SIXTH DIVISION
September 15, 2017

No. 1-16-2849
2017 IL App (1st) 162849-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, successor by merger to LASALLE BANK NATIONAL ASSOCIATION, a national banking association,	)	Appeal from the Circuit Court of Cook County.
Plaintiff/Counter-Defendant-Appellee,	)	
v.	)	
	)	No. 15 L 009728
ALL ABOUT DRAPES, INC., an Illinois Corporation, JANET M. LaDOUCEUR, JEANNE LaDOUCEUR and RICHARD LaDOUCEUR,	)	Honorable Patrick J. Sherlock, Judge Presiding.
Defendants/Counter-Plaintiffs-Appellants.	)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court erred in granting summary judgment in favor of Bank of America on its breach of contract claim where a triable issue remains as to whether defendants were fraudulently induced into entering the contract, and as to whether they were fraudulently induced into entering the release.

¶ 2 This is the second time this case is before this court. On June 8, 2015, in the case of *Bank of America v. All About Drapes, et al*., 2015 IL App (1st) 142772-U, we reversed the trial court's grant of summary judgment in favor of plaintiff Bank of America (BOA), finding that there was a triable issue of material fact as to whether BOA made fraudulent misrepresentations to Richard LaDouceur and All About the Drapes (Drapes) (collectively, defendants) regarding the maturity

date of a line of credit defendants had with BOA, thereby inducing LaDouceur to sign a second loan agreement with BOA. On remand, the trial court again entered summary judgment in favor of BOA, based on a release the parties entered into after signing the second line of credit. Defendants now appeal.

¶ 3 BACKGROUND

¶ 4 The underlying facts of this case are explained in detail in our June 8, 2015, order, *All About Drapes*, 2015 IL App (1st) 14772-U, so we will only discuss those facts relevant to this appeal.

¶ 5 On June 23, 2004, LaSalle Bank and Drapes executed an application and agreement for a commercial revolving line of credit for up to $50,000 (first LOC). LaDouceur, along with his former wife, Jeanne, and his sister, Janet, personally guaranteed the obligation. The first LOC required Drapes to make a monthly payment comprised of two percent of the outstanding balance plus accrued interest with a minimum monthly payment of $250. LaSalle could terminate the line of credit "at any time upon thirty (30) days prior written notice ***." If LaSalle terminated the first LOC, Drapes was to repay the outstanding balance according to the terms of the agreement, until paid in full, and no additional advances would be permitted. Drapes borrowed money for several years and made timely monthly payments. At some point during this arrangement, BOA merged with LaSalle Bank.

¶ 6 In the spring or summer of 2009, BOA told defendants that the first LOC had a maturity date of August 5, 2009. LaDouceur spoke to several employees of BOA, who all told him that the first LOC had a maturity date. While defendants were contesting the existence of a maturity date, and requesting documented proof that it existed, BOA told defendants that they had to

execute a new loan document by August 5, 2009, or BOA would sue defendants to collect the balance due under the first LOC.

¶ 7 On July 23, 2009, Drapes and BOA entered into an agreement for a second line of credit for $50,000 (second LOC), which contained a maturity date of August 5, 2010, at which time the full outstanding balance would have to be paid. As with the first LOC, LaDouceur executed a personal guarantee. At this time, defendants were still demanding to see documents showing that the first LOC had a maturity date.

¶ 8 On October 21, 2009, BOA's attorney stated in a letter that BOA was "retrieving the loan documentation" and that he was "confident" that the documentation would show that the first LOC had annual maturity dates.

¶ 9 On October 26, 2009, BOA issued a letter with a copy of the first LOC, stating that it was a "demand instrument, which was called to be due effective on August 5, 2009." BOA stated that it was obvious the parties were in disagreement over the meaning of the documents, and that "[i]f we are unable to come to terms regarding the repayment of the debt, I will proceed to make demand on the borrowers and guarantors, and if necessary, have a judicial determination of this matter."

¶ 10 On November 5, 2009, BOA wrote another letter enclosing a copy of the Business Express Line of Credit Agreement that was in effect at the time defendants signed the original LOC. BOA stated that "[i]t is the bank's position that the original loan agreement was terminated effective August 5, 2009, and that the 2009 agreement did not become effective due to the lack of signatures from the guarantors." The letter further stated, "[w]e have offered to give your clients a six month extension to pay interest only without any fees or expenses, provided he repay the principal at the end of those six months. The liability for forbearance fees and other

costs and expenses would arise only if the loan is not repaid at that time. He has rejected this proposal and made an unacceptable counterproposal."

