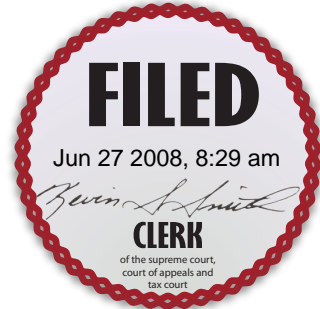


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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LUIZ ALVES, )  
 )  
Appellant-Plaintiff, )  
 )  
vs. ) No. 71A03-0801-CV-4  
 )  
OLD NATIONAL BANK, )  
f/k/a ST. JOSEPH CAPITAL BANK, )  
 )  
Appellee-Defendant. )

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APPEAL FROM THE ST. JOSEPH CIRCUIT COURT  
The Honorable Michael G. Gotsch, Judge  
The Honorable David T. Ready, Magistrate  
Cause No. 71C01-0610-PL-218

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**June 27, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Luiz Alves (“Alves”) appeals the trial court’s entry of summary judgment in favor of Old National Bank f/k/a St. Joseph Capital Bank (“Old National”). We affirm.

### **Issue**

Alves raises three issues on appeal, which we consolidate and restate as: Whether the trial court erred in entering judgment as a matter of law for Old National.

### **Facts and Procedural History**

Alves and Paulo Teixeira (“Teixeira”) owned Masters Entertainment Group, LLC (“MEG”) for the purpose of operating a bowling alley. Teixeira was the President and majority owner. Alves was the Vice President, the only other owner and a salaried employee. MEG received loans from Old National and later defaulted. Teixeira terminated Alves’ employment.

In 2006, two civil actions ensued. In the first, Alves sued Teixeira. An arbitrator affirmed the termination of Alves’ employment. A trial court denied Alves’ motion to vacate the arbitration determination. This Court affirmed the trial court in a memorandum decision, concluding that Alves was merely challenging “the arbitrator’s factual determinations.” Alves v. Teixeira, 872 N.E.2d 219, 220 (Ind. Ct. App. 2007).

Meanwhile, in October 2006, Alves brought the instant action against Old National and alleged that: (1) it owed him a duty; (2) it worked with Teixeira “to undermine the role of Alves in MEG and to ultimately have Alves removed from the company”; (3) it breached its duty to Alves; and (4) the breach caused Alves “to suffer financial ruin and face the possibility of deportation from the United States.” Appendix at 53-54. Old National

answered and filed three counterclaims, two of which sought attorney fees for Alves' maintenance of a frivolous lawsuit. Old National filed a Motion for Summary Judgment. The trial court granted a Partial Summary Judgment in favor of Old National.<sup>1</sup> Alves now appeals.

## **Discussion and Decision**

### **I. Standard of Review**

On appeal, Alves argues that the trial court erred in entering summary judgment in favor of Old National. The trial court shall grant summary judgment “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C). In reviewing the entry of summary judgment, we apply the same standard as the trial court. Filip v. Block, 879 N.E.2d 1076, 1080 (Ind. 2008), reh’g denied. We construe all facts and reasonable inferences in favor of the nonmoving party. Id. However,

this does not mean that a respondent may “rest upon the mere allegations” of her pleadings once the movant designates evidence to support a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Rather, only those facts alleged by the respondent/nonmovant and supported by affidavit or other evidence “must be taken as true.”

McDonald v. Lattire, 844 N.E.2d 206, 212 (Ind. Ct. App. 2006) (citations omitted). When a written contract is unambiguous, its interpretation is a question of law for which summary judgment is particularly appropriate. Will v. Meridian Ins. Group, 776 N.E.2d 1233, 1235 (Ind. Ct. App. 2002), trans. denied. We review de novo summary judgment rulings and other

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<sup>1</sup> The order did not address Old National's counterclaims, which are still being litigated. However, it found

“paper records.” Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). We may affirm a grant of summary judgment upon any theory supported by the evidence. Keaton and Keaton v. Keaton, 842 N.E.2d 816, 821 (Ind. 2006).

## II. Analysis

Alves claimed that Old National and Teixeira conspired to remove him from MEG and that Old National thereby violated its duty to him as a customer, debtor and friend. The trial court made three conclusions, any one of which would support the entry of judgment as a matter of law in favor of Old National: (1) that Alves waived his claim by not giving Old National written notice of it, pursuant to an Agreement between them; (2) that Old National owed no fiduciary duty to Alves; and (3) that Alves failed to designate evidence supporting the inference that Old National did anything to undermine his employment and/or membership in MEG.

### A. Written Notice of Claim

The parties entered an Agreement whereby Alves promised to give Old National written notice within ninety days of any actionable conduct committed by the bank. In responding to a request for admissions, Alves admitted that he had not delivered the required notice. His response to an accompanying set of interrogatories asserted that Alves “sent the correspondence to all of the Directors and partners of [Old National] presenting his accusations, which was done more than once.” App. at 143. At best, Alves’ discovery responses were inconsistent and therefore failed to raise a genuine issue as to any material fact. See id. at 127 and 143.

