STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1594

Mainstreet Bank n/k/a Central Bank,
Respondent,

vs.

Joseph Gisch, et al.,
Defendants,

Dan Fesler,
Appellant,

and

Joseph Gisch,
Third Party Plaintiff,

vs.

Dan Fesler, et al.,
Third Party Defendants.

Filed May 9, 2011
Affirmed
Hudson, Judge

Washington County District Court
File No. 82-CV-09-5064

Michael H. Streater, Daniel N. Moak, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Eric D. Cook, David R. Mortensen, Wilford & Geske, P.A., Woodbury, Minnesota (for respondent)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant Dan Fesler challenges the district court's grant of summary judgment enforcing Fesler's personal guaranty of a mortgage. We affirm.

FACTS

In October 2004, Highland Knoll, LLC (Highland), was created for the purpose of purchasing and developing approximately 24 acres of property in Woodbury. Highland was owned by two entities—Jenik Ventures, LLC, and LDI Enterprises, LLC. Appellant Dan Fesler, Joseph Gisch, and Rick Lingen owned Jenik; Thomas Dvorak owned LDI. On October 12, 2004, Highland entered into a purchase agreement with Richard and Karol O'Brien, the owners of the Woodbury property. The purchase agreement provided that, on the date of closing, Highland would pay $3,000,000, and the O'Briens would execute and deliver "a warranty deed . . . conveying all of the Property to [Highland], free and clear of all liabilities, liens, encroachments . . . obligations, charges and options of any kind whatsoever."

Highland arranged to borrow $1,550,000 from Mainstreet Bank, n/k/a Central Bank (Central), to fund the purchase and development of the property. The record reflects that the bank was aware that the purchase agreement required the O'Briens to deliver a warranty deed conveying the property to Highland at the closing. At the closing on January 20, 2005, however, the O'Briens did not deliver the warranty deed. Rather,

both Highland and the O'Briens signed the mortgage securing Central's loan as co-mortgagors. And Fesler, Gisch, and Dvorak also executed personal guaranties in which each "unconditionally and absolutely" guaranteed the repayment of the loan in the event Highland defaulted. Fesler did not attend the January 2005 closing.

On September 22, 2005, in anticipation of obtaining another loan from Central, Jenik's principals signed a resolution which authorized any corporate officer to act on behalf of and in the name of the corporation as necessary or appropriate to secure the financing from Central. On that same date, Highland executed a promissory note to Central in the principal amount of $2,979,100. The promissory note was signed for Highland by Joseph Gisch, acting pursuant to the authority granted in the resolution. The mortgage was signed by Gisch and the O'Briens, who once again did not deliver a warranty deed conveying the property to Highland. The Highland promissory note was further secured, jointly and severally, by unconditional personal guaranties signed by Fesler, Dvorak, and Gisch. Fesler did not attend this closing either. There is no evidence that Fesler ever attempted to obtain information about the O'Briens' failure to deliver the warranty deed in accordance with the purchase agreement.

Highland defaulted on the note, and Central commenced foreclosure proceedings and purchased the property for $1,400,000 at a sheriff's auction. Central then commenced suit against Fesler, Gisch, and Dvorak, as guarantors of the defaulted note, seeking a money judgment for the unpaid balance of principal, interest, and late charges due on the note. Central's claims against Fesler were based solely on the guaranty he executed and delivered on September 22, 2005, on the second loan. The district court

granted Central's motion for summary judgment against Fesler, Gisch, and Dvorak, reasoning, with regard to Fesler, that there were no disputed issues of material fact regarding the validity of his guaranty or the fact of the default. Fesler's appeal follows.

D E C I S I O N

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). We view "the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *Id*. at 77. We may affirm summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I

Fesler argues that Central breached an affirmative duty to notify him at the September 2005 closing that the O'Briens had materially altered the terms of the purchase agreement by failing to deliver a warranty deed to Highland. He contends that

Central's failure to disclose this information renders his guaranty unenforceable. Because we conclude that Central owed no duty to Fesler and did not conceal any facts from him, we hold that the guaranty is enforceable.

