

Office of the Recorder of Deeds in and for Franklin County, Pennsylvania, in Record Book 1054-212, granted and conveyed unto STEPHEN S. KREISER AND KAREN S. KREISER, husband and wife.

SALE #10

**WRIT NO. AD1998-37
NORWEST MORTGAGE, INC.**

VS

**BRADLEY L. & LORI L. SOMMERVILLE
ATTY: FRANK FEDERMAN, ESQ.**

ALL the following described real estate lying and being situate in Gullford Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin in the Northern line of Lincoln Drive at corner common to Lots Nos. 36 and 37 on a plan of lots hereinafter referred to; thence by the Eastern side of Lot No. 36, North 21 degrees 28 minutes East, 120 feet to an iron pin at lands now or formerly of Carl A. Smith and wife; thence by the same South 68 degrees 32 minutes East, 70 feet to an iron pin at the Northwestern corner of Lot No. 38; thence by the Western line of Lot No. 38, South 21 degrees 28 minutes West, 120 feet to an iron pin in the Northern line of Lincoln Drive; thence by Lincoln Drive, North 68 degrees 32 minutes West, 70 feet to an iron pin, the place of beginning.

BEING Lot No. 37 in the plan of lots laid out for Otis W. Eyer and recorded in the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 287-A, Page 233.

TAX PARCEL NUMBER: D-10G-7

TITLE TO SAID PREMISES IS VESTED IN Bradley L. Somerville and Lori L. Somerville, his wife by Deed from Thomas C. Barnhart and Patsy Ann Barnhart, his wife dated 10/1/93 recorded 10/14/93 in Deed Book 1196 Page 271.

SALE #11

**WRIT NO. AD1998-68
NORWEST MORTGAGE, INC.**

VS

**STEVEN J. TIMMRECK
ATTY: FRANK FEDERMAN, ESQ.**

ALL THAT CERTAIN tract of land situate, lying and being in Southampton Township, Franklin County, Pennsylvania being more fully bounded, limited and described as follows:

BEGINNING at a point in or near the dedicated right of way line of Pineville Road (T-644); thence extending in and along the same, North 30 degrees 37 minutes 27 seconds East, a distance of 80.07 feet to a point; thence continuing on a course of South 59 degrees 42 minutes 43 seconds East, a distance of 36.32

feet to a point; thence continuing along the same by a curve to the right having a radius of 120.93 feet and a length of 117.21 feet to a point; thence continuing by a curve to the right extending into the legal right of way line of Old Scotland Road (PA Rt. 696) having a radius of 50.00 feet and a length of 96.48 feet to a point; thence continuing along the legal right of way line of Old Scotland Road on a course of South 20 degrees 18 minutes 15 seconds West, a distance of 154.91 feet to a point at Lot No. 11; thence along Lot No. 11 and Lot 9, North 70 degrees 47 minutes 18 seconds West, a distance of 164.14 feet to the point and place of BEGINNING.

CONTAINING 27,027 Square Feet of land, more or less being designated as Lot No. 10 on a subdivision Plan of Pentance Court, prepared by Jammolenko & Associate. Said Plan is recorded in Franklin County Records in Plan Book 288F, Page 1447.

TAX PARCEL NUMBER: N-11-145

TITLE TO SAID PREMISES IS VESTED IN Steven J. Timmreck by Deed From Harry H. Fox, Jr. and Ann G. Fox, his wife, and Oakwood Homes, Inc. dated 10/31/96 recorded 1/9/97 in Record Book Volume 1323 Page 462.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property

The balance due shall be paid to the Sheriff by NOT LATER THAN June 22, 1998 at 4:00 PM, prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on June 26, 1998, 1:00 PM, prevailing time, in the Franklin County Court House, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be the higher, shall be paid in full.

