COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3121 **Cir. Ct. No. 2010CV818**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOHNSON BANK,

PLAINTIFF-RESPONDENT,

V.

DENNIS B. TIZIANI,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

CARL F. STATZ & SONS, INC. AND TIZIANI GOLF CAR CORPORATION,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Reversed and cause remanded.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. This is a dispute over the validity of a personal guaranty for multiple commercial loans. The case was resolved on summary judgment. Dennis B. Tiziani appeals the circuit court's grant of summary judgment to Johnson Bank, arguing that there are genuine issues of material fact as to whether he signed the guaranty in justified reliance on a fraudulent or material misrepresentation made by a bank representative. We agree with Tiziani, and conclude that the summary judgment record reflects genuine issues of material fact on the following questions: whether the bank representative's statement to Tiziani constituted a misrepresentation; if so, whether the misrepresentation was fraudulent or material, and; if so, whether Tiziani's reliance on the fraudulent or material misrepresentation was justifiable. Accordingly, we reverse and remand.

BACKGROUND

¶2 We review the summary judgment record in the light most favorable to the non-moving party (here, Tiziani). Therefore, for purposes of this appeal we assume all facts in Tiziani's favor in recounting relevant, admissible evidence reflected in the summary judgment record.

¶3 During the relevant time period, Tiziani and Carl F. Statz & Sons, Inc., together owned Tiziani Golf Car Corporation. Statz & Sons obtained loans for itself and the corporation from Johnson Bank.

¶4 In the process of renewing these loans, Joseph Braunger, a senior vice president of the bank, asked to meet with Tiziani for the purpose of encouraging Tiziani to sign a personal guaranty on the loans. Braunger was a personal friend of Tiziani's. During the meeting, Tiziani expressed concern about

his potential financial liability under the guaranty. This led to the statement that is the focus of this appeal: Braunger explained to Tiziani that, given the large amount of collateral pledged to the bank as security for the loans, the chances of the bank ever enforcing the personal guaranty against him "were slim and none."[1] Based on this representation, Tiziani signed the guaranty without reading it.

¶5 In fact, the guaranty expressly provides that it is one of payment and not collection, meaning that it explicitly gives the bank the option of enforcing the guaranty against Tiziani even if the bank does not first, or ever, pursue any or all assets of pledged collateral.[2]

¶6 Sometime after Tiziani signed the unlimited personal guaranty he now challenges, Braunger offered Tiziani a substitute personal guaranty, which would limit Tiziani's liability to two million dollars. Tiziani declined to sign the new proposed guaranty.

¶7 The borrowers defaulted on the loans at issue approximately two-and-one-half years after Tiziani signed the unlimited personal guaranty. When Tiziani failed to repay the bank as guarantor in response to the bank's demand, the bank brought this money judgment action on the guaranty against Tiziani, without

[1] The cliché about extremely low odds ordinarily places the chances "somewhere *between* slim and none." However, the testimony in this case was that Braunger characterized the chances as *being* "slim and none." The two phrases appear to convey the same meaning; our purpose here is simply to explain what may appear to be a missing word in the key phrase of the quoted testimony.

[2] The guaranty states that the "guarantor absolutely and unconditionally guarantees" payment and that the guaranty is one of "payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the indebtedness or against any collateral securing the indebtedness …."

first seeking to satisfy outstanding debt by collecting only on collateral assets. In response to the bank's motion for summary judgment, Tiziani asserted the following as an affirmative defense: the guaranty was void, because Braunger's statement regarding the guaranty induced Tiziani to sign it, and the statement constituted a fraudulent or material misrepresentation on which Tiziani justifiably relied.

¶8 There was no dispute in the proceedings before the circuit court about the existence of the guaranty or about Tiziani's default. The focus instead was on Tiziani's asserted affirmative defense based on the purported misrepresentation. The circuit court concluded that, as a matter of law based on the summary judgment record, Braunger's statement was not a misrepresentation, and even if it was a misrepresentation, Tiziani's asserted reliance on the alleged statement was not justified. Accordingly, the court granted the bank's motion. For the following reasons, we reverse that decision and remand for further proceedings.

STANDARD OF REVIEW

¶9 We review a grant of summary judgment de novo, applying the same methods as the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). A party is entitled to summary judgment under WIS. STAT. § 802.08(2) (2009-10) "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991) (citation omitted). There is a genuine issue of

fact "if a reasonable jury could find for the nonmoving party." ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178.

