their joint or several, or joint and several, character is generally determined in accordance with the intention of the contracting parties as expressed in the contract or as presumed by law in the absence of expressed intention. Accordingly, such contracts have been held to create either joint or several, or joint and several, obligations as one or the other appeared to be the intention of the parties as expressed in the contract.
>
> "An obligation by, or a right given to, two or more persons is a joint obligation or right, unless distinct words of severance are used to produce a several responsibility or right. The rule followed in most jurisdictions is that an obligation entered into by more than one person is presumed to be joint and that a several responsibility will not arise except by words of severance. In other words, an obligation undertaken by two is presumably joint in the absence of express words to render it several or joint and several, or of terms of a promise considered in the light of the surrounding circumstances indicating an intention to be bound severally, or jointly and severally, or of a statute declaring every contract, though joint in its terms, to be several as well as joint.
>
> "One of the rules for determining whether a contract is joint is whether the interest of the parties in the subject matter is joint, although it has been held that the fact that the interests of the obligors in the contract or its subject matter are diverse does not prevent the duty from being joint. The use of the pronoun "we" usually creates a joint obligation, although, despite the use of that word, the language of some contracts permits of a construction that the parties were intended to be bound severally as well as jointly, or merely severally. If an instrument worded in the singular is executed by several parties, the obligation is a joint and several one.
>
> "Where the language of the contract indicates that the parties bound themselves jointly to nay for the subject of the contract, the fact that words indicative of the proportional part of the subject matter which each of such parties was to take were set against the name of each does not change the construction of the contract or in any way affect their joint liability. Such words do not sufficiently show an intention to limit the liability of each of such parties to his proportion of the subject matter and therefore, so far as the opposite party is concerned, cannot control the general language used in the contract. Such words may, like the word "surety" or "sureties" appended to some of the signatures upon a note, serve to show the relationship subsisting between the parties of the second part of the contract, but they cannot be permitted to subvert or even modify the unambiguous terms of the contract

as made by the parties themselves. If, however, the contract, when properly interpreted, discloses an intention to create a several obligation, such intent will be given effect. In some cases where it is assumed that except for the fixing of the extent of liability of each obligor, the contract would be joint, the words of limitation are regarded as sufficiently indicative of the intention to make the contract a several one." 17 Am.Jur.2d Contracts Section 298.

Because this contract was executed in Montana, this Court will look at contract obligations in Montana. Montana Code Annotated Section 28-1-301 (1937) [hereinafter cited as MCA (1978)] discusses what types of obligations involving several persons are recognized in Montana. This section reads as follows:

"Except as provided in 27-1-703, an obligation imposed upon several persons or a right created in favor of several persons may be:

"(1) joint;

"(2) several;

"(3) joint and several."

MCA Section 28-3-703 (1937) sets forth a presumption on when a promise to pay is presumed to be joint and several. This section reads as follows:

"(1) Where all the parties who unite in a promise receive some benefit from the consideration, whether east or present, their promise is presumed to be joint and several.

"(2) A promise made the singular number but executed by several persons is presumed to be joint and several."

This Court will adopt the above presumption and discuss the overview and presumption in determining the extent of Appellee Diserly's obligation under the contract.

In the overview, there are actually two (2) tests to determine whether an obligation is joint, several or joint and several. The joint or several, or joint and several character of an obligation is either determined by the expressed purposes of the contract or as presumed by law.

In applying the first test, the expressed purposes of the contract clearly demonstrate that Appellee Diserly signed the contract as a co—buyer with Appellee Baros. In language on the face of the contract and directly below Appellee Diserly's signature, she had notice that signing the contract as a co—buyer would obligate her to pay the entire debt. Furthermore, there are no distinct words of severance to produce a several responsibility. Therefore, Appellee Diserly would be jointly and severally liable for the entire debt.

In applying the second test, Appellee Baros testified that Appellee Diserly and her daughter and son were responsible for damage to the repossessed pickup. This testimony was not refuted and other evidence of Appellee Diserly's use of and benefit from the pickup, was not permitted [TR.P.7,L.16-20] This testimony established that Appellees united in an promise to

pay for the pickup under the contract and both received some benefit under the contract. Therefore, Appellees' obligation to Appellant would be presumed joint and several under MCA Section 28-3-703 (1987).

A proper interpretation of the contract requires that Appellees' be held jointly and severally liable for the entire debt remaining on the repossessed pickup. For whatever reason, the Tribal Court failed to find Appellee obligated under the contract and enter judgment for Appellant against the Appellee Diserly. There are no findings of fact and conclusions of law to disclose the Tribal Court's reasoning. This Court will look to rules of decision in Montana for guidance in reviewing the Tribal Court's present action and subsequent Tribal Court proceedings involving contracts and debtor obligations thereunder.

The following Montana cases give reasons which would not be valid for refusing to find Appellee Diserly obligated under the contract.

> "Court cannot set aside contracts because time has demonstrated obligation of one party was onerous or unprofitable." Estabrook v. Sonstelie, 86 Mont. 435, 284 P. 147 (1930).

> "Contract is not invalid because turning out to be unreasonable, dangerous, or burdensome." U. S. Building & Loan Ass'n v. Stevens, 93 Mont. 11, 17 P.(2d) 62 1932).

The following case obligates Montana courts to uphold valid contracts:

> "Court must enforce valid contract notwithstanding harshness or provisions therein." Union Central Life Ins. Co. v. Audet, 94 Mont. 79, 21 P.(2d) 53, 92 A.L.R. 571 (1933).

