FIRST DIVISION
June 8, 2015

No. 1-14-2772
2015 IL App (1st) 142772-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| BANK OF AMERICA, Successor by Merger to LASALLE BANK NATIONAL ASSOCIATION, a National Banking Association, | ) | Appeal from the Circuit Court of Cook County |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 10 L 005970 |
| ALL ABOUT DRAPES, INC., an Illinois Corporation, JANET M. LADOUCEUR, JEANNE LADOUCEUR, and RICHARD LADOUCEUR, | ) | The Honorable Patrick J. Sherlock, Judge Presiding. |
| Defendants-Appellants. | ) | |

JUSTICE CONNORS delivered the judgment of the court.
Justice Harris concurred in the judgment; Presiding Justice Delort concurred in part and dissented in part.

**ORDER**

*Held:* Trial court's grant of summary judgment in favor of plaintiff was improper where genuine issues of material fact existed as to whether plaintiff made fraudulent misrepresentations to defendants regarding the maturity date of a line of credit, thereby inducing defendant into signing second agreement.

¶ 1 This action began in May 2010 when plaintiff Bank of America (BOA) filed a complaint against defendants All About Drapes (Drapes) and its president Richard LaDouceur (LaDouceur). BOA claimed that defendants originally executed a "Business Express Credit Application and Agreement" for $50,000 with its predecessor LaSalle National Bank (LaSalle) on June 23, 2004. The line of credit (LOC) agreement stated under "terms and repayment" that in consideration of LaSalle making available the LOC, Drapes was to pay a principal payment equal to 2.0% of the advances each month "until all outstanding have been paid in full." Along with LaDouceur, Janet LaDouceur and Jeanne LaDouceur were listed as guarantors under the LOC agreement.

¶ 2 BOA stated in its complaint that on July 23, 2009, Drapes executed a loan agreement in the original principal amount of $50,000. A copy was attached to the complaint. The loan agreement stated that the revolving line of credit was "available between the date of this Agreement and August 5, 2010." The agreement was signed by Richard LaDouceur. BOA further stated that in December 2009, BOA and LaDouceur entered into a loan modification agreement whereby the parties acknowledged that Janet LaDouceur and Jeanne LaDouceur were released as guarantors under the loan documents.

¶ 3 BOA asserted in its complaint that defendants failed to pay the monthly installments in February 2010 and in March 2010. Demand for payment was given to defendants on March 16, 2010, which was attached to the complaint. In that demand letter, BOA stated that defendants owed $36,131.38 to BOA. As of the date of the complaint, BOA had not received payment. It asked for a judgment against defendants for the total amount owed.

¶ 4 Defendants filed an answer to BOA's complaint, as well as affirmative defenses and counterclaims. In their answer, defendants stated that after executing their original LOC

agreement with LaSalle, they made monthly payments every month and were never late on those payments. Defendants stated that they received their last bill from LaSalle on September 26, 2008, and that it did not have a maturity date. The next bill received was from BOA, and it stated that the "maturity date" was August 5, 2009.

¶ 5 In June 2009, defendants received notice that BOA wanted them to sign a new loan agreement (second loan agreement) replacing the original LOC because the LOC was set to expire August 5, 2009. Defendants stated in their answer that LaDouceur went to his local BOA branch and demanded to see a copy of an agreement that showed a note date of July 12, 2004, with an expiration date of August 5, 2009. LaDoucer contacted Roger Krieg, a BOA local branch loan officer; Linda Carroll, a BOA representative in St. Louis; Nilda Flores, a BOA representative in St. Louis; and Jason Spargo, a BOA representative in North Carolina, who all claimed that the original LOC had an expiration date of August 5, 2009, and threatened that BOA would demand payment in full of the outstanding balance of the LOC if LaDouceur did not sign the second loan agreement. Defendants claimed that LaDouceur signed the second loan agreement with BOA under economic duress because he was faced with a significant decline in sales due to the recession, financial collapse, bankruptcy, and protracted litigation with BOA.

¶ 6 Based on the above facts, defendants claimed affirmative defenses of fraudulent misrepresentation, economic duress, and lack of consideration. Defendants also filed counterclaims for consumer fraud, fraudulent misrepresentation, breach of contract, and intentional infliction of emotional distress.

¶ 7 BOA then filed a motion to dismiss defendants' affirmative defenses and counterclaims, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615

(West 2012)). BOA claimed that defendants failed to set forth facts to support their affirmative defenses, and failed to allege facts to support their counterclaims.