DISCUSSION

¶10 Tiziani contends that the circuit court erred in concluding that there are no genuine issues of material fact to support his affirmative defense of fraudulent or material misrepresentation, specifically on the questions of whether: (1) Braunger's statement constituted a misrepresentation, (2) the alleged misrepresentation was material or fraudulent, and (3) Tiziani's reliance on the misrepresentation was justified.

¶11 Wisconsin follows the position taken in the RESTATEMENT (SECOND) OF CONTRACTS in determining whether a misrepresentation theory of defense can void a contract. *See* ***First Nat'l Bank & Trust Co. v. Notte***, 97 Wis. 2d 207, 222-23, 293 N.W.2d 530 (1980) (citing RESTATEMENT (SECOND) OF CONTRACTS § 306(1) (Tent. Draft No. 11, 1976)).[3] If one party to a contract induces the other party to enter into the contract by means of fraudulent or material misrepresentation and the second party justifiably relies on the misrepresentation, the contract is voidable. ***Notte***, 97 Wis. 2d at 222. Therefore, to void the contract and avoid liability under the guaranty, Tiziani would need to prove at trial that: (1) Braunger's statement constituted a misrepresentation; (2) the misrepresentation was fraudulent or material; and (3) Tiziani's reliance on

[3] Although the court in ***First National Bank & Trust Co. v. Notte***, 97 Wis. 2d 207, 222-23, 293 N.W.2d 530 (1980), cited what was then a tentative draft of the RESTATEMENT (SECOND) OF CONTRACTS, the final version of the RESTATEMENT (SECOND) OF CONTRACTS, which is the most recent version, maintained the same approach as the tentative draft cited in ***Notte***. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

the misrepresentation was justified. For purposes of summary judgment, Tiziani's affirmative defense should survive summary judgment if Tiziani demonstrated a genuine issue of material fact on these issues. We now examine each of the issues in turn.

I. Misrepresentation

¶12 We pause first to address the nature of the statement at issue. Tiziani testified in a deposition that Braunger told him that, given the large amount of collateral pledged as security, the chances that the bank would ever enforce the personal guaranty against Tiziani were "slim and none." The parties do not appear to dispute that, considered in proper context, this statement could be reasonably understood to consist of an implied statement, an opinion, and a conclusion that follows from the implied statement and opinion:

- Implied statement: In the event of default, the bank will seek to satisfy outstanding debt on the loans, first and exclusively, by pursing collateral assets, and not seek to collect from Tiziani as guarantor, unless that is necessary because the pledged collateral is insufficient to cover the balance due;

- Opinion: It is highly likely that the pledged assets will be sufficient to cover the debt, and therefore;

- Conclusion: Even in the event of default, regardless of the particular odds of a default occurring, it is highly unlikely that the bank will demand any money whatsoever from Tiziani as the guarantor.

¶13 In other words, there is no reasonable dispute that the formulation in Braunger's alleged statement to Tiziani, "given the large amount of collateral,"

would allow Tiziani to contend at trial that, in saying that Tiziani had little to worry about, Braunger was referring to the idea that the bank would not pursue Tiziani first and exclusively. Braunger was not referring to other contingencies—such as the small chance of a default in the first place, or the small chance that the actual value of the collateral assets would decline to the point that Tiziani's risk would become substantial because he was next in line behind the now less valuable collateral. That is, under this interpretation of the alleged statement, Braunger assured Tiziani that in signing the guaranty Tiziani would assume virtually no risk in significant part *for the reason that* the bank would not turn to him unless collection on the collateral first proved to be unsuccessful in satisfying all loan repayment costs.

¶14 Turning now to the arguments of the parties, Tiziani contends that there are genuine issues of material fact regarding whether the *implied statement* described above, that the bank would first seek to satisfy the debt from collateral assets only, amounted to a misrepresentation. The parties agree that the *opinion* described above, that the collateral assets would be sufficient to cover outstanding debt, cannot be characterized as a misrepresentation because it was merely an opinion.

