



Chies v. Highland Bank

2001 | Cited 0 times | Court of Appeals of Minnesota | March 6, 2001

Affirmed

Klaphake, Judge

UNPUBLISHED OPINION

Tim Chies appeals from summary judgment granted to respondent Highland Bank (the bank) in his action for breach of contract, negligent misrepresentation, and breach of fiduciary duty arising from the circumstances surrounding his agreement to lend money to a third party and his entering into a subordination agreement with the bank to establish priority of repayment of their individual loans to the third party. Because the subordination agreement between appellant and the bank did not include the terms that appellant alleges were violated and because any other alleged contractual terms were not in writing as required by law for credit agreements, the district court properly granted summary judgment on the contract claim. Because appellant has failed to establish a prima facie case of negligent misrepresentation or breach of fiduciary duty, the district court properly granted summary judgment on those claims. Because appellant failed to act with due diligence in moving to amend his complaint to add claims of joint enterprise and unjust enrichment, the district court did not abuse its discretion in denying his motion to amend. We thus affirm.

DECISION

Breach of Contract

In August 1998, appellant agreed to lend Diamond Power Mechanical, Inc. (Diamond) \$19,500 to support its business at a time when Diamond had exceeded its line of credit with the bank. The substance of the agreement provided for amendment of the bank's security interest in Diamond's assets to make the bank's interest "subordinate and inferior to the lien created by the Promissory Note and Security Agreement from Diamond Power to Timothy Chies." A recital in the agreement provided that "Highland Bank acknowledges that the loan from Timothy Chies to Diamond Power will allow Diamond Power to pay current and past due wages to its employees."

In granting summary judgment, the district court concluded that (1) the recital was the "only place in the contract that contains the language upon which [appellant] relies to assert his breach of contract claim"; (2) the recitals were not terms of the contract; (3) the terms of the contract were required to be in writing under Minn. Stat. § 513.33 (1998); and (4) the contract language included no promise by the



Chies v. Highland Bank

2001 | Cited 0 times | Court of Appeals of Minnesota | March 6, 2001

bank to use the \$19,500 to cover Diamond's payroll.

The district court was correct in its conclusion about the effect of the contract recital. "It is well established that recitals do not govern the operative provisions of a contract unless the operative provisions are ambiguous." *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 164 F.Supp. 293, 301 (D. Minn. 1957) (citation omitted); see *Berg v. Berg*, 201 Minn. 179, 188, 275 N.W. 836, 841 (1937) ("The recital is no part of the contractual obligations assumed by the terms thereof."); *State by Crow Wing Envtl. Prot. Ass'n v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn. App. 1986) ("general rule is that recitals are not the basis of a binding agreement"), review denied (Minn. Dec. 17, 1986). Here, the pertinent recital did not clarify an ambiguous contract term; if found operative, it would have created a term that did not otherwise exist in the contract. Thus, the language of the recital does not support appellant's claim that the bank agreed to use the \$19,500 for Diamond's payroll. Further, the language of the recital itself does not make this promise--it merely "acknowledges" that the loan "will allow" Diamond to meet its payroll, both past and current.

We also agree that the statute of frauds provisions of Minn. Stat. §513.33 (1998), Minnesota's credit agreement statute, are implicated in this case. The statute of frauds bars a debtor from bringing an action against a creditor on a credit agreement unless the essential elements of the contract are expressed in writing. *Id.*, subd. 2. The statute defines a "debtor" as a person "who seeks a credit agreement with a creditor or who owes money to a creditor." *Id.*, subd. 1(3). The definition of "credit agreement" includes an agreement "to lend or forbear repayment of money," or "to make any other financial accommodation." *Id.*, subd. 1(1).

Given the broad definitions of "debtor" and "credit agreement," we conclude that the district court properly construed the statute under the alleged facts of this case. Appellant met the definition of "debtor" because he sought a credit agreement with the bank. The agreement was a "credit agreement" because the bank agreed to subordinate its security interest in Diamond's receivables on a specific project. This constituted a "financial accommodation" on the bank's part or, arguably, an agreement to forbear the repayment of money Diamond owed to the bank on the account. See *Rural Am. Bank v. Herickhoff*, 485 N.W.2d 702, 706 (Minn. 1992) (upholding credit exchange agreement between two debtor farmers and bank, and rejecting this court's narrow construction of Minn. Stat. § 513.33 that construed "any financial accommodation" to mean only agreements for extension of credit). Thus, the district court properly granted summary judgment on appellant's breach of contract claim because the contract, as written, did not include the terms that appellant alleges were breached. See *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997) (summary judgment proper where no genuine issues of material fact exist and district court properly applied law).