¶ 8 On December 14, 2010, the trial court issued a written order on BOA's motion to dismiss defendants' affirmative defenses and counterclaims. The trial court found that all of defendants' affirmative defenses were dismissed without prejudice, as well as all of their counterclaims, except fraudulent misrepresentation. The trial court therefore denied BOA's motion to dismiss defendants' counterclaim for fraudulent misrepresentation, and ordered BOA to answer the counterclaim.

¶ 9 BOA then filed an answer to defendants' counterclaim of fraudulent misrepresentation, including an affirmative defense alleging that "[f]or good and valuable consideration, the [p]arties entered into a settlement agreement which released Bank of America from any claims, including the claims set forth in the Counterclaim." Attached was the modified loan agreement that had been entered into by LaDouceur and BOA on December 5, 2009.

¶ 10 On June 6, 2012, BOA filed an amended complaint. Count I, entitled "promissory note" alleged that defendants failed to pay monthly installments on their second loan agreement with BOA in February 2010 and March 2010. A demand letter was sent to defendants, and there still remained a balance of $36,131.38. BOA alleged that it was owed the balance as well as attorney fees.

¶ 11 Count II was against Richard LaDouceur as guarantor, which stated that LaDouceur executed a "Continuing and Unconditional Guaranty" on July 23, 2009, which provided that BOA shall recover attorney fees and costs. Specifically, the agreement stated that "[i]n the event of a lawsuit or arbitration proceeding, the prevailing party is entitled to recover costs and

reasonable attorneys' fees incurred in connection with the lawsuit or arbitration proceeding, as determined by the court or arbitrator."

¶ 12 Count III alleged that, even if the second loan agreement was void, LaDouceur and Drapes would still be bound by the original loan agreement.

¶ 13 In Count IV, BOA stated that Jeanne and Janet LaDouceur were guarantors on the original LOC which stated that BOA should recover attorney fees. BOA asked for a judgment in its favor and against Drapes and the LaDouceurs in the amount of $36,131.38.

¶ 14 Defendants filed a motion to dismiss BOA's first amended complaint, alleging that the second loan agreement executed in July 2009 was void due to fraudulent misrepresentation, and thus the first two counts of BOA's first amended complaint should be dismissed. Defendants stated that the third count should be dismissed because LaDouceur was not responsible for Drapes' corporate debts, and that Drapes has no assets from which to satisfy a judgment. And finally, the fourth count should be dismissed because BOA unilaterally modified the original LOC from a revolving line of credit to a term loan without the guarantors' assent, thereby releasing any and all guarantors.

¶ 15 The trial court denied defendants' motion to dismiss and ordered them to answer the first amended complaint. Defendants filed their answers to the first amended complaint, as well as their affirmative defenses on September 25, 2012. Defendants asserted the affirmative defenses of fraudulent misrepresentation, economic duress, and lack of consideration in response to the first two counts, and release of guarantors in response to the final count.

¶ 16 On April 12, 2013, defendants filed a motion for Rule 219(c) sanctions against BOA for failing to comply with trial court orders compelling production of certain loan documentation. A hearing was held on October 29, 2013. BOA asserted that it would stipulate that the loan

documents of the same type that defendants were seeking to obtain did not have maturity dates, and that maturity days were assigned to all of those loans. BOA was willing to admit that, but was not willing to produce the documents. Defendants argued that the BOA as willing to admit the misrepresentation but was not willing to admit the fraud. BOA stated that after telling LaDouceur his loan had a maturity date, it was determined that there was not a maturity date. BOA stated that it was willing to admit that it made a mistake, but not that it told LaDouceur there was a maturity date in order to get him to sign the second loan agreement. BOA stated that it did not know how production of other loan documents was relevant to this case. Defendants argued that it would shed light on how BOA decided to impose maturity dates, and prove that it was not accidental. The trial court denied defendants' Rule 219 sanctions, stating that it would wait and see if the parties could agree on some stipulations in lieu of discovery. The court stated: "It seems to me as though the discovery requests for all of these other loans is outside of the scope of what you need in the defense of your case ***."

¶ 17 On November 25, 2013, defendants filed first amended counterclaims. The first counterclaim was for consumer fraud. Defendants alleged that BOA unilaterally assigned a maturity date of August 5, 2009 to the original LOC after the merger with LaSalle. Defendants alleged that BOA thereafter claimed the documentation showing a maturity date of August 5, 2009, was missing, but that it would be provided once the second loan agreement was signed. Defendants further alleged that LaDouceur signed the second loan agreement relying upon misrepresentations and caused him financial suffering.

