IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOSEPH L. VENTRESCA,	:	
Plaintiff	:	
v.	:	NO. 12 - 1455
MICHAEL J. DONAHUE AND	:	
KAREN P. DONAHUE, HIS WIFE,	:	
Defendants	:	

CIVIL LAW – Personal Guaranty of Corporate Note – Secondary Liability of Guarantor – Discharge of Guarantor and Accompanying Collateral Upon Payment and Satisfaction of Debt Which is the Subject of the Guaranty - Effect at Law of Assignment of Guarantor's Mortgage on Residential Property by Creditor After Discharge of Underlying Debt - Action in Mortgage Foreclosure by Assignee - Judgment in Favor of Defendant Guarantor in Mortgage Foreclosure Action - Entitlement of Defendant Guarantor to Attorney Fees as Prevailing Party - Act 91 - Act 6 – Payment of Principal's Debt by One of Several Co-Guarantors - Right of Contribution By and Between Co-Guarantors – Doctrine of Equitable Subrogation – Relation to Unjust Enrichment – Subrogation of Guarantor Paying Debt in Full to all Rights of Creditor Against Principal Debtor and Co-Guarantors – Subrogee's Right to Recovery Against Co-Guarantors and Collateral Pledged by Co-Guarantors - Pa.R.C.P.No. 1148 – Nature of Counterclaims Permitted in a Mortgage Foreclosure Action - Fiduciary Duties Arising Between Parties Who Do Not Deal With Each Other on Equal Terms - Fiduciary Duties Owed by Majority Shareholder to Minority Shareholder - Fiduciary Duties Owed by Corporate Director to Corporation - Corporation as Indispensable Party in Shareholder Derivative Claim - Right to an Accounting, At Law and in Equity - Discovery as Remedy in lieu of Accounting

1. A guarantor guarantees that another person will pay a debt or perform a duty and such person remains primarily liable. In case of default, the guarantor is secondarily liable.

2. Upon satisfaction of a guaranteed debt, both the personal guaranty of that debt and any mortgage provided as security for the guaranty is discharged at law. Consequently, once the underlying debt has been extinguished, no valid action

in mortgage foreclosure exists for a mortgage given to secure performance of a guaranty of the underlying debt.

3. Unlike Act 6 (41 Pa.C.S.A. § 101, et seq.), no private cause of action exists under Act 91 (35 Pa.C.S.A. § 1680.401c et. seq.) for a borrower or debtor who prevails in an action in mortgage foreclosure on a residential mortgage.

4. Section 503 (a) of Act 6, 41 P.S. § 503 (a), requires payment of reasonable attorney fees incurred by a borrower or debtor who prevails in a mortgage foreclosure action on a residential mortgage.

5. The remedy of equitable subrogation is granted as a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another. Equitable subrogation is premised upon equitable principles one of which is the avoidance of unjust enrichment.

6. For equitable subrogation to apply, four criteria must be met: (1) the claimant paid the creditor to protect its own interest; (2) the claimant did not act as a volunteer; (3) the claimant was not primarily liable for the debt; and (4) allowing subrogation will not cause injustice to the rights of others.

7. Under the principles of equitable subrogation, the payment of a principal's debt by a guarantor of that debt acts as if the guarantor had purchased the creditor's claim; the payment operates as an assignment of the debt *pro tanto* and of all rights of the creditor with regard thereto, including the right to proceed in the name of the creditor against a co-guarantor liable for the same debt. No formal assignment either to create or evidence the right of contribution is required. The right arises out of the equities of two or more persons obligating themselves to pay the debt of another becoming mutually bound thereby to each other to divide and equalize any loss that may arise therefrom to either or any of them. The right of subrogation is not lost because the debt of the principal is satisfied or extinguished by the guarantor's payment; on the contrary, it is just because of such satisfaction or extinguishment that the right of subrogation arises.

8. The right of contribution is enforceable against a co-guarantor not only through the medium of an independent and

direct claim, but by way of subrogation to the rights of the creditor whose claim it has paid.

9. A guarantor who is compelled to pay the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditor as against his co-guarantors in precisely the same manner as against the principal debtor, and as substituted in the place of the creditor is entitled to enforce all of the creditor's liens, priorities and means of payment, including any securities pledged or mortgage granted to secure a guaranty of the debt.

10. Joint or co-guarantors are jointly and severally liable for the whole debt upon the default of their principal, and in relation to each other each is a principal for that proportionate amount for which he is primarily liable as between himself and his co-guarantors, and a guarantor of his co-guarantors with respect to the remaining balance of the principal's debt. In the event one of several co-guarantors pays more than his proportionate share of the common debt, he is entitled to contribution from the other co-guarantors for the amount paid in excess, the extent of the personal liability of each such co-guarantor to the overpaying guarantor being limited, however, to that amount which satisfies each co-guarantor's duty to contribute his proportionate share of the principal's default.

11. Pa.R.C.P.No. 1148 restricts counterclaims in a mortgage foreclosure action to those "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." In accordance with case law, this rule only permits counterclaims which are "part of or incident to the creation of the mortgage relationship itself."

12. A fiduciary relationship exists when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an over-mastering dominance on one side, or weakness, dependence, or justifiable trust on the other. Where neither has been proven, as here, a claim for breach of fiduciary duty on this basis will be denied.

13. A majority shareholder of a business corporation stands in a fiduciary relationship to a minority shareholder.

14. A majority shareholder of a business corporation owes a fiduciary duty to a minority shareholder not to waste, fraudulently dispose of, or divert corporate assets or opportunities for the majority shareholder's personal benefit or that of businesses controlled by him, or

misrepresent or conceal corporate financial information from the minority shareholder. The fact that a business corporation fails financially or becomes insolvent, in and of itself does not establish that the majority shareholder breached any fiduciary obligation to the minority shareholder.

15. A corporate director owes a fiduciary duty to the corporation. When that duty is breached, only the corporation or a shareholder on behalf of the corporation may bring suit for breach of the director's standard of care owed to the corporation. A shareholder does not have standing to commence an action in his name alone for harm that is peculiar to the corporation and that is only indirectly or derivatively injurious to the shareholder. To have standing to sue individually, the shareholder must allege a direct, personal injury – that is one independent of any injury to the corporation – arising from a breach of duty owed to the shareholder such that the shareholder is entitled to receive the benefit of any recovery.

16. A claim against a corporate director for the director's alleged dominating control, self-dealing, diversion of corporate assets, failure to make payment of required taxes, and mismanagement of the corporation asserts an injury primarily to the corporation and, therefore, to the extent a viable cause of action exists for breach of a fiduciary duty, the action is one belonging to the corporation, not to an individual shareholder.

17. At law, because a claim for an accounting is incident to an underlying claim for which damages are recoverable, before an accounting will be granted, a viable claim for damages must exist.

18. In equity, a claim for an accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law.

19. A claim for an accounting will be denied where the information sought is equally obtainable through discovery or where an accounting would serve no useful purpose.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

JOSEPH L. VENTRESCA, Plaintiff	:	
v.	:	NO. 12 - 1455
MICHAEL J. DONAHUE AND KAREN P. DONAHUE, HIS WIFE, Defendants	:	

Jane S. Sebelin, Esquire — Counsel for Plaintiff
Marianne J. Gilmartin, Esquire — Counsel for Defendants

MEMORANDUM OPINION

Nanovic, P.J. – July 22, 2015

Assume:

A corporation borrows $815,000.00 from a bank. Four owners and officers of the corporation personally guarantee this debt. One of the guarantors pledges an investment account with $487,000.00 in assets as additional security. A second guarantor grants a mortgage against his home as collateral for his guaranty.

