

STATE OF MINNESOTA
COUNTY OF HENNEPIN

FILED
2010 MAR 30 PM 2:35
BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Maple Bank,
a Minnesota banking corporation,

Court File No. 27-CV-08-28852

Plaintiff,

**ORDER AND MEMORANDUM
RULING ON POST-TRIAL MOTIONS**

v.

Alliance Bank,
a Minnesota banking corporation,

Defendant.

INTRODUCTION

The above-captioned matter came before the undersigned Judge of District Court on December 31, 2009, upon (1) Defendant's motion for judgment as a matter of law; (2) Defendant's motion, in the alternative, for a new trial; and (3) Plaintiff's petition for attorneys' fees and costs. Norman J. Baer, Esq., and Cheryl A. Stanton, Esq., appeared on behalf of Plaintiff. Larry D. Espel, Esq., appeared on behalf of Defendant.

BACKGROUND

This action arises from dealings between Plaintiff Maple Bank and Defendant Alliance Bank. The primary transaction at issue is a loan participation agreement ("the LPA") that the parties entered into in December 2005. Under the LPA, Alliance Bank sold Maple Bank an ownership interest in a \$750,000.00 loan to Tahoe Boca, LLC ("Tahoe Boca"), with a due date of May 31, 2006. The due date on the loan was extended three times – first to August 31, 2006,

then to October 31, 2006, and finally to April 30, 2007. With each extension, Alliance Bank and Maple Bank entered into a new loan participation agreement with no change in terms except for the due date.¹ Ultimately, Tahoe Boca defaulted on the loan and the collateral and guarantees securing the loan had no value.

After Tahoe Boca defaulted on the loan, Maple Bank commenced this action against Alliance Bank, alleging (1) two counts of breach of contract²; (2) fraudulent inducement; (3) breach of the implied covenant of good faith and fair dealing; (4) breach of the duty to use reasonable care, skill, and diligence; (5) breach of the duty of loyalty; and (6) promissory estoppel.

Maple Bank withdrew the promissory estoppel claim before trial, and at the close of Plaintiff's case, the Court granted judgment as a matter of law on three counts: (1) Count IV: Breach of the Implied Covenant of Good Faith and Fair Dealing; (2) Count V: Breach of the Duty to Use Reasonable Care, Skill, and Diligence; and (3) Count VI: Breach of the Duty of Loyalty. Accordingly, only three claims – both counts of breach of contract and fraudulent inducement – were submitted to the jury.

The Court gave final instructions to the jury at approximately 12:00 p.m. on November 23, 2009. During its deliberations, the jury asked a question about the claim for fraudulent inducement. Shortly thereafter, at 4:25 p.m. on November 23, 2009, the jury reached a verdict.

On the breach of contract claim arising from the LPA for the Tahoe Boca loan, the jury found that (1) Alliance Bank breached the contract; (2) the breach directly caused damage to Maple Bank; and (3) \$967,682.00 would fairly and adequately compensate Maple Bank for the

¹ For ease of reference, the Court will use the abbreviation LPA when referring to each of the four loan participation agreements pertaining to the Tahoe Boca loan.

² One count related to the LPA. The other count related to a separate group of loan participation agreements that were prepaid.

damage. On the breach of contract claim arising from the loan participation agreements for the prepaid loans, the jury found that Alliance Bank did not breach the contract. On the fraudulent inducement claim, the jury found that (1) Alliance Bank falsely represented a past or present material fact to Maple Bank; (2) Alliance Bank knew the representation was false; and (3) Alliance Bank did not intend for Maple Bank to rely on the false representation.

LEGAL STANDARDS

Judgment as a Matter of Law

After a jury verdict is entered, a party may make a request for judgment as a matter of law or renew a request made during trial. Minn. R. Civ. P. 50.02. The motion is a question of law for the court. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979); *Thompson v. Hughart*, 664 N.W.2d 372, 376 (Minn. App. 2003).

In deciding on the motion, the court considers “whether the verdict is manifestly against the entire evidence or whether despite the jury’s findings of fact the moving party is entitled to judgment as a matter of law.” *Navarre v. S. Washington County Schs.*, 652 N.W.2d 9, 21 (Minn. 2002). A party is not entitled to judgment as a matter of law if there is competent evidence that reasonably tends to sustain the verdict, *id.* at 21, or if reasonable minds could differ on the proper outcome, *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983).