¶ 18 The second counterclaim was for fraudulent misrepresentation. Defendants alleged the same facts, adding that on October 26, 2009, BOA acknowledged in a letter that there were no missing documents, and instead claimed that the original LOC was a demand note that could be

called at any time. Defendants alleged that at no time did BOA provide written notice that the original LOC was in default or being called pursuant to any demand clause, and that BOA made false statements regarding the terms of the LOC in order to induce defendants to sign the second loan agreement accelerating payments of the outstanding balance. Defendants alleged that as a result of BOA's fraudulent statements, Drapes was unable to obtain alternate financing, suffered financial losses, and was forced out of business.

¶ 19 Defendants also made counterclaims of breach of contract, and intentional infliction of emotional distress, relying on these same facts. Defendants added a class action counterclaim for a violation of RICO. Defendants claimed that upon information and belief, BOA unilaterally added maturity dates to revolving lines of credit of small business owners. Based on these same facts, defendants added another class action counterclaim for a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

¶ 20 BOA filed a motion to dismiss defendants' amended counterclaims on January 15, 2014. In its motion to dismiss, BOA argued that the consumer fraud claim did not apply because defendants were not consumers, and that the trial court had already determined this in its prior order dated December 14, 2010, dismissing this claim with prejudice.

¶ 21 BOA admitted that while the prior order did not dismiss the previous counterclaim asserting fraudulent misrepresentation, the claim was still deficient because BOA was seeking to recover money owed to it pursuant to a loan, subsequent settlement, and modification agreements.

¶ 22 BOA noted that the counterclaims for breach of contract and intentional infliction of emotional distress had been previously dismissed as well in the December 14, 2010 order.

¶ 23 Regarding the class action counterclaim under RICO, BOA argued that the court did not have jurisdiction over these claims because they dealt with federal matters. BOA further argued that the class action counterclaim for a violation of the Illinois Consumer Fraud Act should be dismissed for the same reasons as the first count, which was that this cause was already dismissed in this case, and that it was outside the three-year limitations period.

¶ 24 Defendants replied that the December 14, 2010 order had dismissed certain counterclaims without prejudice, and that they were allowed to file the amended counterclaims before a final judgment.

¶ 25 On April 11, 2014, the court granted BOA's motion to dismiss defendants' amended counterclaims. The court found that defendants' claims were barred by LaDouceur's execution of the loan modification agreement on December 5, 2009, which released Janet and Jeanne LaDouceur as guarantors under the first LOC. As part of that modification agreement, LaDouceur agreed to release BOA from any and all claims of any kind "known or unknown" against BOA. The trial court found that this modification agreement was a contract, and that modification agreement clearly stated that Drapes "hereby releases, acquits, and forever discharges Lender *** from any and all claims, causes of action, suits, debts, liens *** of any kind, character or nature whatsoever, known or unknown." The court found that Drapes clearly intended to release all claims against BOA and that the language of the agreement clearly contemplated the release of the counterclaims at issue because "they were well within [Drapes'] contemplation on December 5, 2009."

¶ 26 The court further found, in its April 11, 2014 order, that because LaDouceur agreed to guarantee Drapes' debts in his execution of the December 5, 2009 modification agreement, he could not allege any cognizable injury or damages. The court stated that defendants "claim

injury resulted because Defendants were forced to repay the loan by August 5, 2010, a year later than BOA could have demanded repayment under the First LOC's terms." The court granted BOA's motion to dismiss the counterclaims pursuant section 2-619 (735 ILCS 5/2-619 (West 2012)) against Drapes, and to dismiss the counterclaims pursuant to section 2-615 (735 ILCS 5/2-615 (West 2012)) against LaDouceur.

¶ 27 Defendants then filed a motion for summary judgment. In that motion, defendants argued that the second LOC agreement and modification agreement were void because they were based on fraudulent misrepresentation that BOA would provide defendants with the "missing" documentation regarding the maturity date of the original LOC.

¶ 28 BOA responded to defendants' motion for summary judgment that defendants failed to demonstrate that there was no genuine issues of material fact as to BOA's fraudulent misrepresentation.

¶ 29 On March 28, 2014, BOA filed a motion for partial summary judgment on Count I of BOA's first amended complaint, which was breach of a promissory note. BOA argued in support of this motion that there was no dispute that LaDouceur signed the second loan agreement and the modification agreement, and that defendants failed to pay, and thus that Drapes was in default without a valid defense.

¶ 30 In defendants' response to BOA's motion for partial summary judgment, they stated that at no time did they argue that LaDouceur had not signed the modification agreement or that LaDouceur's signature on that document was a forgery. Rather, it was defendants' position that the only reason why LaDouceur signed that document was because he had been promised that he would be provided with the documentation showing that the original LOC had a maturity date of August 5, 2009. Those documents were never provided.