The contract giving rise to this cause of action was signed on the Reservation and in Montana. There is no evidence that this contract is invalid. Because of the above, it would be appropriate to follow the rules of decision of Montana hereinabove set forth. Although there was testimony that Appellee had attempted to turn back the pickup and be released from further liability under the contract, the Tribal Court cannot set aside or refuse to enforce an otherwise valid contract as against Appellee Diserly [Tr.P.6, L. 2-17].

Therefore, Appellees' are jointly and severally liable for the entire debt to Appellant and this matter is remanded to Tribal Court with instructions to also enter judgment for Appellant against Appellee Diserly for the entire debt.

II.

> Whether the Tribal Court erred in failing to allow Appellees to continue any cross-claims they might have against each other to determine the ultimate responsibility for the debt.

Appellant argues that Montana law is replete with law indicating that judgments should be entered against the joint debtors on behalf of the creditor and that it is joint debtor's option to attempt to obtain contribution from his other joint debtors. In support of this argument, Appellant cited the following Sections 25-23-104 (sic) and 195, 25-15-101 et.seq. Section 20-1-301 et.seq.

The above Sections refer to a surety. Blacks Law Dictionary 1611 (4th Ed. Rev. 1960) defines a surety as "One who undertakes to pay money or to do any other act in event that his principal fails therein...." After comparing the definitions of co

—buyer under the contract and surety in Blacks Law Dictionary and these sections, Appellant is correct and Appellee Diserly has the option to attempt to obtain contribution from Appellee Baros. The following is intended to establish a procedure where a debtor can obtain contribution from a joint debtor in Tribal Court.

Although Appellee Diserly is responsible for the entire debt, under Montana law cited above by Appellant, she would be able to compel contribution from Appellee Baros. In MCA Section 25-13-104 (1987) the procedure whereby this can be accomplished is described. This section reads as follows:

> "(1) When property liable to an execution against several persons is sold theron and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as surety for another and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal.
>
> "(2) In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within 10 days after his payment, he file with the clerk of the court where judgment was rendered notice of his payment and claim to contribution or repayment, Upon the filing of such notice, the clerk must make and entry thereof in the margin of the docket."

The purpose of MCA Section 25-13-104 (1987) setting forth this procedure are discussed in the following case:

> "The purpose of this section is to relieve the paying surety from the necessity of bringing an action to enforce reimbursement or contribution. ion. The surety paying for the principal or his cosurety if given "the benefit of the judgment to enforce contribution or repayment" if he gives the notice required in the statute. It is the intention of the provision that the paying surety shall be substituted to all the rights of the plaintiff in the judgment, with the right and privilege of using it, just as the plaintiff could use it, to enforce by the process of execution thereon the payment of such claim as he has." NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1399).

Until the Tribes adopt their own. code provisions for addressing this problem, this Court will adopt the Montana law for allowing a joint debtor and in this case Appellee Diserly as co-buyer to enforce contribution or repayment from Appellee Bares. Appellee Diserly can pay off the deficiency to Appellant and under this action, seek contribution from Appellee Baros. Other Montana cases dealing with this statute and contribution from joint debtors indicate that this remedy is not exclusive and that there would be no statute of limitation problems.

> "The remedy afforded by this section not being exclusive, a surety who has paid a judgment against his principal and himself and others as sureties may take an assignment of the judgment to himself and enforce contribution from his cosureties. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1399).
>
> "The right of a surety, who has paid a judgment against his principal, and himself and

other sureties, to enforce contribution from a cosurety, is not barred by the lapse of the statutory period of limitation after the payment of the judgment but exists so long as the judgment is alive." NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

The other statues cited by Appellant were MCA Sections 25-13-105 and 25-15-101 (1987). MCA Section 25-13-105 (1937) deals with compelling payment from a surety upon appeal and reads as follows,

> "Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same."

In Tribal Court, in an undertaking on appeal executed to stay proceedings upon a money judgment, a debtor jointly and severally obligated can avail himself of this statute and enforce a judgment against a joint debtor. MCA Section 25-15-101 (1937) deals with summoning a joint debtor and reads as follows,

> "When judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Rule 4D(10), M.R.Civ.P., those who were not originally served with the summons and did not appear to the action may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons."

In Tribal Court in a situation where several persons are jointly indebted upon an obligation, parties in an action and joint debtor can avail themselves of this statute and by order to show cause bring in a person jointly indebted upon an obligation to have them bound by the judgment.

Therefore, the Tribal Court erred in failing to enter judgment against both Appellees. The Tribal Court is instructed to permit Appellees to file any cross—-claims they might have or to compel reimbursement or contribution as hereinabove provided.

IT IS THE UNANIMOUS DECISION OF' THIS COURT TO REVERSE THE TRIBAL COURT AND REMAND THIS MATTER TO TRIBAL COURT WITH INSTRUCTIONS TO THE TRIBAL COURT (1) TO ENTER JUDGMENT FOR APPELLANT AGAINST APPELLEE GLORIA DISERLY AND (2) TO PERMIT APPELLEES TO FILE ANY CROSS-CLAIMS THEY MIGHT HAVE AGAINST EACH OTHER OR TAKE ACTION IN ACCORDANCE WITH THIS OPINION TO DETERMINE ULTIMATE RESPONSIBILITY FOR THE DEBT AND OBTAIN REIMBURSEMENT OR CONTRIBUTION FROM EACH OTHER.

DONE this _____ day of April, 1983.

BY THE COURT OF APPEALS:

_____

ARNIE A. HOVE, Chief Justice

DANIEL R. SCHAUER, Justice

GARY JAMES MELBOURNE, Justice