The corporation defaults on its loan. As part of a private foreclosure sale the bank takes possession of the corporation's assets and sells them for $300,000.00 to a third - party with the proceeds of this sale to be applied against the corporation’s

outstanding indebtedness to the bank, leaving $613,000.00 still unpaid.

The $487,000.00 investment account pledged by the one guarantor is applied by the bank to the corporation's indebtedness. This same guarantor, pursuant to his guaranty agreement, pays the remaining unpaid balance of $126,000.00 to the bank.

Two days after the corporate debt has been paid in full, the bank assigns the corporation's promissory note pursuant to which the corporation's initial borrowing was based, together with the written guaranty of the guarantor who pledged his home and the mortgage securing this guaranty, to the guarantor whose investment account and $126,000.00 payment was used to satisfy the corporate debt.

Does the recipient guarantor of this assignment have a valid and enforceable cause of action at law in mortgage foreclosure?

These are the basic, albeit simplified, facts of Plaintiff's case - in - chief. The law in this area is not unduly complicated but appears to be misunderstood by the

parties. This is critical to Plaintiff's claim which in form and substance is an action in mortgage foreclosure.

PROCEDURAL AND FACTUAL BACKGROUND

Appreciated Vending Services, Inc. ("AVS"), is a New Jersey business corporation originally incorporated by the Defendant, Michael J. Donahue ("Donahue"), in 1996. In 2005, its principal business was servicing food and beverage vending machines in Pennsylvania and New Jersey. That same year, Plaintiff, Joseph L. Ventresca ("Ventresca"), and his partner, Jeffrey Snyder, acquired a controlling interest in AVS via a stock purchase agreement.[1] Both before and after this purchase, Donahue and his partner, Christopher Side, each owned a seventeen and one - half percent interest in AVS.

Between 2005 and 2009, Donahue continued as AVS's President. (N.T., 10/14/14, pp.37, 160). In this position, he managed its day - to - day affairs. (N.T., 6/27/14, p.77). Soon after the stock purchase, Ventresca became Chairman of the Board of Directors for AVS. In this position, he controlled policy and made major, non - routine business decisions.

AVS was heavily in debt and struggling financially when Ventresca first became involved. (N.T., 6/27/14, pp.8 - 9). Why, was never made clear. However, in 2006, in order to reduce its interest rate and monthly payments, AVS refinanced its existing debt with Sun Bank, with whom AVS had previously done

business, and entered two new loans with The Bank, a subsidiary of Fulton Bank: one in the amount of $75,000.00 and one in the amount of $340,000.00. Each loan is evidenced by a promissory note dated August 28, 2006, in the face amount of the loan, is made payable to The Bank, and is executed by Donahue in his capacity as President of AVS. (Plaintiff Exhibit Nos. D and F). Both notes on their face state they are secured by the following: (1) AVS's accounts receivable, inventory, equipment and other assets; (2) a mortgage on real estate owned by Donahue and his wife, Karen P. Donahue (the "Donahues"), located at 384 Kipling Lane, Penn Forest Township, Jim Thorpe, Carbon County, Pennsylvania;[2] (3) a mortgage on the Donahues' home located at 30 Gable Hill Road, Levittown, Bucks County, Pennsylvania; (4) an A.G. Edwards investment account pledged by Ventresca and his wife, Tinamarie G. Ventresca; and (5) the personal guaranties of Joseph L. Ventresca, Tinamarie G. Ventresca, Jeffrey Snyder, Christopher Side, Michael J. Donahue and Karen P. Donahue.

Separate mortgages with respect to the Donahues' property at 384 Kipling Lane, Penn Forest Township, Jim Thorpe, Carbon County, Pennsylvania, were recorded in the Carbon County Recorder of Deeds Office on October 16, 2006, for each note. Other than the face amount of the mortgage which corresponds to the amount of the note guaranty for which it is collateral, the language of both mortgages are substantially the same.

Both mortgages state in bold print the following:

> THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PERFORMANCE OF A GUARANTY FROM GRANTOR TO LENDER, AND DOES NOT DIRECTLY SECURE THE OBLIGATIONS DUE LENDER UNDER THE NOTE AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THIS MORTGAGE.

Both mortgages also define the term "Indebtedness" to mean "all obligations of the Grantor under the Guaranty" and further provide that "[i]f the Grantor strictly performs all of the Grantor's obligations under the Guaranty and all of the Grantor's obligations imposed upon the Grantor under the Mortgage, the Lender will execute and deliver to Grantor a suitable satisfaction of the Mortgage."[3]

A third loan with The Bank in the amount of $400,000.00 was also taken on March 2, 2007. This loan is evidenced by a promissory note dated March 2, 2007, and executed by Donahue in his capacity as President of AVS on behalf of AVS as maker. According to the terms of this note, it is secured by the following: (1) AVS's accounts receivable, inventory, equipment and other assets; (2) assignment of the A.G. Edwards investment account pledged by Joseph L. Ventresca; and (3) the personal guaranties of Joseph L. Ventresca, Jeffrey L. Snyder, Christopher Side and Michael Donahue. (Plaintiff Exhibit No. G). This third loan is not secured by any real estate owned by Donahue or his wife.

Unfortunately, AVS's financial condition continued to deteriorate. (N.T., 6/27/14, pp.10 - 11, 105; N.T., 10/14/14, pp.58, 209). In September 2008, it entered a wholesale agreement with Stomel Vending, Inc. ("Stomel") for Stomel to operate and manage AVS's business. (Defendant Exhibit No. 6). On August 31, 2009, AVS entered into an Asset Purchase Agreement with Stomel which, in conjunction with a collateral sale agreement between The Bank, as seller, and Stomel, as buyer, provided for the sale of virtually all of AVS's assets to Stomel, with the net proceeds of this sale to be applied against AVS's debt owed to The Bank.[4] The Asset Purchase Agreement was signed by Donahue as President of AVS and by Ventresca as guarantor of AVS's obligations thereunder.

Settlement of AVS's debts with The Bank and closing for Stomel's purchase of AVS's assets occurred on September 30, 2009, at two separate locations. (N.T., 6/27/14, pp.142, 150 - 54, 161; N.T., 10/14/14, pp.47, 183; Defendant Exhibit No. 2). Ventresca and his counsel first met at The Bank's offices in New Jersey to finalize the settlement of AVS's indebtedness to The Bank in advance of the sale of AVS's assets to Stomel. Ventresca expected Donahue to be present at this settlement, however, he failed to show. (N.T., 6/27/14, p.13).

According to Ventresca, The Bank was to receive $300,000.00 from the sale to Stomel, leaving a deficiency of approximately

$613,000.00 owed on AVS's debt to The Bank. To close this gap, The Bank seized the assets in Ventresca's investment account valued at $487,000.00. The remaining difference, $126,099.05, was covered by Ventresca's personal check for this amount written to The Bank on September 30, 2009. (Defendant Exhibit No. 21). Absent this payment, the sale to Stomel would not have gone forward and what residual value AVS then possessed would have been lost. (N.T. 6/27/14, pp.24 - 25).

Going into the settlement with The Bank on September 30, 2009, Ventresca knew the $300,000.00 payment by Stomel would not satisfy AVS's debt obligations and also that the value of the stocks and bonds in his AG Edwards investment account would be insufficient to make up the difference, although he did not know exactly what additional amount would need to be paid to The Bank. (N.T., 6/27/14, pp.21 - 24). Ventresca advised Donahue before settlement that there would be a shortfall and also that Donahue would be expected to contribute to this deficiency in proportion to his ownership interest in AVS. Ventresca initially estimated this number to be $157,000.00, but later honed this figure to $125,000.00. (N.T., 6/27/14, pp.12 - 13, 126).

