STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1857

Grace Capital, LLC, et al.,
Respondents,

Michael Cassaza, et al.,
Plaintiffs,

vs.

Wayne W. Mills, et al.,
Defendants,

Henry Fong,
Appellant.

Filed August 31, 2010
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-08-4767

Charles J. Schoenwetter, William Barron, Bowman & Brooke LLP, Minneapolis, Minnesota (for respondents)

Tiffany A. Blofield, Joseph M. Windler, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art VI, § 10.

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

HUDSON, Judge

On appeal from summary judgment in this action for breach of a personal guaranty on a promissory note, appellant challenges the district court's determination that his fraudulent-inducement defense failed as a matter of law. We affirm summary judgment as it relates to the majority of the statements allegedly made by respondents. But we reverse the district court's exclusion of affidavits that relate to the alleged "Transporta" statements and appellant's fraudulent-nondisclosure theory. Accordingly, we remand those matters for further proceedings.

FACTS

Appellant Henry Fong, an independent financial consultant and director of defendant FastFunds Financial Corporation, personally guaranteed the payment of several promissory notes, which were issued by FastFunds in favor of respondents. Respondent Grace Capital, LLC, took an assignment of one of the notes.[1] FastFunds is a holding company; Grace Capital is an investment company. The notes, which were issued in the aggregate sum of $1.7 million, each provided for interest rates of 15%, or 20% in the event of default, and indicated that they would mature one year from their March 1, 2007 date of issue.

Appellant was acquainted with some of the principals of Grace through previous business dealings. Appellant had initially worked with plaintiff Michael Cassaza in 1990

[1] The only respondents currently represented by counsel in this appeal are Barry Benowitz, Locksley Shae Trust, Verne Schmitz, Monica Schmitz, Gretchen Strandell, and Robert Strandell.

in bringing a sporting-goods company out of bankruptcy. He also worked with Cassaza and respondent Ijaz Anwar in 2001, in connection with Chex Services, a company providing check-cashing services at casinos. Chex Services was an operating subsidiary of FastFunds.

In 2006, FastFunds sold Chex Services and sought additional financing for other business opportunities. Grace was formed as an investment firm, and Grace's partners, including Cassaza and Anwar, offered additional financing for FastFunds through Grace. FastFunds borrowed funds from respondents by way of the promissory notes.

Beginning in April 2006, Grace also provided financing for the accounts receivable of Transporta, LLC, a purported trucking company owned by Cassaza. To finance the amounts lent to Transporta, the Grace partners obtained investments and loans from various individuals. Transporta, which was located in Colorado, allegedly provided trucking services to construction projects. But the record contains evidence that Transporta was instead a sham company, run by Cassaza using a "Ponzi" scheme, in which Cassaza used funds obtained from recent investors to pay previous investors and to pay his personal expenses.

Appellant has alleged that in early 2007, Cassaza and other Grace partners needed to obtain investment capital for Grace and approached FastFunds, offering to lend money to FastFunds, with appellant guaranteeing the notes. FastFunds issued seven promissory notes in favor of respondents in the aggregate sum of $1.7 million. Appellant personally guaranteed these notes, up to a cap of $1 million. Appellant maintains that the Grace partners fraudulently induced him to sign the guaranty, anticipating that appellant would

be forced to pay the guaranty and that Grace would then use those funds to mitigate the financial difficulties caused by Transporta.

In November 2007, Grace, acting on behalf of respondents, declared FastFunds to be in default on the notes and accelerated the notes. FastFunds did not pay the amounts owed; appellant did not pay on his guaranty; and respondents filed this action to recover the amounts owed. Appellant asserted the affirmative defense that the Grace partners had fraudulently induced him to guarantee the notes by making certain representations as to Grace's financial condition and the availability of continued financing for FastFunds.

