2011-CA-01264 RT

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2. Whether the trial court was correct in granting Summary Judgment in favor of Trustmark National Bank in the Counter-Claim for breach of contract filed by Joe E. Morgan, Jr.

II.
STATEMENT OF THE CASE

This case concerns a dispute between a lender, Trustmark National Bank (Trustmark) and four (4) Guarantors, Joe E. Morgan, Jr., (Morgan), J. Frank Pucylowski (Pucylowski), Thomas M. Harkins, Jr. (Harkins) and C. Mark Dorion (Dorion), (collectively, "the Guarantors"), who guaranteed a loan to Old Fifty One, LLC (Old 51). Old 51 sought to develop a tract of commercial property and contacted Trustmark to provide the financing. R. at 186. To develop the property, Old 51 needed a land acquisition loan and a construction loan. Trustmark emailed Dorion, setting out the terms of an acquisition loan, and a construction loan and these terms were agreeable to Old 51. R. at 417.

Trustmark made the land acquisition loan and obtained Guaranties from the four (4) members of Old 51 named above. Trustmark would not make the construction loan on the agreed upon terms. Old 51 defaulted and Trustmark made demand on the Guarantors.

The lower court granted Summary Judgment in favor of Trustmark on its claims under the Guaranty Agreements and granted Trustmark's Summary Judgment Motion, dismissing Morgan's Counter-Claim for breach of contract.

III.
SUMMARY OF THE ARGUMENT

The fact that the Guarantors signed the Guaranty Agreements to Trustmark is not disputed. The arguments concern whether Trustmark agreed to grant a construction loan on the terms set out in Trustmark's email dated March 3, 2007 to Dorion and other representations. R. at 417. Even if a contract was not created, the Guarantors assert that these and other representations were used to fraudulently induce them to sign the Guaranty Agreements. The Guarantors also raise the defense of breach of fiduciary relationship. Based on this, the Guarantors suggest that these issues should not have been decided by Summary Judgment.

IV.
FACTS AND ARGUMENT

Morgan, Pucylowski, Harkins and Dorion formed Old 51 as a commercial real estate development company. Old 51's members identified a piece of property known as Log Village, which was an old development once containing retail businesses in log cabins. The condition of the center had deteriorated. R. at 186.

Old 51 developed a plan to acquire the property, demolish the log cabins and build a new retail development in their place. The project would be built in phases and would be known as Gas Lamp Village II. An adjoining property had been developed by some of the members as Gas Lamp Village. R. at 186.

Harkins and Dorion, two members of Old 51, presented Carl Sandberg, a Trustmark Vice-President, with a development plan for Gas Lamp Village II. The plan covered the acquisition of the property, the demolition of the existing structures and the construction of the new retail center. R. at 186. All parties knew Old 51 was not interested in buying the property except to develop it. R. at 171 and 188.

On March 3, 2007, Carl Sandberg emailed Dorion, setting out the terms of the acquisition loan and the construction loan for Gas Lamp Village II. Exhibit "1" to Joe E. Morgan's Affidavit. R. at 417. The email is clear that there would be a land acquisition loan and a construction loan. It sets out the terms of the land acquisition loan and the terms of the construction loan.

In May of 2007, Sandberg and Zack Nordan, another Trustmark officer, presented Old 51's proposal to the loan committee. R. at 418-420. The Trustmark officers assured the members of Old 51 that there was no problem with their request.

In June of 2007, Trustmark made the land acquisition loan to Old 51 and Old 51 acquired the property. The members of Old 51 all signed Personal Guaranties for the full amount of the land acquisition loan, $2,300,000.00. Guaranty Agreements, R. at 27-38. Morgan would not have signed the Personal Guaranty if not for the promise that Trustmark would make the construction loan as agreed in Sandberg's email. Affidavit of Joe E. Morgan, R. at 171-176.

On June 6, 2008, Trustmark issued a formal Loan Commitment on Gas Lamp Village II to Old 51. The Commitment differed from the terms in Sandberg's email in several material respects. It required an additional 10% equity contribution and had several other differences. Also, the interest rate was not fixed as in the prior agreement. Trustmark Commitment, R. at 622-632. This proposal came only a few days after Trustmark had cancelled the line of credit of Harkins, one of the members of Old 51. Harkins Affidavit, R. at 184-189. Trustmark should have known that the members of Old 51 could not comply with the terms of the Loan Commitment.