Because Ventresca knew Donahue did not have this amount of money immediately available to him, in order for the Donahues to save their property at 384 Kipling Lane, rather than have it

foreclosed upon by The Bank, in or about February 2009, at the time Ventresca estimated Donahue's contribution to be $157,000.00, he also suggested the Donahues obtain a mortgage from The Bank for $157,000.00 to finance this payment. Ventresca had a draft mortgage prepared for these purposes which he provided to Donahue who chose not to follow up on this suggestion. (N.T., 6/27/14, pp.104, 106, 108; N.T., 10/14/14, pp.62 - 63, 77 - 79; Defendant Exhibit No. 7).[5]

Later, after Ventresca was able to determine more precisely what amount should be contributed by Donahue to pay his pro rata share of the deficiency, he proposed advancing the Donahues the $125,000.00 necessary to satisfy AVS's outstanding debts at closing and taking back a mortgage on the Donahues' property for this amount. (N.T., 6/27/14, pp.12 - 13, 32 - 34). Ventresca testified he never received a definite answer to this proposal but that he fully expected Donahue to be present at the settlement with The Bank and that he believed they would be able to work out what amount Donahue should be contributing to the unpaid deficiency owed on AVS's debt to The Bank. (N.T., 6/27/14, pp.32 - 33, 125 - 26; N.T. 10/14/14, pp.182 - 83).

Ventresca was upset and disappointed that Donahue did not show for the settlement with The Bank at which AVS's debts to that financial institution were to be settled; he felt betrayed, that it was wrong for him to be fully responsible for the full

burden of the deficiency owed to The Bank; and he believed his only chance of receiving any contribution from the Donahues toward this debt was for him to purchase AVS's two promissory notes and the corresponding mortgages held by The Bank on the Donahues' property. (N.T., 6/27/14, pp.13 - 14, 108). Because of this last minute development, Ventresca testified that closing on Stomel's purchase of AVS's assets was pushed back later in the day. (N.T., 6/27/14, p.13).

The closing on Stomel's purchase of AVS's assets was originally scheduled for either 10:00 or 11:00 A.M. on September 30, 2009, at Stomel's bank, First Colonial. (N.T., 6/27/14, p.156; N.T. 10/14/14, pp.60 - 61). Donahue was present at the scheduled time and signed all of the documents required to transfer title to those vehicles owned or leased by AVS to Stomel. (N.T., 6/27/14, pp.151 - 52, 158; N.T. 10/14/14, pp.60 - 61, 85). These vehicles had not been used as collateral for The Bank loans and, therefore, were not part of the collateral sale agreement between The Bank and Stomel.

When Ventresca did not appear by 11:30 A.M. for this closing, and there was some indication that he might not be appearing, the parties present decided to recess for lunch and to reconvene at approximately 1:30 P.M., when it was hoped more would be known on whether the closing could proceed. (N.T., 6/27/14, pp.151 - 52, 156 - 57; N.T., 10/14/14, p.61).

According to Donahue, he did not believe Ventresca was coming to closing; therefore, once the group broke for lunch, he left and did not return. (N.T., 10/14/14, pp.60 - 61).[6]

When the parties reconvened, Ventresca was present and the closing with Stomel went forward. At this closing, as planned, Stomel paid $300,000.00 to The Bank for AVS's corporate assets, which amount was applied to AVS's indebtedness to The Bank. (N.T., 6/27/14, p.151; Defendant Exhibit No. 21). With this payment, The Bank's receipt of Ventresca's stocks and bonds in his investment account worth $487,000.00, and the $126,099.05 check Ventresca wrote to The Bank to cover the remaining balance, The Bank was paid in full on AVS's indebtedness. (N.T., 6/27/14, pp.21, 25, 45).[7]

Inexplicably, none of the parties has provided a copy of the settlement statements for either of the settlements held on September 30, 2009. Nor has any party provided an amortization schedule for any of the three loans taken by AVS from The Bank. Consequently, we do not know the amount of the unpaid principal balance on any of the three loans as of September 30, 2009, or in what amounts and to which loans The Bank applied the $300,000.00 payment from Stomel, the $487,000.00 in value of Ventresca's investment account,[8] or the $126,099.05 check written by Ventresca.

Several days after settlement, on October 2, 2009, The Bank assigned to Ventresca the Donahue mortgage encumbering their Penn Forest property with respect to the $340,000.00 loan. This assignment specifically states that:

> the said Assignor hereby constitutes and appoints the Assignee as the Assignor's true and lawful attorney, irrevocable in law or in equity, in the Assignor's name, place and stead but at the Assignee's cost and expense, to have, use and take all lawful ways and means for the recovery of all sums due Assignee by Michael J. Donahue and Karen P. Donahue by reason of mutual guarantees given to The Bank as security for the note referenced in the mortgage; and in case of payment, to discharge the same as fully as the Assignor might or could do if these presents were not made.

(Plaintiff Exhibit No. H). By a second assignment dated July 31, 2014, The Bank assigned to Ventresca both mortgages on the Donahues' Penn Forest property "along with their corresponding Promissory Notes and the Guaranties of Michael J. Donahue and Karen P. Donahue." This Assignment of Note and Mortgage further states that:

> the said Assignor hereby constitutes and appoints the Assignee as the Assignor's true and lawful attorney, irrevocable in law or in equity, in the Assignor's name, place and stead but at the Assignee's cost and expense, to have, use and take all lawful ways and means for the recovery of all sums due assignee by Michael J. Donahue and Karen P. Donahue by reason of mutual guarantees given to Assignor as security for the note referenced in the mortgage; and in case of payment, to discharge the same as fully as the Assignor might or could do if these presents were not made.

(Plaintiff Exhibit No. W). None of the guaranties referenced in either of these assignments was ever presented in evidence.

On or about October 21, 2009, The Bank sent a notice to AVS advising that the $75,000.00 loan was paid off on October 6, 2009. (Defendant Exhibit No. 12). Further, the $75,000.00 promissory note was marked paid by The Bank on October 6, 2009, and the $340,000.00 promissory note marked paid by The Bank on October 2, 2009. (Defendant Exhibit Nos. 11, 12).

On the strength of the first assignment – the second assignment had yet to occur - Ventresca commenced the instant mortgage foreclosure action against the Donahues on July 2, 2012. In response to this complaint, the Donahues averred, *inter alia*, that Ventresca failed to establish any breach of guaranty by the Donahues, failed to establish the amount of any loss to Ventresca for which the Donahues were responsible, failed to establish that any loss to Ventresca was secured by the mortgage such that Ventresca was entitled to commence foreclosure proceedings, and failed to provide proper notice prior to commencing suit. In addition, the Donahues filed a three - count counterclaim against Ventresca for breach of fiduciary duty, unjust enrichment, and an accounting.

Trial in this matter was held on June 27, 2014, and October 14, 2014.

DISCUSSION

A. Ventresca's Claim for Mortgage Foreclosure

This case is procedurally and substantively a mess. To begin, Ventresca's complaint for foreclosure is premised upon the assignment of one mortgage by The Bank to Ventresca on October 2, 2009. The assignment purports to transfer the $340,000.00 mortgage only with no transfer made of the promissory note, or of the claimed guaranty of this note by the Donahues. This assignment on its face authorizes Ventresca in The Bank's name, not Ventresca's name, to use whatever legal means are available to recover all sums due Ventresca by the Donahues by reason of mutual guaranties given to The Bank as security for the $340,000.00 promissory note. Clearly, this suit was not commenced in The Bank's name, no mutual guaranties have been proven, and the terms and conditions of any personal guaranties given by the Donahues to The Bank are unknown because neither copies of these guaranties nor evidence as to their terms and conditions was presented. From this, it is evident that whether the Donahues have breached these guaranties cannot be determined and if breach has occurred, why Ventresca should be due any monies from the Donahues is unexplained.