Respondents moved for summary judgment. In opposing summary judgment, appellant based his fraudulent-inducement claim on the following alleged statements:

> (1) Not to worry, we will take care of you;
> (2) . . . [FastFunds] was a small part of the big picture;
> (3) Grace had lots of new clients and lots of new deals;
> (4) Grace had new financing sources;
> (5) Financing would remain available for a time sufficient to complete [FastFunds'] business prospects;
> (6) Financing would remain available for the planned restructuring of [FastFunds] . . .;
> (7) The refinanced note at issue and the guaranties would be renewed annually into the future as [the note] had been in the past . . .;
> (8) Grace was growing its funds and it had all the money it needed in place to do many other deals; and
> (9) [The Grace partners] are confident in Transporta and its growth.

On June 4, 2009, after the hearing but before the district court issued its summary-judgment order, appellant's attorney filed two affidavits, taken from the record of a different district court matter, in which a plaintiff bank was seeking relief against Grace

and other defendants.[2] These affidavits, taken together, alleged that (1) the bank had issued to Grace a $2.5 million line of credit, based on Grace's relationship with Transporta, which was guaranteed by Grace partners; (2) Grace had defaulted on the line of credit and the guarantors had not paid according to their guaranties; (3) Grace had experienced payment difficulties with Transporta; and (4) based on the reports of a private investigator hired by Grace and a county attorney in Colorado, the documents and agreements Transporta submitted to Grace were fabricated and the matter had been referred for federal investigation.

The district court issued its order granting summary judgment to respondents. The court concluded that the alleged misrepresentations to appellant amounted only to general statements, which were not actionable in fraud; that insofar as they related to expectations of future acts, they were not actionable; and that any reliance on representations that were directly contrary to the terms of the notes was unreasonable as a matter of law. The district court concluded, however, that respondents' damages against appellant and the other defendants were capped by the express amounts of the guaranties, which in appellant's case was $1 million. The district court also stated that because additional facts submitted by appellant "which relate to other business dealings of Grace and its principals [ ] have no legal relevance to the court's grant of summary judgment . . . under the notes and guaranties," the court declined to consider those facts in granting summary

[2] *Bridgewater Bank v. Grace Capital, LLC, et al.*, No. 27-CV-09-4773 (Minn. Dist. Ct. Mar. 12, 2009 and May 14, 2009).

judgment. The district court entered judgments in favor of respondents on the notes and the guaranties.

On appeal, respondents moved to strike the June 4 affidavits and the references to those affidavits in appellant's brief, arguing that the affidavits did not form part of the record. This court denied the motion to strike, determining that because the June 4 affidavits were filed in the district court and addressed in the court's summary-judgment order, they formed part of the record.

D E C I S I O N

Summary judgment allows a court to dispose of a claim on the merits if there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); Minn. R. Civ. P. 56. Summary judgment is proper if the pleadings, affidavits, answers to interrogatories, admissions on file, and depositions "show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. If a motion for summary judgment is supported, the nonmoving party "must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

In reviewing the district court's grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the nonmoving party must present evidence that is "sufficiently probative with respect to an

essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH*, 566 N.W.2d at 71. We "review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

Appellant argues that the district court erred by granting respondents' motion for summary judgment on his affirmative defense of fraudulent misrepresentation. To prevail on an affirmative defense of fraudulent misrepresentation, a party must prove that

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Group, L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (citation omitted); *see also MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008) (stating that a party asserting an affirmative defense has the burden of proving the defense's elements).

The district court considered the representations alleged in appellant's affidavit and concluded that (1) the statements were merely general statements, which could not form a basis for a defense of fraudulent inducement; (2) to the extent that the statements related to future acts, they were not actionable in fraud; and (3) appellant's reliance on statements that were directly contrary to the terms of the notes was unreasonable as a matter of law.

Even at the summary judgment stage, a party must produce particular evidence of all material facts for which it bears the burden of proof at trial. *Goward v. City of Minneapolis*, 456 N.W.2d 460, 464 (Minn. App. 1990). A failure to be particular in the production of evidence "justifies summary judgment against the party alleging it." *Berke v. Resolution Trust Co.*, 483 N.W.2d 712, 717 n.3 (Minn. App. 1992), *review denied* (Minn. May 21, 1992).

