STATE OF MICHIGAN

COURT OF APPEALS

FIRST MACOMB MORTGAGE CO.,

Plaintiff-Appellee,

v

MICHAEL DAVID SCHWARTZ

Defendant-Appellant,

and

DAVID L. LEVY,

Defendant.

UNPUBLISHED

No. 173988; 176208
Oakland Circuit Court
LC No. 91 414173 CK

Before: Gribbs, P.J., and Reilly and J. P. Adair*, JJ.

REILLY, J. (dissenting)

I respectfully dissent from the majority's determination to reverse.

I agree with the majority that the Uniform Commercial Code does not apply to this guaranty of payment of a debt secured by a real estate mortgage, and that First Macomb does not have a good faith obligation under Michigan common law. I also agree that, according to the waiver provision in the guaranty agreement, Schwartz waived any right to notification that the value of the property had diminished.

However, I disagree with the majority that any obligation to provide notice of the decline in the value of the property is somehow revived under Schwartz' theory of avoidable consequences. First Macomb did not have an obligation to protect the security or provide notice to the guarantor of diminished value of the mortgaged property when the written waiver specifically negated any such obligation. The relevant provision of the waiver provided that Schwartz

* Circuit judge, sitting on the Court of Appeals by assignment.

> waive[d] . . . (c) . . . notice of dishonor, . . . and all other notices whatsoever; and (d) all due diligence in . . . protection of, or realization upon the Liabilities or any thereof, any obligation hereunder, or any security for or guaranty of any of the foregoing.

In view of this waiver language, I do not believe that Schwartz was entitled to any notice whatsoever, even to protect the security or to mitigate the damage that resulted from the decline in the value of the security. There is no reason to believe that the guaranty agreement was a contract of adhesion. Schwartz is bound by it.

Finally, even if we accept Schwartz' claim that it was the obligation of First Macomb to provide notice, in order to defeat First Macomb's motion for summary disposition, it was incumbent on Schwartz to show that, if given notice of the diminution of value of the security, he could have, and would have, taken steps to avoid the diminution. No such evidence was provided.

For these reasons, I would affirm the trial court's grant of summary disposition in favor of First Macomb.

/s/ Maureen Pulte Reilly