¶ 11 In two different letters to BOA, both drafted in November 2009, LaDouceur noted that the "missing document that was promised to me almost six months ago has finally showed up and there is no expiration date," referring to the copy of the first LOC that he had signed, which showed no maturity date. He also stated, "after five months, BOA finally came up with the missing document that was supposed to prove this LOC had an expiration date and it clearly shows it did ***not*** have the represented expiration date."

¶ 12 On December 1, 2009, LaDouceur sent a letter to BOA's attorney stating that he was "pleased that BOA agreed to the terms outlined in our phone conversation of 11/23/09, and as I said then, I agree." According to LaDouceur's affidavit, BOA continued to claim the first LOC had a maturity date and that the BOA had documentation to prove it. On December 5, 2009, defendants and BOA executed a documented titled "Loan Modification, Settlement and Release Agreement." In that agreement, BOA agreed to release LaDouceur's former wife and sister from their personal guarantees under the two lines of credit. Drapes reaffirmed it would pay the complete balance due by August 5, 2010, and LaDouceur reaffirmed his personal guarantee. The modification, settlement, and release agreement also contained the following provision:

> "5. Release. Borrower hereby releases, acquits, and forever discharges Lender, each and every past and present subsidiary, affiliate, stockholder, officer, director, agent, servant, employee, representative, and attorney of Lender from any and all claims, causes of action, suits, debts, liens, obligations, liabilities, demands, losses, costs and expenses (including attorneys' fees) of any kind, character, or nature whatsoever, known or unknown, fixed or contingent, which

> Borrower may have or claim to have now or which may hereafter arise out of or be connected with any act of commission or omission of Lender existing or occurring prior to the date of this Agreement or any instrument executed prior to the date of this Agreement including, without limitation, any claims, liabilities or obligations arising with respect to the indebtedness evidenced by any of the Loan Documents. The provisions of this Section 5 shall be binding upon Borrower, its successors and assigns, and shall inure to the benefit of Lender, and its respective successors and assigns."

¶ 13 Thereafter, defendants failed to make their monthly payments in February and March of 2010. By a letter dated March 16, 2010, BOA demanded the entire balance. When defendants did not pay, BOA commenced the instant action against them.

¶ 14 Count I of BOA's amended complaint was against Drapes for breach of contract, and Count II was against LaDouceur on his personal guarantees of the loan documents. Defendants raised three affirmative defenses to the amended complaint: fraudulent misrepresentation, economic duress, and lack of consideration. They also filed counterclaims alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 (West 2012)), fraudulent misrepresentation, breach of contract, and intentional infliction of emotional distress.

¶ 15 On December 14, 2010, the trial court dismissed the affirmative defenses without prejudice. It also dismissed the counterclaims for consumer fraud, breach of contract, and intentional infliction of emotional distress. It declined to dismiss the counterclaim for fraudulent misrepresentation, however, finding that defendants had pled sufficient facts to establish the elements of fraudulent misrepresentation where defendants "alleged facts that demonstrate

misrepresentations were made, when they were made, who made the misrepresentations and to whom." The trial court found that defendants had a right to rely on the representations of BOA.

¶ 16 The parties then cross-moved for partial summary judgment. On May 8, 2014, the trial court granted BOA's motion for summary judgment on Count I, the issue of liability against Drapes. The trial court noted that as previously discussed in its order addressing BOA's motion to dismiss defendants' counterclaims, Drapes signed a loan modification, settlement, and release agreement which "unambiguously released 'all [of its] claims…. of any kind, character or nature whatsoever[,]' which necessarily includes [Drapes'] affirmative defenses of fraud and mutual mistake that [Drapes] asserts here." Thus, the trial court granted BOA's motion for partial summary judgment on Count I of the amended complaint.