¶ 31 On May 8, 2014, the trial court entered an order granting BOA's motion for partial summary judgment as to Drapes on Count I of its first amended complaint, which alleged the breach of a promissory note. The court found that the modification agreement unambiguously released all of defendants' claims against BOA.

¶ 32 The court further found, in its May 8, 2014 order, that defendants were not entitled to summary judgment on the remaining counts of the first amended complaint. The court found that LaDouceur did not dispute the fact that he signed the loan modification agreement and accompanying guaranty agreements. The court noted that defendants' argument that LaDouceur was induced into signing the second LOC agreement and modification agreement was "not well-taken" because he had stated in his deposition that he did not believe the bank's representation that the original LOC agreement had an expiration date of August 5, 2009. The court noted that an element of fraudulent misrepresentation was that the party to whom a fraudulent misrepresentation was made must be ignorant to its falsity and must reasonably believe it to be true.

¶ 33 The trial court further found that LaDouceur did not meet his burden for summary judgment because in order to satisfy the burden of proof for the affirmative defense of material breach, he had to show that he was damaged somehow by plaintiff's "material breach," and here he did not show he suffered any damages. And as to Count IV of the first amended complaint, the court denied defendants' motion for summary judgment because of the loan modification agreement that LaDouceur signed.

¶ 34 Accordingly, the trial court granted BOA's motion for partial summary judgment on Count I against Drapes. Counts III and IV of the first amended complaint were dismissed as

moot with regard to Drapes. LaDouceur remained in the case as a defendant in Counts II, III, and IV. Defendants' motion for summary judgment was denied.

¶ 35 In July 2014, BOA filed a motion for summary judgment against defendants. It noted that it already had received partial summary judgment against Drapes for liability on Count I, but was now seeking damages on the same count. It further sought liability and damages against LaDouceur on Count II. BOA did not seek judgment on the remaining counts because "Counts III and IV are alternative theories rendered moot by prior court order."

¶ 36 Defendants responded to BOA's motion for summary judgment by stating that BOA failed to prove that there were no genuine issues of material facts as to each count of its first amended complaint.

¶ 37 On September 9, 2014, the trial court entered a final order of judgment in which it granted BOA's motion for summary judgment on Counts I and II of the complaint. The court found that apart from the fact that "defendants gave up their misrepresentation claims in the modification/release, this Court feels compelled to note that not all misrepresentations are actionable," and that an essential element of the tort of misrepresentation is the party's reliance on its truth. Because LaDouceur testified in his deposition that he never believed BOA's representation that the first LOC matured on August 9, 2009, the court found that he "cannot therefore use the representation – incorrect as it may have been – to avoid liability on the basis of fraud."

¶ 38 On the issue of damages, the court noted that BOA sought damages of $47,270.05 in principal and interest up to and including July 8, 2014, additional interest to the date of judgment of $7.11736 per day, and attorney fees and costs of $55,389.90, recovery of which was authorized by the loan agreements. The trial court noted that the bank provided the affidavit of

Edward Han, its assistant vice president, which contained a detailed explanation of the calculation of principal and interest.

¶ 39 As to its request for attorney fees and costs, BOA provided the affidavit of Scott E. Jensen, one of the bank's attorneys, which authenticated the time records and cost expenditures. The court found that defendants made no objection to this affidavit, time records, or cost expenditures. The court found the attorney fees to be reasonable, and the final calculation of damages to be $103,101.23, together with post judgment interest and costs. The court granted BOA's motion for summary judgment as to damages against Drapes, the motion of BOA for summary judgment on Count II of the amended complaint, and dismissed with prejudice counts III and IV of the amended complaint. Defendants now appeal.

¶ 40 ANALYSIS

¶ 41 We first address defendants' argument regarding the trial court's grant of summary judgment in favor of BOA on Counts I and II of the first amended complaint, and the denial of defendants' motion for summary judgment on all counts. Summary judgment is appropriate only where the "pleadings, depositions, 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). When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). However, the mere filing of cross-motions for summary judgment does not establish that there is no genuine issue of material fact and does not obligate the court to render summary judgment. *Haberer v. Village of Sauget*, 158 Ill. App. 3d 313, 317 (1987). A triable issue precluding summary judgment exists where the facts are disputed, or where, the material facts being

undisputed, reasonable persons might draw different inferences from the undisputed facts. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518 (1993). The use of summary judgment is a "drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt." *Id*. We review the grant of a motion for summary judgment *de novo*. *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 690 (1999).