Negligent Misrepresentation

Appellant also claims that the bank negligently misrepresented its intentions in encouraging him to lend money to Diamond. Minnesota has adopted the Restatement of Torts' definition of negligent



Chies v. Highland Bank

2001 | Cited 0 times | Court of Appeals of Minnesota | March 6, 2001

misrepresentation, as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Florenzano v. Olson*, 387 N.W.2d 168, 174 n.3 (Minn. 1986) (quoting Restatement (Second) of Torts § 552 (Tent. Draft No. 12 1966)); *Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298-99 (1976).

Viewing the evidence in the light most favorable to appellant, at least two elements of a negligent misrepresentation claim are lacking here. First, appellant has not shown that the bank owed a duty to him. See *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000) ("essential element" of negligent misrepresentation claim is tortfeasor must owe "a duty of care to the person to whom they are providing information," and this duty of care does not exist in commercial transactions where adversaries negotiate at arm's length). The parties engaged in a commercial transaction for their individual benefits. While they may have had a mutual interest in ensuring that Diamond remained solvent so that they both would be paid, their interests in the subordination agreement were completely adverse to each other. See *id.* at 424-25 (bank that held construction loan on new home owed no duty of care to home title insurer in negotiating terms of closing for sale of home).

Second, appellant has not alleged any facts showing that the bank supplied false information to him during their discussions. See *Faribo Oil Co. v. Tatge Oil Co.*, 501 N.W.2d 699, 701-02 (Minn. App. 1993) (business buyer could not maintain negligent misrepresentation action against business seller and broker where buyer failed to produce evidence of seller's negligent misrepresentation of facts), review denied (Minn. Aug. 24, 1993). Thus, we affirm the district court's grant of summary judgment to the bank on this claim.

Breach of Fiduciary Duty

Appellant further claims that the district court erred in granting summary judgment on his claim that the bank breached its fiduciary duty to him by allegedly not allowing the \$19,500 he loaned Diamond to be disbursed for Diamond's payroll, and instead improperly using the money to pay off a portion of Diamond's line of credit. A party to a business transaction, however, generally has no duty to disclose material information to the other party unless a fiduciary relationship exists. *Vacinek v. First Nat'l Bank*, 416 N.W.2d 795, 799 (Minn. App. 1987); *MacKenzie v. Summit Nat'l Bank*, 363 N.W.2d 116, 119 (Minn. App. 1985); see also *Hurley v. TCF Banking & Sav., F.A.*, 414 N.W.2d 584, 588 (Minn. App. 1987) (banks generally do not have fiduciary relationship with customers). For a fiduciary relationship to exist, the bank was required to have superior knowledge and appellant must have placed his confidence in the bank. See *Vacinek*, 416 N.W.2d at 799.



Chies v. Highland Bank

2001 | Cited 0 times | Court of Appeals of Minnesota | March 6, 2001

We again agree with the district court's conclusion that, as a matter of law, no fiduciary relationship existed between appellant and the bank. Appellant has not offered evidence to show that his relationship with the bank was anything other than that of a fellow investor in Diamond's business. As such, the bank owed appellant no fiduciary duty.

Motion to Amend Complaint

Appellant claims that the district court abused its discretion in declining to allow him to amend his complaint to include claims of joint enterprise and unjust enrichment. Under Minn. R. Civ. P. 15.01, a party may amend a complaint once before a responsive pleading is served "as a matter of course," and thereafter "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The district court has discretion to allow amendment of a complaint, and an appellate court will reverse that decision only for a clear abuse of discretion. *Cherne Contracting Corp. v Wausau Ins. Cos.*, 572 N.W.2d 339, 344 (Minn. App. 1997), review denied (Minn. Feb. 19, 1998). Amendments are typically allowed unless the opposing party can establish prejudice. See *Lumbermen's Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580, 584 (Minn. App. 1991), review denied (Minn. Apr. 1, 1991). The district court may consider the timing of any proposed amendment in relation to the stage of the proceedings in determining whether to allow amendment. See *Wessin v. Archives Corp.* 592 N.W.2d 460, 468 (Minn. 1999); see also *Meyer v. Best Western Seville Plaza Hotel*, 562 N.W.2d 690, 694 (Minn. App. 1997) (party must act with due diligence in attempting to amend complaint), review denied (Minn. June 26, 1997).

We observe no abuse of discretion in the district court's denial of appellant's motion to amend. The motion to amend was untimely according to the district court's pretrial scheduling order, and it was made more than a year after the action was initiated and after depositions of the primary parties had been taken.

Affirmed.

