IN THE SUPREME COURT OF MISSISSIPPI

JOE E. MORGAN, JR., J. FRANK PUCYLOWSKI, AND THOMAS M. HARKINS, JR., APPELLANTS

VS.

TRUSTMARK NATIONAL BANK, APPELLEE

No. 2011-CA-1264

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellants, Joe E. Morgan, Jr., J. Frank Pucylowski, and Thomas M. Harkins, Jr. certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Trustmark National Bank
2. Joe E. Morgan, Jr.
3. J. Frank Pucylowski
4. Thomas M. Harkins, Jr.
5. C. Mark Dorion
6. Don A. McGraw, Jr.
7. Patrick F. McAllister
8. William M. Simpson, II
9. James R. Mozingo
10. John S. McDavid
11. Honorable William E. Chapman, III

SO CERTIFIED this the 27th day of December, 2011.

John S. McDavid and Don A. McGraw, Jr.,
Attorneys for Joe E. Morgan, Jr., J. Frank Pucylowski,
and Thomas M. Harkins, Jr.

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BRIEF OF APPELLANTS

I.
STATEMENT OF THE ISSUES

1. Whether the trial court was correct in granting Summary Judgment in favor of Trustmark National Bank in its claims under a Guaranty Agreement signed by Joe E. Morgan, Jr., Thomas M. Harkins, C. Mark Dorion and J. Frank Pucylowski.

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. <u>FRAUD IN THE INDUCEMENT</u>

This court has addressed fraud in the inducement in a case very similar to the one at bar. In *Crystal Springs Insurance Agency, Inc. vs. Commercial Union Insurance Co.*, 554 So.2d 884 (Miss. 1989), Commercial Union convinced Crystal Springs Insurance and Young to buy the accounts of a struggling insurance agency and execute a Promissory Note to Commercial Union. The agency wrote insurance for Commercial Union. About one year later, Commercial Union cancelled the

agency relationship with Crystal Springs Insurance and Young.

Crystal Springs Insurance and Young raised the defense of fraudulent inducement. They claimed Commercial Union knew at the time of the Agreement it would terminate the agency relationship.

The lower court granted Commercial Union's Motion for Summary Judgment. On appeal, this court noted that:

> "In an allegation of fraud, [...] the precise facts which would establish the fraud will often be known only by the party or parties alleged to have committed the fraud. Because the factor of intent which is necessary to establish fraud requires knowledge of the perpetrator's state of mind, it may not be possible for an opponent to reveal detailed precise facts in support of his claim." *Id.* At 185.

The court held that if Young can prove that Commercial Union promised that his agency would continue for a long time with no intention of keeping the promise he would be entitled to relief. *Id.* at 886.

It stated:

> "The best way and perhaps the only way for Young to prove that would be at a trial in which he could test the credibility of the persons whom he claims made that promise to him." *Id* at 886.

In our case, the members of Old 51 should be allowed to examine the Trustmark employees at trial to establish the intent of Trustmark when the Agreement was made. This is certainly a material fact in dispute.

In the terms set out in Sandberg's email, and in the representations made by the Trustmark officers to the members of Old 51, representations were made that induced the members to sign the Guaranties. They were told a construction loan would be made on agreeable terms. "It is a settled

rule that a contractual promise, made with the undisclosed intention of not performing it, is fraud." *First Money, Inc. v. Frisby,* 369 So.2d 746 (Miss. 1979).

Trustmark may argue that the representations were future promises and thus not fraudulent. However, "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). The members of Old 51 should be given the opportunity to prove that the representations made to them were made with no intent to follow through. Trustmark delayed in making the construction loan and then when it finally made a formal Loan Commitment it was vastly different than previously promised.

Another case deals with bank loan documents and whether they were procured by fraud. *Great Southern National Bank v. McCullough Environmental Services, Inc.,* 595 So.2d 1282 (Miss. 1992). In this case a bank set up loan documents in a fictitious corporate name. The lower court granted Summary Judgment in McCullough's favor. The court on appeal noted 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. This court reversed the Summary Judgment and remanded for trial.

Surely the members of Old 51 should be given the same opportunity.

2. <u>BREACH OF CONTRACT</u>

All parties to this transaction knew that Old 51 needed a land acquisition loan and a construction loan. The parties agreed that Trustmark would make these loans on certain terms. The terms are set out in Sandberg's email (R. at 417), the representations of the Trustmark officers, Sandberg and Nordan, and the proposal to the Loan Committee. R. at 418.

In Mississippi, it is not necessary that all of the terms of an agreement appear in one writing.

Kalavros v. Deposit Guarantee Bank & Trust Co., 158 So.2d 1037 (Miss. 1985); *Polk v. Sexton*, 613 So.2d 841, 843 (Miss. 1993).

If you examine these documents, you will see that all or almost all of the relevant terms of the Agreement are present. Sandberg's email sets out that there would be a land acquisition loan and a construction loan, the land loan would be interest only, due semi-annually, at the interest rate of 7.50% fixed for two (2) years; the construction loan would be a fixed rate loan for five (5) years, with an interest rate of 7.50%, first two (2) years would be interest only, termed out with a twenty (20) year amortization. The construction loan also required that the building must be pre-leased, the maximum loan to value ratio must be 80%, that there be no origination fee, and all four principals must sign Guaranties. R. at 417. The Loan Memorandum sets out the borrower, the loan amount of the acquisition loan, the interest rate, that the acquisition loan would be paid off by the construction loan, and other matters. R. at 418. Certainly this included all the essential terms of a loan contract.