¶ 42 In Count I of BOA's first amended complaint, it alleged that Drapes breached a promissory note by failing to pay monthly installments on their second loan agreement with BOA in February 2010 and March 2010. After a demand letter was sent to defendants for the entire amount of the loan, the balance was never paid. In defendants' answer to BOA's first amended complaint, they raised the affirmative defense of fraudulent inducement. Defendants argued that several BOA employees told LaDouceur that the original LOC agreement had a maturity date of August 2009, and that if he did not sign the second loan agreement, he would be sued for the entire amount owed. They told him that the documentation would be provided to him once he signed the second loan agreement. Defendants included the names of each branch member LaDouceur spoke with regarding the maturity date. Defendants alleged that, relying on the assertions that BOA would sue LaDouceur for the entire amount owed if he did not sign the second loan agreement, LaDouceur signed the second loan agreement. He additionally signed the modification loan agreement so that he could release his ex-wife and sister as guarantors on the loan.

¶ 43 The trial court granted summary judgment in favor of BOA, finding that because LaDouceur admitted during his deposition that he did not actually believe loan documents existed with the August 2009 maturity date, his claim of fraudulent inducement failed. The court also found that it failed because LaDouceur signed the loan modification agreement, which

specifically stated: "[Drapes] hereby releases, acquits, and forever discharges [BOA] *** from any and all claims, causes of action, suits, debts, liens *** of any kind, character or nature whatsoever, known or unknown," which released BOA of all claims against it, including any claims of fraudulent misrepresentation. We disagree and instead find that there was sufficient evidence presented to support a claim of fraudulent inducement.

¶ 44 "A contract may contain all of the elements necessary for enforceability, but may nonetheless be unenforceable as a result of the imposition of an affirmative defense." *Jordan v. Knafel*, 378 Ill. App. 3d 219, 228 (2007). Fraud in the inducement of a contract is a defense that renders that contract voidable. *Id*. at 229. In order for a representation to constitute fraud that would permit a court to set aside a contract, the party seeking such relief must establish that the representation was: (1) one 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. *Id*.

¶ 45 A misrepresentation is "material" if the party seeking rescission would have acted differently had he been aware of the fact or if it concerned the type of information upon which he would be expected to rely when making his decision to act. *Id*. Here, it is undisputed that BOA represented to LaDouceur that there was a maturity date on the original LOC, that documentation showing a maturity date on the original LOC existed, and that such documentation would be provided to him after he signed the second loan agreement. It is also undisputed that such documentation was never provided to LaDouceur – not before BOA brought suit, nor in any of the pleadings in the trial court. Accordingly, both telling LaDouceur that his original LOC had a maturity date, as well as telling him that documentation reflecting that maturity date existed and

would be provided to him, constituted misrepresentations. These misrepresentations were "material" misrepresentations because LaDouceur would have acted differently if the misrepresentations had not been made. Namely, would not have signed the second loan agreement or the subsequent loan modification agreement.

¶ 46 These misrepresentations were made so that BOA could obtain LaDouceur's signature on the second loan agreement. BOA employees told LaDouceur that BOA would sue defendants for the entire amount owed under the original LOC if LaDouceur did not sign the second loan agreement. Accordingly, the misrepresentations were made in order to induce LaDouceur to act.

¶ 47 Additionally, we believe there is sufficient evidence in the record to support the proposition that BOA knew that there was no such documentation reflecting a maturity date on the original LOC, as evidenced by the fact that it has never been produced, and by the fact that BOA eventually admitted that no documentation existed reflecting the unilateral maturity date. See *Jordan*, 378 Ill. App. 3d at 229 (in order for a representation to constitute fraud that would permit a court to set aside a contract, the party seeking such relief must establish that the representation was known to be false by the maker); *DeHart v. DeHart*, 2013 IL 114137, ¶ 39 ("To constitute fraud in the inducement, defendant must have made a false representation of material fact, knowing or believing it to be false and doing it for the purpose of inducing one to act.")

¶ 48 And finally, there is sufficient evidence to suggest that LaDouceur relied upon the misrepresentations to his detriment – namely, he signed the second loan agreement and he signed the loan modification agreement which released BOA of all claims against it.

¶ 49 The trial court found that LaDouceur's fraud claim must fail first because of the admissions he made in his deposition. Namely, the trial court found that because LaDouceur

admitted that he did not believe that the original LOC had a maturity date, defendant's claim must fail. The following colloquy occurred during LaDouceur's deposition:

> Q: When you're having these conversation with Roger or when you had these conversations with Roger on multiple occasions and he was telling you there was an expiration date, did you ever believe him?
>
> A: No.
>
> * * *
>
> Q: When you received the December 5th agreement, when you got that piece of paper?
>
> A: Right.
>
> Q: Did you believe the bank when they had told you the original loan had an expiration date?
>
> A: No.
>
> * * *
>
> Q: Was there anything else that Bank of America's employees told you that turned out to not be true?
>
> A: Let me think about that for a minute.
>
> Q: Sure.
>
> A: Well, they all told me there was a second document that was a supplement to the original loan that had the expiration date on it. I was told by everybody that I spoke to, Jason Spargo, Robert Kreig, Nilda Flores, that underwriter, and one other woman. Oh, I called the document retention office in St. Louis. I don't remember who I talked to, but they all said the same thing.