"[N]either opinions nor statements that are general and indefinite are representations of fact" that will support a claim for fraudulent misrepresentation. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000) (quotation omitted). Here, appellant alleged that respondents made several general representations relating to Grace's financial condition: that FastFunds was "a small part of the big picture"; that Grace had "lots of new clients and new deals"; and that Grace "was growing its funds and had all the money it needed in place to do many other deals." These statements, however, do not rise to the level of specificity required to support appellant's fraud claim. They do not identify any specific new clients, deals, or financing arrangements that could reasonably be expected to induce appellant to execute a guaranty of a substantial sum of money. Further, appellant did not allege dates when these statements occurred or identify with particularity the respondents who allegedly made these statements.

Appellant also alleged that the Grace partners misrepresented to him that they would "take care of [him]" in the future. A representation as to future events may support an action for fraud if "it [is] made affirmatively to appear that the promisor had

no intention to perform at the time the promise was made." *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). But a representation that appellant would be "take[n] care of" in the future is not specific enough to support a cause of action for fraud.

Appellant also asserts that he reasonably relied on respondents' specific statements that "financing would remain available . . ." and that "the refinanced note at issue and the guaranties would be renewed annually into the future." *See Hoyt Props., Inc.*, 736 N.W.2d at 318 (stating that in order to show fraud, a party must demonstrate reasonable reliance on the alleged misrepresentations). A plaintiff alleging fraud cannot, however, prove reasonable reliance on alleged oral representations if those representations were "directly contrary to the terms of" a written agreement. *See Dahmes v. Indus. Credit Co.*, 261 Minn. 26, 35, 110 N.W.2d 484, 490 (1961); *see also Johnson Bldg. Co. v. River Bluff Dev.*, 374 N.W.2d 187, 194 (Minn. App. 1985) (stating that "reliance on an oral representation [is] unjustifiable as a matter of law . . . if the written contract provision explicitly state[s] a fact completely contradictory to the claimed misrepresentation"), *review denied* (Minn. Nov. 18, 1985).

We agree with the district court that the alleged statements that FastFunds would receive ongoing financing, and that the notes and guaranties would be renewed on an annual basis, were directly contradictory to the terms of the notes. The notes all stated that they would mature after one year, at which time the entire balance of each note "shall be due and payable in full." Appellant's guaranty states that he guaranteed "the performance and full and prompt payment when due, whether at maturity or earlier by

reason of acceleration or otherwise, of the obligations of [FastFunds] under the Restructured Notes." Thus, any representation that the notes would be renewed is contrary to their express terms, and appellant has failed to show a material factual issue with respect to his reliance on any such promise. *See, e.g.*, *Dahmes*, 261 Minn. at 34–35, 110 N.W.2d at 489–90 (concluding that plaintiffs' claim of fraud in inducing guaranty of corporate promissory note, based on promise of future financing, failed as matter of law when note provided for payment on demand).

Nonetheless, our conclusion that the district court did not err by granting summary judgment as to certain misrepresentations does not extend to all of the alleged misrepresentations. The June 4 affidavits contain specific allegations relating to Grace's relationship with Transporta, Transporta's lack of creditworthiness, and a criminal investigation of Transporta. The district court determined that this evidence was not relevant to appellant's fraudulent-inducement defense and declined to consider it. *See* Minn. R. Evid. 401 (stating that relevant evidence has a tendency to make more or less probable, facts of consequence to determination of action). But the affidavits contain information on Grace's relationship with Transporta and Transporta's financial problems. Thus, the June 4 affidavits are relevant to proving the truth or falsity of appellant's specific asserted misrepresentations that Grace had confidence in Transporta and its growth and that Grace had "new financing sources," to the extent that this statement may relate to Transporta. We therefore conclude that the district court abused its discretion by excluding the June 4 affidavits as irrelevant. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 420 (Minn. App. 2003) (stating abuse-of-discretion standard for

evidentiary issues). Nonetheless, the district court remains in the best position to evaluate the affidavits and their possible effect on appellant's claim. For this reason, we remand to the district court to consider whether the June 4 affidavits—and specifically the statements concerning the viability of Transporta—present material factual issues that would preclude summary judgment as to appellant's fraudulent-inducement claim.

