COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1446 **Cir. Ct. No. 2007CV458**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MID-WISCONSIN BANK,

PLAINTIFF-APPELLANT,

V.

CARRIE J. KOSKEY, JOAN'S ACCOUNTING & TAX SERVICE, INC., ALICE J. MOBLEY AND DEAN M. SMITH,

DEFENDANTS,

JAMI L. SMITH AND RICHARD C. SMITH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Mid-Wisconsin Bank appeals a summary judgment dismissing its claim against Richard Smith for enforcement of a personal guaranty executed by Smith as part of a refinancing of his family's auto dealership.[1] The circuit court concluded that an oral misrepresentation by Mid-Wisconsin's agent during the course of negotiations constituted an enforceable obligation despite the presence of an integration clause in the guaranty. It further determined that Mid-Wisconsin's breach of this obligation excused Smith from performance.

¶2 We conclude that the circuit court erred when it determined that the agent's oral statement constituted an enforceable obligation. However, Smith was nonetheless entitled to summary judgment, both on Mid-Wisconsin's claim for enforcement of the guaranty and Smith's counterclaim for rescission. Mid-Wisconsin's material misrepresentation permits Smith to avoid the contract. Accordingly, we affirm, but on different grounds.

BACKGROUND

¶3 In 2005, Mid-Wisconsin agreed to make a business loan to Smith Brothers Ford, Inc. Smith was one of the founders of the auto dealership, but had largely transferred control of the business to his children. The dealership had prior loans from River Valley Bank, where Smith was a director until 2005. Eventually, River Valley discovered that the business collateral had been double financed. Because of this and concerns about the dealership's financial status, River Valley declared Smith Brothers Ford in default, asked Smith to resign as director, and requested that the dealership find another lender.

[1] Mid-Wisconsin also sued Richard's wife, Jami Smith.

¶4 Smith contacted James Berndt, a loan officer with Mid-Wisconsin who had previously approached Smith about obtaining the dealership's business. Ultimately, Mid-Wisconsin agreed to a $9.3 million refinancing on the condition that Smith personally guarantee a portion of the business debt. On August 31, 2005, Smith executed a document entitled "CONTINUING GUARANTY (Limited)," in which Smith guaranteed payment of up to $3 million of the loan. According to a loan analysis by Mid-Wisconsin, Smith's guaranty served as secondary collateral designed to cover the shortfall left from collateralization of the dealership's real estate and inventory. It is undisputed that at the time the guaranty was executed, Berndt represented that Mid-Wisconsin would obtain first position on the business collateral by paying off a prior loan from Advantage Community Bank.

¶5 In 2006, an independent review determined that Advantage Community Bank still held first position on the dealership collateral. When Berndt was confronted about the matter, he gave inconsistent statements, asserting variously that he had never intended for Mid-Wisconsin to obtain first position on the loans, and that the failure to obtain first position was an oversight. When Smith learned that Mid-Wisconsin had not obtained first position on the business collateral, he notified Mid-Wisconsin that he wanted to revoke the guaranty.

¶6 The dealership defaulted on the loan and Mid-Wisconsin filed suit against Smith and others. As to Smith, the bank sought to collect on the guaranty and set forth claims for negligent, intentional, and strict liability misrepresentation, conspiracy to defraud, and injury to business.[2] Smith answered and

[2] Only Mid-Wisconsin's claim against Smith is the subject of this appeal.

counterclaimed for rescission, alleging that Mid-Wisconsin's statement that a portion of the loan amount would be used to pay off the earlier loan constituted a misrepresentation of material fact and a material breach of the guaranty.

¶7 On cross-motions for summary judgment, the circuit court dismissed all claims against Smith. The court concluded that Mid-Wisconsin had failed to establish a prima facie case on its claims for misrepresentation, conspiracy, and business injury.[3] The court also determined that a genuine issue of material fact existed as to whether Mid-Wisconsin made a misrepresentation that would allow Smith to rescind the guaranty. On this basis, the court denied Mid-Wisconsin summary judgment on its claim for enforcement of the guaranty, and partially denied Smith's motion for summary judgment on his rescission counterclaim.

¶8 However, the court granted Smith summary judgment on the theory that the bank's promise to obtain first position on the dealership collateral was an enforceable obligation, the breach of which excused Smith from performing under the guaranty. The court found this to be a "separate issue from rescission," and dismissed Mid-Wisconsin's guaranty claim. The court principally relied on ***People's Trust & Savings Bank v. Wassersteen***, 226 Wis. 249, 276 N.W. 330 (1937), which the court found factually analogous.