The second assignment from The Bank to Ventresca dated July 31, 2014, purports to assign both mortgages on the Donahues' property, the corresponding promissory notes related to each

mortgage, and the guaranties of Michael J. Donahue and Karen P. Donahue. While this assignment ostensibly corrects the perceived defects in the first assignment – noting, however, that at no time did Ventresca move to conform the pleadings to the evidence, either at the time it was presented on the second day of trial or later - it did not cure the procedural and evidentiary concerns mentioned in the previous paragraph. No mutual guaranties were proven and how and in what respect the Donahues breached any guaranties given by them to The Bank has not been shown, nor has Ventresca proven how any such breach has caused damages to him or to what extent.

The three promissory notes from AVS to The Bank on their face total $815,000.00. Two of the notes are dated August 28 2006, and the third is dated March 2, 2007. The first two notes were issued more than three years prior to the settlement held on September 30, 2009, and the third is more than two and a half years prior to that settlement date. The evidence is undisputed that payments on all three notes were made prior to September 30, 2009, although the amount of these payments may well be in dispute, yet no evidence was presented as to the unpaid principal amount due and owing on any of the three promissory notes as of September 30, 2009. (N.T., 6/27/14, pp.93 - 97).

We know, if we accept Ventresca's evidence, that at least $913,000.00 was paid to The Bank at the settlement held on

September 30, 2009: $300,000.00 by Stomel, $487,000.00 by virtue of the value of Ventresca's investment account, and Ventresca's check for $126,099.05. This amount is almost $100,000.00 more than the face amount of the three notes combined.

We do not know how The Bank allocated the monies it was paid on September 30, 2009, and are unable to determine from the evidence presented whether any of the monies from the $126,099.05 check Ventresca wrote at the time of settlement was used to pay either of the promissory notes indirectly secured by the Donahues' property, or was used to satisfy payment of the $400,000.00 promissory note. If to the $400,000.00 note, the Donahues would have no obligation to The Bank - or to Ventresca for that matter - in this action for mortgage foreclosure since no mortgage was given by the Donahues on this note.[9] Nevertheless, we also know that The Bank was paid in full all indebtedness owed it by AVS and that The Bank on its records marked both promissory notes which were the subject of the Donahues' guaranties secured by their mortgages as paid.

Significantly, the mortgages Ventresca seeks to foreclose upon secure only the guaranties given by the Donahues in relation to the $75,000.00 and $340,000.00 promissory notes. They do not guarantee directly the payment of these notes. We do not have the benefit of being able to examine any of the Donahues' guaranties to determine what notices or other

preconditions, if any, must be met before enforcement of the guaranties - and by extension, foreclosure of the mortgages by which they are secured - may occur, whether the guaranties are full or limited guaranties of the note amounts, or whether the Donahues have breached any of their terms or conditions, but can safely conclude from their mention in the notes that these guaranties were for the benefit of The Bank to ensure payment of the notes and that once the notes were paid in full and the primary liability thereunder of AVS was extinguished, the secondary liability of the guarantors also ended, as did the security of the mortgages. Citicorp North America, Inc. v. Thornton, 707 A.2d 536, 539 n.2 (Pa.Super. 1998) ("A guarantor undertakes that another person will pay a debt or perform a duty and such person remains primarily liable. . . . In case of default the guarantor is secondarily liable. . . .") (quoting Homewood People's Bank v. Hastings, 106 A. 308, 309 (Pa. 1919)); In re Estate of Snyder, 13 A.3d 509, 514 (Pa.Super. 2011) ("[I]t is well settled in this Commonwealth that, although each is a distinct security, [t]he payment of either a mortgage or [an underlying] bond discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties") (quotation marks and citation omitted), *appeal denied*, 25 A.3d 329 (Pa. 2011). Therefore, because Ventresca's mortgage

foreclosure action is expressly dependent upon the assignment of the Donahue mortgages to him by The Bank, for this additional reason, Ventresca's claim must fail.[10, 11]

Before considering the Donahues' counterclaims we believe it appropriate to briefly discuss the doctrine of equitable subrogation. Subrogation is "the substitution of one [entity] in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." Public Serv. Mut. Ins. Co. v. Kidder - Friedman, 743 A.2d 485, 488 (Pa.Super. 1999) (quotation marks and citation omitted). "The right of subrogation is granted as a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another." Hi - Tech - Enterprises, Inc. v. General Accident Ins. Co., 635 A.2d 639, 642 (Pa.Super. 1993), *abrogated on other grounds*, Egger v. Gulf Ins. Co., 903 A.2d 1219 (Pa. 2006).

> The payor must have acted on compulsion, and it is only in cases where the person paying the debt of another will be liable in the event of a default or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished.

Id. (quoting Dominski v. Garrett, 419 A.2d 73, 77 (Pa.Super. 1980)); *see also* Home Owners' Loan Corp. v. Crouse, 30 A.2d 330, 331 (Pa.Super. 1943).[12]

As applies instantly, a guarantor (*i.e.*, Ventresca) who pays the debt of his principal (*i.e.*, AVS) is entitled to be subrogated to the rights of the principal's creditor (*i.e.*, The Bank) not only against the principal, but also as against other guarantors of the principal for the same debt.[13] "[A] surety paying the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditors, as against his co[-]sureties in precisely the same manner as against the principal debtor, and as substituted in the place of the creditor and entitled to enforce all his liens, priorities and means of payment." Commonwealth ex rel. Schnader v. National Surety Co., 37 A.2d 753, 757 (Pa. 1944) (quoting Hess's Estate, 69 Pa. 272, 275 (1871)).

"The right of subrogation is not lost because the debt of the principal is satisfied or extinguished by the surety's payment; on the contrary, it is just because of such satisfaction or extinguishment that the right of subrogation arises. When a surety pays the debt of a principal it is just as if the surety had purchased the claim; the payment operates as an assignment of the debt *pro tanto* and of all rights of the

creditor with regard thereto, including, as the authorities thus indicate, the right to proceed in the name of the creditor against a co[-]surety liable for the same debt." Schnader, 37 A.2d at 759; *see also* Wright v. Grover & Baker Sewing Mach. Co., 82 Pa. 80, 82 (1876) ("Although actual payment discharges a bond, judgment or other encumbrance at law, it does not in equity, when justice requires that it be kept afoot for the safety of the paying surety.").

As a general rule, "if a surety has paid a debt, he is entitled to all the securities the creditor had against the principal debtor." Wright, 82 Pa. at 81.

> If a paying surety is entitled to all the securities of the creditor, it would reasonably follow that he should also have all the remedies. Hence, it was held, in Himes v. Keller, 3 W.& S. [401,] 404 [(Pa. 1842)], that he is entitled to a cession of the debt, and substitution or subrogation to all the rights and actions of the creditor against the debtor; and the security is treated as between the surety and debtor, as still subsisting and unextinguished.

Wright, 82 Pa. at 82. "Put more simply, equitable subrogation allows a person who pays off an encumbrance to assume the same priority position as the holder of a previous encumbrance." 1313466 Ontario, Inc. v. Carr, 954 A.2d 1, 4 (Pa.Super. 2008) (citation and quotation marks omitted).