As a threshold matter, Fesler alleges that Central acted inappropriately by amending the mortgage prior to the January 2005 closing to name both Highland and the O'Briens as co-mortgagors. Fesler contends that before the closing, Central's attorneys learned that the O'Briens did not intend to deliver a warranty deed to Highland, at which point the bank "modified" the mortgage to add the O'Briens as co-mortgagors in order to secure the loan with the property. But this contention assumes the existence of an "original" mortgage naming only Highland as mortgagor; there is no such document in the record.

The record does contain a document, prepared by Central prior to January 2005, stating that the O'Briens "are to convey title to the property to Highland Knoll via warranty deed." But this statement is declarative, not imperative. And Central Senior Vice President David Coen, who attended the January 2005 closing, testified that, at the time of the closing, he had no knowledge about the conveyance provision in the purchase agreement. Even though Central was aware of the warranty deed requirement prior to the closing, there is no evidence that Central knew that the O'Briens did not intend to transfer the deed at the closing. However the O'Briens came to be designated as co-mortgagors, we can find no legal support for Fesler's contention that the bank owed him any duty under the guaranty—contractual or otherwise—to notify him that the O'Briens did not

deliver the warranty deed to Highland at either the January 2005 or September 2005 closing.

It is indisputable that the relationship between Fesler and Central was strictly contractual, based exclusively on the two personal guaranties Fesler signed to secure Central's loans to Highland. Fesler has offered no evidence of any pre-existing relationship between himself and Central, or any relationship outside of the guaranties. Fesler attended neither closing; and in response to an interrogatory, he stated that he had "no recollection of having ever communicated with [Central] regarding the subject matter of this action." As such, the parties' mutual obligations are limited as a matter of law to those contained in the guaranties.

"[A] guaranty is construed the same as any other contract, the intent of the parties being derived from the commonly accepted meaning of the words and clauses used, taken as a whole." *Am. Tobacco Co. v. Chalfen*, 260 Minn. 79, 81, 108 N.W.2d 702, 704 (1961). By its express terms, the personal guaranty signed by Fesler in September 2005 states that he "[u]nconditionally and absolutely guarantees" the loan and "[a]grees that upon an Event or Default . . . the Lender may demand payment from the Guarantor of any installment (or portion thereof) of principal or interest on the Loan, when due, and the Guarantor shall immediately pay the same to the Lender." This language is plain, clear, and not ambiguous. *See Art Goebel, Inc. v. N. Suburban Agencies, Inc*., 567 N.W.2d 511, 515 (Minn. 1997) (stating that "[a] contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation").

"[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Knudsen v. Transp. Leasing/Contract, Inc*., 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). By its plain terms, the September 2005 guaranty requires Fesler to pay the amount due on the loan in case of default. There is no language in the instrument providing that Fesler's obligation to Central is contingent on the O'Briens' compliance with the purchase agreement or that Fesler can avoid his contractual liability under the guaranty based on any act or omission by Central or any third party. Because the guaranty is unambiguous, Fesler may not rely upon Central's alleged motives or his own claimed assumptions at the time of its execution to avoid his obligation under the guaranty. *See Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 312 (Minn. 2003) (indicating that extrinsic evidence may not be used to vary the terms of a written contract when the contract is neither incomplete nor ambiguous); *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc*., 470 N.W.2d 118, 123 (Minn. 1991) (stating that if a contract is unambiguous, a party cannot alter its language based on "speculation of an unexpressed intent of the parties").

The guaranty's plain and unequivocal terms are also fatal to Fesler's related contention that the conveyance of a warranty deed was an implied condition precedent to his duty to perform under the guaranty and that the guaranty is therefore void for Central's failure to notify him of a material modification to the purchase agreement. It is true that the purchase agreement provides that the O'Briens will deliver a warranty deed to Highland, and that Fesler expected the conveyance to occur at closing. But even

though Central was aware of Fesler's expectation under the purchase agreement, there is no evidence that Central agreed to be bound by any condition precedent or that Fesler's obligations under the guaranty cannot be understood without reference to the purchase agreement. *See Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557, 560 (Minn. App. 1986) (stating that a court may read an implied condition precedent into a contract when the "parties have omitted a term that is essential to a determination of their rights and duties") (quotation omitted)). Furthermore, Fesler's argument that the purchase agreement should be consulted to determine whether the transfer of title was intended as a condition precedent to performance of the guaranty is precluded by the rule that extrinsic evidence of the parties' intent may only be considered when the terms of a contract are ambiguous. *Alpha Real Estate Co.*, 664 N.W.2d at 312. As to Central's alleged failure to notify Fesler of a material modification to the purchase agreement, Fesler does not demonstrate either why Central had a duty to notify him about an alteration to a contract to which it was not a party or that Central concealed any information about the alteration from him.

