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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1202
A11-1229**

Summit Community Bank,
Respondent,

vs.

WHG MN, LLC, et al.,
Defendants,

Thomas L. Corrigan, III, et al.,
Appellants (A11-1202),

James H. Ervin, et al.,
Appellants (A11-1229),

and

Thomas L. Corrigan, III, et al.,
Counterclaim Defendants/Third Party Defendants (A11-1229),

James H. Ervin, et al.,
counterclaim defendants/third party defendants,
Appellants (A11-1229),

vs.

Summit Community Bank, counterclaim defendant,
Respondent (A11-1229),

and

Peoples Bank of Wisconsin,
a Wisconsin financial corporation, et al.,
Third Party Defendants (A11-1229).

Filed May 14, 2012
Affirmed
Bjorkman, Judge

Washington County District Court
File No. 82-CV-09-3610

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Landenberger)

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James H. Ervin and George E. Rossez)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Respondent-lender sued appellant-guarantors to recover for the borrower's default on a loan contract. Appellants challenge the district court's denial of summary judgment on their failure-of-conditions-precedent and fraudulent-inducement defenses and allege numerous trial errors. Respondent appeals the district court's denial of its motion for summary judgment on appellants' fraudulent-inducement defense. Because appellants' defenses fail as a matter of law and because the district court did not abuse its discretion with respect to its evidentiary rulings and jury instructions, we affirm.

FACTS

Peoples Bank of Wisconsin loaned \$1.5 million to WHG, L.L.C. in connection with a hotel development. On November 17, 2006, Kevin Kelly, an employee of Peoples Bank, wrote a letter summarizing “the terms and conditions under which the bank will provide financing” (the letter). The loan was to be guaranteed by WHG members: appellants Thomas Corrigan, III, Jay Feider, and Mija Landenberger (the Corrigan guarantors); appellants George Rossez and James Ervin (the Rossez guarantors); and four others. Additionally, the loan was to be secured by more than \$1.5 million worth of 3M stock, liens on all of WHG’s assets, and mortgages on some of the guarantors’ properties, including a \$230,500 junior mortgage on the property of WHG-investor Roger Zahn, and a \$380,000 junior mortgage on the property of WHG-investor Robert Snyder. And WHG was required to maintain several operating accounts with Peoples Bank during the term of the loan.

On November 18, Kelly sent the letter to Jeff Wallis, a guarantor who is not a party to this appeal. Wallis forwarded the letter to the other guarantors along with the note, the loan agreement, and the guaranties (collectively, the loan contract). Over the next two days, the guarantors signed their respective guaranties. Corrigan, Ervin, and Wallis also signed the remaining loan documents on behalf of WHG. Peoples Bank advanced the loan to WHG on November 20.

Sometime between November 16 and November 20, Kelly received information from the title company that the Zahn property was encumbered by \$613,500 in prior liens, not \$577,000 as stated in the letter. Kelly also learned that title to Snyder’s

property was actually in the name of his late wife, whose probate had not yet begun. Peoples Bank eventually perfected a \$230,500 mortgage on the Zahn property but was unable to perfect its mortgage on the Snyder property because, after Snyder obtained title, other creditors promptly filed \$3,000,000 in liens on the property. In May 2007, Peoples Bank assigned the loan contract to respondent Summit Community Bank (generically, the bank). WHG later defaulted on the note.

The bank sued the guarantors on the unpaid note. The guarantors denied liability on the note, asserting that (1) the nonoccurrence of conditions precedent set out in the letter rendered the loan contract unenforceable and (2) the guarantors were induced to enter the guaranties by fraudulent misrepresentations in the letter. Both the bank and the guarantors moved for summary judgment. The district court denied the motions, expressly concluding that material disputes of fact precluded summary disposition of the guarantors' fraud defense.

At trial, the bank repeatedly moved for judgment as a matter of law (JMOL), which the district court denied. The jury returned a verdict in favor of the bank, finding that it had not falsely represented or concealed a past or present material fact. The guarantors moved for a new trial based on evidentiary errors, erroneous jury instructions and special-verdict questions, and insufficient evidence to support the verdict. The district court denied the motion. These consolidated appeals follow.

DECISION

I. The guarantors' conditions-precedent defense fails as a matter of law.

The guarantors argue that the district court erred by denying their motion for summary judgment or, alternatively, by refusing to give jury instructions and special-verdict questions on their conditions-precedent defense. Denial of summary judgment is outside the scope of appellate review when (1) the denial was based on the existence of factual disputes, (2) a trial has been held, and (3) the parties had a full and fair opportunity to litigate their claims. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918 (Minn. 2009). The district court implicitly denied summary judgment based on the existence of factual disputes and allowed the guarantors to present their conditions-precedent defense at trial. Accordingly, the denial of summary judgment is not within our scope of review, and we will only review the denial of the guarantors' requested jury instructions and special-verdict questions on this defense. We review jury instructions and special-verdict questions for an abuse of discretion. *Johnson v. Wash. Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994); *Covey v. Detroit Lakes Printing Co., a Div. of Forum Pub. Co.*, 490 N.W.2d 138, 142 (Minn. App. 1992).

An unfulfilled condition precedent prevents enforcement of a contract. *Crossroads Church of Prior Lake MN v. Cnty. of Dakota*, 800 N.W.2d 608, 615 (Minn. 2011). A condition precedent “calls for the performance of some act or . . . event *after* the contract is entered into, and upon the performance or happening of which [the operation of the contract] is made to depend.” *Id.* (emphasis added) (quotation omitted).

The letter lists a series of “conditions” under which the bank would provide financing to WHG:

1. “Borrower will be required to maintain [its operating] accounts with Peoples Bank of Wisconsin or its Minnesota affiliate *during the term of the loan. . . .*”

2. “Bank to be in receipt of title work evidencing and insuring the bank’s valid lien positions on the subject parcels being offered as collateral subject to the [enumerated] prior liens”

3. “Bank to be in receipt of appraisals or other evidence of value on the real estate parcels being pledged as collateral in a form and substance acceptable to bank evidencing *sufficient collateral to provide adequate coverage for the loan amount.*”

4. “Borrower to be required to open and maintain *during the term of the loan* an interest reserve account with Peoples Bank of Wisconsin or its Minnesota affiliate in the amount of \$77,500.”

(Emphasis added.) The letter concludes, “Once you have approved the terms and conditions contained herein we will begin to work towards a closing with an anticipated closing date early the week of November 20th *subject to our ability to perfect our liens on the collateral being offered.*” (Emphasis added.)

The guarantors argue that the quoted terms constitute conditions precedent, the non-occurrence of which rendered the loan contract, including the obligations of the guarantors, unenforceable. We disagree. The first and fourth “conditions” explicitly require the borrower to perform acts during the term of the loan, so they cannot be conditions precedent to the operation of the loan contract. The second and third “conditions” do not indicate that they must occur before the loan contract takes effect;

instead, they are conditions to the bank's obligation to enter into the loan contract. And the concluding statement makes perfection of the liens an event to be performed *before* the contract is entered into—i.e., a condition to the bank's willingness to execute the loan contract. Because the letter unambiguously does not establish any conditions precedent to the operation of the loan contract, the guarantors' conditions-precedent defense fails as a matter of law. *See City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991) (stating that whether a contract is ambiguous is a matter of law, as is the interpretation of an unambiguous contract), *review denied* (Minn. Apr. 18, 1991). The district court did not abuse its discretion by refusing to instruct the jury and submit special-verdict questions on the conditions-precedent defense.

II. The jury's verdict was not contrary to the evidence and the guarantors' fraudulent-inducement defense fails as a matter of law.

Both the bank and the guarantors appeal the denial of their motions for summary judgment on the guarantors' defense that they were fraudulently induced to sign the guaranties. The district court's denial of summary judgment is outside the scope of our review because it was based on the existence of factual disputes, which the parties had a full and fair opportunity to litigate before the jury. *See Bahr*, 766 N.W.2d at 918. We therefore construe the guarantors' appeal as taken from the denial of its motion for a new trial due to insufficient evidence to support the verdict, and we construe the bank's appeal as taken from the denial of its JMOL motions.