DISCUSSION

¶9 Mid-Wisconsin argues the circuit court erred in two ways: first, by denying its motion for summary judgment on its claim for enforcement of the continuing guaranty; and, second, by granting Smith's motion for summary

[3] Mid-Wisconsin does not appeal this portion of the judgment.

judgment and dismissing Mid-Wisconsin's guaranty claim. We review a decision granting or denying summary judgment de novo, using the same methodology as the circuit court. ***Crowbridge v. Village of Egg Harbor***, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We conclude the circuit court properly determined that Smith was entitled to summary judgment. However, we disagree with the circuit court's reasoning. As a result, we affirm, but on different grounds. *See* ***Koestler v. Pollard***, 162 Wis. 2d 797, 819 n.13, 471 N.W.2d 7 (1991).

¶10 The circuit court's reasoning rests on the premise that Mid-Wisconsin's oral representation was an enforceable obligation. However, the guaranty contains an unambiguous integration clause.[4] Generally, a court construing a fully integrated contract may not consider evidence of any prior or contemporaneous oral agreements between the parties.[5] ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶37, 330 Wis. 2d 340, 793 N.W.2d 476; ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 608, 288 N.W.2d 852 (1980).

[4] The integration clause states that the written guaranty was intended by the parties to be the "complete and exclusive statement of its terms, there being no conditions to the full effectiveness of this Guaranty."

[5] The court found this case factually analogous to ***People's Trust & Savings Bank v. Wassersteen***, 226 Wis. 249, 276 N.W.2d 330 (1937), in which "the defendant agreed to guarantee a business debt if the bank loaned the business more money; in that case, the court held that the bank's failure to make the additional loan excused the defendant from performing under the guarantee." However, in ***People's Trust***, the contract was partly oral and partly written, and the written portion, unlike the contract in this case, apparently did not include an integration clause. ***Id.*** at 254.

¶11 To avoid the parol evidence rule, the circuit court took a narrow view of the doctrine. The court construed the doctrine to apply only to those contracts that are not part of a larger transaction—in other words, stand-alone agreements. It then concluded that the rule did not apply because "[t]he very nature of a guarant[y] contract is that it relates to some other transaction or debt." However, we have uncovered no case law holding the rule generally inapplicable to guaranty contracts. The rule exists to "promote the integrity, reliability, and predictability of written contracts and to reduce the threat of juries being misled or confused by statements or negotiations that may have taken place before a contract was entered into." ***Town Bank***, 330 Wis. 2d 340, ¶36. Neither the court nor Smith provided a reason for departing from this well-settled rule simply because a guaranty relates to some other obligation.

¶12 The circuit court reached the correct conclusion despite this error. Parol evidence is admissible to show fraud. *See* ***Dairyland Equip.***, 94 Wis. 2d at 606-07. Fraud is a "generic and an ambiguous term" encompassing intentional, negligent, and strict liability misrepresentation. ***Whipp v. Iverson***, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). "A material misrepresentation of fact may render a contract void or voidable." ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 731, 456 N.W.2d 585 (1990). Thus, Smith is entitled to avoid the contract if there is no genuine issue of material fact as to any type of misrepresentation.

¶13 We first address whether Smith has made a threshold showing of misrepresentation. Intentional, negligent, and strict liability misrepresentation share three common elements: (1) the person made a factual misrepresentation; (2) which was untrue; and (3) which the other person believed to be true and relied on to his or her detriment. ***Grube v. Daun***, 173 Wis. 2d 30, 53-54, 496 N.W.2d 106 (Ct. App. 1992). With respect to the first two elements, Mid-Wisconsin

concedes its agent falsely represented that Mid-Wisconsin would obtain first priority on the business collateral.[6] As far as reliance, Smith stated in an affidavit that he would never have agreed to the guaranty if Mid-Wisconsin had not assured him it would obtain first position on the business collateral.

¶14 Mid-Wisconsin, relying on two contract clauses, asserts that Smith's reliance was unreasonable. In the first clause, entitled "REPRESENTATIONS," Smith purports to disclaim reliance on any representations or warranties with respect to "the enforceability of any of the Obligations or the financial condition of any Debtor or guarantor." Mid-Wisconsin seizes on this clause to argue that Smith expressly agreed not to rely on Berndt's statement. This argument conveniently ignores the language limiting the clause's effect. Berndt's false statement does not relate to the enforceability of the underlying obligations or to the financial condition of the car dealership.