¶ 17 The trial court then addressed defendants' motion for summary judgment as to the remaining count of the amended complaint, Count II. The trial court noted that LaDouceur was arguing that he was entitled to a finding that the guaranties he executed on the loan documents were void because of fraud. He did not dispute the fact that he signed the documents, but argued that BOA's alleged misrepresentation regarding the expiration date of the first LOC induced him into executing the second LOC. The trial court noted that LaDouceur admitted under oath that he did not believe the bank's representation that the original LOC had a maturity date, and therefore he failed to establish the element of fraud requiring him to reasonably believe the misrepresentation to be true.

¶ 18 BOA then filed a motion for summary judgment seeking an award of damages on Count I against Drapes and a finding of liability and an award of damages on Count II against LaDouceur. The trial court granted the motion.

¶ 19 On appeal, defendants argued in part that the trial court's grant of summary judgment in favor of BOA was in error because there was a question of fact as to whether they were fraudulently induced to sign the second LOC, which is an affirmative defense to breach of contract. We agreed with defendants, finding that even though LaDouceur knew that the original LOC he signed did not have a maturity date, there was a question as to whether LaDouceur reasonably believed BOA's assertions that it had documentation indicating a maturity date, especially in light of the fact that several BOA employees told him that such documentation existed. Accordingly, we reversed the trial court's grant of summary judgment in favor of BOA on Count I of the first amended complaint, and remanded to the trial court for further proceedings. We noted that "if fraudulent misrepresentation occurred, then the second loan agreement (which included the provision allowing for attorney fees to be recovered by the prevailing party) would be void, as well as the loan modification agreement releasing BOA of all claims against it." *All About Drapes*, 2015 IL App (1st) 142772-U, ¶ 51.

¶ 20 Upon remand, defendants filed a motion for summary judgment on all counts of BOA's first amended complaint "pursuant to the mandate of the Illinois Appellate Court, First District." Defendants claimed that this court's mandate reversing the trial court's denial of defendants' motion for summary judgment thereby "grant[ed] Defendants' motion for summary judgment."

¶ 21 On November 5, 2015, BOA responded to defendants' motion for summary judgment, arguing that this court did not make a determination that there was fraudulent inducement, but rather remanded the case for that determination.

¶ 22 The trial court entered an order on December 2, 2015, denying defendants' motion for summary judgment, stating in pertinent part that this court held there was a triable issue of fact as

to whether defendants' agreement to the second loan documents was fraudulently induced, and that "further proceedings before this Court will be conducted accordingly."

¶ 23 Also upon remand, the trial court again dismissed all of defendants' affirmative defenses to BOA's first amended complaint, except for the affirmative defense of fraudulent misrepresentation, based on this court's ruling.

¶ 24 Defendants filed second amended counterclaims, which contained nine counts, including consumer fraud, fraudulent misrepresentation, breach of contract, RICO violations, and class action claims of consumer fraud and breach of contract.

¶ 25 BOA moved to dismiss all counts of the counterclaim under section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), by reason of the loan modification and release agreement. Defendants responded that the release did not operate to bar their claims because it was also fraudulently induced. The trial court granted BOA's motion to dismiss the counterclaims, without prejudice, based in part on defendants' failure to plead anywhere in the counterclaim that BOA fraudulently induced defendants to sign the loan modification and release agreement. The trial court stated that defendants "cannot raise fraudulent inducement as a defense to the release when they have not pleaded it." For that reason, the court dismissed all counts of the counterclaim, without prejudice.

¶ 26 Defendants then filed a third amended counterclaim, which contained a new count for fraudulent inducement of the modification agreement. It stated in pertinent part that as of the date of the modification agreement, December 5, 2009, BOA had "never corrected or retracted the Bank's representations that induced LaDouceur to sign the second LOC, including the misrepresentation that the first LOC had a maturity date and a missing document showing that date." In their counterclaim for misrepresentation, defendants stated that "[w]hile LaDouceur did

not personally believe the first LOC had a maturity date, LaDouceur reasonably relied upon BOA's representations since he did not know what documents BOA might have ***."

¶ 27 BOA moved to dismiss the third amended counterclaim. One of its grounds for dismissal was the release contained in the modification agreement, releasing BOA of all claims. It argued that defendants could not allege that the modification agreement was fraudulently induced when BOA acknowledged that the original LOC did not have a maturity date by providing LaDouceur with the documents reflecting the same before he signed the modification agreement.