Joint or co - sureties are jointly and severally liable for the whole debt upon the default of their principal, and in

relation to each other each is a principal for that proportionate amount for which he is primarily liable as between himself and his co - sureties, and a surety of his co - sureties with respect to the remaining balance of the principal's debt. In the event one of several co - sureties pays more than his proportionate share of the common debt, he is entitled to contribution from the other co - sureties for the amount paid in excess, the extent of the personal liability of each such co - surety to the overpaying surety being limited, however, to that amount which satisfies each co - surety's duty to contribute his proportionate share of the principal's default. Bailey's Estate, 27 A. 560, 562 (Pa. 1893); Keystone Bank v. Flooring Specialists, Inc., 518 A.2d 1179, 1185 - 86 (Pa. 1987).[14] The fraction of the common debt for which each co - surety is proportionately liable as between themselves is in equal shares: "contribution rests on the ancient maxim, 'equality is equity.'" Freeman v. Sundhiem, 35 A.2d 295, 297 (Pa. 1944); Bailey's Estate, 27 A. at 562.

Under the equitable principles at play in equitable subrogation, no formal assignment either to create or evidence the right of contribution is required. The right arises out of the equities of two or more persons obligating themselves to pay the debt of another becoming mutually bound thereby "to each other to divide and equalize any loss that may arise therefrom

to either or any of them." Bailey's Estate, 27 A. at 562. This right is enforceable against a co - surety "not only through the medium of an independent and direct claim, but by way of subrogation to the rights of the creditor whose claim it has paid." Schnader, 37 A.2d at 759; *see also* Bailey's Estate, 27 A. at 562 (acknowledging that the right of contribution may be enforced by an action of assumpsit or by subrogation to the rights of the creditor).

Had Ventresca raised a claim of equitable subrogation - which we hasten to add, he has not[15] - our analysis would be different, but perhaps not the results. The initial failure of The Bank to assign the notes and guaranties would be irrelevant, and the satisfaction of the notes would not be fatal to Ventresca's claims. *See* Wright, 82 Pa. at 83. However, Ventresca's right of contribution would likely be limited to at best one - third, perhaps one - fourth, of the amount Ventresca paid pursuant to his guaranty – the Donahues being two of six guarantors, and having signed one of four guaranty agreements. Further, because the amount of AVS's indebtedness to The Bank after subtraction of the $300,000.00 payment by Stomel and credit given for the $487,000.00 value of Ventresca's investment account is in dispute, if AVS's total indebtedness to The Bank as of September 30, 2009, did not exceed $787,000.00, The Bank had no right to an additional payment from any of the

guarantors. Kramph's Executrix v. Hatz's Executors, 52 Pa. 525 (1866) (holding joint guarantor of debt was entitled to assert in defense to claim for contribution by co - guarantor, those defenses that could have been asserted against creditor).[16]

B. Donahue Counterclaim[17]

(1) Breach of Fiduciary Duty

The Donahues' counterclaim against Ventresca fails for many of the same reasons Ventresca's claim fails, lack of proof. While it is true, as argued by the Donahues, that a "fiduciary relationship exists when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an over - mastering dominance on one side, or weakness, dependence, or justifiable trust on the other," neither has been proven by the Donahues. McDermott v. Party Citi Corp., 11 F.Supp.2d 612, 626 (E.D.Pa. 1998) (quoting Comm. Dept. of Transp. v. E - Z Parks, Inc., 620 A.2d 712, 717 (Pa. Cmwlth. 1993)).

Here, Donahue was the President of AVS before Ventresca and his partner, Jeffrey Snyder, acquired a sixty - five percent interest, and he continued as President after that acquisition. Donahue knew the business before Ventresca became involved (in fact, he started the business in 1996), and he knew the business after Ventresca was involved. (N.T., 6/27/14, p.108). Donahue placed his personal property at stake in guarantying all three

promissory notes and in granting mortgages on his real estate in Bucks and Carbon Counties. But so did Ventresca when he also personally guarantied the three notes, pledged the investments in his A.G. Edwards investment account as security for their payment, and personally wrote checks to AVS or on its behalf for $468,181.93 between September 29, 2005, and September 25, 2009. (N.T., 6/27/14, pp.128 - 130; N.T., 10/14/14, p.58; Plaintiff Exhibit No. Q).

Donahue knew AVS's business was failing and that AVS was in default under its loan obligations to The Bank. Donahue knew that The Bank was exercising its right to dispose of substantially all of AVS's assets in a private foreclosure sale, and he knew that the only assets of AVS that were not collateralized with The Bank were being sold to Stomel. (N.T., 10/14/14, pp.86 - 87). In the Asset Purchase Agreement, which Donahue signed in his capacity as AVS's President, Donahue expressly acknowledged that the planned transfer of AVS's assets to The Bank and The Bank's sale of those assets to Stomel was most likely to maximize the amount realized from the collateral to reduce AVS's loan obligations.

Donahue attended part of the closing which was scheduled to begin either at 10:00 or 11:00 A.M. on September 30, 2009, and had the right to attend the settlement held earlier that morning at The Bank. He chose not to do so. This was his decision and

one he must live with. As the President of AVS, Donahue had the right to question The Bank at settlement as to the amount of any deficiencies claimed and how these would be accounted for, he had the right to question and to know how the monies paid by Stomel would be applied, and he had the right to assure himself and determine whether he retained any personal exposure or liability to The Bank following the sale to Stomel and in what amount. Donahue had an obligation to protect himself and if he failed to do so, this was not a breach of fiduciary duty by Ventresca.

Nor did Ventresca breach any fiduciary duty owed to Donahue when Vistar Corporation entered a personal judgment against him and AVS for $55,833.89 in January 2008 or when the State of New Jersey entered a judgment against him on June 14, 2012, in the amount of $116,225.76 as "a responsible person of [AVS]" for unpaid corporate income and sales and use taxes. (Defendant Exhibit Nos. 10A, 22). On February 12, 2008, Donahue executed a promissory note to Vistar Corporation in the face amount of $79,405.67 and personally guaranteed this note. (N.T., 10/14/14, pp.180 - 81; Plaintiff Exhibit No. K). As President of AVS, the State of New Jersey identified Donahue as a responsible party for the payment of AVS's taxes. (N.T., 10/14/14, pp.179 - 80). Both judgments were a direct result of deliberate decisions made

by Donahue to personally guaranty a corporate debt and to serve as AVS's president, respectively.[18]

(2) Unjust Enrichment

The Donahues' claim for unjust enrichment against Ventresca requires proof of the following three elements: (1) that they conferred benefits on Ventresca, (2) that Ventresca appreciated these benefits, and (3) that Ventresca accepted and retained these benefits under such circumstances that it would be inequitable for Ventresca to retain them without payment of value. Ameripro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa.Super. 2001). Specifically, the Donahues contend that at the closing transferring AVS's assets to The Bank, which was followed by the sale of AVS's assets to Stomel, Ventresca arranged to have the monies received from Stomel applied first to satisfy Ventresca's personal obligations to The Bank or those debts for which Ventresca's personal assets were at risk, in preference to those debts for which the Donahues were personally responsible or their property might be foreclosed upon.

To the same extent that Ventresca has failed to prove how The Bank allocated the proceeds at settlement, so too have the Donahues failed to prove this allocation. No evidence has been presented that Ventresca somehow benefited from the allocation. To the contrary, Ventresca was required to contribute $613,000.00 from his personal assets at the time of settlement

in order for the sale to Stomel to proceed and to cut further losses on AVS's obligations to The Bank. These monies came solely from Ventresca - $487,000.00 from his investment account and $126,099.05 from a personal check – with nothing paid personally by the Donahues. Ironically, it is this disproportionate recovery by The Bank from one guarantor (*i.e.*, Ventresca) over another (*i.e.*, Donahue) that potentially could have formed the basis for a claim of equitable subrogation on Ventresca's behalf, itself founded on principles of unjust enrichment.