* * *

Q: Did you believe any of them?

A: No."

¶ 50 The trial court found that based on these admissions by LaDouceur, defendants could not prove fraudulent inducement because LaDouceur never actually believed documentation existed that reflected a maturity date on the original LOC. The trial court relied on *Roda v. Berko*, 401 Ill. 335, 340 (1948)), in support of this proposition, which states: "The party to whom [the misrepresentation] is made must be ignorant of its falsity, must reasonably believe it to be true, must act thereon to his damage, and in so acting must rely upon the truth of the statement." Since *Roda* was decided in 1948, there has been at least one supreme court case that has not imposed this requirement for a claim of fraudulent inducements. See *DeHart*, 2013 IL 114137, ¶ 39 ("To constitute fraud in the inducement, defendant must have made a false representation of material fact, knowing or believing it to be false and doing it for the purpose of inducing one to act.").

¶ 51 However, we recognize that the majority of fraudulent misrepresentation cases continue to impose the additional requirement that there must be "action by the plaintiff in justifiable reliance on the truth of the statement." See *Doe v. Dilling*, 228 Ill. 2d 324, 343 (2008) (elements of fraudulent misrepresentation are: a false statement of material fact, known or believed to be false by the person make it, an intent to induce plaintiff to act, action by the plaintiff in justifiable reliance on the truth of the statement, and damage to the plaintiff resulting from such reliance). We find that imposing this requirement would not change the outcome of this case. Namely, we find that 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, especially in light of the fact that several BOA employees told him that such documentation existed, and that BOA employees told LaDouceur that he would be sued based on the maturity date if he did not sign the second agreement. We reiterate that a triable issue precluding summary judgment exists where the facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). Here, we find that on the undisputed facts, reasonable persons might draw different inferences as to whether LaDouceur justifiably relied on BOA's assertions that it had documentation which reflected a maturity date on the original LOC and that it would sue LaDouceur based on that maturity date if he did not sign the second agreement, and thus summary judgment should not have been granted on the issue of fraudulent inducement. Additionally, 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.

¶ 52 Accordingly, we reverse the trial court's May 8, 2014, grant of summary judgment in favor of BOA on Count I of the first amended complaint. Based on the same reasoning, we also reverse the trial court's September 9, 2014, grant of summary judgment on Count II of the first amended complaint, which alleged that LaDouceur's execution of the loan modification agreement released BOA of any claims against it. We also reverse the trial court's May 8, 2014 denial of LaDouceur's summary judgment motion, which was based on fraudulent misrepresentation. See *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193

(1989) (the elements of the tort of fraudulent misrepresentation are (1) a false statement of material fact known or believed to be false by the party making it; intent to induce the other party to act; action by the other party in justifiable reliance on the truth of the statement, and damage to the other party resulting from the reliance.) It follows that we vacate the award of attorneys' fees to BOA based on the second loan agreement.

¶ 53 We also find that the April 11, 2014 order dismissing defendants' counterclaims must be reversed. The court granted BOA's combined 2-619.1 motion to dismiss defendants' counterclaims on two bases: (1) LaDouceur's execution of the loan modification agreement on December 5, 2009, released BOA from any and all claims against it, and thus the counterclaims were barred; and (2) because LaDouceur agreed to guarantee Drapes' debts in the modification agreement, and his obligation to do so was absolute and unconditional, defendants could not allege any cognizable injury or damages. The court stated that defendants "claim injury resulted because Defendants were forced to repay the loan by August 5, 2010, a year later than BOA could have demanded repayment under the First LOC's terms." However, because we find that there is evidence in the record to support a claim of fraudulent inducement, which could lead to a finding that the loan modification agreement was void, we must reverse the trial court's dismissal of defendants' counterclaims as the dismissal was based solely on LaDouceur's execution of the loan modification agreement.