¶ 28 On April 25, 2016, the trial court entered an order on BOA's motion to dismiss the third amended counterclaim. The court noted that the fraud alleged in the third amended counterclaim was that BOA failed to correct or retract its maturity date misrepresentations before December 5, 2009, when LaDouceur signed the modification agreement. It noted, however, that defendants had made numerous sworn statements to the contrary, including acknowledgement of the letter from BOA on October 26, 2009. Accordingly, the trial court dismissed the new count of defendants' third amended counterclaim for fraudulent inducement of the modification agreement. The trial court then noted that because the modification agreement was not fraudulently induced, and because it contained a release of all claims against BOA that existed or occurred prior to December 5, 2009, all of Drapes' allegations of wrongdoing against BOA were to be dismissed with prejudice.

¶ 29 Thereafter, BOA moved for summary judgment as to defendants. The trial court noted all that remained pending before the court was BOA's first amended complaint that sought to recover on the loan from defendants. The trial court granted the motion, based on defendants' failure to make monthly payments under the loan. It calculated the amount due on the loan,

exclusive of fees and costs, as $53,355.14, and the amount of attorney fees, which defendants did not argue with, as $124,564.57, for a total of $177,919.71.

¶ 30 Defendants appealed, identifying several trial court orders in their notice of appeal.

¶ 31 ANALYSIS

¶ 32 On appeal, defendants contend that the trial court erred in granting summary judgment in favor of BOA, erred in dismissing defendants' affirmative defenses, and erred in dismissing defendants' counterclaims.

¶ 33 When this case was first before us, we found that based on the facts that appeared in the record at that time, there was sufficient evidence to suggest that LaDouceur "reasonably believed BOA's assertions that it had documentation indicating a maturity date" on the first LOC, such that summary judgment was not appropriate in BOA's favor. *All About Drapes*, 2015 IL App (1st) 142772-U, ¶ 51. Our finding was premised on the fact that LaDouceur had talked to many BOA employees and officers, all of whom told him his first LOC had a maturity date of August 5, 2009.

¶ 34 Upon remand for further proceedings, there are simply no additional facts that have emerged that unequivocally show that LaDouceur could not have reasonably relied on BOA's allegations that it had documentation reflecting a maturity date on the first LOC. BOA points to defendants' statements in their third amended counterclaim that "LaDouceur did not personally believe the first LOC had a maturity date." We acknowledged this fact in the first appeal when we noted: "there is sufficient evidence, creating a triable issue, to suggest that even though LaDouceur knew he did not sign any documents with an August 2009 maturity date on the original LOC, and therefore did not believe the LOC had a maturity date, he nevertheless reasonably believed BOA's assertions that it had documentation indicating a maturity date." *Id.*

¶ 51. This was in light of the fact that BOA employees repeatedly told defendants that BOA had documentation reflecting a maturity date on the first LOC.

¶ 35 In order for a representation to constitute fraud that would permit a court to set aside a contract, the party seeking relief must establish that the representation: (1) was made of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by the maker on other grounds to be true, but reasonably believed to be true by the other party; and (4) was relied upon by the other party to his detriment. *Jordan v. Knafel*, 378 Ill. App. 3d 219, 228 (2007). There must be "action by the plaintiff in justifiable reliance on the truth of the statement." *Doe v. Dilling*, 228 Ill. 2d 324, 343 (2008).

¶ 36 BOA contends that there could not be justifiable reliance by defendants on the truth of BOA's statement that there was a maturity date because LaDuceur admitted that he did not believe there to be a maturity date on first LOC. However, the distinction that we made in the first appeal and will make again here, is that despite LaDouceur knowing that the first LOC did not have a maturity date, reasonable persons might draw different inferences as to whether LaDouceur nevertheless justifiably relied on BOA's assertions that it possessed, or had on file, documentation indicating a maturity date. The fact that LaDouceur knew he did not sign an LOC with a maturity date does not defeat his claim for fraudulent inducement, and at the very least, there remains a triable issue as to the fraudulent inducement of the second LOC.

¶ 37 We note that the trial court's grant of summary judgment in favor of BOA this time around was not based on a lack of fraudulent inducement of the second LOC, but rather was based on the subsequent modification and settlement agreement, which allegedly released BOA of all liability to defendants from claims arising before the execution of such agreement.