¶15 Addressing the question of whether the implied statement was a misrepresentation, Tiziani acknowledges the general rule that promises or predictions of future events are not ordinarily categorized as misrepresentations. However, he contends that Braunger's implied statement constituted a promise or prediction of future events that fits within one of two exceptions to the general rule. Under this exception, a statement that implies the existence of facts from which the promised or predicted consequences will follow is a misrepresentation as to those implied facts. As discussed below, we conclude that the implied

statement fits within that exception, and therefore we do not address the other exception that Tiziani raises.

¶16 We begin our analysis with the general rule that a misrepresentation involves facts as they exist at the time the statement is made. "A misrepresentation is an assertion that does not accord with facts as they exist." ***Notte***, 97 Wis. 2d at 222. An assertion is generally not a misrepresentation if it is "based on future events or facts not in existence when the representation was made, or on unfulfilled promises." ***Schurmann v. Neau***, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157 (WI App 2000). The assertion "must relate to present or pre-existing events or facts." ***Hartwig v. Bitter***, 29 Wis. 2d 653, 656, 139 N.W.2d 644 (1966).

¶17 However, certain types of statements that include a promise or prediction of future events are categorized as exceptions to this general rule and are considered misrepresentations. As noted above, one such exception is a promise or prediction of future events that implies the existence of facts from which the promised or predicted consequences will follow, and is a misrepresentation as to those implied facts. *See* ***id.*** at 657-58; RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. c. ("a promise or a prediction of future events may by implication involve an assertion that facts exist from which the promised or predicted consequences will follow, which may be a misrepresentation as to those facts"). An example of this exception is the following. Assume that a party makes a prediction that a particular machine will reach a specified level of performance when used. In that case, the other party may infer that certain facts exist, such as details related to the machine's present design and condition, that make the machine capable of reaching the predicted level of performance. RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. c. If

the machine's present design and condition render it incapable of reaching the predicted level of performance, the statement may constitute a misrepresentation, because the implied facts are untrue. *See* ***id.***

¶18 Tiziani contends that Braunger's prediction of his financial risk as guarantor fits within this exception, because it included the implied statement of fact that the bank's practice is, or at least in this case would be, to recover collateral before enforcing a personal guaranty and this fact was a misrepresentation. We agree, and conclude that Tiziani produced evidence of misrepresentation that fits the exception and, if believed by the trier of fact, could reasonably support a finding of the misrepresentation element of Tiziani's affirmative defense.

¶19 A reasonable jury, viewing the evidence and reasonable inferences from that evidence in Tiziani's favor, could find that Braunger's assertion included the following prediction of future events: Tiziani's financial risk was very low due to the fact that exclusive and primary collection efforts against the collateral would render the chances of subsequent collection against Tiziani diminishingly small. There is also a basis to find that this prediction implied the existence of facts from which the predicted event would follow, namely, that the bank's practice was, or at least its practice in this case would be, to recover first and exclusively on the collateral before attempting to enforce the personal guaranty. Finally, the jury could find that the implied facts were not true, based on the bank's actions in seeking to enforce the guaranty before seeking to obtain the value of the collateral.

¶20 In sum, we conclude that there are genuine issues of material fact as to whether Braunger's statement fit within this exception and therefore was a misrepresentation.

II. Fraudulent or Material Misrepresentation

¶21 Having concluded that there is a triable issue as to the existence of a misrepresentation, we turn to the issues of whether the alleged misrepresentation was either fraudulent or material should be submitted to a jury. As mentioned above, a successful affirmative defense requires that Tiziani also prove that the misrepresentation was fraudulent or material; either is sufficient to establish this element of the defense. The circuit court concluded that the alleged misrepresentations were not fraudulent, because Braunger merely offered an opinion, and did not make a false statement with the knowledge that the statement was false. However, the court did not decide whether the alleged misrepresentation could be found to be material. We conclude that the court erred by granting summary judgment on this point, because Tiziani has asserted facts that may be proven or inferred based on admissible evidence that could lead a reasonable jury to conclude that the alleged misrepresentation was either fraudulent or material. We discuss each issue in turn.

A. Fraudulent Misrepresentation

¶22 Tiziani argues that the alleged misrepresentation was fraudulent, because Braunger's prediction implied a statement of fact, and Braunger knew that the implied statement of fact was untrue based on the language of the guaranty. The bank suggests that Braunger's implied statement was "too indefinite and vague" to constitute a fraudulent misrepresentation. We conclude that whether Braunger knew at the time he made the alleged misrepresentation that the

statement was false is a triable fact and therefore summary judgment on the issue was improper.