New Trial

Rule 59.01 of the Minnesota Rules of Civil Procedure establishes the grounds on which a court may grant a new trial, including when “[t]he verdict . . . is not justified by the evidence, or is contrary to law.” Minn. R. Civ. P. 59.01(g). A motion for new trial under Rule 59.01(g) “vest[s] the broadest possible discretionary power in the trial court.” *Ginsberg v. Williams*, 135 N.W.2d 213, 220 (Minn. 1965). “Whether the verdict is justified by the evidence presents a

factual question and the district court may properly weigh the evidence.” *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004) (citing *Lamb*, 333 N.W.2d at 855).

The standard for granting a new trial under Rule 59.01(g) is “demanding” though “less rigorous” than the standard for granting judgment as a matter of law. *Clifford*, 681 N.W.2d at 687. A new trial should be granted only if “the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment.” *LaValle v. Aqualand Pool Co.*, 257 N.W.2d 324, 328 (Minn. 1977). When applying this standard, the Court must view the evidence as a whole and in a light most favorable to the verdict. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 919 (Minn. App. 2001) (citing *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984)).

ANALYSIS

Alliance Bank’s motion is, not surprisingly, focused on the jury’s determination that Alliance Bank breached the LPA for the Tahoe Boca loan and thereby damaged Maple Bank in the amount of \$967,682.00. On that claim, which is Count I of the Amended Complaint, Alliance Bank moves for judgment as a matter of law or, alternatively, for a new trial on the grounds that the jury’s findings are contrary to the evidence.

In arguing that the verdict is contrary to the evidence, Alliance Bank approaches the evidence in fragments rather than as a whole, which is somewhat problematic since the jury’s finding of breach of contract may have been based on Alliance Bank’s course of conduct as a whole rather than any discrete acts or omissions. For example, the jury may have found that Alliance Bank, through its cumulative course of conduct, breached the standard of care required by section 3(B) of the LPA.

Setting aside the merits of the fragmentary approach, Alliance Bank's arguments against the jury verdict are largely, if not entirely, premised on the notion that there could be no breach of the LPA before the ultimate maturity date of April 30, 2007. However, the LPA is a separate contract from the loan agreement, and a default under the loan agreement is not a necessary condition for a breach of the LPA. Indeed, Alliance Bank highlights the distinction between the two contracts in arguing against the jury's damages award.

With those principles in mind, the Court turns to the pivotal question of whether the evidence as a whole, when viewed in a light most favorable to the verdict, reasonably tends to sustain the jury's findings that (1) Alliance Bank breached the LPA; (2) the breach caused damage to Maple Bank; and (3) \$967,682.00 would fairly compensate Maple Bank for the damage.

Breach of Contract

There is evidence to support the jury's finding that Alliance Bank breached the LPA. Specifically, there is evidence that would allow a reasonable person to find that Alliance Bank breached section 6 of the LPA by not providing information concerning the loan and the continued creditworthiness of the borrower.

Section 6 of the LPA provides in pertinent part:

[Alliance Bank] agrees to provide [Maple Bank] with complete and current credit related and other information concerning Borrower, the Loan and the collateral securing the Loan including without limitation, copies of:

....

(D) any information and/or documents in possession of [Alliance Bank] bearing upon the *continued creditworthiness* of Borrower.

(Emphasis added.)

The evidence shows that Alliance Bank withheld information bearing upon the continued creditworthiness of Tahoe Boca. For example, on August 16, 2006, Stan Edwards, a Vice President at Alliance Bank, emailed Mike Waldo, Chief Financial Officer for Contractor Property Developers Company (“CPDC”),³ to ask for updates on various items, including the Tahoe Boca loan. (Ex. 44.) At the end of the message, Edwards writes:

The daily press reports on land and home sales in the news is not helping with the participating banks, and I foresee a real push from them to see a plan to reduce your debt/holdings over the next 6-9 months.

(*Id.*) This email was sent only 15 days before the due date on the Tahoe Boca loan, and despite his reference to “participating banks” and the allusion to their concerns, Edwards did not communicate the information on Tahoe Boca to Maple Bank. Instead, during the following weeks, David Nightingale, Credit Manager at Maple Bank, was left to send a series of emails asking Alliance Bank for information and updates on the Tahoe Boca loan. (Exs. 441, 445, and 447.)

