IN THE COURT OF APPEALS OF IOWA

No. 9-543 / 08-1799
Filed November 12, 2009

PENDER STATE BANK,
Plaintiff-Appellant/Counterclaim Defendant,

vs.

HARRIETT A. REMINGTON,
Defendant-Appellant/Counterclaim Plaintiff.

HARRIETT A. REMINGTON,
Third-Party Plaintiff,

vs.

JOHN KOERSELMAN,
Third Party Defendant-Appellee.

Appeal from the Iowa District Court for Adair County, William H. Joy, Judge.

Harriett Remington appeals the district court's grant of summary judgment to Pender State Bank and John Koerselman on her counterclaims and third-party claims of fraudulent inducement and Iowa securities laws violations in the bank's mortgage foreclosure action against her. **AFFIRMED AND REMANDED.**

Thomas D. Hanson and Jonathan D. Bergman of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellant.

Jeffrey N. Bump of Bump & Bump, Panora, for appellee.

Heard by Vaitheswaran, P.J., Mansfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

I. Background Facts & Proceedings

Harriett Remington owned more than 500 acres of farmland in Adair and Madison Counties. She and her son, Scott Remington, operated a livestock operation on the farm. They had an operating loan of $125,000 from Union State Bank that they were interested in refinancing. On August 26, 2004, Harriett signed a general power of attorney designating Scott as her attorney-in-fact.

Scott had previously been in prison in South Dakota, and there he became acquainted with Jack Irons. Irons approached Scott about investing in Columbia Advanced Wireless, Inc. (Columbia), a start-up company based in Vancouver, Washington.[1] Scott discussed the matter with Harriett. Harriett and Scott both expressed interest in investing in Columbia, but stated they did not have any money to invest.[2]

Another individual, Terry Svejda, became involved in helping the Remingtons find money to invest in Columbia. Scott and Svejda approached Union State Bank. Scott stated he was seeking to borrow between $150,000 to $175,000.[3] He expressed surprise that Svejda suggested a loan of $400,000. Union State Bank rejected the loan request for the larger amount.

John Koerselman, the CEO of Pender State Bank in Pender, Nebraska, became aware Svejda was seeking an agricultural loan for farmland in Iowa.

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[1] The company was also known as Columbia International, Inc. and Columbia Card Services International, L.L.C.

[2] Both Harriett and Scott stated they were told that if they invested money in Columbia the company would buy back their stock at double the price within one year.

[3] This amount represented $125,000 to refinance the operating loan, plus between $25,000 to $50,000 to invest in Columbia.

Koerselman discussed the matter with Svejda, and then with Scott, and met with them to view the Remington land. Koerselman had a telephone conversation with Harriett to verify her income sources. Koerselman was aware Harriett and Scott intended to use some of the proceeds from the loan to purchase stock in Columbia. Pender State Bank approved a loan to Harriett, with her farmland used as collateral.

On April 12, 2005, Scott, Harriett, and Svejda drove to Pender so that Harriett could sign the loan documents. Harriett and Koerselman met alone in Koerselman's office, while Scott and Svejda waited outside. Harriett stated she was very surprised to see the loan was for $530,000, and expressed concerns about the large amount.[4] Harriett told Koerselman she did not want to lose her farm. In a deposition, Harriett stated Koerselman told her she would not lose her farm because the loan would be paid for by sale of the stock in Columbia. Koerselman testified in a deposition he instead replied, "if you don't want to lose the farm, you shouldn't put a mortgage on it because you're putting it at risk by mortgaging it."

Harriett signed the loan documents and mortgage on her farmland. She also signed a letter, which stated:

> This letter is to inform you that our bank has not studied nor have we endorsed in any way any investments in publicly traded stock, privately held stock, or any other way that you may decide to use the proceeds from our loan funding. Your use of any of these monies is strictly under your own volition, and not under the guidance or opinion of our institution.

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[4] Harriett also stated she expected the loan to be for between $150,000 to $175,000, with $125,000 needed to refinance the Union State Bank loan and $25,000 to $50,000 to invest in Columbia.

In a private memo to his file, Koerselman noted the “unusual and possible risky use of the loan proceeds.”

Of the loan proceeds, $124,293 was used to retire the operating loan from Union State Bank. The amount of $399,260 was placed in Harriett’s checking account. The remainder was used for loan fees and expenses. On April 14, 2005, Harriett approved a wire transfer of $380,000 from her checking account to Columbia. Harriett and Scott were jointly issued 400,000 shares of stock, and Scott was individually issued 50,000 shares.

Harriett and Scott did not receive the expected return on their investment in Columbia. Harriett came into default on her loan from Pender State Bank. On April 23, 2007, Pender State Bank filed a petition for foreclosure of the mortgage. Harriett raised affirmative defenses of equitable estoppel, promissory estoppel, conspiracy to engage in predatory practices, conspiracy to commit fraud, and equitable rescission. She also filed counterclaims against Pender State Bank. Harriett raised third-party claims against several parties, including Koerselman, Svejda, and Irons. Her counterclaims and third-party claims raised the issues of civil conspiracy, fraudulent inducement, violation of federal securities laws, and violation of Iowa securities laws.[5] She raised an issue of equitable rescission against Pender State Bank. Against the third-party defendants she raised an additional claim of breach of contract.