(3) Accounting

As to the Donahues' claim for an accounting, the information the Donahues seek – what payments were made by AVS, or on its behalf, on its indebtedness to The Bank; how the net proceeds of the sale of AVS's assets to Stomel were allocated to the payment of AVS's indebtedness to The Bank; and how the balance of that indebtedness was accounted for - was as accessible to Donahue as it was to Ventresca. As President of AVS, Donahue had as much right to attend the settlements held on September 30, 2009, as Ventresca. Donahue had the same opportunity as Ventresca to be present and obtain this information from The Bank. Yet Donahue never requested an accounting of AVS's outstanding debts to The Bank. (N.T., 10/14/14, pp.201 - 202).

Why, if Donahue wanted this information, he did not obtain a copy of the settlement statement for the closing he attended on September 30, 2009, or attend and obtain a copy of the settlement statement for the settlement held earlier in the morning, we cannot say. The information, however, appears to have been equally available to him, and Donahue has not proven otherwise. Moreover, as it affects the claims raised by Ventresca and the Donahues in these proceedings, the trial has been concluded, our decision made, and the Donahues present no case for the benefit of an accounting at this late date.[19]

CONCLUSION

This case has been unduly complicated for a variety of reasons, among them: (1) the failure to appreciate the doctrine of equitable subrogation and its applicability to the facts of this case; (2) the failure to provide critical evidence, such as the Donahues' written guaranties and those of Joseph L. Ventresca, Tinamarie G. Ventresca, Jeffrey Snyder and Christopher Side, the settlement statements for the closings held at The Bank on September 30, 2009, and the Stock Purchase Agreement for Ventresca's purchase of AVS stock; and (3) the failure to follow Pa.R.C.P. 1148, which precludes counterclaims in foreclosure that do not "arise[] from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action [*i.e.*, the execution of the note

and mortgage] arose." Absent such unnecessary complications, the issues that appear are fairly resolvable under well - recognized equitable principles. Though not applied, because not presented, we believe that the resolution we have reached is legally sound and just based upon the causes of action asserted by the parties and the evidence presented to support them.

BY THE COURT:

_____

P.J.

---

[1] Ventresca and Snyder purchased a sixty-five percent ownership interest in AVS. A copy of the stock purchase agreement was not provided and it is unclear whether this sixty-five percent stock interest is held by a limited liability company owned by Ventresca and Snyder, or is owned by them in their individual names. (N.T., 6/27/14, pp.51-52, 109-112; N.T., 10/14/14, pp.83-84). Either way, Ventresca testified that he either owned or controlled eighty percent of the sixty-five percent interest purchased, that is, fifty-two percent of AVS.

[2] This is a residential property on which the Donahues maintain a second home. It is not their primary residence. The Donahues' primary residence is at 30 Gable Hill Road, Levittown, Bucks County, Pennsylvania. (N.T., 6/27/14, p.65).

[3] One difference which does appear between the $75,000.00 and $340,000.00 mortgages is that the $340,000.00 mortgage contains a paragraph entitled "Events of Default" which does not appear in the $75,000.00 mortgage. One of these events of default is if the borrower (*i.e.*, AVS) fails to make any payment when due under the indebtedness.

[4] Included in the background recitals of the Asset Purchase Agreement is the following:

> Lender has declared Seller to be in default under the Loan Obligations and has advised Seller that it intends to exercise its right to dispose of the Collateral in a private foreclosure sale pursuant to Section 6-910 of the New Jersey Uniform Commercial Code (the "UCC"). In furtherance of such intention, and in order to maximize the amount realized from the sale of the Collateral, on or about the date hereof Lender and Buyer have entered into an Agreement for Sale of Collateral after Default (the "Collateral Sale Agreement"), whereby Buyer has agreed to purchase the Collateral from Lender, and the proceeds of such sale will be applied to reduce Seller's outstanding indebtedness

> under the Loan Obligations. Seller and Guarantor concur that the proposed private foreclosure sale of the Collateral to Buyer is most likely to maximize the amount realized from the Collateral to reduce the Loan Obligations.

(Plaintiff Exhibit No. S (Asset Purchase Agreement, Background, Paragraph B)). The guarantor in the above-quoted language refers to Ventresca as the guarantor under the Asset Purchase Agreement.

[5] The draft mortgage Ventresca gave Donahue to review correctly stated the principal amount to be repaid, $157,000.00, but incorrectly made reference to a note dated October 28, 2005, in the original amount of $3,570,000.00. In reviewing the draft mortgage, Donahue noticed this reference to the October 28, 2005 note, did not know what it meant, and was unwilling to sign the document. (N.T., 10/14/14, pp.62-63, 77-79; Defendant Exhibit No. 7). Donahue, however, never told Ventresca why he was unwilling to sign the document and did not ask Ventresca why the October 28, 2005 note was referenced, which Ventresca believed to be a typographical error. (N.T., 6/27/14, pp.104-106).

[6] This reason, we believe, is only partly true. After Ventresca told Donahue he expected Donahue to personally contribute to the deficiency owed on AVS's debt, there is no evidence that Donahue ever seriously discussed with Ventresca his personal obligation to pay this debt. Instead, for more than a week prior to settlement, Donahue did not communicate with Ventresca (N.T., 6/27/14, p.13), and there is every indication that Donahue wanted to avoid facing Ventresca.

[7] In addition, Ventresca pledged collateral worth $300,000.00 to assist Stomel in securing the financing necessary to purchase AVS's assets. (N.T., 6/27/14, pp.20, 26, 59-61, 141-42; Plaintiff Exhibit No. S, pp.8-9).

[8] At trial, Ventresca testified this investment account was used to satisfy the $400,000.00 loan. (N.T., 6/27/14, pp.44-45).

[9] To the extent the monies in Ventresca's investment account were used to pay either or both of the $75,000.00 and $340,000.00 notes, the use of this collateral for payment of these two notes was separate and independent from the Donahues' guaranties and therefore would not trigger foreclosure of the mortgages.

[10] Most commonly, a mortgage provides the collateral security for a debt, usually in the form of a bond or promissory note. *See, e.g.,* In re Evanovich's Estate, 408 A.2d 1092, 1093 (Pa. 1979). In contrast, in the instant case the Donahues' mortgages secure the guaranties of separate notes, not the notes directly. Nevertheless, since each guaranty appears to be a promise to pay a specific debt of AVS if AVS fails to do so, once the notes were paid in full, the related mortgages were discharged since the obligations arising under the guaranties – and secured by the mortgages – were dissolved. Stated differently, once AVS's debt was paid in full at the settlement held on September 30, 2009, AVS's debt to The Bank was extinguished and The Bank no longer held any legally cognizable interests or rights in the Donahues' guaranties or mortgages to assign to Ventresca. Zeller v. Henry, 27 A. 559, 560 (Pa. 1893); Meyer v. Industrial Valley Bank & Trust Co., 44 Pa.D.&C.2d 295, 301 (1967); *cf.* Kiski Area School District v.

Mid-State Surety Corporation, 967 A.2d 368, 371-72 (Pa. 2008) (holding that once the principal has fully performed, the obligee cannot look to the surety).

