PURCHASING NOTES—WHETHER THE *PURCHASE* OF A PROMISSORY NOTE FROM THE NOTE HOLDER BY A THIRD-PARTY DISCHARGES THE NOTE

By Jessica Ebbs*

Anderton v. Cawley, 378 S.W.3d 38 (Tex. App.—Dallas 2012, no pet.).

In *Anderton v. Cawley*, the Dallas Court of Appeals addressed an infrequently applied rule of law concerning whether a third party's payment of a promissory note to the holder discharges the note obligation.[1] The court concluded this type of transaction is presumed to be a purchase rather than a payment and discharge of the note.[2] In stating the applicable rule, the court acknowledged recent authority is sparse but cited cases over 50 to 70 years old.[3] The decision is consistent with long-standing case law in Texas and other jurisdictions. In 2002, Lewie Anderton and William R. Cawley formed two partnerships—Cascade Properties, Ltd. and Bellwood Lake Partnership, Ltd.—to develop nearly 500 acres of land near Tyler, Texas.[4] Their aspirations included transforming the large parcel of land into a golf and residential community.[5] Each partnership was formed to serve a specific purpose.[6] The purpose for Cascades Properties, Ltd. ("Cascades Ltd.") was to develop the portion of the 500 acre land that was to be used for residential purposes, while the purpose for Bellwood Lake Partnership, Ltd. ("Bellwood Ltd.") was to acquire and improve an existing golf course that sat adjacent to the intended residential community.[7] Both partnerships were "headed by" Anderton under the entity Cascade Properties GP Corp., which served as the original managing general partner of the two partnerships.[8]

The development plan had three phases.[9] During phase one, Cawley informed Anderton that the costs for this part of the development exceeded his personal financial abilities and, accordingly, he recommended Cascades Ltd. borrow funds from Park Cities Bank (the "Bank") to cover this shortfall.[10] In fact, this proposed transaction would prove simple for Cawley, considering he was a 10% shareholder, director, and member of the loan committee for the Bank.[11] In 2003, Anderton agreed to Cascade Ltd.'s borrowing of $3 million from the Bank—an amount that, after being refinanced into a line of credit less than a year later, grew to $5.5 million.[12]

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1 378 S.W.3d 38 (Tex. App.—Dallas 2012, no pet.).

2 *Id.* at 49–50.

3 *Id.*

4 *Id.* at 42–43.

5 *Id.* at 43.

6 *Id.*

7 *Id.* at 42–43.

8 *Id.* at 43.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

At the beginning of phases two and three, the relationship between Anderton and Cawley began to deteriorate.[13] Further, the intended development, yet again, lacked sufficient funding.[14] As a result and at different times in 2006, the Bank loaned $6.5 million to Cascades Ltd. and $13.325 million to Bellwood Ltd. Anderton signed and personally guaranteed the $13.325 million promissory note.[15]

In 2008, the tension between Anderton and Cawley continued to heighten and, as a result of many unsettled disputes, Anderton brought suit against Cawley in a Dallas County district court.[16] In February 2009, the Bank put Bellwood Ltd., including Anderton and Cawley, on notice that it was in default on the $13.325 million promissory note due to its failure to pay property taxes in 2008, plus the related interest amount, totaling $114,456.46.[17] On June 30, 2009, the Bank paid this amount of property taxes and interest on Bellwood Ltd.'s behalf as authorized by the executed loan documents.[18] On the same day, BOT Real Estate ("BOT"), a limited liability company formed by Cawley for the sole purpose of purchasing Bellwood Ltd.'s debt, wrote a check, signed by Cawley and payable to the Bank in the amount of $114,456.46.[19]

On the following day of July 1, 2009, the Bank demanded reimbursement of the property tax payment from Bellwood Ltd. and gave notice of its intent to accelerate the entire debt.[20] The notice was communicated by letter and explicitly stated that Bellwood Ltd. would be in default if the Bank was not reimbursed for the property tax payment by July 3, 2009 at 3:00 p.m.[21] Bellmont Ltd. did not make a reimbursement payment; consequently, the Bank assigned the Bellwood Ltd. $13.325 million promissory note and related liens and guaranties to BOT.[22] Soon after acquiring the note, BOT foreclosed on Bellwood Ltd.'s collateral.[23]