II

Fesler next argues that outside of any contractual obligation, Central committed fraud by breaching a common-law tort duty to disclose the fact that the O'Briens had not conveyed a warranty deed. In support of his argument, he cites *Richfield Bank & Trust Co. v. Sjogren*, in which the supreme court identified three "special circumstances" in which one party to a transaction may have a duty to disclose material facts to the other:

> (a) One who speaks must say enough to prevent his words from misleading the other party[;]
>
> (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party[; or]
>
> (c) One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.

309 Minn. 362, 366, 244 N.W.2d 648, 650 (1976) (quotations and citations omitted). Fesler correctly concedes that Central owed him no fiduciary duty. *See Hurley v. TCF Banking & Sav., F.A.*, 414 N.W.2d 584, 587 (Minn. App. 1987) ("Generally, a bank is not in a fiduciary relationship with a customer, rather the relationship is one of debtor and creditor."). Rather, Fesler contends, pursuant to the second circumstance described in *Richfield*, that Central owed him a duty arising out of its special knowledge of material facts to which he did not have access. *See* 309 Minn. at 365, 244 N.W.2d at 650 (observing that "if a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such facts were expressly denied" (quotation omitted)). He also relies heavily on *Gerdin v. Princeton State Bank*, which held that a bank and its agent had a duty to disclose the existence of tax liens to a bidder at a foreclosure auction. 371 N.W.2d 5, 9 (Minn. App. 1985), *aff'd on other grounds*, 384 N.W.2d 868 (Minn. 1986).

As previously discussed, the parties' relationship here was solely contractual, and their mutual obligations were confined to the four corners of the guaranties. There is simply no basis, on the record before us, to conclude that the guaranties in any way

obligated Central to assume that Fesler depended upon the bank to notify him about changes to the purchase agreement, to which the bank was not a party. Nor is there any evidence that Central knew that Fesler was unaware that the O'Briens had failed to produce a warranty deed, particularly in light of the presence at each closing of Highland principals. We conclude that Central neither had nor breached a common-law tort duty to Fesler. We also note that Fesler's arguments on the theory of avoidable consequences and the failure to mitigate damages rely on an entirely speculative explanation of why Highland defaulted on the Central loan: Fesler contends that the O'Briens' failure to transfer title at the closing caused Highland to default by complicating the sales process once Highland began selling off parcels of land. Fesler contends that Central could have avoided the default had it enforced the purchase agreement. In fact, no one, including Fesler, knows whether Highland would have defaulted even if the transfer had occurred. And, in any case, Central had no duty to enforce the purchase agreement, and Fesler's theory about the cause of the default is far too uncertain to justify the reduction of Fesler's damages on this ground.

Fesler correctly contends that a claim for fraudulent concealment may arise from Central's failure to disclose even where, as here, the parties' relationship is strictly contractual. We have recognized that in commercial relationships involving sophisticated parties negotiating at arm's length, where neither party is "supplying information for the guidance of the other," an aggrieved party may bring a "suit in contract or in fraud." *Safeco Ins. Co. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). But there is no evidence in the

record that Central ever concealed anything from Fesler, fraudulently or otherwise. At each of the two closings, Gisch, who was authorized by resolution to act on Jenik's behalf, signed the mortgage presented by Central. Fesler does not claim, and there is no evidence, that Central attempted to conceal from Gisch at either closing that the O'Briens were not transferring title to the property. Fesler chose not to attend either closing, and there is no evidence that he ever inquired of Gisch or anyone else whether the O'Briens had delivered title to the property. And Fesler provides no legal basis for his assertion that Central was obligated to personally notify Fesler that the O'Briens had not conveyed the property. Accordingly, we conclude that the bank owed Fesler no duty and did not commit fraud by declining to personally notify him of the O'Briens' actions.