A district court should grant a new trial if the verdict is manifestly contrary to the preponderance of the evidence, and we review whether the district court exercised

reasonable discretion in denying a new trial. *Eliason v. Textron, Inc.*, 400 N.W.2d 805, 807 (Minn. App. 1987). A district court should grant JMOL if the moving party prevails as a matter of law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). We review the denial of JMOL de novo. *Id.*

If one party fraudulently induces another party to enter a contract, the contract is voidable. *Carpenter v. Vreeman*, 409 N.W.2d 258, 260-61 (Minn. App. 1987). To establish fraudulent inducement, a party must prove, among other things, that the opposing party made a material misrepresentation of fact. *Id.* at 261. “A misrepresentation is material if it would be likely to induce a reasonable person to manifest his or her assent or the maker knows that for some special reason it is likely to induce the particular recipient to manifest such assent.” *Id.*

The guarantors point to the following terms of the bank’s letter as conclusive evidence of material misrepresentations:

1. The Zahn property was encumbered by \$577,000-worth of prior liens [the prior liens totaled \$613,500];
2. Snyder pledged a \$380,000 mortgage on property [Snyder did not have title to the property];
3. The bank intended to perfect its liens prior to closing [the bank had no intention of doing so].

We disagree. First, the guaranties specifically disclaim any obligation of the bank to foreclose on the mortgages before holding the guarantors personally liable for a default: “The liability of the [guarantors] shall not be affected or impaired by . . . any failure to . . . enforce any collateral security” Second, a reasonable person would recognize

that the bank would hold the guarantors personally liable before it would pursue the expensive and time-consuming process of foreclosing on a group of mortgages of varying priority. Indeed, the letter described each *guaranty* as secured or unsecured, indicating the bank's intent to foreclose on the mortgages only if and after the guarantors demonstrated an inability to repay the loan. Third, the guarantors have no equitable right to foreclose on the perfected mortgages. Under the doctrine of equitable subrogation, a person who has discharged the debt of another "stands in the shoes" of the creditor for the purpose of asserting the claim against the *debtor*." *In re Minn. Kicks, Inc.*, 48 B.R. 93, 104 (Bankr. D. Minn. 1985) (emphasis added); *see also Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. App. 2003). So the guarantors could assert the bank's rights against WHG but not the other mortgagors. Consequently, the value of the mortgages and the bank's intent to perfect them would not affect a reasonable person's decision to guaranty the loan. And finally, it is undisputed that the guarantors have not paid the bank on the note.

For these reasons, we conclude that the jury's verdict was not manifestly contrary to the preponderance of the evidence, and the district court correctly denied the guarantors' motion for a new trial. For the same reasons, we conclude that the guarantors' fraudulent-inducement defense fails as a matter of law, and that the district court erred by denying the bank's motion for JMOL.¹

¹ We reject the bank's alternative argument that the guarantors' fraud defense should be dismissed for failure to plead fraud with particularity. The pleadings were sufficient because they identified each allegedly fraudulent representation and concealment and how each fulfilled the elements of fraud. *See Schumacher v. Schumacher*, 627 N.W.2d

III. The guarantors are not entitled to a new trial based on alleged trial errors.

Although we conclude that the guarantors' defenses fail as a matter of law, we also consider the claimed trial errors. We review evidentiary determinations and jury instructions under an abuse-of-discretion standard. *Johnson*, 518 N.W.2d at 601.

a. The district court did not abuse its discretion by admitting evidence of the guarantors' wealth and the economic benefits they received from the loan.