**Robert B. Wollyung
Sheriff
Franklin County
Chambersburg, PA
05/22, 05/29, 06/05/98**

**Douglas McKee and Madelyn McKee, a/k/a Madeline McKee,
Plaintiffs v. Linda Harbaugh, Defendant, Franklin County
Branch, Civil Action - Law No.: A.D. 1997 - 199**

McKee v. Harbaugh

Contract -- Lack of Consideration -- Preliminary Objections

1. Lack of consideration is normally an affirmative defense which must be raised by an answer in an action on the merits.
2. The existence or non-existence of consideration on the face of an alleged written contract is properly raised by preliminary objections.
3. Where the pleader relies for his cause of action upon a written instrument upon the face of which no consideration appears or the existence of consideration appears doubtful, it would seem logical to raise the question by preliminary objections particularly where the written instrument is the keystone of the cause of action.
4. It has always been deemed essential to the sufficiency of a complaint that it set forth distinctly facts showing a legally sufficient consideration for the contract upon which the action is founded. A complaint which fails to allege facts showing legal consideration is demurrable and is not within the purview of affirmative defenses as set forth in Pa.R.C.P. 1030.
5. A contract unsupported by consideration is unenforceable.
6. A promise to pay the debt of another must be supported by consideration to the enforceable.
7. Consideration is a bargained for exchange which can be shown by proof of a benefit conferred upon the promisor or a detriment incurred by the promisee.
8. To make the promisor liable to answer for the debt of another, consideration for the promise must be shown
9. Where a written document which serves as the basis for a contract action merely memorializes an individual's promise to pay another's debt and no consideration appears on the face of the document, preliminary objections in the nature of a demurrer will be sustained and the Complaint will be dismissed.

*Timothy W. Misner, Esq., Counsel for Plaintiffs
Stanley J. Kerlin, Esq., Counsel for Defendant*

OPINION AND ORDER

Herman, J. April 29, 1998:

Factual Background

This Court is called upon to decide the preliminary objections of defendant Linda Harbaugh to the complaint filed against her by Douglas and Madelyn McKee, a/k/a Madeline McKee. The

complaint alleges that Mrs. Harbaugh is in default of a written agreement wherein she promised to pay the McKees \$2,500.00 plus interest to cancel a prior debt incurred by her son.¹ After making two payments pursuant to the agreement, Mrs. Harbaugh discontinued payments and the McKees sued.

Mrs. Harbaugh, through counsel, filed preliminary objections in the nature of a demurrer on two grounds. First, Mrs. Harbaugh argues that the referenced agreement is unenforceable because it is not supported by consideration. Second, defendant contends that plaintiffs are not entitled to the relief requested (\$2,415.17 plus interest) because the agreement does not contain an acceleration clause, and therefore, plaintiffs can make a claim only for the installment payments not made and not for the full value of the contract.

For the reasons set forth below, we will sustain the demurrer and dismiss the complaint without prejudice.

Discussion

Preliminary objections in the nature of a demurrer will be sustained only where the complaint is clearly insufficient to establish a right to relief, and any doubt must be resolved in favor of overruling that demurrer. *Olon v. Com., Dept. Of Corrections*, 147 Pa. Cmwlth. 22, 606 A.2d 1241 (1992), *reversed on other grounds*, 534 Pa. 90, 626 A.2d 533, *reargument denied, certiorari denied* 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed. 2d 658. A demurrer will be sustained only in cases which are clear and free from doubt. *Ambrose v. Cross Creek Condominiums*, 412 Pa. Super. 1, 602 A.2d 864 (1992). In the review of preliminary objections, facts that are well pleaded, material and relevant will be considered as true, together

¹ The substantive portions of the January 22, 1997 agreement read as follows:

Linda Harbaugh agrees to make monthly payments of at least \$50 per month to Douglas/Madelyn McKee for the money that Linda's son Keith E. Harbaugh borrowed from them. The amount borrowed from the McKee's was \$2500. The amount to be paid back is \$2500 plus 5% interest yearly or \$125/year until paid off.

with such reasonable inferences as may be drawn from such facts. *Mellon Bank v. Fabinyi*, 437 Pa. Super. 559, 650 A.2d 895 (1994).

In the instant case, defendant seeks a demurrer based on the alleged lack of consideration in the subject agreement. For their part, plaintiffs argue that the issue of lack of consideration is improperly raised by preliminary objections and suggest that it should be pled as new matter pursuant to Pa.R.Civ.P. 1030.