Alliance Bank continued to withhold information after the due date had been extended from August 31, 2006, to October 31, 2006. On November 13, 2006, Edwards emailed Waldo to discuss his concerns regarding Homer Tompkins and his doubts about a prospective deal between CPDC and either Newland Properties (“Newland”) or Varde. (Ex. 52.) In that email, Waldo writes:

Please read this email from Homer and tell me how anyone who wrote this could possibly be planning to go to Spain next week and think that we, *or any other lender* can believe anything that he says. Absolutely nothing has been accomplished. One payroll has been met and there may be enough money to get to tomorrow or the next day, and at that, we have huge chunk of interest past due . . . Given the performance Friday where Homer assured us that Varde really liked

³ CPDC was connected to the Tahoe Boca loan on several levels. First, CPDC owned one-third of Tahoe Boca. (Ex. 27.) Second, CPDC was the primary source of the wealth of Homer Tompkins, one of the three guarantors of the Tahoe Boca Loan. (Ex. 23.) Third, the TIF Note securing the Tahoe Boca loan was payable to CPDC or its assigns. (Ex. 101.)

him and CPDC and that they really wanted to do business, it becomes even clearer that nothing out of [Homer's] mouth can be taken as anything but a sales pitch with no real substance behind it. How can we possibly put any stock in the Newland deal, and why would Newland do business with someone who continues to ignore their obligations by running off to hunting trips while his business falls apart. Why would they fund a huge amount of money to someone who clearly has no sense of honor or obligation.

(Exhibit 52 (emphasis added).) Despite his skepticism about a deal with Varde or Newland, Edwards emailed Nightingale four days later to suggest extending the due date⁴ to facilitate a deal with Varde or Newland. In that email, Waldo writes:

Tahoe matured 10-31-06. They have approval for a loan from a bank in California that allows them to purchase more land, but the \$ amount of the loan came back at a number that is not sufficient to pay out the note we have CPDC has waited to close that loan because CPDC has also been negotiating with a firm named Varde thru a Broker (CB Ellis) to have them purchase all of their notes/debts. In that case Varde would be assigned all of our notes and we would be paid out on all of the CPDC notes and they would no longer be our customer. CPDC is also negotiating directly with a firm named Newland Properties My best guess is that Tahoe will need to be renewed to at least the middle of January o[r] 1st of February to allow one of these deals to hopefully close.

(*Id.*) Thus, Alliance Bank urged Maple Bank to agree to another extension without communicating any of its doubts about the basis for another extension (i.e., a deal with Varde or Newland).

Given Alliance Bank's failure to advise Maple Bank of its concerns regarding Homer Tompkins' veracity and its doubts about a deal with Varde or Newland, there is evidence to support a finding that Alliance Bank breached section 6 of the LPA by withholding information bearing upon the continued creditworthiness of Tahoe Boca.

Causation

The jury's finding of causation is not contrary to the evidence because it is reasonable to infer that Maple Bank would not have consented to the last two extensions if Alliance Bank had

⁴ The October 31 due date had already passed by that point.

complied with its obligations under section 6 of the LPA. Both extensions required Maple Bank's consent because section 3(B) of the LPA provides: "Anything in this Section 3 to the contrary notwithstanding, however, [Alliance Bank] may not, without the prior consent and concurrence of [Maple Bank] . . . (1) make or consent to any amendments in the terms and conditions of the Loan, the Note or in the Loan Documents." (Ex. 26.)

The documentary evidence and the testimony of Nightingale and Fizal Kassim both support the jury's finding of causation. For example, after Edwards emailed to Nightingale suggesting another extension to facilitate a deal with Varde or Newland, Nightingale emailed Kassim, President of Maple Bank, noting that "the payoff expected is delayed and another renewal until mid January will be necessary" and recommending that Maple Bank "allow Alliance to handle the situation and then react when a reaction is needed." (Ex. 452.) Maple Bank was thus proceeding on the understanding that a deal with Varde or Newland was on the horizon. If Alliance Bank had communicated its doubts about Tompkins' veracity and the prospect of a deal with Varde or Newland, it is likely that Maple Bank would have questioned a further extension.

Moving further down the chain of causation, if Maple Bank had not consented to the final extension, the loan would have been due on October 31, 2006, and collection efforts would have begun in late 2006 before the Tahoe Boca situation had completely unraveled. It is reasonable to infer that Tompkins and CPDC would have ensured payment of the Tahoe Boca loan, a relatively minor loan in the scheme of things, to preserve the prospect of a major deal with Varde, Newland, or some other outside investor.

The documentary evidence supports that link in the causal chain. For example, on December 6, 2006, Edwards emailed Waldo, noting: "Without the participants being willing to

work thru this there will be no Newland deal and there will be no CPDC left.” (Ex. 57.)

Similarly, Edwards’ written comments from March 16, 2007, refer to the trouble of a loan being 90 days past due and its adverse impact on a deal with Newland. (Ex. 67.) Without the final extension, the Tahoe Boca loan would have been 90 days past due in January 2007.