[11] In their proposed Findings of Fact and Conclusions of Law filed on December 9, 2014, the Donahues contend Ventresca failed to comply with the notice requirements of the Pennsylvania Loan Interest and Protection Law, 41 Pa.C.S.A. § 101, *et seq*. ("Act 6"), and the Emergency Assistance Law, 35 Pa.C.S.A. § 1680.401c, et seq. ("Act 91"), and request an award of attorney fees. The Donahues claim under Act 91 is easily disposed of since that statute, unlike Act 6, does not provide for a private right of action. Hammill v. Bank of America, 2013 WL 4648317 *3 n.1 (W.D. Pa. 2013).

In contrast,

> Act 6 provides that "[a]ny person affected by a violation of [the Act] shall have the substantive right to bring an action ... for damages [incurred as a result] of such conduct or violation, together with costs including reasonable attorney's fees and other such relief to which such person may be entitled under law." 41 Pa. Stat. Ann. § 504. Regarding attorney's fees and costs, the Act contains three separate fee-shifting provisions: (1) section 406, which permits a mortgage lender to receive attorney's fees "[u]pon commencement of foreclosure or other legal action with respect to a residential mortgage"; (2) section 407, which allows "[a]ny debtor who prevails in any action to remove, suspend or enforce a judgment entered by confession ... to recover reasonable attorney's fees and costs as determined by the court"; and (3) section 503, which provides that "[i]f a borrower or debtor, including but not limited to a residential mortgage debtor, prevails in an action arising under this act, he shall recover the aggregate amount of costs and expenses ... together with a reasonable amount for attorney's fee." 41 Pa. Stat. Ann. §§ 406, 407(b), and 503(a). Sections 407 and 503, which permit borrowers as opposed to lenders to recover attorney's fees and costs, require that the borrower be the prevailing party in the mortgage foreclosure action.

Hammill, *3. As concerns debtor's rights, the Donahues have not commenced any action seeking damages for any violation of Act 6, nor do these proceedings involve a judgment entered by confession.

However, as a prevailing party the Donahues are entitled to recover their attorney fees and costs pursuant to 41 P.S. § 503 (a). First National Bank of Allentown v. Koneski, 573 A.2d 591, 594 (Pa.Super. 1990). A prevailing party is one who "succeeds in obtaining substantially the relief sought." *Id*. (quoting Gardner v. Clark, 503 A.2d 8, 10 (Pa.Super. 1986)). "[O]nce it has been found that a debtor has prevailed, the award of reasonable counsel fees and costs is mandatory." Koneski, 573 A.2d at 595. The factors to be considered by the court in determining the amount of an attorney fee award are set forth in 41 P.S. § 503 (b).

[12] More recently, in 1313466 Ontario, Inc. v. Carr, 954 A.2d 1, 4 (Pa.Super. 2008) the Superior Court set forth four criteria which must be met for equitable subrogation to apply: (1) the claimant paid the creditor to protect its own interest; (2) the claimant did not act as a volunteer; (3) the claimant was not primarily liable for the debt; and (4) allowing subrogation will not cause injustice to the rights of others.

[13] At common law, a surety became liable immediately upon default by the principal obligor, whereas a guarantor did not become liable until efforts to collect from the principal proved to be unavailing. Keystone Bank v. Flooring Specialists, Inc., 518 A.2d 1179, 1184 n.6 (Pa. 1987); First National Consumer Discount Co. v. McCrossan, 486 A.2d 396, 399 n.2 (Pa.Super. 1984). This distinction, however, has been largely abolished by statute in Pennsylvania. 8 P.S. § 1. Under this statute, "a written agreement made by one person to answer for the default of another subjects such person to the liabilities of suretyship unless the agreement contains in substance the words 'this is not intended to be a suretyship.'" First National Consumer Discount Co., 486 A.2d at 399 n.2 (citation omitted). As previously discussed, copies of the Donahues' guaranties were not placed in evidence. Consequently, absent proof to the contrary, the Donahues are subjected to the liabilities of a surety.

[14] "[T]he right to have and the liability to make contribution inhere in the transaction by which the sureties [are] jointly and severally bound for the debt of the principal." Bailey's Estate, 27 A. 560, 562 (Pa. 1893).

[15] At the risk of being repetitious, Ventresca's claim for mortgage foreclosure is an action at law premised upon an alleged breach of two specific written documents, the Donahues' mortgages, whereas equitable subrogation is premised upon equitable principles one of which is the avoidance of unjust enrichment. United States Fidelity & Guaranty Co. v. United Penn Bank, 524 A.2d 958, 963-64 (Pa.Super. 1987) (quoting, *inter alia*, Comment, Equitable Subrogation - Too Hardy a Plant to be Uprooted by Article 9 of the UCC?, 32 Pitt.L.Rev. 580, 583 (1971)). In this case, neither of the parties has alleged, argued, or even mentioned, that equitable subrogation is relevant to these proceedings.

[16] As of March 1, 2012, Ventresca claimed the Donahues owed $449,254.50 on the two loans indirectly secured by their mortgages computed as follows: $415,000.00 in unpaid principal; $17,637.48 in interest, with an additional $1,469.79 accruing monthly; $2,400.00 in late fees, with an additional $100.00 accruing each month; $217.00 in miscellaneous fees; an escrow deficit of $6,000.00; and $8,000.00 in attorney fees. (Complaint, paragraph 17). The unpaid principal balance alleged is equal to the combined face value of both notes (*i.e.*, that for $75,000.00 and that for $340,000.00) and runs counter to Ventresca's testimony that to his recollection no payments were missed on either note (N.T., 6/27/14, pp.93-97, 100-101), as well as the sum of $50,075.65 paid to The Bank between December 2008 and September 2009 during the period while Stomel operated and managed AVS's business pursuant to the wholesale agreement. (N.T., 6/27/14, pp.101, 148-150; Plaintiff Exhibit No. S, Article 8.4.4, p. 8; Defendant Exhibit No. 5, p.2).

The unpaid principal balance alleged in the complaint also contradicts The Bank's records which document an outstanding balance on the $340,000.00 note as of September 28, 2009, of $222,984.57, with no reduction made to the outstanding balance for the $75,000.00 note. (N.T., 10/14/14, pp.101-104; Defendant Exhibit No. 14, pp.2,4). The total outstanding balance (*i.e.*, consisting of both principal and interest) of both notes just two days prior to the first assignment was $297,984.57. Accepting Ventresca's testimony that the $487,000.00 in his investment account paid the amount owed on the $400,000.00 note, the $300,000.00 payment from Stomel would have been sufficient to pay in full the outstanding balance owed on the two notes for which Ventresca now seeks contribution from the Donahues. Ventresca has not

explained the $151,269.93 discrepancy between the amount he claims he is owed in the complaint (*i.e.*, $449,254.50) and the amount shown as unpaid on The Bank's records (*i.e.*, $297,984.57).

[17] Pa.R.C.P. No. 1148 restricts counterclaims in a mortgage foreclosure action to those "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." This rule has been interpreted to permit only counterclaims which are "part of or incident to the creation of the mortgage relationship itself." Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa.Super. 1998), *appeal denied*, 734 A.2d 861 (Pa. 1999); *see also* Rearick v. Elderton State Bank, 97 A.3d 374, 383 (Pa.Super. 2014) (holding that in Pennsylvania "the scope of a foreclosure action is limited to the subject of the foreclosure, *i.e.*, disposition of property subject to any affirmative defenses to foreclosure or counterclaims arising from the execution of the instrument(s) memorializing the debt and the security interest in the mortgaged property").

Because the Donahues' counterclaims all relate to alleged misconduct by Ventresca which occurred after the subject mortgages were entered, these counterclaims, which seek to impose personal liability on Ventresca, have not been properly pled in response to Ventresca's action in mortgage foreclosure, which is strictly an *in rem* proceeding. Nevertheless, because Ventresca has not objected to the counterclaims and Rule 1148's bar is a procedural limitation, not a jurisdictional one, we consider the merits of these claims. *See* Beneficial Consumer Discount Company v. Vukman, 77 A.3d 547, 553 (Pa. 2013) ("Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs.") (citation and quotation marks omitted).