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[5] The claims of civil conspiracy were dismissed by the district court on motions to dismiss filed by Pender State Bank, Koerselman, and Svejda. The court also dismissed Central States Marketing Group, L.L.C., as a third-party defendant.

Pender State Bank and Koerselman filed a motion for summary judgment. Harriett resisted the motion and filed a memorandum of authorities which raised arguments on the claims of fraudulent inducement and Iowa securities laws violations, as well as other issues.

The district court issued a decision on October 10, 2008, granting the motion for summary judgment. The court found Harriett was not entitled to relief on her affirmative defenses of promissory estoppel, equitable estoppel, equitable rescission, or conspiracy. The court then concluded Pender State Bank was entitled to summary judgment against Harriett as a result of her default on the mortgage and notes. The court ordered the Bank was entitled to foreclosure of the mortgage.

On the counterclaims and third-party claims, the court found that Harriett conceded that the motion for summary judgment should be granted on the claims of fraudulent inducement and federal securities laws violations. The court also found that Harriett had conceded that Koerselman was entitled to summary judgment on claims that he had violated the Iowa securities laws as a primary violator. The court then considered whether he was an aider and abettor under Iowa Code section 502.509(7)(c) (2007). The court found Koerselman did not have knowledge of the Iowa Securities Act violations, and granted summary judgment to him.[6] The court granted summary judgment to Pender State Bank on Harriett's counterclaims against it. The court granted summary judgment to

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[6] Svejda had also filed a motion for summary judgment. The court found summary judgment was not appropriate on the claims of violations of the Iowa securities laws against Svejda as an aider and abettor. The court granted summary judgment to Svejda on other claims against him.

Koerselman on all claims against him, and he was dismissed as a third-party defendant. All other third-party claims remained in litigation.

A judgment and decree of foreclosure was filed. Harriett has appealed the decision of the district court, disputing only the court's ruling on the issues of fraudulent inducement and the Iowa securities laws as against Pender State Bank and Koerselman.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the corrections of errors at law. *See* Iowa R. App. P. 6.4. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Id.*

III. Fraudulent Inducement

Harriett contends the district court erred by granting summary judgment to Pender State Bank and Koerselman on her claim of fraudulent inducement.

Pender State Bank and Koerselman assert that this issue has not been preserved for our review because the district court found Harriett had conceded this issue, and Harriett did not file any post-trial motions to challenge the court's ruling. At the same time, however, the Bank and Koerselman state, "Although

Remington conceded that summary judgment was appropriate on several of her other claims and defenses, she resisted summary judgment on her fraudulent inducement claim." We determine error was adequately preserved in this case. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) ("The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it."). The court was aware of the issue, but determined incorrectly that it had been conceded by Harriett.

We turn then to the merits of Harriett's claim of fraudulent inducement against Pender State Bank and Koerselman. The elements of a claim of fraudulent inducement are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. *Whalen v. Connelly*, 545 N.W.2d 284, 294 (Iowa 1996). These elements must be established by clear and convincing evidence. *Id.*

This case does not involve a misstatement; Harriet alleges a failure to disclose.[7] A failure to disclose may be actionable if the party has a legal duty to

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[7] Harriett had previously urged there was a misstatement based on Koerselman's statement to her that she would not lose her farm. On appeal, however, she states, "Remington's fraudulent inducement claim is based upon Koerselman and the Bank disclosing very little if anything to Remington about her loan as well as the entire loan process until the time of the actual closing of the loan." She additionally states she should have been made aware of "Bank loan policies which were overlooked, waived, or not followed in the Bank's decision to approve Remington's loan." She is claiming a breach of the duty to disclose by concealing material facts. Her reliance, on appeal, on a theory of failure to disclose is emphasized by her statement in her reply brief that "[a]s Remington's fraudulent inducement claims involved allegations of concealment on the part of the Bank and Koerselman, it is necessary to find that both owed Remington a fiduciary duty." We determine she has waived her claim of misrepresentation. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.").

communicate the concealed fact to the other party. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 174 (Iowa 2002). The duty to communicate may "arise[ ] from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances." *Sinnard v. Roach*, 414 N.W.2d 100, 105 (Iowa 1987) (citations omitted). "[O]ur analysis of the duty-to-reveal issue parallels the same analysis in a breach of fiduciary or confidential relationship case." *Id.*

Harriett argues there is a genuine issue of material fact about whether Pender State Bank and Koerselman owed a fiduciary duty to her. She states Koerselman had superior knowledge of the loan, and that she was an unsophisticated elderly woman. Harriett testified in her deposition that she trusted Koerselman and his professional judgment. She contends that if she had known Koerselman believed the loan was risky she would not have signed the loan documents.