We further note that the authority relied upon by Fesler is inapposite. He cites to *In re Boss* for the proposition that "[n]ondisclosure may constitute fraud where there is a duty, either legal or equitable, to disclose a certain fact." 487 N.W.2d 256, 259 (Minn. App. 1992), *review denied* (Minn. Aug. 11, 1992). But *Boss* involved an attorney-client fiduciary relationship, and is therefore inapposite. He also relies on *Gerdin*, in which this court held that a bank had a duty to the bidder in part because "the prevailing practice is to have tax liens extinguished prior to a foreclosure sale." 371 N.W.2d at 9. Fesler does not identify any prevailing practice that would require Central to either notify Highland of the O'Briens' anticipatory breach of the purchase agreement (before the closings) or notify Fesler of Gisch's decision to proceed with both closings without obtaining the warranty deed. He finally cites *Sjogren*, in which the lender's duty to disclose arose from actual knowledge of the fraudulent activities of one of its depositors, which were

unknown to the borrower and which would be furthered were the loan to proceed. 309 Minn. at 369, 244 N.W.2d at 652. There is no evidence here that Central knew the O'Briens were engaged in fraud, no evidence that Central tried to conceal any aspect of the closing from Fesler, and no evidence that Central knew Fesler was unaware that the O'Briens had deviated from the terms of the purchase agreement. Moreover, the holding in *Sjogren* was limited to "the unique and narrow 'special circumstances' of [that] case." *Id*., 244 N.W.2d at 652.

Finally, the lack of record evidence that Central fraudulently misrepresented or failed to disclose to Fesler any aspect of the transaction is fatal to Fesler's arguments based on the Restatement (First) of Security (1941) and the Restatement (Third) of Suretyship and Guaranty (1996). Fesler cites to the restatements for the proposition that a creditor may not fraudulently induce a guarantor's assent by failing to disclose facts unknown to the guarantor and which materially increase the risk to the guarantor, and that doing so voids the guaranty. Restatement (First) of Security § 124(1); Restatement (Third) of Suretyship and Guaranty § 12(3). Fesler contends that there are material facts here as to whether Fesler's guaranty is void due to Central's failure to disclose that Highland did not receive title to the property at either closing. But these arguments, which are substantively identical to those we have already rejected, ask us to infer that Central knew that the O'Briens' failure to transfer title to the property would increase Fesler's risk, that Central knew that Fesler was unaware that the O'Briens had failed to transfer title, and that Central intentionally and fraudulently concealed this fact from Fesler. But there is not a scintilla of record evidence to support any of these inferences,

and Fesler's argument is therefore unavailing. We further note that the restatement provisions upon which Fesler relies have never been cited, let alone adopted, by Minnesota courts.

III

Finally, we consider Fesler's argument that he is entitled to rescind his guaranty pursuant to the doctrine of unilateral mistake, which is in effect no more than another variation on his duty-to-disclose argument. A contract can be rescinded on the basis of unilateral mistake if one party wrongfully concealed material facts from the other or induced or contributed to the mistake in some other way. *Sorensen v. Coast-to-Coast Stores (Central Org.), Inc*., 353 N.W.2d 666, 670 (Minn. App. 1984), *review denied* (Minn. Nov. 7, 1984).

There is no basis to set aside the guaranty due to unilateral mistake. Fesler argues he is entitled to rescission because Central concealed from him the fact that Highland did not receive title to the property from the O'Briens at either closing. At each closing, Central entered into a mortgage and note with Highland and the O'Briens and received the guaranties from Fesler and the other Highland principals. Highland principals attended the first closing, at which the O'Briens did not transfer title, and there is no evidence that Central tried to conceal this fact from anyone or was aware that it was not known to all the parties.

In addition, there is no evidence that Fesler made a mistake, particularly with respect to the second guaranty, which he signed some eight months after the O'Briens' refusal to transfer title was known to Central and Highland and without ever attempting

to verify whether the condition he now claims was the absolute prerequisite to his guaranty had even taken place. Because we see no fraud or misrepresentation here, Fesler cannot claim he was unjustly induced to mistakenly sign the guaranty.

Affirmed.