We also note appellant's additional argument that respondents breached a duty to disclose information material to appellant's execution of the proposed guaranty.[3] Although one party to a business transaction generally has no duty to disclose material facts to the other party, such a duty may arise if the parties stand in a fiduciary relationship or one party "has special knowledge of material facts to which the other party does not have access." *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 366, 244 N.W.2d 648, 650 (1976). If a party conceals these facts, "knowing that the other party acts on the presumption that no such fact[s] exist[ ]" nondisclosure may constitute fraud. *Id*. at 365, 244 N.W.2d at 650 (quotation omitted); *see also Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972) (stating that a party who speaks "must say enough to prevent his words from misleading the other party").

Appellant's allegations, coupled with the information in the June 4 affidavits, raised a colorable argument that the Grace partners owed appellant a duty of due care to disclose material facts relating to Transporta, and a corresponding duty to say enough to

[3] Although respondents maintain that this argument was not timely raised, appellant's responsive motion sufficiently raised the issue of fraudulent nondisclosure.

prevent misleading appellant in his decision to guarantee the notes. We therefore direct the district court on remand to reconsider this issue as well.[4]

We briefly consider respondents' argument that summary judgment may be sustained on alternate grounds. *See Krogness v. Best Buy Co.*, 524 N.W.2d 282, 287 (Minn. App. 1994) (stating that appellate court "will affirm a summary judgment if it can be sustained on any grounds"), *review denied* (Minn. Jan. 25, 1995). Respondents assert that the application of Minnesota's credit-agreement statute of frauds precludes the portion of appellant's fraud defense relating to a promise of future funding for FastFunds. *See* Minn. Stat. § 513.33, subd. 2 (2008) (stating that credit agreement must be in writing). But because we have determined that any promise of future funding for FastFunds is contrary to the terms of the note, we need not consider that argument.

Respondents also argue that, since appellant guaranteed his obligation to pay the principal debt on FastFunds' default, and the guaranty included a waiver of all defenses, appellant waived a defense of fraud in the inducement. But "[a] party who makes fraudulent representations to induce another to make a contract cannot escape liability for his fraud by incorporating a disclaimer of fraud in the contract." *Nat'l Equip. Corp. v. Volden*, 190 Minn. 596, 600, 252 N.W. 444, 445 (1934); *see also Ganley Bros., Inc. v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 377, 212 N.W. 602, 603 (1927) (stating that "[t]he law should not and does not permit a covenant of immunity to be drawn that will

[4] Because the district court did not address respondents' assertion that appellant's interrogatory responses were inadmissible on hearsay or other grounds, we decline to reach that issue. *See Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 47 (Minn. 1984) (stating that appellate courts do not render advisory opinions).

protect a person against his own fraud"). We conclude that by signing the guaranty, appellant did not waive a defense of fraudulent inducement, and we decline to sustain summary judgment on that ground.

In sum, we conclude that the district court properly granted summary judgment as to the majority of the statements alleged to support appellant's fraudulent-inducement defense. But we reverse the district court's exclusion of affidavits that contain allegations relating to Transporta and remand for further proceedings to determine whether those allegations, taken in conjunction with appellant's asserted Transporta-related statements, raise a genuine issue of material fact so as to preclude summary judgment on appellant's fraud claim. We also direct the district court on remand to consider the applicability of appellant's theory of fraudulent nondisclosure as it relates to the Transporta facts presented at summary judgment.

Affirmed in part, reversed in part, and remanded.