NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0565

FIRST AMERICAN BANK AND TRUST

VERSUS

GEAUX DEVELOPMENT GROUP, LLC; GEORGE BONFANTI; BEN R. MILLER, JR.; MICHAEL A. GRACE, JR.; WALTER L. COMEAUX; AND KATHERINE K. FACKRELL

Judgment Rendered: JAN 07 2015

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 97,771

The Honorable Ralph Tureau, Judge Presiding

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Comeaux; and Katherine K. Fackrell

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by defendants, George Bonfanti, Katherine K. Fackrell, and Geaux Development Group, LLC, from a judgment of the trial court in favor of plaintiff, First American Bank and Trust. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

First American Bank and Trust ("the Bank") issued a loan to Commerce Centre, LLC, ("Commerce Centre") in the amount of $9,800,000.00, with an interest rate of 7.75% and an assigned loan number of 4655111, as evidenced by a promissory note executed on September 22, 2006 ("the 2006 loan"). This note was executed by George Bonfanti, as the Managing Member of Commerce Centre, and the loan was secured by a "Multiple Indebtedness Mortgage" executed by Commerce Centre on immovable property it owned in Ascension Parish.[1] The loan was also secured by the guarantees of ten certain individuals and companies, including the six defendants herein, who executed continuing commercial guarantees for "FULL AND PUNCTUAL PAYMENT" of Commerce Centre's indebtedness to the Bank. A commitment letter of August 7, 2006, further provided that the guarantors would have limited guarantees of 125% of their individual ownership obligation.[2]

Thereafter, the 2006 loan was renegotiated to provide for a lower interest rate and to provide additional financing. A second promissory note was executed on December 17, 2007, in the amount of $8,517,500.00, which

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[1]The loan proceeds were used, in part, to acquire the property encumbered by the mortgage.

[2]The commitment letter listed Walter L. Comeaux, Michael A. Grace, Jr., George Bonfanti, Ben R. Miller, Jr. and Bettsie Miller, Kay Fackrell, Geaux Corporation, L.L.C., Geaux Development Group, L.L.C., BBM Properties, L.L.C., and Dutton Road Building, L.L.C. as "Principals/Guarantors" for the 2006 loan.

included the outstanding balance owed on the 2006 loan,[3] plus additional sums that were being advanced, with an interest rate of 7.25% and a different assigned loan number 4688034 ("the 2007 loan"). The promissory note for the 2007 loan was likewise executed by George Bonfanti as the Managing Member of Commerce Centre, and set forth that the loan was payable in full on demand by the lender, and that if no demand was made, payment of the loan in full with interest was due on December 20, 2008. The 2007 loan was secured by the existing Multiple Indebtedness Mortgage, and an acknowledgement of same was executed by Bonfanti as the Managing Member of Commerce Centre. The second loan was further secured by the guarantees of six of the original guarantors, namely, Geaux Development Group, LLC (hereafter "Geaux"); George Bonfanti; Ben R. Miller, Jr.; Michael A. Grace, Jr.; Walter L. Comeaux; and Katherine K. Fackrell, who executed new commercial guarantees, each limited to a specified maximum amount.

The 2007 loan went into default, and on September 20, 2010, the Bank filed a "Petition for Money Owed" against the six guarantors of the 2007 loan seeking a deficiency judgment for the unpaid balance due of $7,181,451.23, plus accrued interest in the amount of $1,196.91. Geaux, Bonfanti, and Fackrell answered the petition, whereas the Bank's claims against Miller, Comeaux, and Grace, were resolved and dismissed by a joint motion and order for partial dismissal with prejudice.

The Bank also instituted an executory proceeding against Commerce Centre, which resulted in the seizure and sale of the mortgaged immovable property, with the benefit of appraisal, at a judicial auction. Thus, the Bank filed first and second amended petitions in these proceedings, amending its

[3]The 2006 loan was satisfied in December 2007 when the outstanding loan balance of $7,807,825.80 was paid from proceeds of the 2007 loan upon its execution.

claims and demands against the remaining defendants to reflect the amount realized from the sale of the property and the amounts paid by the settling defendant guarantors.

In response to the "Petition for Money Owed," the three remaining defendant guarantors, Geaux, Bonfanti, and Fackrell, filed a compulsory reconventional demand against the Bank, averring that as a result of the Bank's renegotiation of the loan, the Bank had increased their "potential virile share liabilities" to their direct detriment, without their consent and through fraud, as false representations and/or omissions were made by the Bank to the defendants/plaintiffs-in-reconvention. Specifically, as plaintiffs-in-reconvention, the defendant guarantors contended that at no time were they made aware that Geaux Corporation, Miller, BBM Properties, L.L.C., and Dutton Road Building, L.L.C., who were guarantors of the 2006 loan, were not executing guarantees on the 2007 loan, which therefore increased the remaining guarantors' exposure and potential liability. As plaintiffs-in-reconvention, they further alleged that this information was intentionally withheld by the Bank, and that had they known that four of the previous guarantors from the 2006 loan were going to be released, they never would have executed the guarantees securing the 2007 loan individually or on behalf of Geaux. The defendants/plaintiffs-in-reconvention further contended that they detrimentally relied on representations of the Bank; that the actions of the Bank amounted to fraud; and that pursuant to LSA-C.C. art. 1958,[4] the Bank was liable to them for attorney's fees. They also contended that the Bank's activities constituted deceptive practices in violation of the "Federal Trade Commission Act and now the Fair Debt Collection Practices Act," and that the Bank's failure "to mitigate

[4]Louisiana Civil Code article 1958 provides, "[t]he party against whom rescission is granted because of fraud is liable for damages and attorney fees."

its damages" renders it liable to the defendant guarantors/plaintiffs-in-reconvention for damages pursuant to LSA-C.C. art. 1997.[5]

Thereafter, the Bank filed a motion for summary judgment on its main demand for a deficiency judgment against the three remaining guarantors, contending that considering the pleadings, exhibits, and entire record of the completed foreclosure proceedings, no genuine issues of material fact remained and that it was entitled to judgment in its favor as a matter of law. The Bank also filed peremptory exceptions raising objections of no cause of action and prescription as well as a motion for summary judgment seeking dismissal of the defendants' reconventional demand.

The defendants/plaintiffs-in-reconvention opposed the motion for summary judgment on the Bank's main demand, contending that the 2007 loan was confected by fraud and should be rescinded. In support, the defendants/plaintiffs-in-reconvention contended that the deposition testimony of Rodney Logarbo, the Bank's Vice President, was at odds with the Bank's discovery responses, and that this discrepancy alone creates issues of fact regarding the existence of fraud, which therefore precludes summary judgment.

Following a hearing, the trial court issued a "Judgment with Written Reasons" wherein it granted the Bank's motion for summary judgment on the main demand.

The defendants/plaintiffs-in-reconvention then filed a motion for new trial, challenging the summary judgment rendered in favor of the Bank on the main demand on the basis that the judgment was entered prematurely without the opportunity for adequate discovery. In support, the defendants/plaintiffs-in-reconvention attached emails documenting their request for a corporate

[5]Louisiana Civil Code article 1997 provides, "[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform."

deposition of a Bank representative pursuant to LSA-C.C.P. art. 1442 and an affidavit from Bonfanti wherein he attested that had he known four of the previous guarantors from the 2006 loan were not acting as guarantors for the 2007 loan, he would not have agreed to renegotiate the loan. However, the defendants/plaintiffs-in-reconvention were ultimately able to take the corporate deposition of Bank representative Ronald Falgoust on November 21, 2013.

Following a hearing on December 2, 2013, the trial court maintained the Bank's exceptions raising objections of prescription and no cause of action, granted the Bank's motion for summary judgment as to the reconventional demand, and denied the motion for new trial regarding the summary judgment previously granted on the Bank's main demand.

A "Final Judgment" was signed by the trial court on December 10, 2013, denying the defendants/plaintiffs-in-reconventions' motion for new trial of the summary judgment on the main demand and granting judgment in favor of the Bank and against the defendants/plaintiffs-in-reconvention for the principal sum of $7,181,451.23, with accrued interest in the amount of $1,196.91, and default interest on the outstanding amount of the loan at 21% per annum, subject to various credits. These credits were for $9,366.67 received on July 22, 2010, $1,000,000.00 received on December 16, 2010, and $3,773,666.67 received on February 8, 2012. The judgment also assessed the liability of each guarantor in accordance with their guarantees.[6] The judgment further maintained the peremptory exceptions of prescription and no cause of action as to the claims asserted in the reconventional demand and granted summary judgment dismissing the reconventional demand, with prejudice, at the defendants/plaintiffs-in-reconventions' cost.

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[6]The judgment limited the liability of Geaux to $7,209,021.00, the liability of Bonfanti to $4,672,526.00, and the liability of Fackrell to $3,903,913.00.

The defendants/plaintiffs-in-reconvention now appeal the final judgment of the trial court, contending that the trial court erred in granting summary judgment on the main demand, where the defendants/plaintiffs-in-reconvention showed that facts remained to be determined regarding defenses raised by the defendants/plaintiffs-in-reconvention, and in maintaining the Bank's peremptory exceptions and granting summary judgment dismissing their reconventional demand.

DISCUSSION

Summary Judgment

Assignment of Error Number One

In this assignment of error, the defendants/plaintiffs-in-reconvention contend that the trial court erred in granting the Bank's motion for summary judgment and in entering judgment against them for the balance due on the 2007 loan pursuant to the terms of the promissory note and the commercial guarantees, where material issues of fact remain regarding their defense of fraud.[7]

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. All Crane Rental of Georgia, Inc. v. Vincent, 2010-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 2010-2227 (La. 11/19/10), 49 So. 3d 387. While summary judgments are now favored, a motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, **admitted** for purposes of the motion for summary

[7]As to the reconventional demand, the defendants/plaintiff-in-reconvention assigned error to the grant of prescription and no cause of action, yet did not specifically appeal the granting of summary judgment rejecting the reconventional demand. However, to the extent that it is raised in other arguments in brief by the defendants/plaintiffs-in-reconvention, we will nonetheless address this issue.

judgment,[8] show that there is no genuine issue as to material fact, and that the movant is entitled to summary judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).

The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

Thus, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a **material** factual dispute mandates the granting of the motion. LSA–C.C.P. art. 967(B); Pugh v. St. Tammany Parish School Board, 2007-1856 (La. App. 1st Cir. 8/21/08), 994 So. 2d 95, 97 (on rehearing), writ denied, 2008-2316 (La. 11/21/08), 996 So. 2d 1113. Moreover, when a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts

[8]Louisiana Code of Civil Procedure article 966 was recently amended by Acts 2013, No. 391, § 1, to provide for **submission** of evidence and objections to evidence for motions for summary judgment. Under the amended version of the article, evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with LSA-C.C.P. art. 966(F)(3). Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion. LSA-C.C.P. art. 966 (F)(2). Moreover, a summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. LSA-C.C.P. art. 966(F)(1).

showing that there remains a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

In determining whether summary judgment is proper, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1035, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. Material facts are those that potentially ensure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Populis v. Home Depot, Inc., 2007-2449 (La. App. 1st Cir. 5/2/08), 991 So. 2d 23, 25, writ denied, 2008-1155 (La. 9/19/08), 992 So. 2d 943. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. Christakis v. Clipper Construction, L.L.C., 2012-1638 (La. App. 1st Cir. 4/26/13), 117 So. 3d 168, 170, writ denied, 2013-1913 (La. 11/8/13), 125 So. 3d 454.

In a suit on a promissory note, the plaintiff must merely produce the note in question to make out a *prima facie* case. The burden then shifts to the defendant to prove any affirmative defenses. Long v. Long, 2004-938 (La. App. 5th Cir. 1/25/05), 895 So. 2d 34, 39.

In support of its motion for summary judgment, the Bank attached an Affidavit of Correctness of Account and/or Note of NonMilitary Service executed by the Executive Vice-President of the Bank, Malcolm J. Peytavin, and a Statement of Uncontested Facts, citing the following supporting evidence: the promissory note for the 2007 loan executed by Commerce Centre; the Multiple Indebtedness Mortgage; the "Acknowledgment of Existing Multiple Indebtedness Mortgage"; the "Limited Liability Company Resolution to Borrow/Grant

Collateral"; the Commercial Guaranty of Geaux Development Group for the 2007 loan; the Commercial Guaranty of George Bonfanti for the 2007 loan; the Commercial Guaranty of Katherine K. Fackrell for the 2007 loan; and the Bank's demand letter dated June 23, 2010.

At the hearing, the Bank also relied on evidence submitted by the defendants/plaintiffs-in-reconvention, including: the promissory note for the 2006 loan; the August 7, 2006 commitment letter issued in connection with the 2006 loan; the account history for the 2006 loan; and Bonfanti's commercial guaranty for the 2006 loan.[9]

According to the Bank, the evidence noted above establishes the following pertinent facts: that Commerce Centre was obligated to the Bank on the promissory note for the 2007 loan; that the defendants/plaintiffs-in-reconvention undisputedly signed the guarantees of the promissory note; that the amount claimed by the Bank, after applying appropriate credits, represents the actual amount due; and that the commercial guarantees signed by the guarantors, as to both the 2006 and 2007 loans, specifically provided that the Bank could release any guarantor without notice to any other guarantor or the principal and that any such release would not impact the liability of any remaining guarantors.

In a suit for deficiency judgment against a guarantor, a bank vice president's summary judgment affidavit is sufficient, where the vice president is familiar with the account and the bank's business records. Regions Bank v. Louisiana Pipe & Steel Fabricators, LLC, 2011-0839 (La. App. 1st Cir. 12/21/11), 80 So. 3d 1209, 1213. The evidence relied upon by the Bank included the affidavit of Bank Vice President Peytavin, wherein he attested that he is familiar

[9]While the Bank also referenced an accounting and account history for the 2007 loan, we note that these items were not cited in or attached to the Bank's motion for summary judgment and were not submitted in opposition to the motion for summary judgment. See LSA-C.C.P. art. 966(F)(2).

with the account and debt of Commerce Centre, the promissory note which forms the basis of that obligation, and the commercial guarantees of that indebtedness executed by the defendants/plaintiffs-in-reconvention. Peytavin further attested to the amount owed as the balance on the 2007 loan, subject to amounts credited for the sale of the mortgaged immovable property and from the settling defendant guarantors, and the individual limitations for each defendant/plaintiff-in-reconvention

On *de novo* review, we agree that based on this evidence alone, the Bank established a *prima facie* case showing its entitlement to summary judgment for the amounts due under the note, and satisfied its initial burden of proof. We further agree that the burden thus shifted to the defendants/plaintiffs-in-reconvention to produce factual support sufficient to establish that they would be able to prove an affirmative defense at trial. After careful review, we find the defendants/plaintiffs-in-reconvention have failed to do so.

The contract of guaranty is equivalent to a contract of suretyship. Katz v. Innovator of America, Inc., 552 So. 2d 724, 726 (La. App. 1st Cir. 1989). Suretyship must be express and in writing. LSA-C.C. art. 3038. Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. Regions Bank v. Louisiana Pipe & Steel Fabricators, LLC, 80 So. 3d at 1212. An agreement to become a surety must be expressed clearly and must be construed within the limits intended by the parties to the agreement. Placid Refining Company v. Privette, 523 So. 2d 867 (La. App. 1st Cir.), writ denied, 524 So. 2d 748 (La. 1988). However, the creditor's acceptance is presumed, and no notice of acceptance is required. LSA-C.C. art. 3039.

Contracts of guaranty or suretyship are subject to the same rules of interpretation as contracts in general. Ferrell v. South Central Bell Telephone Company, 403 So. 2d 698, 700 (La. 1981). Where the contract is silent, courts

may look to the provisions of the civil code governing the contract of suretyship to resolve differences between the parties. Where, however, the contract is not silent, the parties are bound by its contents, as agreements legally entered into have the effect of laws on those who have formed them. First National Bank of Crowley v. Green Garden Processing Company, Inc., 387 So. 2d 1070, 1073 (La. 1980).

Fraud, as applied to contracts, is the cause of an error concerning a material part of the contract, created or continued by artifice and with intent to obtain an unjust advantage or cause a detriment or loss to the other party. Greene v. Gulf Coast Bank, 593 So. 2d 630, 632 (La. 1992); see also LSA-C.C. art. 1953. However, in order to find fraud from silence or suppression of the truth, there must first exist a duty to speak or to disclose the information. Greene v. Gulf Coast Bank, 593 So. 2d at 632. And while fraud may indeed result in some circumstances from a party's silence or inaction, mere silence or inaction without fraudulent intent does not constitute fraud. Terrebonne Concrete, LLC v. CEC Enterprises, LLC, 2011-0072-2011-0079 (La. App. 1st Cir. 8/17/11), 76 So. 3d 502, 509, writ denied, 2011-2021 (La. 11/18/11), 75 So. 3d 464.

Louisiana Revised Statute 6:1124 addresses the duties owed by the banks and provides in relevant part as follows:

> **No financial institution or officer or employee thereof shall be deemed or implied to be acting as a fiduciary, or have a fiduciary obligation or responsibility to its customers or to third parties other than shareholders of the institution, unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary.** The fiduciary responsibility and liability of a financial institution or any officer or employee thereof shall be limited solely to performance under such a contract and shall not extend beyond the scope thereof. Any claim for breach of a fiduciary responsibility of a financial institution or any officer or employee thereof may only be asserted within one year of the first occurrence thereof. This Section is not limited to credit agreements and shall apply to all types of relationships to which a financial institution may be a party. [Emphasis added.]

Further, pursuant to LSA-R.S. 6:1124, a financial institution has no fiduciary duties toward customers or third parties unless expressly set forth in a written agency or trust agreement. Ultra Fabricators, Inc. v. M.C. Bank and Trust Company, 97-1947 (La. App. 1st Cir. 9/25/98), 724 So. 2d 210, 214, writ denied, 98-2682 (La. 12/18/98), 732 So. 2d 1238. Additionally, any fiduciary responsibility and liability of a financial institution or any officer or employee shall be limited solely to performance under such a contract and shall not extend beyond the scope thereof. LSA-R.S. 6:1124. Here, the parties agree that the Bank was not acting as a fiduciary in connection with this transaction. Thus, to defeat the Bank's *prima facie* case, the defendants/plaintiffs-in-reconvention must show that some other duty to act existed herein.

In support of their opposition to the Bank's motion for summary judgment, the defendants/plaintiffs-in-reconvention offered the following evidence: the deposition, with attachments, of Rodney Logarbo,[10] a Bank Vice-President in Lending; their Second Set of Interrogatories and Second Request for Production; their reconventional demand; and the Bank's September 23, 2013 response to the discovery and reconventional demand.

The defendants/plaintiffs-in-reconvention contend that the promissory note and guarantees for the 2007 loan that the Bank seeks to enforce were confected fraudulently in that the Bank did not make proper disclosures to the defendants/plaintiffs-in-reconvention prior to the execution of the 2007 loan, representing to them instead that the paperwork was simply executed to provide them with a lower interest rate on the loan. The defendants/plaintiffs-in-

[10]Attachments to Rodney Logarbo's deposition that were also submitted consisted of: the commitment letter for the 2006 loan; a letter from the Bank to Commerce Centre dated October 14, 2008; the promissory note for the 2006 loan; the Multiple Indebtedness Mortgage for the 2006 loan; and commercial guaranties from Bettsie Miller, Ben Miller, George Bonfanti, Michael Grace, Jr., Walter L. Comeaux, Katherine K. Fackrell, Geaux Development Group, L.L.C., Geaux Corporation, BBM Properties, L.L.C., and Dutton Road Building, L.L.C. for the 2006 loan.

reconvention contend that if the 2007 loan was confected by fraud, it should be rescinded, and thus, would not be enforceable against them.

The defendants/plaintiffs-in-reconvention further contend that the deposition testimony of Logarbo that he had no knowledge of and was not involved in the release of some of the original guarantors in negotiating the 2007 loan, and that, although he was the "point person" for the 2006 loan, he was *not* the "point person" for the 2007 loan, was at odds with the Bank's answers to interrogatories, which state that Logarbo worked with the guarantors in determining the amounts of their individual commercial guarantees and that Logarbo "was the only Bank officer in contact with representatives of Commerce Centre, LLC, Geaux Development Corporation, BBM Properties, Dutton Road Building, LLC and/or other principals or guarantors on either loan." The defendants/plaintiffs-in-reconvention contend that this is conflicting evidence that creates an issue of material fact as to their defense of fraud precluding summary judgment.

They further contend that a November 3, 2010 letter from Alvin A. LeBlanc, Jr., counsel for the Bank, to David Rubin, counsel for the settling defendants/guarantors, Ben R. Miller, Walter L. Comeaux, and Michael A. Grace, Jr., shows that the 2007 loan was the result of negotiations with certain guarantors to obtain releases from the Bank. Notably, however, the defendants/plaintiffs-in-reconvention failed to submit any affidavits or other evidence in opposition to the Bank's motion for summary judgment, in particular from Bonfanti or Fackrell, that would show what actions, if any, were taken by the Bank or its representatives to mislead them.[11]

[11] Although an affidavit by Bonfanti was later submitted in support of the motion for new trial by defendants/plaintiffs-in-reconvention, the affidavit fails to state or set forth any misrepresentations made to Bonfanti, or to the other remaining guarantors for that matter, or allegations of fraud committed by other representatives from the Bank.

The Bank contends that the evidence submitted by the defendants/plaintiffs-in-reconvention in opposition does not establish a material issue of fact that would preclude summary judgment in its favor because: (1) the Bank had no obligation to advise the guarantors that certain guarantors of the first loan would not be guaranteeing the second loan; and (2) the defendants/plaintiffs-in-reconvention made no showing whatsoever that the Bank concealed information from them, either negligently or intentionally. Thus, the Bank contends, that under the applicable substantive law, because the defendants/plaintiffs-in-reconvention have failed to raise and support any issue that is material to their liability under the guarantees, the trial court properly rendered summary judgment in its favor. We agree.

In the instant case, the defendants/plaintiffs-in-reconvention have failed to set forth any evidence to show or establish that the Bank had a duty to disclose any information concerning the other guarantors on the 2007 loan, as is required to prevail on their defense of fraud. The defendants/plaintiffs-in-reconvention have further failed to establish that there was a special relationship between the parties that would give rise to a duty to disclose this information. See Greene v. Gulf Coast Bank, 593 So. 2d at 632. The defendants/plaintiffs-in-reconvention concede that the Bank did not have a fiduciary duty to defendants/plaintiffs-in-reconvention, but instead assert that the Bank breached a duty of "good faith and fair dealing" owed to them. The documents executed by defendants/plaintiffs-in-reconvention in connection with the 2007 loan, however, contain no contractual provision imposing such a duty, and the defendants/plaintiffs-in-reconvention have failed to set forth any statutory or jurisprudential authority for the imposition of any such duty in these commercial transactions.

Moreover, the commercial guarantees which were undisputedly signed and executed by the defendants/plaintiffs-in-reconvention in connection with the 2006

and 2007 loans contain a provision whereby the guarantors specifically agreed that the Bank could release any one or more of the guarantors, **without notice to the other guarantors** and **without impairing** or releasing any of the guarantors' **obligations** or liabilities, as follows:

> Guarantor agrees that **Lender may, at its sole option, at any time, and from time to time, without the consent of or notice to Guarantor, or any of them,** or to any other party, and without incurring any responsibility to Guarantor or to any other party, and without impairing or releasing any of Guarantor's obligations or liabilities under this Guaranty:
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> * * *
>
> (B) **Discharge, release** or agree not to sue **any party** (**including**, but not limited to, Borrower or **any other guarantor**, surety, or endorser of Borrower's Indebtedness), who is or may be liable to Lender for any of Borrower's Indebtedness.

(Emphasis added.)

Thus, according to the plain and unambiguous wording of the commercial guarantees executed by the guarantors, the defendants/plaintiffs-in-reconvention contractually agreed that the Bank, in its discretion, had the right to release any guarantor it chose from the obligations arising from the 2006 loan and the 2007 loan, and, further, could do so **without** notice to the other guarantors. On review, we agree with the trial court that absent any duty, statutory, contractual or otherwise, on the Bank to advise the guarantors of the status of other guarantors on the loan, the Bank was entitled to summary judgment against the defendants/plaintiffs-in-reconvention for the amounts due under the loan and their guarantees. Moreover, we can find no special circumstances in this case that would impose a duty on the Bank to disclose the release of guarantors to the other guarantors, particularly where the guarantees agreed to and entered into by the guarantors specifically provided otherwise. Thus, any discrepancies which may exist between Logarbo's deposition testimony and the Bank's answers to interrogatories regarding his involvement with the renegotiation of the 2006 loan

and the inception of the 2007 loan is of no moment, as there can only be a finding of fraud from silence or suppression of the truth where there is a duty to speak or to disclose information. See Greene v. Gulf Coast Bank, 593 So. 2d at 632.

Moreover, the defendants/plaintiffs-in-reconvention have failed to establish that the Bank intentionally withheld or concealed any information from them. A fact is only "material" for the purposes of summary judgment if it potentially ensures or precludes recovery, affects the litigant's success, or determines the outcome of a legal dispute. Populis v. Home Depot, Inc., 991 So. 2d at 25. Thus, even if we were to find that the conflict between Logarbo's testimony and the Bank's answers to interrogatories created an issue of fact as to the Bank's defense of fraud, because a finding of fraud from silence or suppression of the truth cannot exist without a duty to speak or to disclose information or a showing of fraudulent intent, this conflict does not affect the obligations of the defendants/plaintiffs-in-reconvention under the contracts they entered into.[12]

It is well established by our courts that signatures to obligations are not mere ornaments, and parties who sign obligations must expect to be held liable

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[12]Moreover, to the extent that the defendants/plaintiffs-in-reconvention contend that summary judgment was improper because they were not allowed to conduct adequate discovery prior to the hearing, we note that the summary judgment hearing was originally scheduled for September 3, 2013. The defendants/plaintiffs-in-reconvention filed a motion to continue the hearing pending a ruling on their motion to compel discovery. The trial court granted the motion and continued the hearing until October 8, 2013. The Bank subsequently responded to their discovery request on September 23, 2013, approximately two weeks before the motion for summary judgment was heard. Although the defendants/plaintiffs-in-reconvention stated at the hearing that they needed additional time to conduct further discovery, no second motion to continue was filed or requested before or during the hearing on the motion for summary judgment.

We agree that a motion for summary judgment should be granted only after adequate discovery. See LSA-C.C.P. art. 966(C)(1). However, the mere contention by an opponent to a motion for summary judgment that he does not have the information necessary to defend against the motion because of the movant's failure to comply with discovery is insufficient to defeat the motion. Bowman v. City of Baton Rouge/ Parish of East Baton Rouge, 2002-1376 (La. App. 1st Cir. 5/9/03), 849 So. 2d 622, 630, writ denied, 2003-1579 (La. 10/3/03), 855 So. 2d 315; Christakis v. Clipper Construction, L.L.C., 117 So. 3d at 171 (where suit was filed three and a half years prior to the hearing on the motion for summary judgment and the opponents did not object to the prematurity of the motion, request more time to conduct additional discovery, or request a continuance, the trial court did not abuse its broad discretion in granting summary judgment before the completion of opponent's discovery). Thus, we find no merit to their argument that summary judgment was improvidently granted on this basis.

according to their tenor. See American Bank & Trust Company v. Blue Bird Restaurant & Lounge, Inc., 279 So. 2d 720, 724 (La. App. 1st Cir. 1973), affirmed by, 290 So. 2d 302 (La. 1974) (where defendant guarantor was not present during the loan negotiations between the bank and borrower and was not apprised of the terms of the loan contract, the defendant guarantor was nonetheless bound as the defendant guarantor was afforded an opportunity to read the guaranty before signing it and the mutual intention of the parties was clear from the language of the guaranty. Thus, the argument that there was no meeting of the minds lacks merit.). Here, the guarantors are presumed to have read the commercial guarantees they executed in connection with the 2007 loan and are bound by the clear and unambiguous terms set forth therein.

After thorough review, we find no error in the trial court's determination that the Bank was entitled to summary judgment and that the defendants/plaintiffs-in-reconvention failed to make the necessary showing that they will be able to prove their affirmative defense of fraud at trial. Thus, the Bank was entitled to summary judgment in the Bank's favor on the defaulted promissory note.

Assignment of Error Number Two

In their second assignment of error, the defendants/plaintiffs-in-reconvention contend that the trial court erred in dismissing their reconventional demand by maintaining the Bank's peremptory exceptions of no cause of action and prescription and granting the Bank's motion for summary judgment. At the outset, we address defendants/plaintiffs-in-reconventions' contentions that the trial court erred in granting the Bank's motion for summary judgment.

As set forth above, in order to recover on their reconventional demand, the defendants/plaintiffs-in-reconvention must point to a duty, whether

contractual or legal, owed by the Bank and obligating it to disclose the absence or release of guarantors to the other guarantors. As noted by the Bank in its brief, simply put, there has been no demonstration, in law or in jurisprudence, of any duty or obligation that would require the bank to advise a guarantor on a loan that other guarantors had elected not to guarantee the loan.

Considering our finding herein that the defendants/plaintiffs-in-reconvention have failed to show that the Bank had a duty, statutory, contractual or otherwise, to advise the guarantors of the status of other guarantors on the loan, and have made no showing of fraud by the Bank, we find that the trial court was correct in granting the Bank's motion for summary judgment as to the reconventional demand. Accordingly, we find no merit to this assignment of error.

Having found that the trial court correctly granted the Bank's motion for summary judgment as to the claims set forth in the defendants' reconventional demand, we pretermit discussion of the remaining assignments raised in assignment of error number two on appeal challenging the trial court's decision to maintain the exceptions of no cause of action and prescription.[13]

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[13]In doing so, although we pretermit discussion of the assignment of error concerning Bank's exception of no cause of action, we note that where there is no duty upon the Bank to advise the guarantors of the other guarantors, there can be no cause of action for a breach of that duty. Moreover, if any such duty did exist, the defendants/plaintiffs-in-reconvention clearly waived it by agreeing to the terms of the guaranty that provided that the Bank could release any guarantor at any time without notice to the other guarantors. See St. Landry Homestead Federal Savings Bank v. Vidrine, 2012-1406 (La. App. 3rd Cir. 6/12/13), 118 So. 3d 470, 488, writs denied, 2013-2218, 2013-2219 (La. 12/2/13), 126 So. 2d 1283 (where the court found that defendants failed to state a cause of action for fraud against the Bank pertaining to pre-credit-agreement negotiations, noting that "[a]ny cause of action for fraud with regard to these pre-credit-agreement negotiations is precluded by the Louisiana Credit Agreement Act"); Commercial National Bank in Shreveport v. Audubon Meadow Partnership, 566 So. 2d 1136, 1140-1141 (La. App. 2nd Cir. 1990)(where the guaranty agreement, signed by the guarantor, permits the bank to surrender any other guarantors or securities without notice or consent from him, there can be no cause of against the bank for failing to act in "good faith"); cf. Guzzardo-Knight v. Central Progressive Bank, 99-1449, 99-1278 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1243, 1247, writ denied, 2000-2298 (La. 6/15/01), 793 So. 2d 208 (where this court held that plaintiffs' causes of action for fraud, negligent misrepresentation and detrimental reliance, which arose out of an oral credit agreement, are barred by the Louisiana Credit Agreement Act, codified in LSA-R.S. 6:1122, *et seq.*); and cf. Jesco Construction Corporation v. Nationsbank Corporation, 2002-0057 (La. 10/25/02), 830 So. 2d 989, 991-992 (where the court found that all actions, including

CONCLUSION

For the above and foregoing reasons, the December 10, 2013 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to defendants/plaintiffs-in-reconvention/appellants, Geaux Development Group, LLC, George Bonfanti, and Katherine K. Fackrell.

AFFIRMED.

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detrimental reliance, negligent misrepresentation, unfair trade practices, and breaches of the duty of good faith and fair dealing based upon an oral agreement to lend money are barred by LSA-R.S. 6:1122).