STATE OF MICHIGAN

COURT OF APPEALS

EMPIRE NATIONAL BANK OF TRAVERSE CITY,

Plaintiff/Counterdefendant-Appellee,

v

LYNDON E. GREELEY and VIRGINIA M. PATTEE,

Defendants/Counterplaintiffs-Appellants,

and

KENNETH R. KOBMANN and ADVANCED STAINLESS, INC.,

Defendants.

UNPUBLISHED
September 24, 1999

No. 209287
Grand Traverse Circuit Court
LC No. 96-015523 CZ

Before: Bandstra, P.J., and Markman and Meter, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order of judgment in favor of plaintiff in this action to recover on a promissory note. We affirm.

During the summer of 1995, individual defendants started a business to manufacture and sell stainless steel fixtures. The business was named Advanced Stainless, Inc., and the three individuals were to become shareholders in the corporation. On May 24, 1996, Empire National Bank and defendants entered into a group of agreements, including a promissory note, business purpose affidavit, guaranty and security agreement. Pursuant to these agreements, Empire drew up a $50,000 line of credit loan to individual defendants. The promissory note for the loan, dated May 24, 1996, was executed by defendants in their individual capacities, and provided that the borrowers were "jointly and severally" liable.

The individual defendants subsequently defaulted on the promissory note and plaintiff filed suit on November 25, 1996 against defendants. On March 19, 1997, defendants Pattee and Greeley filed a countercomplaint against plaintiff, alleging that plaintiff "committed fraud in the execution through its agent and/or agents by misrepresenting the nature of the document signed and [defendants'] liability therein." Summary disposition was granted in favor of plaintiff on its claims as well as on the counterclaim.

Defendants argue that the trial court erred in granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) on defendants' counterclaim. Specifically, defendants argue that there were genuine issues of material fact regarding whether defendants signed a promissory note and other documents as a result of the fraudulent misrepresentations of plaintiff's agent. We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 370; 572 NW2d 201 (1998).

To establish a cause of action for fraud or misrepresentation, a plaintiff must prove:

> (1) [T]he defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

With regard to the fifth element, this Court recently clarified that an individual must show reasonable reliance on the representation, as opposed to actual reliance. *Novak v Nationwide Mut Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 204162, issued 6/1/99), slip op, at 6. Here, the alleged misrepresentation made by plaintiff's agent to defendant Greeley was that Greeley was not responsible for paying back the loan, and that only defendants Kobmann and Advanced Stainless would be liable in the event of default.

Michigan courts have held that a party who executes a written agreement is charged with knowledge of the contents of the agreement. *Sponseller v Kimball*, 246 Mich 255, 260; 224 NW 359 (1929); *Stopczynski v Ford Motor Co*, 200 Mich App 190, 193; 503 NW2d 912 (1993). Similarly, this Court has held that where the terms of an agreement are readily ascertainable, a party executing an agreement is charged with knowledge of its terms and therefore cannot rely on the alleged representation in executing the agreement. See *Draeger v Kent County Savings Ass'n*, 242 Mich 486, 488-90; 219 NW 637 (1928); *Nieves v Bell Industries Corp*, 204 Mich App 459, 464-65; 517 NW2d 235 (1994).

In *Webb v First of Michigan Corp*, 195 Mich App 470, 474-75; 491 NW2d 851 (1992), the plaintiffs pursued a fraudulent misrepresentation claim when a fund in which they had invested became worthless. The plaintiffs claimed that the defendant misrepresented that the investment was "risk free." *Id.*, at 473-74. On appeal, the Court noted that "there can be no fraud where the means of knowledge

regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Id.*, at 474. The Court further stated:

> Here, plaintiffs acknowledged receipt of the . . . Fund prospectus and agreement to its terms by signing the subscription agreement form before making their initial investment. The subscription agreement and power of attorney form states that the person signing "warrants, represents, covenants and agrees" that the "undersigned" "understands the nature of the risks involved" in the investment and "the financial hazards involved in the offering, including the speculative nature of the investment and the risk of losing the undersigned's entire investment." Further, the front page of the prospectus states that the investment involves special risks and that the reader should consult the risk factors section. . . . Even a cursory review of any of these documents would have enlightened plaintiffs that the investment was not "risk free" as represented by the broker. Accordingly, we hold that plaintiffs cannot claim to have been defrauded when they had information available to them that they chose to ignore. [*Id.*, at 474-475.]

In this case, the promissory note was clearly labeled a "promissory note" at the top of the document, and stated in the opening paragraph:

> FOR VALUE RECEIVED, on the Due Date the undersigned, jointly and severally, if more than one maker ("Borrower"), promise(s) to pay to the order of EMPIRE NATIONAL BANK OF TRAVERSE CITY, ("Bank"), at its office set forth below, or at such other place as Bank may designate in writing, the principal sum of [$50,000] or such lesser sum as shall have been advanced by Bank to Borrower under the Loan Account hereinafter provided . . . .

The specific details of the note are then set out in several paragraphs written in smaller print, at the bottom of which its states that "[t]he liability of the Borrower shall be absolute and unconditional, without regard to the liability of any other party thereto." Defendant Greeley admitted that he knew he was signing a loan and that he did not read the promissory note. Although defendant Greeley testified that the papers were late in arriving, he did not contend that plaintiff's agent denied him the opportunity to read the documents or otherwise inhibited his ability to read the note prior to signing it. In fact, Greeley testified that he signed it because he was "in a hurry" to leave the bank. We conclude, as in *Webb, supra,* that since the promissory note plainly indicated that the obligation to repay the note was joint and several, and since defendant Greeley had an opportunity to read the note before signing, no fraud could be successfully alleged since the means of knowledge regarding the truthfulness of the representation was fully available to Greeley. *Id.*, at 474.

Defendant Pattee's claim of misrepresentation is based on a claim that plaintiff's agent told her on three separate occasions that she was only legally responsible for twenty-five percent of the $50,000 due under the note. We conclude that defendant Pattee also failed to show that she reasonably relied on the agent's alleged representations. Again, the promissory note plainly indicated that defendants would be jointly and severally liable for the full amount. Further, like Greeley, Pattee admitted that she did not read the note before signing it. Nor is there evidence in the record that the agent prohibited or

attempted to prevent her from reading the promissory note before signing. Thus, it would appear that Pattee, like Greeley, had the opportunity to read the note, which would have revealed the joint and several liability language. Since Pattee had information plainly available to her that she chose to ignore, she cannot now claim to have been defrauded. *Nieves*, *supra* at 465.

We agree with the trial court that there were genuine issues of fact regarding the alleged misrepresentations. Defendants Greeley and Pattee testified that plaintiff's agent made certain statements regarding liability to defendants. The agent denied making any statement to Greeley, and there is no evidence on the record regarding how the agent responded to Pattee's claims regarding the three alleged conversations. However, as the trial court concluded, fact questions identified by defendants here were not material to the dispositive legal claim. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Since defendants failed to show reasonable reliance on the alleged misrepresentations, summary disposition was properly granted.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter