

from Honey v. Davls p. 284

Bd. v. Hurst, 410 N.W.2d 560 (S.D.1987). Those cases are distinguishable in that each deals with a lessor attempting to assert a surety's defense against the lessee's lender/creditor.

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Response
brief
p. 34,
(2nd cite)

*284 In *Matthews*, the court recognized the rule that when a surety signs a security document as a principal, the creditor may estop him from denying his status as such. That rule does not affect the relationship between the surety and the principal, however. *Matthews*, 44 Cal.Rptr. at 696. That [896 P.2d 1306] rule has been recognized in Washington as well. In *Leuning v. Hill*, 79 Wash.2d 396, 400, 486 P.2d 87 (1971), the court noted that while comakers of a promissory note may appear on the face of the writing as principals, they may in fact occupy the relation of principal and surety.

[3] Here, the Honeyes are not asserting their suretyship status against a creditor, but against the principal. Thus, they are not estopped from relying on their status as sureties by the form of their signature on the deed of trust. *Matthews* also states a lessor could not be a surety because the lessors subordinated their interest for "the promotion of their personal financial interests" and that they had exposed their interest to "direct liability independently of auxiliary collection attempts against the borrowers". *Matthews*, 44 Cal.Rptr. at 696. However, the very nature of a suretyship is that the surety is directly liable to the creditor. A creditor need not attempt to collect from the principal before making demand on the surety unless the surety's contract is for a "guaranty of collection". Restatement of Security s 82, comment f (1941). Likewise, the fact the surety stood to benefit from the transaction does not preclude surety status. Indeed, a compensated surety may enter a suretyship contract solely because it intends to benefit from the agreement. See Restatement of Security s 82, comment i (1941). Here, although the Honeyes may have benefited indirectly from the subordination, the primary benefit of the contract to which they were sureties, the Rainier loan, went to Mid-Valley.

[4] We hold the lessor in a long-term subordinated ground lease may stand as a surety for the lessee. Here, material issues of fact exist regarding such a suretyship. Thus, summary judgment cannot be based upon that ground.

[5] *285 The Honeyes also contend that none of the several affirmative defenses raised by Mid-Valley will support summary judgment dismissal of their claims. The first of those affirmative defenses was that the statute of frauds, RCW 19.36.010, renders the agreement unenforceable. RCW 19.36.010, provides:

In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing. ... (2) *every special promise to answer for the debt, default, or misdoings of another person;*

(Italics ours.) Mid-Valley argues the lease does not provide for a suretyship. The lease requires the Honeyes to subject their interest in the property to the lien of the lender financing the construction. This is functionally the equivalent of hypothecating the property. The deed of trust shows the Honeyes did so. While the lease may not use the word "suretyship", compliance with its terms places the Honeyes in such a position. The lease, together with the deed of trust, are adequate writings to avoid the statute