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* at 843.

Trustmark delayed making the construction loan, and then when it finally issued a formal Loan Commitment letter it contained terms that were materially less favorable than the terms to which the parties had agreed. The formal Loan Commitment required an additional $400,000.00 (10% additional equity) be contributed by Old 51. Also, the interest rate was not fixed as in the prior agreement. R. at 622. Trustmark knew or should have known the members of Old 51 would not be able to make the required equity payment. These variations are a breach of the prior agreement.

Morgan and the other Guarantors were damaged by this breach. They were unable to

complete the development of the property and pay off the land acquisition loan. The payoff of the land acquisition loan was to be made from the construction loan. Loan Presentation Memo, R. at 418.

3. BREACH OF FIDUCIARY DUTY

Because of the actions of Trustmark, and the relationship between Trustmark and the Guarantors, a fiduciary relationship existed. This court has expressed a three-part test for determining whether a fiduciary relationship exists in a commercial transaction. *AmSouth Bank v. Gupta,* 838 So.2d 205 (Miss. 2002). It includes whether:

1. The parties have shared goals in each others' commercial activities;
2. One of the parties places justifiable confidence or trust in the other party's fidelity, and;
3. The trusted party exercises effective control over the other party. *Id* at 216.

The actions of Trustmark and the relationship of the parties satisfy these elements. Whether a fiduciary relationship exists is a question of fact. *Lowery v. Guaranty Bank and Trust Co.,* 592 So.2d 79 (Miss. 1991). Thus, Summary Judgment was not proper on this issue.

4. MORGAN'S COUNTER-CLAIM

The lower court granted Trustmark's Motion for Summary Judgment on Morgan's Counter-Claim. Morgan asserts that there are genuine issues of material fact which should have precluded the granting of Summary Judgment.

The moving party has the burden of proof to demonstrate there are no genuine issues of material fact. The Court must view all the evidence in a light most favorable to the non-moving party. *Morton v. City of Shelby,* 984 So.2d 323 (Miss. App. 2007).

The Counter-Claim of Morgan states that an agreement was reached between Morgan and

the other Defendants and the Plaintiff, Trustmark. This Agreement concerned Trustmark making a construction loan to Defendants on certain terms. Defendants contacted Trustmark about a series of loans to purchase and demolish existing structures and construct a new building for retail commercial space. R. at 186. The discussions included an initial loan to purchase the property known as Log Village, followed by a construction loan which would be made to finance the new construction on the property. After that, a term loan would be made for permanent financing. Trustmark disputes that an agreement was reached.

The email from Carl Sandberg of Trustmark to Mark Dorion dated March 8, 2007 (R. at 417) together with the Loan Presentation Memorandum (R. at 418) evidence a contract to make the above-mentioned loans.

It is not necessary that a contract be set out in one writing. *Kalavros v. Deposit Guaranty Bank & Trust Co.,* 158 So.2d 740 (Miss. 1963). The Loan Presentation Memorandum (Memo) and the email of Carl Sandberg (Email) contain the essential terms of the Agreement. The Memo sets out the lender, the borrower, the amount of "this request" (implies a series of loans), the term of the initial loan, the source of repayment (a construction loan), the interest rate, description of the collateral, purpose of the loan (for construction of Gas Lamp Village II) and the fees. The Email set out some details about the land loan and many details about the construction loan, the term, the interest rate, the period that would be interest only (2 years), the amortization period, the debt service requirements, the pre-leasing requirements, the maximum loan to value ratio, the requirement of Guarantors and the fees.

The terms included in the two documents discussed above cover all or the great majority of the terms concerning this type loan agreement. Where one document's terms may not adequately state the parties' agreement, another may be used to resolve the deficiency:

> 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).

All these terms had been discussed by the Defendants and Trustmark. An agreement had been reached and the Defendants relied on the representations of Trustmark contained in this agreement when they signed the land loan note and the Guaranty Agreements.

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. R. at 622.

The new terms were contained in a Commitment Letter dated June 6, 2008. R. at 622. The terms varied in several respects from the original agreement. The terms of the Commitment Letter that were different include: the interest rate (floating not fixed), the period when the payments would be interest only (1 year vs. 2), the equity requirement, the requirement of assignment of liquid collateral in the amount of $400,000.00, the requirement of three year leases in place before closing.

Trustmark should have known that Defendants could not agree to these new and different terms.

Morgan in particular was injured by this breach. He had been selected to build the improvements. He had prepared plans and specifications and allocated costs to the various components. He would have made a profit of $500,000.00 if Trustmark had honored its agreement. As demonstrated by the above, there are numerous material issues of fact that are in dispute. The Counter-Claim should not have been dismissed on 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 granting of Summary Judgment in Trustmark's favor dismissing the Counter-Claim of Morgan for breach of contract.

Respectfully submitted,

JOE E. MORGAN, JR., J. FRANK PUCYLOWSKI, AND THOMAS M. HARKINS, JR.

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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 ***Memorandum Brief of Appellants*** via United States Mail, postage prepaid to the following:

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THIS the 27th day of December, 2011.

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