In October of 2009, Old 51 was no longer able to make payments on the land acquisition loan. The loan went into default.

On April 27, 2010, Old 51 filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of the Southern District of Mississippi. Dorion also filed bankruptcy.

Trustmark made representations that induced Old 51's members to execute the land acquisition loan guaranties. The email from Sandberg sets out the terms of a land acquisition loan and a construction loan. The members of Old 51 relied on these representations in signing the land acquisition loan documents. R. at 171.

Trustmark did not perform as agreed and represented. When the Construction Loan Commitment was finally issued, it contained onerous terms that differed from the prior representations. The Construction Loan Commitment required an additional 10 % equity payment that Trustmark knew the members could not make. R. at 622.

1. Fraud in the Inducement.

The Guarantors assert that if not for Trustmark's representation that it would make them a construction loan on agreeable terms they never would have signed the Guaranty Agreements. R. at 172 and 188. The Guarantors rely upon *Crystal Springs Insurance Agency, Inc. v. Commercial Union Insurance Co.,* 554 So.2d 884 (Miss. 1989) in support of their position on this point.

Trustmark argues that *Crystal Springs* is factually unrelated to the instant case. We disagree. Commercial Union wanted Crystal Springs Insurance to sign a Promissory Note in exchange for some accounts of a struggling agency. Commercial Union had an agency relationship with Crystal Springs Insurance whereby Crystal Springs would write insurance for Commercial Union. About one year later, Commercial Union cancelled the agency relationship.

Crystal Springs Insurance argued that the promise to continue the agency relationship induced them into signing the note. In our case, the promise to make a construction loan on reasonable terms induced the Guarantors to sign their Guaranties.

In Crystal Springs, the court held that Summary Judgment was not proper. The court stated that the best way to prove fraud would be by the testimony of the parties involved. Id at 886. The

Guarantors should have the opportunity to prove the fraud at trial.

Trustmark argues that the Guarantors' defense of fraud in the inducement fails because the representation complained of is of a "future event rather that a present fact" Appellee's Brief (P. 17). Trustmark does not address the rule set out in the Guarantors' Brief that "a future promise may be fraudulent when it is part of a general scheme or plan, existing at the time, to induce a person to act, as he otherwise would not, to his injury." *Kidd v. Kidd*, 49 So.2d 824 (Miss. 1951). In *Kidd* the court cancelled a Deed because it found fraud in the inducement.

In this case, the email from Sandberg (R. at 417) indicated Trustmark would make a construction loan on acceptable terms. Without this representation, the Guarantors would not have signed the Guaranty Agreements. R. at 171 and 188-189. The Guarantors should have the opportunity to prove this fraud at trial.

2. Breach of Contract

Trustmark argues that Sandberg's email (R. at 417) was not definite enough to be a contract. It is not necessary that a writing contain every single point of agreement. This court has held that "a contract is sufficiently definite if it contains matters which would enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence "*Polk v. Sexton*, 613 So.2d 841, 843 (Miss. 1993).

This email (R. at 417) reveals (1) The lender, Trustmark, (2) the borrower, Mark Dorion or an entity controlled by him, (3) that there would be a land acquisition loan and a construction loan, (4) the land loan would be interest only, (5) the land loan would be due semi-annually, (6) the land loan would be at the interest rate of 7.5% fixed (7) the land loan would be for a term of two years, (8) the construction loan would have a fixed rate of interest for five years, (9) the construction loan

would have a 7.5% rate of interest, (10) the construction loan would require interest only payments for the first two years, (11) the construction loan would be termed out with a twenty year amortization, (12) the construction loan would require that the building be pre-leased, (13) the maximum loan to value ratio of 80%, (14) there would be no origination fee, and (15) all Guarantors must sign Guaranties.

This list covers all of the essential terms of the loan contract. If there are any minor terms omitted, the court could supply these under the rules set out in *Polk.*

When Trustmark finally issued a formal Loan Commitment it contained different and less favorable terms than those contained in the email. (R. at 322-332). The Loan Commitment contained the following terms that were different from the email; (1) interest rate was floating not fixed, (2) the construction period was twelve months not two years, and (3) required a 10% or $415,000.00 equity pledged for the project.

When Trustmark failed to make the construction loan in conformity to the original agreement it breached that agreement. The Guarantors have at least established an issue of material fact as to whether a contract was formed and whether it was breached.

3. <u>Breach of Fiduciary Duty.</u>

Because of the actions of Trustmark, and the relationship between Trustmark and the Guarantors, a fiduciary relationship existed. A three-part test exists for determining whether a fiduciary relationship exists in a commercial transaction. In *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002) the test is set out as follows:

1. The parties have shared goals in each others' commercial activities;
2. One of the parties places justifiable confidence or trust in the other parties fidelity; and

3. The trusted party exercises effective control over the other party.

One case that is similar to this case is *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79 (Miss. 1991). This case dealt with a lender and a borrower. It considered whether a fiduciary relationship existed between the two. It states "a fiduciary relationship could have been created from the Lowerys' dealing with Guaranty Bank aside from the note." Id at 85.

In *Lowery*, the court said that the Lowerys had a regular relationship with one particular officer and relied on that relationship, and placed trust and confidence in the officer. Because of this, the court said a fiduciary relationship could be created. Id at 85. Thus, the court found Summary Judgment was not proper on this issue.

In the case at bar, one of the Guarantors, Thomas Harkins, had a long and active relationship with Trustmark. R. at 184-189. It was not uncommon for him to agree with Trustmark on the details of a project over the phone or in an impromptu meeting usually sealed with a verbal agreement or a hand shake. R. at 185. Harkins had a regular relationship with the officers in this case like the Lowerys. He and the other Guarantors placed trust and confidence in this relationship. Accordingly, a fiduciary relationship was formed. The Guarantors at least should be allowed to prove this issue at trial, and the Summary Judgment issued by the lower court should be reversed.

The case of *Great Southern National Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282 (Miss. 1992) also supports the Guarantors' position. In this case, the bank set up loan documents in a fictitious corporate name. Summary Judgment was granted by the lower court in McCullough's favor. This Court on appeal held that "cases which involve issues of contractual ambiguity and interpretations as well as allegations of fraud or misrepresentation generally are inappropriate for disposition at the Summary Judgment stage." Id at 1289. The Court reversed the Summary Judgment and remanded for trial.

4. **Morgan's Counter-Claim.**

Trustmark states in its Brief that for Morgan to prevail on his Counter-Claim he must prove the existence of a contract, a provision placed in the contract for the benefit of Morgan, and a breach of contract by Trustmark. If there is a genuine issue as to any material facts in this matter, the Summary Judgment against Morgan should be reversed.

The existence of the contract has been argued above. It is the position of Morgan and the other Guarantors that the Sandberg email (R. at 417), and the Loan Presentation Memorandum (R. at 418) together or separately evidence a contact between Old 51 and Trustmark.

The contract contained a provision that would reasonably benefit Morgan. Morgan was a professional building contractor. It would be reasonable to assume he would build the commercial buildings which were set out in the contract.

Trustmark argues that the email (R. at 417) is not definite enough to create a contract. This court has addressed the terms that must be in a contract as follows:

> Neither law nor equity requires that every term and condition of an agreement be set forth in a contract. The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency.

Bushing v. Griffin, 465 So.2d 1037 (Miss. 1985).

When Trustmark came forward with construction loan terms that were significantly different from those agreed to, it amounted to a breach of the original agreement. This breach foreseeably harmed Morgan especially since he had been selected to build the improvements. He would have made a profit of $500,000.00 had Trustmark honored its agreement. This claim should not have been dismissed by Summary Judgment.

V.

CONCLUSION

Genuine issues of material fact exist with respect to the issues raised before the trial court on Summary Judgment. Therefore, Morgan, Harkins, and Pucylowski respectfully request that this court reverse the Summary Judgment granted in Trustmark's favor on its claims, and further reverse the Summary Judgment in Trustmark's favor dismissing the Counter-Claim of Morgan for breach of contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John S. McDavid of Montgomery McGraw, PLLC do hereby certify that I have this day transmitted a true and correct copy of the above and foregoing ***Reply Brief of Appellants*** via United States Mail, postage prepaid to the following:

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THIS the 6th day of February, 2012.

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