

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>JOHN H. SCHIAVI,</b>	)	
	)	
<b>PLAINTIFF</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 00-84-P-H</b>
	)	
<b>CALVIN J. COLEMAN, ET AL.,</b>	)	
	)	
<b>DEFENDANTS</b>	)	

**ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Here, a co-guarantor/co-maker of a note who ended up paying almost the entire debt seeks to recover a pro rata contribution share from another co-guarantor/co-maker. He has moved for summary judgment. The facts are essentially undisputed. There are two defenses: first, that the statute of limitations bars part of the recovery; second, that the paying guarantor/maker did not actually pay the creditor back. I conclude that neither defense succeeds and **GRANT** the plaintiff's motion for summary judgment.<sup>1</sup>

**UNDISPUTED FACTS**

The plaintiff John Schiavi and the defendant Calvin Coleman guaranteed the \$1,500,000 note of their corporation, Redstone Properties, Inc., to Key Bank in 1986. They secured their guarantees with their stock. The note was interest only,

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<sup>1</sup> The defendant's Motion for Leave to Submit Brief Response to Plaintiff's Reply Memorandum is **GRANTED**.

with the face amount due on October 8, 1989. All the parties extended its term to December 31, 1992, by an allonge in November 1989. Redstone never had cash to pay the interest, so Schiavi and Coleman advanced amounts to Redstone so that it could pay Key Bank. Coleman stopped paying in October 1989, and thereafter Schiavi paid the entire amount (but for one payment of \$751.12 by Coleman on February 2, 1990).

On June 30, 1993, the transaction was rewritten at Key Bank's request. Redstone paid off \$500,000 of the principal by selling land; the note was changed to require semi-annual payments of principal; a new term of 55 months was established (to January 1, 1998); additional security was provided in the form of a Redstone mortgage on New Hampshire real estate; all three parties were co-makers; and Key Bank stamped the original note "paid."

Schiavi made all payments thereafter. Since 1998, when the debt was paid in full, he has been writing Coleman demanding that Coleman reimburse him for his share of the entire amount. Coleman never denied his obligation to Schiavi, but pleaded financial distress. On September 30, 1998, Schiavi demanded that Coleman make monthly payments to him of \$5,000. On October 5, 1998, Coleman promised to send the first \$5,000 installment. On October 26, 1998, Coleman made a single \$5,000 payment to Schiavi.

## ANALYSIS

Jurisdiction is based on diversity of citizenship. The papers documenting the transactions provide that Maine law applies, and the parties do not contest its application.

### *Statute of Limitations*

The Maine statute of limitations for a lawsuit seeking contribution is six years. 14 M.R.S.A. § 752 (West 1980). Here, the Complaint was filed February 28, 2000. The original debt was paid and a new transaction entered into on June 30, 1993, more than six years earlier. Schiavi argues that it is nevertheless the same debt, not a new one. He contends that since his action for contribution did not accrue until he had paid more than his pro rata share, Restatement (Second) of Suretyship and Guaranty § 63 (1996), a stage he did not reach until 1994, the statute of limitations is no bar.

Under Maine law, when one note is substituted for another, the intent of the parties controls on the question whether the original debt is considered paid. St. Agatha Federal Credit Union v. Ouellette, 722 A.2d 858, 861 (Me. 1998). Here, the summary judgment record contains no direct evidence on the parties' (Key Bank; Schiavi; Coleman; Redstone) state of mind in 1993. What I have are the documents and their terms as I have described them. Maine law also recognizes certain presumptions. If the creditor ends up with just as much security, the new note presumptively constitutes payment of the old ("the giving of a note

presumptively constitutes payment of a debt only where the security of the creditor is not impaired”) *Id.* at 860; Hanscom v. Bourne, 177 A.2d 187, 190 (Me. 1935). The presumption can be rebutted by evidence of a contrary intent, *id.*; evidence that is missing here. But the presumption is not necessary to reach the conclusion that in 1993 the original debt among these parties was terminated and a new one created: the terms are different (new maturity; amortization instead of lump sum; additional security in the form of a mortgage); a substantial part of the original debt was paid off in a lump sum payment; and the Bank stamped the old note “paid.” I conclude, therefore, that the statute of limitations began running in 1993 on any action for contribution under the old note. If Schiavi wanted to make arrangements for Coleman to reimburse him for payments on that note, 1993 was the time to do it.

But Maine also recognizes a pertinent exception to the statute of limitations defense:

An unqualified part payment voluntarily made by a debtor of an existing debt is held to be an acknowledgement by the debtor of the debt, and from such payment there arises an implied promise to pay the balance which is sufficient to take the case out of the limitation imposed by the statute.

Reed v. Harris, 28 A.2d 741, 743 (Me. 1942). Payment alone is not enough; the question is whether the circumstances show that the debtor (here Coleman) was admitting the debt. *Id.*

Coleman made his \$5,000 payment on October 26, 1998. It was in response to Schiavi's demand that Coleman reimburse him for his pro rata share of the entire transaction. There is no suggestion that the payment was only on the new note, and no suggestion that as between Schiavi and Coleman they thought in those terms. Indeed, other evidence in the record demonstrates a continuing recognition by Coleman of his obligation/debt to Schiavi. See Schiavi Aff. ¶¶ 15, 19, Ex. M; Compl., Ex. O. I conclude that the \$5,000 payment removes the entire debt from the protection of the statute of limitations.

### ***Who Paid Key Bank?***

Coleman argues that Schiavi did not in fact pay Key Bank; that what Schiavi did was loan money to Redstone so that Redstone could stay current on its obligation to Key Bank. As a result, says Coleman, Schiavi may have a cause of action against Redstone for the loan, but no right of contribution against Coleman.

The only support for this argument is a deposition statement Schiavi made when asked how the payments were “physically” made to Key Bank: “To the best of my recollection, the interest—I would loan money from my checkbook to the Redstone checkbook. Then Redstone would draw a check to fund the interest payment. At the same time, 50 percent of the interest was my obligation, and 50 percent of it was carried on a worksheet for Buzz's [Coleman's] behalf.” Schiavi Dep. at 32-33. These two sentences, read together and in context, do not suggest that Schiavi decided to loan money to Redstone as a debt from Redstone.

Instead, they demonstrate that he was doing it as a co-guarantor or co-maker, with an equal obligation from Coleman. Indeed, as long as he was financially able, Coleman sent a monthly check to Schiavi to reimburse him for one-half the interest payment. Coleman Dep. at 28-29. In his answer, Coleman admitted that “Schiavi made all of the payments under the Replacement Note.” Compl. ¶ 13; Answer ¶ A. In his deposition, Coleman acknowledged that he owed Schiavi money as a result of Schiavi’s payments in satisfaction of the Redstone loan. Coleman Dep. at 35. Moreover, Coleman admitted that he kept Schiavi informed of his difficult financial circumstances because he recognized that Schiavi was satisfying both of their obligations on the note. Coleman Dep. at 52.

#### CONCLUSION

Accordingly, summary judgment is **GRANTED** to the plaintiff on his action for contribution. It is unnecessary to address his additional claims.

The plaintiff now has a default judgment against Redstone, see Default Judgment dated April 29, 2000, and a summary judgment against Coleman on these financial dealings. The plaintiff shall propose a form of judgment to the Court.

**SO ORDERED.**

**DATED THIS 19TH DAY OF OCTOBER, 2000.**

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**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**

U.S. District Court  
District of Maine (Portland)  
Civil Docket For Case #: 00-CV-84

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plaintiff

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v.

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REDSTONE PROPERTIES, INC.  
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