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that there was no just reason for delay and entered judgment with respect to Alves’ claim.

Meanwhile, the provision applied to actionable conduct “in connection with this Agreement . . . or any related transactions.” Id. at 243. Contrary to his appellate argument, Alves’ claim that Old National interfered with his employment and/or membership in MEG relates to MEG’s indebtedness to Old National. The debt and the Agreement related to the instant claim and therefore required Alves to give Old National written notice.

### B. Fiduciary Duty

Alternatively, the trial court concluded that Old National owed no fiduciary duty to Alves. Old National propounded interrogatories, including a demand that Alves explain the nature of Old National’s duty to him. Alves responded as follows:

The moment, in which [MEG] opened an account with [Old National], [Old National] had the duty when dealing with Alves to treat him with respect, be just, transparent and completely trust worthy, and especially to not favor his partner, Paulo Teixeira, over him and not to interfere with the business relationship between his partner Paulo Teixeira so as not to negatively affect the financial situation of [MEG] [Old National] owed a duty under the law of fair dealing and good faith, dealing at arms length in the ordinary course of business.

Id. at 167. Alves then quoted a letter from Rosenthal to Teixeira:

We will always tell the truth with compassion. That is what integrity is all about. Our friendship is very important to me. In fact, it means more to me than this opportunity that you have put before us. To that end, I want to do every thing I can to protect and promote that friendship.

Id. In his affidavit, Alves testified as follows:

5. At some point, Rosenthal, Shishman and Teixeira started to meet privately without [Alves], giving start to a conspiracy that led to the removal and disassociation of the undersigned from MEG.

...

7. [Alves] had a special relationship with both Rosenthal and Shishman, in which they attended social gatherings together as well as meeting simply as friends. This special relationship continued until the point where the conspiracy involving Rosenthal, Shishman and Teixeira was initiated.

...

10. As a result of the conspiracy, between [Old National] and Teixeira, the reduction in [Alves'] salary was implemented under the direction of [Old National] and in this way fragilized [sic] [Alves] financially.

11. [I]t was during the various private meetings between [Old National] and Teixeira that the decisions to identify an investor for the bowling center and to start the process which resulted in the dismissal and disassociation of [Alves] from MEG.

Id. at 253-54.

On appeal, Alves argues that a fiduciary relationship formed through the bank/customer relationship and the “strong presumption of friendship” between the parties. Appellant’s Brief at 11. However, the mere existence of a relationship between a bank and its customer does not create a special relationship of trust and confidence. Wilson v. Lincoln Fed. Sav. Bank, 790 N.E.2d 1042, 1046 (Ind. Ct. App. 2003). “Absent special circumstances, a lender does not owe a fiduciary duty to a borrower.” Id. at 1047. Alves did not allege or designate any special circumstances giving rise to a fiduciary relationship. See Kreighbaum v. First Nat’l Bank & Trust, 776 N.E.2d 413, 419 (Ind. Ct. App. 2002).

### C. Conduct of Old National

Finally, the trial court concluded that Alves failed to designate any evidence supporting an inference that Old National undermined Alves’ position with MEG. Alves

asserted that Old National committed “torturous conduct” by meeting privately with Teixeira to discuss solutions, ideas and the addition of a new investor. App. at 168. In support of its Motion for Summary Judgment, Old National designated deposition testimony of Teixeira and affidavits of Old National employees John Rosenthal and Scott Shishman. Teixeira stated:

Q: Did [Old National] ever suggest to you that [Alves] should be terminated?

A: No. That’s not up to them.

Id. at 76. Teixeira testified that Old National encouraged him to solicit an additional investor as MEG “need[s] more capital.” Id. at 77. When Teixeira indicated repeatedly that he knew of no options, Old National suggested a potential investor, Mike Leep, who served on St. Joseph Capital Bank’s Board of Directors. Ultimately, Teixeira never met Leep.

Old National’s Rosenthal spoke repeatedly with Teixeira concerning MEG’s financial difficulties and curing its default on its indebtedness to Old National. While he suggested that MEG should obtain additional capital and reduce its expenses, “including equally reducing the compensation paid to both Alves and Teixeira,” he never suggested that Alves’ employment should be terminated and he did nothing to undermine Alves’ role in MEG. Id. at 200. Shishman also denied taking “any action whatsoever to work with, suggest or in any respect encourage any person (including Teixeira) to terminate the employment of Alves with MEG, other than suggesting in general that MEG reduce expenses.” Id. at 207.

#### D. Conclusion

Old National designated evidence supporting a prima facie showing that there was no

genuine issue as to any material fact. Alves therefore could not rest upon his mere allegations, but was required to designate evidence that he gave the required written notice to Old National, that Old National owed him a duty and that it caused the termination of his employment and/or his removal from MEG. To the contrary, Alves asserted without clear evidentiary support that he gave constructive notice of his claim to Old National. His designated evidence established only that Old National loaned him money and that he agreed to repay it. No duty arose and therefore no duty was breached. For these reasons, we conclude that the entry of summary judgment was proper.

### **Conclusion**

The trial court did not err in entering summary judgment in favor of Old National.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.