¶23 A misrepresentation is fraudulent if the maker intends to induce a party to manifest the party's assent, and the maker: (1) knows or believes that the assertion is not in accord with existing facts; (2) does not have confidence in the truth of the assertion as it is stated or implied; or (3) knows that there is not a basis for the assertion as it is stated or implied. ***Notte***, 97 Wis. 2d at 223 n.7. The intent-to-induce part of the definition, found in the first phrase of this formulation, is not at issue; there is no dispute that there is at least a jury issue as to whether Braunger intended through his statement to induce Tiziani to sign the guaranty.

¶24 For the following reasons, we conclude that the jury could reasonably conclude that Braunger knew that the bank was free to, and might well, pursue collection through any combination of collection attempts in any order, despite the fact that he told Tiziani, in effect, that the bank as a general practice or at least in this case would enforce the guaranty only after first collecting any collateral that could be applied against outstanding debt. There is evidence that Braunger was familiar with both the terms of the guaranty and the ordinary practices of the bank. As noted previously, at least during the relevant period Braunger was a senior vice president of the bank. The bank prepared the guaranty. Further, Braunger testified that he had the authority to decide what procedures the bank would follow to collect on a loan, including whether to collect against a guarantor. Therefore, a jury could reasonably find that Braunger knew that what he conveyed to Tiziani was not the only, or even the most likely, option that the bank might use for collection, and therefore he did not have confidence in the truth of his assertion as stated or implied.

B. Material Misrepresentation

¶25 We next determine whether Tiziani has produced evidence to support his allegation that the misrepresentation was material. We do so, even though we have already resolved the fraudulent representation issue in favor of Tiziani, because the jury would be presented with both issues as alternatives at a trial if both apply.

¶26 A misrepresentation that was made without any of the three states of mind defined as fraudulent recited above in ¶23 of this opinion, can nevertheless form the basis for voiding a contract if the misrepresentation is material to the recipient. ***Notte***, 97 Wis. 2d at 222-23. "A misrepresentation is material if it is likely to induce a *reasonable person* to manifest his assent, or if *the maker* knows that it is likely that the recipient *will be induced* to manifest his assent by the misrepresentation." ***Id.*** (emphasis added).

¶27 Tiziani points to two pieces of evidence to support his assertion that Braunger's statements were material to his assent to the contract. First, Tiziani stated in his affidavit that, but for the bank representative's representations, he would not have signed the guaranty. Second, Tiziani contends that the fact that he chose not to sign the proposed substitute personal guaranty limiting his liability—which this time did not come with Braunger's reassurances to Tiziani that it represented virtually no financial risk to him—supports Tiziani's assertion that the reassurances were material to his decision to sign the unlimited guaranty.

¶28 The bank does not address the issue of whether Tiziani produced evidence that creates genuine issues of material fact regarding whether the alleged misrepresentations were material. We therefore deem the argument as conceded and conclude that there are genuine issues of material fact regarding whether the

alleged misrepresentations were material so as to preclude summary judgment. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted."). Therefore, the issue of materiality should also go to the jury.

III. Justified Reliance on Misrepresentation

¶29 Because Tiziani has demonstrated that there are triable issues as to whether Braunger's statement constituted a misrepresentation and whether the alleged misrepresentation was fraudulent or material, we next address Tiziani's allegation there are genuine issues of material fact regarding whether his reliance on Braunger's statement was justified. For the following reasons, we conclude that the record contains admissible evidence sufficient to create a genuine issue of fact regarding justified reliance.

¶30 The circuit court concluded that even if Braunger's statements constituted a material or fraudulent misrepresentation, Tiziani was not justified in relying on them, because by his own account he failed to read the guaranty, which plainly states that it absolutely and unconditionally guarantees full payment. In addition, the court concluded that, even without reading the terms of the guaranty, someone of Tiziani's "experience, education, and intellect" would not be justified in believing that, in signing the guaranty, he would be responsible only for the debt that remained after the bank first attempted to collect on the collateral.