A fiduciary relationship may arise between a bank and a borrower. *Weltzin v. Cobank, ACB*, 633 N.W.2d 290, 293 (Iowa 2001). A bank-customer relationship, however, does not automatically create a fiduciary duty. *Engstrand v. West Des Moines State Bank*, 516 N.W.2d 797, 799 (Iowa 1994). Whether there is a fiduciary relationship depends upon the facts and circumstances of each individual case. *Weltzin*, 633 N.W.2d at 293. We consider whether "confidence is reposed on one side, and dominion and influence result on the other." *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986). Factors to consider are:

> the acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence

> by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another.

Id. (citation omitted).

In discussing Harriett's affirmative defense of equitable estoppel, the district court found Harriett was unable to prove the elements necessary to establish a fiduciary duty. The court noted Harriett had spoken to Koerselman on the telephone only one time, and had never met him prior to the occasion when she signed the loan documents. There was no evidence to show Koerselman knew Harriett was relying on him in making her decision to sign the documents. The court found, "No facts were presented to support a finding that Koerselman exercised such influence over the defendant."

We further note that there was no evidence Harriett was incapable of handling her own financial affairs. She testified she signed the power of attorney so that Scott could take care of things if she got sick, and it was merely as a precaution. Harriett had previously taken out loans and signed mortgages for the farm, and admitted she knew how mortgages and collateral worked. There was no evidence Koerselman or the Bank were acting as advisors to Harriett, or that they exercised influence over her business decisions. *See Engstrand*, 516 N.W.2d at 799 (finding no fiduciary relationship where there was no evidence bank exercised influence over plaintiffs). We find no error in the district court's determination that the Bank and Koerselman have established there is no genuine issue of material fact as to whether there was a fiduciary duty between Koerselman and Harriett.

Harriett also claims the facts concealed from her were material. She further claims the evidence is sufficient to prove the elements of scienter, intent to deceive, reliance, and damages. Because there was no fiduciary relationship, there was no duty to disclose. *See Sinnard*, 414 N.W.2d at 105. Since Pender State Bank and Koerselman had no duty to disclose, Harriett is unable to prove her claim of fraudulent inducement. Therefore, we are not required to address the additional elements of a claim of fraudulent inducement. If we were to address these elements, however, we would find Harriett has not established a genuine issue of material fact so as to preclude the entry of summary judgment. We determine summary judgment on the issue of fraudulent inducement was appropriate.

IV. Iowa Securities Laws

Harriett asserts Pender State Bank and Koerselman should be civilly liable for aiding and abetting violations of the Iowa Uniform Securities Act, Iowa Code chapter 502. Section 502.509(7)(c) provides for joint and several liability for:

> An individual who is an employee of or associated with a person liable under subsections 2 through 6 or a person, whether an employee of such person or otherwise, who materially aids in the act or transaction constituting the violation, and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.

"[A] person who merely aids and abets the violation has no liability if he or she can prove a reasonable lack of knowledge of such facts."[8] *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 769 (Iowa 2004).

The Iowa Insurance Commissioner issued a cease and desist order on February 15, 2008, finding Iowa securities laws violations by Columbia, William Read, the president of Columbia, Irons, and Corporate Solutions, L.L.C., a company operated by Irons, under sections 502.301, 502.402, and 502.501. The order found they had "participated in the offer or sale of promissory notes, stock and/or investment contracts that were not federally covered securities," they had made untrue statements of material fact in the sale of securities, they had made omissions of material fact in the sale of securities, and Read and Irons had acted as unregistered agents.

Harriett contends Pender State Bank and Koerselman aided and abetted Columbia, Read, Irons, and Corporate Solutions in violating the Iowa Uniform Securities Act. The district court found Koerselman, and through him, Pender State Bank, did not have knowledge of the securities laws violations. The court noted, "The knowledge that a person is going to invest in a risky start-up company with money borrowed from a bank does not demonstrate knowledge of a securities law violation."

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[8] In the past the Iowa Supreme Court has employed a test requiring the plaintiff to show knowledge of the securities law violation by the alleged aider and abettor. *See Tubbs v. United Central Bank, N.A.*, 451 N.W.2d 177, 182 (Iowa 1990) (citing *Metge v. Baehler*, 762 F.2d 621, 624 (8th Cir. 1985)). The discrepancy between this test and the language of the statute was recognized in *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369, 377 (Iowa 1997).

While Koerselman knew Harriett intended to invest in Columbia, a start-up company, we find no evidence in the record to show Koerselman knew, or should have known, the parties named in the cease and desist order were violating the Iowa securities laws. There was no evidence Koerselman had any contact with any of the parties named in the cease and desist order. The letter signed by Harriett at the time she signed the loan documents provides that the Bank "has not studied nor have we endorsed in any way any investments . . . ." We conclude the district court properly granted summary judgment to Pender State Bank and Koerselman on Harriett's claims based on violations of Iowa securities laws.

V. Appellate Attorney Fees

Pender State Bank seeks attorney fees and court costs, as provided for in the language of the promissory note and mortgage signed by Harriett. We determine the matter of attorney fees should be remanded to the district court.

VI. Disposition

We affirm the decision of the district court granting summary judgment to Pender State Bank on Harriett's counterclaims, and to Koerselman on Harriett's third-party claims. We remand to the district court to determine appellate attorney fees. Costs of this appeal are assessed against Harriett.

AFFIRMED AND REMANDED.