¶15 Mid-Wisconsin also argues that Berndt's statement was contrary to a clause entitled "CONSENT." The consent clause provides, in pertinent part:

> [W]ith respect to any of the Obligations, Lender may from time to time before or after revocation of this Guaranty without notice to Guarantor and without affecting the liability of Guarantor … (c) fail to perfect its security interest in or realize upon any security or collateral ….

We agree that this clause is inconsistent with Berndt's oral representation. The sole reasonable inference from the undisputed facts is that Berndt meant to reassure Smith that the dealership collateral would be available to satisfy the loan.

[6] Specifically, Mid-Wisconsin's reply brief states: "Mid-Wisconsin does not dispute that James Berndt, its employee, told Richard Smith that Mid-Wisconsin would secure first position on all collateral. Likewise, Mid-Wisconsin does not dispute that it did not secure a first position on all collateral."

It follows that Mid-Wisconsin would first look to the other collateral securing the business debt before seeking payment under the guaranty. Yet the consent clause effectively permitted Mid-Wisconsin to enforce Smith's guaranty without first pursuing the business collateral. We therefore construe Berndt's statement that Mid-Wisconsin would obtain first position as a material misrepresentation of fact. *See* ***Bank of Sun Prairie***, 155 Wis. 2d at 730-31. The misrepresentation dramatically altered Smith's calculation of the transaction's risk.

¶16 In short, neither provision of the guaranty creates a factual issue regarding reliance that must be tried. In general, contract language is ineffective to negate an assertion of reasonable reliance on an oral statement. *See* ***id.*** at 731; ***Anderson v. Tri-State Home Improvement Co.***, 268 Wis. 455, 460, 67 N.W.2d 853 (1955) ("The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices."); *see also* ***Grube***, 173 Wis. 2d at 59 ("as is" clause does not relieve seller from the duty to verify affirmative representations regarding the condition of property). No properly instructed, reasonable jury could find Smith's reliance on Berndt's conceded misrepresentation unreasonable, particularly in light of Mid-Wisconsin's own loan analysis identifying the guaranty as secondary collateral.

¶17 The circuit court concluded that a genuine issue of material fact precluded summary judgment for Smith on his counterclaim. The court apparently perceived a factual dispute about whether Berndt's statement was nonactionable as

a statement of opinion or prediction of future events.[7] *See* ***Ludin v. Shimanski***, 124 Wis. 2d 175, 192, 368 N.W.2d 676 (1985). Such statements are nonetheless actionable "if the speaker knows of facts incompatible with his opinion." ***Id.*** The court noted contradictory evidence regarding Berndt's knowledge at the time he made the representation. Berndt stated at various times both that he never intended for Mid-Wisconsin to obtain first position on the business collateral, and that the failure to do so was an unintentional oversight.

¶18 We conclude Smith is entitled to avoid the contract regardless of Berndt's knowledge at the time he made his statement. At best for Mid-Wisconsin, the undisputed evidence establishes that Berndt negligently misrepresented that the bank would obtain first position on the business collateral. *See* ***Stevenson v. Barwineck***, 8 Wis. 2d 557, 564, 99 N.W.2d 690 (1959) ("A representation made with an honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts …."). Even an honest misrepresentation is a ground for rescission.[8] ***Whipp***, 43 Wis. 2d at 171. At worst, the evidence establishes intentional misrepresentation. *See* ***Grube***, 173 Wis. 2d at 54-55. Because Smith is entitled to rescind the guaranty under any interpretation of the evidence, summary judgment for Smith was appropriate.

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[7] As we have stated, Berndt's statement is best described not as a promise giving rise to an enforceable obligation, but as a misrepresentation of fact. We therefore need not linger on whether the statement was a mere opinion or prediction.

[8] ***Whipp v. Iverson***, 43 Wis. 2d 166, 171, 168 N.W.2d 201 (1969), expressly reserved the question of whether a negligent misrepresentation would entitle the plaintiff to rescission, though it strongly suggested it would. We deem that matter to have been settled by ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶36, 270 Wis. 2d 146, 677 N.W.2d 233, in which our supreme court reasoned that "a party fraudulently induced to enter a contract may affirm the contract and seek damages for breach or pursue the equitable remedy of rescission and seek restitutionary damages."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.