Further, given the nature of these claims, whether they should be analyzed under New Jersey law is a question not raised by the parties, and, because waived, one we do not address.

[18] Alternatively, the Donahues claim that Ventresca, as a majority shareholder, stands in a fiduciary relationship to Donahue, a minority shareholder. *See* Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1050 (Pa. 1983) (holding that "majority shareholders have a duty to protect the interests of the minority."). First, whether Ventresca is a majority shareholder is by no means clear. *See supra* footnote 1; *see also*, N.T., 10/14/14, p.116. If the limited liability company of which Ventresca is a member, or if Ventresca and his partner, Jeffrey Snyder, jointly own sixty-five percent of the outstanding stock of AVS, then either the limited liability company or Snyder would be indispensable parties to this counterclaim, thereby divesting this court of jurisdiction to make a substantive decision. Hart v. O'Malley, 647 A.2d 542, 549 (Pa.Super. 1994).

Assuming for purposes of argument only, that Ventresca is in fact the individual owner of a majority interest in AVS, the Donahues have failed to prove any breach of a fiduciary obligation owed by Ventresca to Donahue arising from Ventresca's status as a majority shareholder. Though the Donahues argue generally that after Ventresca became a shareholder he assumed control over AVS's operations and financing, and that within four years AVS was out of business, the Donahues have presented no evidence that Ventresca wasted, fraudulently disposed of, or diverted corporate assets or opportunities for his personal benefit or that of his other businesses, or that he misrepresented or concealed corporate financial information from Donahue, or that he in some manner violated or abused his fiduciary

responsibilities to Donahue. To the contrary, Ventresca personally obligated himself to AVS's debts, pledged substantial assets of his own to secure these debts, and, through one of his other businesses, provided rent-free office space to AVS. (N.T., 6/27/14, pp.47-48, 68-69).

The Donahues have not established that Ventresca acted fraudulently, illegally, or oppressively toward Donahue. *See e.g.*, 15 Pa.C.S.A. § 1767 (a)(2); Ford v. Ford, 878 A.2d 894, 899-900 (Pa.Super. 2005). Further, Donahue was not frozen out of AVS's business operations by Ventresca: he continued as AVS's president and acted as such (*e.g.*, Donahue signed AVS's promissory notes to The Bank which are the subject of the Donahues' personal guaranties, the Asset Purchase Agreement with Stomel, and corporate tax returns of AVS in his capacity as president). (Plaintiff Exhibit Nos. D, F, G, S; Defendant Exhibit No. 10A). Donahue was active in the business and he was kept advised of its financial status. (N.T., 6/27/14, pp.77, 84, 102; N.T., 10/14/14, pp.42-43). *Cf.* Viener v. Jacobs, 834 A.2d 546 (Pa.Super. 2003) (finding a breach of fiduciary duty where a minority shareholder was removed from office by the majority shareholders and effectively frozen out of any meaningful role in the corporation's business, thereby allowing the majority shareholders to control the corporation for their own benefit), *appeal denied*, 857 A.2d 680 (Pa. 2004), *cert. denied*, 543 U.S. 1146 (2005). The fact that AVS failed financially does not, by itself, prove that Ventresca breached his fiduciary obligations to Donahue. *Cf.* Selheimer v. Manganese Corp. of America, 224 A.2d 634, 644 (Pa. 1966) (setting forth several well-established principles in determining when a director has personal liability to a corporation).

Finally, although Ventresca was a director of AVS, it does not appear that the Donahues base their counterclaim against Ventresca on breach of Ventresca's fiduciary duty as a director to AVS. 15 Pa.C.S.A. § 1712 (a); Anchel v. Shea, 762 A.2d 346 (Pa.Super. 2000), *appeal denied*, 782 A.2d 541 (Pa. 2001). Nor could they: "In Pennsylvania, only the corporation and 'a shareholder. . . by an action in the right of the corporation' may bring a lawsuit and claim that a director breached the standard of care owed to the corporation." Hill v. Ofalt, 85 A.3d 540, 548 (Pa.Super. 2014) (quoting 15 Pa.C.S.A. § 1717). "[A] shareholder does not have standing to institute a direct suit for a harm that is peculiar to the corporation and that is only indirectly injurious to the shareholder." *Id.* (citation and quotation marks omitted). "To have standing to sue individually, the shareholder must allege a direct, personal injury - that is independent of any injury to the corporation - and the shareholder must be entitled to receive the benefit of any recovery." *Id.* (quotation marks and citation omitted). For the shareholder's claim to be direct, rather than derivative, the duty breached must be one owed to the shareholder, not to the corporation. This would occur, for instance, where the shareholder's suit is "based on a contract to which the individual shareholder is a party, or on a right belonging severally to the shareholder, or on a fraud affecting him or her directly." *Id.* at 549 (quoting 12B Fletcher Cyclopedia of Law of Corporations § 5911 (2013)).

Because the injuries claimed by the Donahues are dependent upon and derivative from injury to AVS - which the Donahues claim resulted from Ventresca's alleged dominating control, self-dealing, diversion of corporate assets, failure to make payment of required taxes, and mismanagement of AVS - if a cause of action exists for breach of Ventresca's fiduciary duty as a director, it belongs to AVS and not to the Donahues. Hill, 85 A.3d at 551-52 (holding the filing of a tax lien against shareholder/officer/director of corporation for corporation's failure to remit required withholding taxes to

appropriate taxing authorities and commencement of litigation proceedings against the shareholder/officer/director based upon his personal guaranty of the corporation's debt, while causing personal financial harm to the individual shareholder/officer/director, is nevertheless an indirect injury in that it resulted from a breach of duty of the director owed to the corporation, not to the shareholder/officer/director, such that any injury to the shareholder/officer/director was dependent upon and derivative to the corporate injury).

[19] In requesting an accounting, a complaint "seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason of its wrongful possession." Boyd & Mahoney v. Chevron U.S.A., 614 A.2d 1191, 1197 (Pa.Super. 1992), *appeal denied*, 631 A2d 1003 (Pa. 1993). Hence, a party is only entitled to an accounting when there are underlying claims that warrant a recovery of damages.

An accounting at law pursuant to Pa.R.C.P. 1021 is "merely an incident to a proper assumpsit claim." Buczek v. First National Bank of Mifflintown, 531 A.2d 1122, 1123 (Pa.Super. 1987). Here, the Donahues have not asserted any claim for breach of contract, or any other claim for assumpsit.

An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. Rock v. Pyle, 720 A.2d 137, 142 (Pa.Super. 1998) (citations omitted). While the Donahues allege a fiduciary relationship and self-dealing by Ventresca, the Donahues' claims in this regard have been denied by us.

In addition, the information the Donahues request from an accounting has previously been requested by them in discovery in this case. In response, Ventresca stated that a fire in January 2011 destroyed some of the records the Donahues were requesting, but that he had produced all documents in his possession responsive to the Donahues' request and responded fully to the Donahues' discovery. (N.T., 6/27/14, pp.48-49; Ventresca Second Reply to Donahues' Motion for Sanctions, paragraphs 3-14; Ventresca Answer to Motion *in Limine*, paragraphs 6, 9). Not only will an accounting be denied where the information sought is equally obtainable through discovery, Buczek, 531 A.2d at 1124, where, as here, discovery has been made and answered, ordering an accounting from Ventresca at this point would serve no useful purpose.