¶ 54 The final issue before us then, is defendants' appeal of the trial court's October 29, 2013, denial of Rule 219(c) sanctions. On September 4, 2012, the trial court granted defendants' motion to compel. It ordered BOA to provide requested loan documentation for similar lines of credit transferred from LaSalle Bank to BOA dated 90 days before and 90 days after the date of the original LOC. On October 29, 2013, when such documentation still had not been provided,

the trial court denied defendants' motion for Rule 219(c) sanctions, but directed BOA to discuss stipulations as to the remaining discovery issues in dispute. Thereafter on December 5, 2013, the trial court ordered BOA to produce, in response to defendants' second request to produce documents, any and all documents relating to policies or procedures related to the inclusion of maturity dates for business loans, and revolving lines of credit originated by LaSalle Bank which did not originally have maturity dates. On June 23, 2014, however, the trial court stated in its order that defendants' oral motion, requesting compliance with the December 5, 2013 discovery order was denied, and that the court did not find any reason to require discovery as to the validity of the August 5, 2009 maturity date.

¶ 55 Defendants take issue with the October 29, 2013 denial of their request for 219(c) sanctions, arguing that the trial court should have imposed sanctions based on the fact that BOA blatantly ignored a court order to produce certain loan documents. Rule 219(c) authorizes a trial court to impose a sanction, including dismissal of the case, upon any party who unreasonably refuses to comply with any provisions of this court's discovery rules or any order entered pursuant to these rules. Ill. S. Ct. R. 219(c) (eff. July 1, 2002 ). The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The sanctions imposed by the trial court should ensure discovery and a trial on the merits. The purpose of the sanction is to coerce compliance with discovery orders, not to punish the remiss party. *Shimanovsky*, 181 Ill. 2d at 123.

¶ 56 Here, defendants contend that the trial court abused its discretion when it failed to impose Rule 219(c) sanctions on BOA in October 2013, after BOA had failed to produce certain loan documents that it had been compelled to produce back in September 2012. In the trial court's

order denying the imposition of sanctions, however, it directed BOA to discuss certain stipulations with defendants on the disputed discovery issues. Because sanctions should only be imposed to coerce compliance with discovery rules, and not as punishment, we cannot say that the trial court should have imposed sanctions at that point since the court directed the parties to discuss stipulations in lieu of producing the requested documentation. While it is clear from the record that those stipulation discussions proved futile, as defendants filed another motion to compel in December 2013, we cannot say that in October 2013 the trial court abused its discretion in failing to impose sanctions on BOA.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we reverse the trial court's grant of summary judgment on Counts I and II in favor of BOA; reverse the trial court's denial of defendants' motion for summary judgment; reverse the trial court's dismissal of defendants' counterclaims; affirm the trial court's denial of Rule 219(c) sanctions; vacate the trial court's order granting BOA's attorney fees; and remand for further proceedings.

¶ 59 Reversed in part; affirmed in part; vacated in part; remanded for further proceedings.

¶ 60 PRESIDING JUSTICE DELORT, concurring in part and dissenting in part:

¶ 61 This case vividly illustrates how administrative problems created when large companies merge can negatively affect their customers. When Bank of America (BOA) absorbed ABN AMRO, it discovered that its automated recordkeeping and billing systems could not accommodate loans which did not contain a set termination date. Computer systems can always be reprogrammed, but it may not be cost-effective to do so merely to accommodate a relatively small number of customers. BOA chose to gloss over the problem by arbitrarily adding a loan termination date in its system for outlier ABN AMRO customers such as Drapes. When the

defendants insisted on following the beneficial original terms of the written agreement with ABN AMRO's predecessor, LaSalle Bank, by paying the loan over an extended period of time at the rate of 2% of the advances per month, BOA went into a bureaucratic meltdown of sorts. Its knee-jerk reaction was to categorically insist that the loan did, in fact, contain a termination date. BOA employees apparently reached that conclusion merely because of what the modified computerized records showed. LaDouceur prodded BOA staff members far and wide to produce some written documentation of this missing "term sheet," but he came up empty.

¶ 62 BOA and the defendants eventually resolved their differences through entering into the loan modification agreement. BOA brought this case to remedy the defendants' subsequent breach of that second agreement. The defendants argue that they were fraudulently induced into signing the loan modification agreement by BOA's false representations that the defendants had to pay the outstanding balance by the designated termination date.

¶ 63 I agree with the majority's analysis regarding the denial of the defendants' motion for discovery sanctions. See *supra* ¶¶ 55-57. However, I must respectfully disagree with its finding regarding the central issue in this case, which is whether LaDouceur actually could have had a reasonable belief that the original loan had a set termination date, a belief allegedly created by BOA's assertion to him that it did.