¶ 38 The purpose of a summary judgment motion is to determine whether a genuine issue of material fact exists. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Summary judgment is proper where "the pleadings, depositions, 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). In determining whether a genuine issue of material fact exists, a court must construe the materials of record strictly against the movant and liberally in favor of the non-moving party. *Perri v. Furama Restaurant, Inc*., 335 Ill. App. 3d 825, 829 (2002). The grant of summary judgment is reviewed *de novo*. *Id*.

¶ 39 In the case at bar, when viewing the facts in a light most favorable to defendants, we find that there exists a genuine issue of material fact as to whether LaDouceur was fraudulently induced into signing the settlement and modification agreement. As noted in our first order, if the second LOC was found to be fraudulently induced, we believe it would follow that the loan modification agreement would also be void, as it would never have been entered into if LaDouceur had not first signed the second LOC. See *All About Drapes*, 2015 IL App (1st) 142772-U, ¶ 51.

¶ 40 We further state that while defendants had been provided a copy of the first LOC by the time LaDouceur signed the modification agreement, BOA was still alleging that there was missing documentation showing a maturity date on the first LOC. Namely, in BOA's letter dated October 21, 2009, BOA stated that it was retrieving the loan documentation and was "confident" that it would show a maturity date on the first LOC. On October 26, 2009, BOA stated that the first LOC was actually a "demand instrument, which was called to be due effective on August 5, 2009." And on November 5, 2009, BOA changed its position again, stating that the original loan agreement was terminated effective August 5, 2009, based on the Business Express Line of

Credit Agreement that was in effect at the time. Accordingly, the facts indicate that BOA was still claiming there was documentation reflecting a maturity date, and that the original LOC came due on August 5, 2009, up until LaDouceur signed the release on December 5, 2009.

¶ 41 We further note that BOA continued this misrepresentation throughout the beginning of this litigation. Specifically, in 2010, BOA denied defendants' request to admit that no other documents "signed by the Defendants/Counter-Plaintiffs" existed. In an answer to interrogatories, filed in 2012, BOA stated: "A term sheet was provided to the Defendants. Such document was prepared and delivered to all borrowers for the loan product acted by the Defendants. A copy of the document can not [*sic*] be located, but, on information and belief, the document must exist and the Defendants would have, contemporaneously with the loan, been provided with the materials." Accordingly, to unequivocally conclude that BOA came clean at any point before LaDouceur signed the release in December 2009 would be disingenuous. Accordingly, we reject the trial court's grant of summary judgment in BOA's favor based on the release clause of the modification and settlement agreement.

¶ 42 Moreover, we want to highlight that releases are strictly construed against the benefitting party (BOA), and that the intention of the parties is determined not only from the express language of the release, "but also from the circumstances surrounding its execution." *Construction Systems, Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶ 25. Under Illinois law, a release will not be construed to defeat a valid claim that was not contemplated by the parties at the time the agreement was executed, and general words of release are inapplicable to claims that there unknown to the releasing party. *Id.* As discussed above, the surrounding circumstances in the case at bar do not tend to indicate that defendants intended to release BOA of all claims arising from the maturity date misrepresentations, especially in light of the fact that

BOA was still claiming to have documentation reflecting a maturity on the original LOC at the time LaDouceur executed the release.

¶ 43 Accordingly, we reverse the trial court's grant of summary judgment in favor of BOA. It follows then that we also reverse the trial court's dismissal of defendants' third amended counterclaim, as it was dismissed due to the release provision. We also reverse the trial court's dismissal of defendants' affirmative defenses of misrepresentation and fraud.

¶ 44 Finally, we note that it is not our intent to allow this litigation to drag on unnecessarily. However, it is our intent to ensure that a just outcome is reached. Summary judgment is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *City of Maroa v. Illinois Central R.R.*, 229 Ill. App. 3d 503, 505 (1992). "Although inferences may be drawn from undisputed facts, an issue should be decided by the trier of fact and summary judgment denied where reasonable persons could draw divergent inferences from the undisputed facts." *Id*. Accordingly, because we find that reasonable persons could draw divergent inferences from the undisputed facts, as evidenced by the differing of opinions between this court and the lower court, we find that summary judgment was inappropriate.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this court's order.

¶ 47 Reversed and remanded.