¶31 Tiziani points to three aspects of the summary judgment record that he asserts support a finding of justified reliance: (1) that his personal relationship with Braunger caused him to sign the guaranty, implying a level of trust created by the relationship; (2) that Tiziani's professed lack of experience with the type of guaranty at issue left him vulnerable to misrepresentation; and (3) that the terms of

the guaranty did not clearly contradict Braunger's statements, and so it did not matter whether Tiziani read the guaranty. We address each of these three points below and conclude that the evidence is sufficient to create a jury issue as to whether Tiziani could have been justified in relying on the alleged misrepresentation without reading the guaranty.

¶32 As mentioned above, the general rule is that a contract is voidable by a party based on the party's claim that its assent to the contract was induced by a fraudulent or material misrepresentation so long as the party was justified in relying on the misrepresentation. ***Notte***, 97 Wis. 2d at 222. "[A party's] fault in failing to discover the facts before entering the contract does not make his reliance unjustified unless [its] fault amounts to a failure to act in good faith or to conform [its] conduct to reasonable standards of fair dealing." ***Id.*** at 224.

¶33 A party is not barred, as a matter of law, from claiming that a misrepresentation induced the party to participate in the formation of a contract when the party fails to read the contract. ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 733, 456 N.W.2d 585 (1990). Instead, in deciding whether an individual acted reasonably in relying on a misrepresentation, the trier of fact is to consider all relevant facts and the overall circumstances, including the "intelligence and experience of the misled individual and the relationship between the parties, to determine whether the individual acted reasonably when relying on the misrepresentation." ***Id.*** at 734.

¶34 The bank essentially asks this court to prejudge how a reasonable jury might assess the impact of evidence bearing on the nature of Tiziani's relationship with Braunger and on Tiziani's asserted lack of experience with this type of personal guaranty. That is not our function, because there is more than one

way to reasonably view Tiziani's factual assertions on these two issues. Tiziani is entitled to have a jury determine the justified reliance issue, after being presented with all of the relevant evidence and supplied with the correct legal standards.

¶35 The parties dispute the significance of the relationship between Tiziani and Braunger as well as Tiziani's familiarity with the type of guaranty at issue here. To determine whether these factors outweigh such countervailing considerations as Tiziani's sophistication in business and banking, a jury would need to consider the extent and nature of the Tiziani-Braunger relationship, as well as Tiziani's prior experience with similar financial documents. Facts bearing on the parties' prior commercial dealings and social interactions would be relevant to a jury's determination regarding the relationship's influence on Tiziani's decision to sign the guaranty. Similarly, it is the province of the jury to evaluate whether Tiziani's purported lack of familiarity with this type of guaranty caused him to rely more heavily on Braunger's experience and expertise. *See* ***id.*** ("all the circumstances must be considered, including the … experience of the misled individual ….").

¶36 Tiziani's argument that the guaranty's terms did not clearly contradict Braunger's statement may be true in the sense that one option open to the bank under the guaranty was to take the very approach that Braunger is alleged to have implied that the bank would take: collect first and exclusively against assets, cushioning Tiziani from liability unless absolutely necessary. However, the question of whether there is a conflict between Tiziani's claim of justifiable reliance and the terms of the contract is beside the point, because he has a factual basis to assert that he signed the contract based on a misrepresentation. That is, even clear contract terms that are contrary to the position taken by the party asserting justifiable reliance do not necessarily preclude justifiable reliance as a

matter of law when that party submits evidence to support a finding that the party did not read the contract because the other party made a misrepresentation, which is the case here. To conclude otherwise would be inconsistent with ***Esser***. There, as here, a guarantor failed to read the guaranty and asserted misrepresentation of its terms as a defense, yet the court concluded that justifiable reliance was a jury question. *See* ***id.*** at 728, 732-34. The ***Esser*** court did not inquire into whether the pertinent terms in the contract were unclear on their face or when compared to the representations at issue. For these reasons, the fact that Tiziani did not read the contract does not foreclose his justifiable reliance claim as a matter of law.

¶37 In sum, Tiziani has presented genuine issues of material fact regarding his relationship with Braunger and his lack of experience with this particular type of personal guaranty that, if believed by a jury considering all relevant evidence reflected in the summary judgment record, could result in a finding that Tiziani's reliance on Braunger's statements in signing the guaranty without reading it was justified.

CONCLUSION

¶38 For these reasons, the circuit court's decision to grant summary judgment is reversed and the case is remanded for trial.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.