¶ 64 Over a century ago, our supreme court declared that deceit was an element of a claim for fraudulent misrepresentation. *Foster v. Oberreich*, 230 Ill. 525, 527 (1907). In more modern times, it explained the origin of this legal doctrine in the following terms:

> "The history and origin of the tort of fraudulent misrepresentation lies in the common law action of deceit, a very narrow tort that applied only to cases involving business or

> financial transactions between parties." *Doe v. Dilling*, 228 Ill. 2d 324, 343 (2008) (citing W. Keeton, Prosser & Keeton on Torts § 105, at 725 (5th ed. 1984)).

¶ 65 In case after case involving fraudulent inducement claims, our supreme court has held that a plaintiff must allege, or show, that he reasonably relied on the false statement – in other words, that he was, in fact, *deceived*. See, *e.g.*, *Glazewski v. Coronet Insurance Co.*, 108 Ill. 2d 243, 249 (1985) ("[t]he plaintiff must also allege his reasonable belief in and reliance on the statement to his detriment"); *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 288 (1986); *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193 (1989); *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 28 (plurality op.) (requiring "action by the other party in reliance on the truth of the statements").

¶ 66 In fact, in *Dilling*, the court found that "a critical element that must be established by a plaintiff in a fraudulent-misrepresentation claim is that he or she acted in justifiable reliance on the truth of the allegedly fraudulent statement." *Dilling*, 228 Ill. 2d at 351. The *Dilling* court rejected the fraudulent inducement claim before it, stating that the plaintiff "not only had actual knowledge of facts that made her reliance unjustifiable, but she also could have easily discovered additional facts if she had not chosen to consciously ignore what was plainly in front of her." *Id.* at 359. Even more recently, the same seven justices who currently sit on our supreme court unanimously noted that the court had "exhaustively examined the history and scope of fraudulent misrepresentation" as explained in *Dilling* and "need not repeat that discussion." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 35.

¶ 67 The majority suggests that our supreme court may have eliminated the reasonable reliance requirement, citing *DeHart v. DeHart*, 2013 IL 114137, ¶ 39, for that proposition. Indeed, in *DeHart*, the court recited the elements of a fraudulent inducement claim without specifically including reasonable or justifiable reliance. However, in so doing, the court did not cite, as precedential authority, cases which it had recently issued such as *Bonhomme* or *Dilling*, but rather a 2010 lower court case, *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1006 (2010). Additionally, even the *DeHart* court held that the plaintiff must know or believe the statement was false. *DeHart*, 2013 IL 114137, at ¶ 39. *DeHart* did not squarely address the issue presented in *Dilling* and in this case, namely, whether the plaintiff did, in fact, reasonably rely on the false statement. I do not, as the majority suggests, believe that *DeHart*'s omission of that element in a fleeting reference to the tort in question indicates that our supreme court suddenly decided to write the long-established reasonable reliance requirement out of the law.

¶ 68 BOA should hardly win a "good corporate citizen" award for how it handled the merger with respect to customers like the defendants. Even after the defendants squarely raised their position regarding the lack of a termination date, the bank held fast, even incorrectly answering interrogatories by stating that the loan had a termination date. It had to back off that position later when it could not produce anything in writing to that effect.

¶ 69 Even so, in light of the authorities from our supreme court, it is clear that the defendants' claims are not viable. Necessary elements of a fraudulent inducement claim include that the party trying to invalidate the contract must have reasonably believed in the false statement, and that he relied on it to his detriment. The evidence, however, clearly showed that LaDouceur was not at all deceived by BOA's assertions regarding the phantom "term sheet." In fact, he testified at his deposition that he did not believe a term sheet existed. See *supra* ¶ 53. Additionally, the

terms of the loan actually were hardly a mystery. Under the Illinois Credit Agreements Act, the only enforceable terms of a bank loan to a business are those set forth in writing. 815 ILCS 160/2 (West 2012). The terms of the original LaSalle Bank agreement were simple, straightforward, and contained in an application and in a compact accompanying three-page document.

¶ 70 When faced with the dilemma of being unable to pay on the original agreement, LaDouceur had two choices. He could have rescued himself from BOA's threat of immediate suit by refinancing the line of credit and entering into the loan modification agreement. Or he could have instead held firm and forced BOA to sue him under the original agreement. In the latter case, he probably would have prevailed because BOA would have been unable to produce any written document showing that the loan was in default because it had terminated. LaDouceur made the former choice and should live with the consequences. Even construing the evidence in the light most favorable to LaDouceur and Drapes, LaDouceur knew that BOA was lying, bluffing, or simply was incorrect. Accordingly, there is no material issue of genuine fact demonstrating that LaDouceur justifiably relied on BOA's incorrect assertions or that his justifiable reliance induced him into signing the loan modification agreement. That defeats the fraudulent inducement claim. Because I disagree with my colleagues on the fraudulent inducement issue, I would affirm the judgment below in all respects.