The guarantors argue that the testimony and exhibits regarding the guarantors' wealth were irrelevant and unfairly prejudicial.² We disagree. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" Minn. R. Evid. 403. Evidence of a party's wealth may be unfairly prejudicial, particularly if it is used to compare the poverty of the opposing party. *See, e.g., Anderson v. Hawthorn Fuel Co.*, 201 Minn. 580, 582, 277 N.W. 259, 260 (1938). But here, the danger of unfair prejudice was slight because the guarantors' opposing party, the bank, likewise has substantial assets. And the guarantors' wealth is relevant to the bank's decision to enforce the personal guarantees before foreclosing on the various

725, 730 (Minn. App. 2001). We also reject the bank's argument that the parol evidence rule defeats the guarantors' fraud defense. "[O]nly when an allegedly fraudulent statement directly contradicts a substantive contract term will courts rely on the parol-evidence rule to reject a fraud claim." *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1083 (D. Minn. 2007). No direct contradiction exists here because the letter indicates the bank's *intent* to perfect the mortgages, whereas the guaranties deny its *obligation* to do so.

² The bank argues that the guarantors waived this issue by not objecting to the evidence at trial. But because the district court made "a definitive ruling on the record admitting" the evidence before trial, the guarantors were not required to "renew [their] objection . . . to preserve a claim of error." *See* Minn. R. Evid. 103(a).

mortgages. On this record, we conclude that the district court did not abuse its discretion in admitting evidence of the guarantors' financial condition.

The Rossez guarantors also argue that the bank's closing argument inaccurately and unfairly suggested that the guarantors received an economic benefit from the loan to WHG. We are not persuaded. The bank's counsel explained to the jury that the guarantors received \$95,000 in distributions from WHG and that they claimed capital-loss tax deductions of \$1,295,000. Counsel argued that "it would be extremely unjust to allow them to escape from their obligations under the note for the \$1.5 million dollars and then also enable them to reap the benefits of \$1,400,000 of either tax attributes or straight up distributions." The statements are accurate; they do not, as the Rossez guarantors claim, suggest that the guarantors received \$1.4 million in cash from the loan. And counsel's argument rebuts any implication that the guarantors were innocent victims of WHG's default. The admission of counsel's argument was not an abuse of discretion.

b. The district court's refusal to instruct the jury on fraud by concealment did not prejudice the guarantors.

The guarantors challenge the district court's refusal to instruct the jury regarding fraud by concealment. We are not persuaded to reverse on this basis. Generally, a party is entitled to jury instructions consistent with the law and the party's theory of the case. *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992). But "[e]rrors in jury instructions warrant a new trial only if they destroy the substantial correctness of the charge, cause a miscarriage of justice, or result in substantial prejudice." *Id.* The special verdict form asked the jury, "Did [the bank] falsely represent *or conceal* a past or present

material fact(s) to [the guarantors]?” Likewise, the bank’s counsel told the jury during his closing argument that fraud required a fraudulent misrepresentation *or concealment*. Moreover, the guarantors’ theory of fraudulent concealment was inseparable from their theory that the bank committed affirmative fraud by telling the guarantors that Snyder “pledged” security to the bank even though Snyder could not pledge security in property he did not have title to. Thus, if the jury rejected the guarantors’ theory of affirmative fraud, as it did, it would also have rejected their theory of fraud by concealment. Even if the district court abused its discretion by omitting a specific fraud-by-concealment instruction, the charge was substantially correct, and the error did not cause a miscarriage of justice or prejudice the guarantors.

c. The district court did not abuse its discretion by refusing to instruct the jury on fraud by misrepresentation of future intent and events and equitable subrogation.

The Rossez guarantors also challenge the district court’s refusal to instruct the jury that fraud includes: (1) a false representation of one’s intent to do some act in the future, and (2) a false representation regarding a future event that one knows will not occur. Their argument is unavailing. The first instruction was unnecessary because the guarantors were permitted to argue to the jury that the bank lied about what it planned to do in the future—i.e., that it lied about its present intent. And the second instruction is erroneous because “[a]n allegation of fraud must relate to a past or existing fact and may not be predicated upon future contingencies or predictions.” *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. App. 1993). We discern no abuse of discretion.

Finally, the Rossez guarantors argue that the district court abused its discretion by refusing to instruct the jury that “[u]pon full payment of the debt, a guarantor is entitled to receive all the lender’s rights in the collateral.” We disagree. As explained in section II., the guarantors had no right of equitable subrogation, so the district court properly refused to give this instruction.

Affirmed.