Lack of consideration is normally an affirmative defense which must be raised by an answer in an action on the merits. *Mar Ray, Inc. v. Schroeder*, 242 Pa. Super. 14, 363 A.2d 1136 (1976). However, the existence or non-existence of consideration on the face of the alleged written contract is properly raised by preliminary objection. *In re Plasterer's Estate*, 413 Pa. 513, 516, 198 A.2d 525, 527 (1964). In *Plasterer's Estate* the Supreme Court reasoned that,

Where the pleader relies for his cause of action upon a written instrument upon the face of which no consideration appears or the existence of consideration appears doubtful, it would seem logical to raise this question by preliminary objections particularly where the written instrument is the keystone of the cause of action.

Id., at 198 A.2d 527.

It has always been deemed essential to the sufficiency of a complaint that it set forth distinctly facts showing a legally sufficient consideration for the contract upon which the action is founded. A complaint which fails to allege facts showing legal consideration is demurrable and is not within the purview of affirmative defenses as set forth in Pa.R.C.P. 1030.

Porta v. American B&T Co. of Pa., 48 D.&C.2d 523, 525 (C.P. Lebanon County, Sept. 1969).

Upon review of the agreement and the complaint in this case, it is clear to the Court that the document is not an enforceable contract. It is axiomatic that a contract unsupported by consideration is unenforceable. *In re Packer Ave. Associates*, 1

B.R. 286 (E.D. Pa., 1979). A promise to pay the debt of another must be supported by consideration to be enforceable. *Bittenbender v. Sunbury and E.R. Co.*, 40 Pa. 269, 9 P.L.J. 121 (1861). Even when we assume the truth of the allegations in the complaint, as we must, there are insufficient facts to show that this agreement is supported by legal consideration.

Consideration is a bargained for exchange. *Com. Dept. of Transp. v. First National Bank*, 77 Pa. Cmwlth. 551, 466 A.2d 753 (1983). Consideration can be shown by proof of a benefit conferred upon the promisor or a detriment incurred by the promisee. *Kelly by Kelly v. Ickes*, 427 Pa. Super. 542, 629 A.2d 1002 (1993). There is no evidence of consideration on the face of the agreement nor are facts pled in the complaint which would lead this Court to conclude that consideration was given to support the agreement. No benefit was conferred upon Mrs. Harbaugh and the McKees suffered no detriment.

To make the promisor liable to answer for the debt of another, consideration for the promise must be shown. *Riland v. Shaeffer*, 7 Sch. 110 (C.P., 1911). In this case, Mrs. Harbaugh cannot be liable under the agreement because no consideration has been shown. For this reason, we believe it appropriate to dismiss the complaint.

There is a suggestion in the complaint and in plaintiffs' brief that the document in question is a negotiable instrument under the Uniform Commercial Code. This would make a significant difference because an instrument given for value for the debt of a third person does not require further consideration to be enforceable. 13 Pa.C.S. § 3303(a)(3); See also, Comment 4 to § 3303. However, this document does not fit into the definition of a negotiable instrument because it lacks language of negotiability, and the U.C.C. is therefore inapplicable to this agreement.²

² The Uniform Commercial Code, as adopted in Pennsylvania, defines a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money... if it... is payable to bearer or to order at the time it is issued." 13 Pa.C.S. § 3104(a). The agreement in question does not contain the language of negotiability required by the statute, and is therefore, not a negotiable instrument.

Furthermore, plaintiffs' counsel conceded at oral argument that the document at issue is not a negotiable instrument as defined by the applicable statute.

Because we have decided to dismiss the complaint on the ground of lack of consideration in the agreement, we find it unnecessary to address the defendant's second preliminary objection at this time.

ORDER OF COURT

AND NOW, this 29th day of April, 1998, upon consideration of the Preliminary Objections referred to in the Opinion attached hereto and incorporated herein, of the briefs submitted, and oral argument presented,

IT IS HEREBY ORDERED AND DECREED that the Preliminary Objections are granted consistent with the Opinion filed herewith, and the Complaint in the above captioned matter is hereby dismissed.