The evidence supports the following inferences: (1) that Maple Bank would not have consented to the final extension if Alliance Bank had complied with section 6 of the LPA and communicated its doubts about the prospect of a deal with Varde or Newland; (2) that if Maple Bank had not consented to the final extension, collection efforts would have begun in late 2006 before the situation completely unraveled; and (3) that those efforts were likely to be successful because payment of the relatively minor Tahoe Boca loan would have preserved the prospect of a major deal with Varde, Newland, or some other outside investor.

Damages

The jury’s award of damages is consistent with the evidence because the evidence shows that Tompkins and CPDC had access to funds in late 2006 and early 2007. For example, in December 2006, Tompkins generated at least \$1.5 million from the sale of land in Costa Rica. (Ex. 57.) In a comment dated February 20, 2007, Edwards discusses the possibility of interim funding to facilitate a deal with Newland. (Ex. 61.) In an email dated March 26, 2007, Tompkins talks about adding a partner to the Truckee deal and buying out Brian Olson, one of the Tahoe Boca guarantors, for \$500,000. (Ex. 70.) Also, on April 27, 2007, Alliance Bank made a proposal whereby Tompkins would pay the Tahoe Boca loan in full, thereby implying that he had access to the requisite funds. (Ex. 77.)

The evidence thus indicates that in late 2006 and early 2007 (i.e., after the penultimate due date of October 31, 2006 but before the ultimate due date of April 30, 2007), Tompkins and

CPDC had access to sufficient funds to pay the Tahoe Boca loan in full. In addition to this supporting evidence, the guarantors' financial statements from March 2005 indicates that their collective net worth exceeded the amount of the Tahoe Boca loan by several million dollars. (Ex. 11,12, and 23.)

The evidence supports the jury's damages award because the evidence indicates that, in late 2006 and early 2007, CPDC and Tompkins had access to sufficient funds to pay the Tahoe Boca loan in full.

Alliance Bank's Arguments Regarding Section 6

Alliance Bank raises two arguments in opposition to the theory that Alliance Bank breached section 6 of the LPA by withholding information bearing upon the continued creditworthiness of Tahoe Boca.

First, Alliance Bank argues that Maple Bank did not claim or prove fraudulent inducement with respect to the nondisclosure. This argument is unavailing because Alliance Bank's duty to disclose flows from the contract – specifically, from section 6 of the LPA – not the common law. Where the duty to disclose is contractual, the claimant need only prove breach of contract, not fraud. By way of analogy, a claimant under the Truth in Lending Act (“TILA”) need not prove fraud, only a TILA violation. It is the source of the duty – whether contract, statute, or common law – which determines the nature of the claim and the claimant's burden of proof. In this case, the LPA gives rise to the duty of disclosure, and the proper claim is thus breach of contract.

Second, Alliance Bank argues that the nondisclosure could not cause any damage because Maple Bank had no power to act on the information. However, under section 3(B)(1) of

the LPA, Alliance Bank could not amend the terms or conditions of the loan without Maple Bank's consent. The due date was obviously a term of the loan.

The Fragmentary Approach

In arguing the breach of contract claim, Alliance Bank approaches the evidence as fragments rather than a whole. The Court has tried to analyze the breach of contract claim within that framework by identifying the nondisclosure of relevant information as a particular act or omission which constitutes breach of contract. However, it should be noted that the jury's findings may have been premised on other acts or omissions.

For example, the jury might have found that Alliance Bank breached its standard of care under section 3(B) of the LPA by not declaring the loan in default when the original due dates passed without payment. Along similar lines, Maple Bank cites evidence that Alliance Bank breached the LPA by subordinating Maple Bank's interest in recovering on the Tahoe Boca loan to Alliance Bank's interest in collecting on larger loans. On this issue, Alliance Bank cites section 8(B) of the LPA, which provides:

[Maple Bank] further recognizes and agrees that [Alliance Bank] shall have no obligation to attempt to collect payments under the Loan in preference and priority over the collection and/or enforcement of any other and/or additional loans by [Alliance Bank] as referenced in (A) above.

Given this provision, Alliance Bank is correct in noting that the LPA did not require Alliance Bank to prioritize repayment of the Tahoe Boca loan. However, the absence of an obligation to prioritize does not imply liberty to subordinate. Equal treatment was required.

Fraudulent Inducement and the Letter of Credit

Apart from the evidentiary issues, Alliance Bank argues that a new trial is warranted because the fraudulent inducement claim should have been dismissed at the start of trial and references to the Rottlund Homes letter of credit thereby excluded. The Court denied Alliance