The lawsuit brought by Anderton in 2008 asserted numerous theories of liability against several parties, including Cawley and BOT.[24] After foreclosing on Bellwood Ltd.'s collateral, BOT asserted a counterclaim and later filed a traditional motion for partial summary judgment against Anderton on his guaranty of the promissory note seeking to recover the amount of the deficiency remaining after the foreclosure.[25] BOT asserted that its June 30 payment in the amount of the property taxes due served as partial purchase of the note, while Anderton countered by stating the June 30 payment cured Bellwood Ltd.'s default and thus, discharged

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13 *See id.* at 43.
14 *Id.* at 49–50.
15 *Id.*
16 *Id.* at 44.
17 *Id.*
18 *Id.*
19 *Id.* at 45, 48.
20 *Id.* at 44.
21 *Id.* at 47.
22 *Id.* at 44–45.
23 *Id.* at 45.
24 *Id.*
25 *Id.*

his obligations under the note.[26] The trial judge granted BOT's partial summary judgment motion and awarded BOT nearly $8.6 million in damages plus prejudgment interest against Anderton.[27] Further, the judge ordered Anderton take nothing on his previously asserted claims against BOT.[28]

On appeal, Anderton alleged that the evidence within the record raised a genuine issue of material fact as to whether Bellwood Ltd. was in default when BOT foreclosed on its property.[29] Anderton did not contest that Bellwood Ltd. was in default up to June 30, 2009 due to its failure to pay overdue property taxes.[30] The disputed issue, however, was whether the payment by BOT to the Bank of the exact amount of the deficient property taxes constituted a purchase or a payment and discharge of Anderton's obligation to BOT through his guarantee of the promissory note.[31] This was in doubt because the July 1, 2009 letter sent to Bellwood Ltd. indicated that default would result if reimbursement payment was not made.[32] Nonetheless, BOT wrote a check to the Bank on the following day for the exact amount of Bellwood Ltd.'s deficient property taxes.[33] Thus, for purposes of reviewing the summary judgment, the question was whether BOT's July 30 payment to the Bank was a purchase of the note or a payment and discharge of the obligation to Bellwood Ltd.[34]

In general, a party's obligation to pay an instrument is discharged if payment is made.[35] A payment is made under limited circumstances—"an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument."[36] Contrary to the trial court's ruling, the Dallas Court of Appeals concluded the evidence presented was sufficient to survive the summary judgment stage of the proceeding.[37] The Court began its analysis by stating "the applicable rule of law is this: when a third party pays the holder of a note, the transaction is presumed to be a purchase and not a payment and discharge of the note unless evidence shows the parties to the payment intended otherwise."[38]

The Court cited a case decided in 1934, *Shanks v. First State Bank of Coahoma*,[39] involving a bank that purchased a note from the defendant and later brought suit to recover deficient funds, and quoted the relevant language from the court's analysis: "[T]he payment for and receipt of a note by a stranger to it, is presumptively a purchase and not a payment of the

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[26] *Id.* at 50.

[27] *Id.* at 45.

[28] *Id.*

[29] *Id.* at 47.

[30] *Id.*

[31] *Id.* at 49.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* TEX. BUS. & COM. CODE ANN. § 3.601 (West Supp. 2012).

[36] TEX. BUS. & COM. CODE ANN. § 3.602(a) (West Supp. 2012).

[37] *Anderton*, 378 S.W.3d at 51.

[38] *Id.* at 49–50 (citations omitted).

[39] 70 S.W.2d 444, 446 (Tex. Civ. App.—Eastland 1934, no writ).

note."[40] The Court also cited *Eberley v. First Nat'l Bank of Stanton*,[41] decided in 1954, as additional support.[42] The relevant language from the *Eberley* case stated that "[w]here a note is paid by a stranger thereto, it is generally held to be a purchase, not payment, of the note."[43] Furthermore, the Court cited several other cases with similar facts that laid out the applicable rule.[44]

After stating the applicable rule, the Court concluded that the evidence presented by Anderton raised a genuine issue of material fact of whether BOT's June 30, 2009 payment to the Bank in the exact amount of the deficient property taxes cured Bellwood Ltd.'s defaulting status.[45] Specifically, the Court stated:

> We conclude that the evidence raises a genuine issue of material fact on the question of whether BOT's June 30 payment cured Bellwood Ltd.'s default. Under the general rule, we presume that BOT's payment was intended as a purchase of the partnership's obligation unless there is evidence tending to show that BOT and the Bank intended for the payment to discharge the partnership's obligation instead.[46]

Moreover, the Court held that a material issue of fact existed in regards to BOT's and the Bank's intent.[47] In its reasoning, the Court explicitly referenced several key pieces of evidence.[48] Specifically, the Court examined BOT's check and check stub for the June 30, 2009 payment to the Bank in the amount of $114,456.46—the check stub reflected that the $114,456.46 figure was the sum of six different line items of different amounts, yet all six line items were labeled "08PropTaxBLP" in a separate column.[49] This was noteworthy because the six line items all referenced "08PropTaxBLP" and said nothing about a partial payment for acquisition of the Bellwood Ltd. note or any other distinction from simply "08PropTaxBLP."[50] Along with this finding, the Court also looked to other factors such as the check amount BOT

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[40] *Anderton*, 378 S.W.3d at 49 (citing *Shanks*, 70 S.W.2d at 446).

[41] 272 S.W.2d 532, 537 (Tex. Civ. App.—Austin 1933, writ ref'd).

[42] *Anderton*, 378 S.W.3d at 49.

[43] *Id.* (citing *Eberley*, 272 S.W.2d at 537).

[44] *Id.* at 49–50 (citing Vogel v. Cent. Tex. Sec. Corp., 62 S.W.2d 243, 245 (Tex. Civ. App.—Austin 1933, writ ref'd) ("The intention of the parties relative to the discharge of a debt when it is paid by a stranger to the holder either determines whether the debt is discharged or transferred . . .")). The Court also referenced other jurisdictions in the same time period which followed a similar rule. *Id.* at 50 (citing Bradley v. Lehigh Valley R. Co., 153 F. 350, 353 (2nd Cir. 1907) ("Payment of an obligation of another by a third party does not discharge it as between the original parties, unless the payment is made and received with the intention that it shall do so."); Proctor v. Pyle, 91 P.2d 187, 191 (Cal. Ct. App. 1939) ("When a note is paid after maturity by a stranger thereto, in the absence of evidence to the contrary, it is presumed the transaction constitutes a purchase of the instrument and not an extinguishment of the obligation."); Union Trust Corp. v. Fugate, 200 S.E. 624, 626 (Va. 1939) ("Ordinarily, [a payment by a stranger to a note] is to be considered as a purchase, in the absence of anything to show a contrary intention.")).

[45] *Anderton*, 378 S.W.3d at 51.

[46] *Id.* (citing *Shanks*, 70 S.W.2d at 446).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 48, 51.

[50] *Id.* at 51.

wrote to the Bank matching the exact amount of the property taxes the Bank demanded from Bellwood Ltd.[51] Additionally, the Court examined the fact that the Bank paid the property taxes simultaneously with its receipt of BOT's funds.[52] Along with a few additional factors, the court reasoned that this evidence was sufficient to raise a reasonable inference that BOT and the Bank may have intended the June 30, 2009 payment to be on behalf of and for the benefit of Bellwood Ltd., thus curing Bellwood Ltd.'s default.[53]

After analyzing the evidence, the Court of Appeals found that the trial court erred in granting summary judgment in favor of BOT on its counterclaim.[54] Thus, the case was remanded back to the trial court for further consideration.[55]

The distinction to be recognized in *Anderton* is a third party paying the holder of a note, rather than a guarantor paying the debt. A third party is presumed to purchase the note, rather than to be making a payment on the note, and thus, acquires the lender's rights to any collateral, or other security, and the debt is not discharged.[56] But, if evidence demonstrates that parties intended a payment and resulting discharge to the obligor, it will so apply.[57] On the other hand, a guarantor of a note, or debt, who pays the debt of the principal is subrogated to all of the rights, remedies, equities, and security of the original creditor unless these rights have been waived.[58]

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[51] *Id.*

[52] *Id.*

[53] *Id.*; *see also supra* note 39.

[54] *Anderton*, 378 S.W.3d at 51.

[55] *Id.*

[56] *See id*. at 49–50.

[57] *Id.*

[58] *See* Bradford Partners II, L.P. v. Fahning, 231 S.W.3d 513, 517 (Tex. App.—Dallas 2007, no pet.) (citing Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985)).